

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.02.2021

PRONOUNCED ON : 16.04.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.16955 of 2018

and

M.P.No.20167 of 2018

M/s.Palghat Credit Corporation,
Represented by its Partner,
D.Meera,
No.B-1/S-3, Navins Clarmount Court,
Nelson Manickam Road, Aminjikarai,
Chennai - 600 029.

... Petitioner

Vs

1.The Principal Commissioner of Income Tax-3
Room No.410, 4th Floor, Main Building,
121, Uthamar Gandhi Salai, Chennai - 34.

2.The Assistant Commissioner of Income Tax,
Non-Corporate Circle-10(1),
Chennai - 600 001.

...Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India to issue a writ of Certiorari or any other appropriate writ, direction or order in the nature of a writ calling for the records of the first respondent in PAN: AADFP3223H dated 26.03.2018 passed under Section 264 of the Income Tax Act, 1961 for the assessment year 2014-15.

For Petitioner : Mr.T.Vasudevan

For Respondents : M/s.Hema Muralikrishnan
Senior Standing Counsel

ORDER

The petitioner is aggrieved by the impugned order dated 26.03.2018 passed by the first respondent under Section 264 of the Income Tax Act, for the Assessment Year 2014-2015.

2. By the impugned order, the first respondent has rejected the application filed by the petitioner for revising the Assessment order dated 21.12.2016 passed by the second respondent under Section 143(3) of the Income Tax Act.

3. Challenge to the order dated 21.12.2016 of the second respondent before the first respondent was primarily on the ground that petitioner has not claimed depreciation under Section 32 of the Income Tax Act, 1961 in respect of four of its properties which were later sold during the course of Financial year 2013-2014 pursuant to an auction and then the petitioner cannot be perforce given the benefit of Section 15(2) of the Income Tax Act, 1961 instead of indexation under Section 48.

4. It is the case of the petitioner that the last return that was filed by the petitioner was for the Assessment year 2001-2002. Thereafter, for the next 11 years, the petitioner had not filed returns as was neither having any income nor loss from the business.

5. It is the further case of the petitioner that the four properties which came to be auctioned and sold resulted in capital gains and therefore the petitioner claimed indexation under Section 48 of the Income Tax Act.

6. It is submitted that the second respondent while passing Assessment order on 21.12.2016 under Section 143(3) denied the indexation under Section 48 of the Income Tax Act, 1961 and impose Section 15(2) of the Income Tax Act, 1961. Even though, Section 15(2) of the Income Tax applies only to depreciable assets.

7. It is submitted that under Section 50(2) of the Income Tax Act, 1961, where any block of assets ceases to exist as such, for the reason that all the assets in that block are transferred during the previous year, the cost of acquisition of the block of assets shall be the written down value of the block of assets at the beginning of the previous year, as increased by the actual cost of any asset failing within that block of assets, acquired by the assessee during the previous year and the income received or accruing as a result of such transfer or transfers shall be deemed to be the capital gains arising from the transfer of short- term capital assets.

8. In this connection, learned counsel for the petitioner also drew attention to Section 43(6) of the Income Tax Act, 1961 which defines the expression "written down value" as follows:

Section 43(6) in The Income- Tax Act, 1995

"(6) " written down value" means-

(a) in the case of assets acquired in the previous year, the actual cost to the assessee;

(b) in the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed to him under this Act, or under the Indian Income- tax Act, 1922 (11 of 1922), or any Act repealed by that Act, or under any executive orders issued when the Indian Income- tax Act, 1886 (2 of 1886), was in force: Provided that in determining the written down value in respect of buildings, machinery or plant for the purposes of clause (ii) of sub- section (1) of section 32, " depreciation actually allowed" shall not include depreciation allowed under sub- clauses (a), (b) and (c) of clause (vi) of sub- section (2) of section 10 of the Indian Income- tax Act, 1922 (11 of 1922), where such depreciation was not deductible in determining the written down value for the purposes of the said clause (vi);]

(c) in the case of any block of assets,-

(i) in respect of any previous year relevant to the assessment year commencing on the 1st day of April, 1988 , the aggregate of the written down values of all the assets falling within that block of assets at the beginning of the previous year and adjusted,-

(A) by the increase by the actual cost of any asset falling within that block, acquired during the previous year; and

(B) by the reduction of the moneys payable in respect of any asset falling within that block, which is sold or discarded or demolished or destroyed during that previous year together with the amount of the scrap value, if any, so, however, that the amount of such reduction does not exceed the written down value as so increased; and

(C) in the case of a slump sale, decrease by the actual cost of the asset falling within that block as reduced-

(a) by the amount of depreciation actually allowed to him under this Act or under the corresponding provisions of the Indian Income- tax Act, 1922 (11 of 1922) in respect of any previous year relevant to the assessment year commencing before the 1st day of April, 1988; and

(b) by the amount of depreciation that would have been allowable to the assessee for any

assessment year commencing on or after the 1st day of April, 1988 as if the asset was the only asset in the relevant block of assets,

so, however, that the amount of such decrease does not exceed the written down value;"

(ii) in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1989, the written down value of that block of assets in the immediately preceding previous year as reduced by the depreciation actually allowed in respect of that block of assets in relation to the said preceding previous year and as further adjusted by the increase or the reduction referred to in item (i).]

Explanation 1-When in a case of succession in business or profession, an assessment is made on the successor under sub-section (2) of section 170 the written down value of any asset or any block of assets shall be the amount which would have been taken as its written down value if the assessment had been made directly on the person succeeded to.

Explanation 2.- Where in any previous year, any block of assets is transferred,-

(a) by a holding company to its subsidiary company or by a subsidiary company to its holding company and the conditions of clause (iv) or, as the case may be, of clause (v) of section 47 are satisfied; or

(b) by the amalgamating company to the amalgamated company in a scheme of amalgamation, and the amalgamated company is an Indian company, then, notwithstanding anything contained in clause (1), the actual cost of the block of assets in the case of the transferee- company or the amalgamated company, as the case may be, shall be the written down value of the block of assets as in the case of the transferor-company or the amalgamating company for the immediately preceding previous year as reduced by the amount of depreciation actually allowed in relation to the said preceding previous year.)

Explanation 2A.-Where in any previous year, any asset forming part of a block of assets is transferred by a demerged company to the resulting company, then,

notwithstanding anything contained in clause (1), the written down value of the block of assets of the demerged company for the immediately preceding previous year shall be reduced by the book value of the assets transferred to the resulting company pursuant to the demerger.

Explanation 2B.—Where in a previous year, any asset forming part of a block of assets is transferred by a demerged company to the resulting company, then, notwithstanding anything contained in clause (1), the written down value of the block of assets in the case of the resulting company shall be the value of the assets as appearing in the books of account of the demerged company immediately before the demerger :

Explanation 3.— Any allowance in respect of any depreciation carried forward under sub-section (2) of section 32 shall be deemed to be depreciation" actually allowed". 1 Explanation 4.— For the purposes of this clause, the expressions " moneys payable" and " sold" shall have the same meanings as in the Explanation below sub-section (4) of section 41]"

9. The learned counsel for the petitioner therefore submits that the second respondent in its Assessment order has calculated the depreciation which was never claimed by the petitioner for all the years during which period the petitioner has never filed returns after Assessment year 2001-2002.

10. Even though, the petitioner had not claimed depreciation all along, the petitioner had treated the income from rent received from the four properties which were sold during the Financial Year 2014-2015 prior to 2001 as income from rental property under Section 14 of the Income Tax Act, 1961.

11. It is submitted that the income from the rental property was never treated as an income from the business or profession of the petitioner and therefore the second respondent was not justified in imposing depreciation Section 32 of the Income Tax Act, 1961 read with Explanation 5 to Section 32 and Section 15 (2) of the Income Tax Act, 1961.

12. The learned counsel for the petitioner further submits that the law and the subject is well settled. The heads of the income cannot be altered. All along the immovable property were treated as a house property from which rent was the income which was never treated as a business income and therefore when the properties were sold in the year 2013-2014, naturally, the petitioner was entitled to claim indexation for the purpose of

computation of the Long term capital gains under Section 48 of the Income Tax Act.

13. In this connection, the learned counsel for the petitioner refers to the decision of the Hon'ble Supreme Court in the following cases:

1. East India Housing & Land Development Trust Ltd. Vs. CIT [42 ITR 49-Supreme Court]
2. CIT Vs. Express Newspapers Ltd. [53 ITR 250 - Supreme Court]
3. CIT Vs. Chugandas & Co. [55 ITR 007 - Supreme Court]
4. KS. Venkataraman & Co. (P) Ltd Vs. State of Madras [60 ITR 112 - Supreme Court]
5. Nalinikant Ambalal Mody Vs. SAL. Narayana Rao, CIT [61 ITR 428 - Supreme Court]
6. CIT Vs. Stanes Motors (South India) Ltd. [105 ITR 289- Madras HC]

14. The learned counsel specifically drew attention to the decision in Nalinikant Ambalal Mody Vs. SAL. Narayana Rao, CIT (61 ITR 428 (Supreme Court)) wherein it has been observed as under:

4. As to the general principles, we first observe that as the heads of income are mutually exclusive, if the receipts can be brought under the fourth head, they cannot be brought under the residuary head. It is said by the Revenue that as the receipts cannot be brought to tax under the fourth head they cannot fall under that head and must therefore fall under the residuary head. This argument assumes, in our view, without justification, that an income falling under one head has to be put under another head if it is not chargeable under the computing section corresponding to the formed head. If the contention of the Revenue is right, the position would appear to be that professional income of an assessee who keeps his account on the cash basis would fall under the fourth head if it was received in a year in which the profession was being carried on, but it would take a different character and fall under the residuary head if received in a year in which the profession was not being carried on. We are unable to agree that this is a natural reading of the provisions regarding the heads of income in the Act.

Whether an income falls under one head or another has to be decided according to the common notions of practical men for the Act does not provide any guidance in the matter. The question under which head an income comes cannot depend on when it was received. If it was the fruit of professional activity, it has always to be brought under the fourth head irrespective of the time when it was received. There is neither authority nor principle for the proposition that an income arising from a particular head ceases to arise from that head because it is received at a certain time. The time of the receipt of the income has nothing to do with the question under which particular head of income it should be assessed.

15. The learned counsel for the petitioner further submits that if the petitioner was to claim depreciation in respect of these properties on an earlier occasion it would not have claimed a meagre depreciation for a sum of Rs.17,383.98 under Section 32 of the Income Tax Act. The property was never treated as a business assets. What was claimed was only depreciation of the furnitures, electric motors, diesel generators etc., and therefore claimed minuscule depreciation of Rs.17,383.98 only as against the total value of the assets at Rs.43,39,835.76/- as on 31.03.2001.

16. It submitted that where the depreciation was never claimed and therefore question of invoking Section 43(6)(b) did not arise. In this connection, a reference was made to the decision of the Hon'ble Supreme Court in *Madeva Upendra Sinai Vs Union of India* [1975 (3) SCC 765] wherein while dealing with the concept of written down value under the provisions of the Income Tax Act, the Court observed as under:

The situation before us is materially different. Here, no depreciation was ever computed or actually allowed to the assessee under the Portuguese law. Indeed, under that law the tax was levied not on net income but on gross turnover of the business. There was, strictly speaking, no assessment of tax on real 'profits and gains' of a business, the tax being levied on gross receipts on ad hoc basis. Allowing or taking into account depreciation of assets was of question in that process of assessment. In the case in hand, the impugned proviso seeks to introduce

a new concept of calculating depreciation. By replacing 'depreciation actually allowed' with 'depreciation deemed to have allowed' by a fiction of law, even where no depreciation was at all allowed under any law outside the taxable territories, it, in effect, attempts to change the fundamental scheme of the Act.

17. The learned counsel for the petitioner further submits that Explanation 5 to Section 32 cannot be imported into Section 50(2) of the Income Tax Act, 1961 and thereby deny the benefit of indexation under Section 48 of the Income Tax Act, 1961.

18. Defending the impugned order, the learned counsel for the respondent submits that the petitioner had an opportunity to file an appeal under Section 246 of the Income Tax Act before the Commissioner of Income Tax (Appeals). She further submits that scope of revision under Section 264 is limited and therefore, the respondent has rightly rejected the application. Hence, the writ petition was liable to be dismissed as there is no case made out for quashing the impugned order of the second respondent.

19. She further submits that the appeal proceedings are continuation of the assessment proceedings and therefore Commissioner of Income Tax (Appeals) can call for a report from the Assessing Officer while passing orders under Section 246 of the Income Tax Act. However, the Chief Commissioner of Income Tax while exercising its power under Section 246 of the Income Tax Act cannot exercise such power as the scope of the provision under Section 264 is limited. The learned counsel for the respondent placed the reliance on the decision of the Hon'ble Allahabad High Court and the the Hon'ble Karnataka High Court in the following cases:

1. Ajai Kumar Singh Khaldelial Vs.
Principal Commissioner of Income Tax [2020]
122 taxmann.com 103 (Allahabad).

2. Nataraju (HUF) Vs. Principal
Commissioner of Income Tax, Mysuru [2018] 91
taxmann.com 467 (Karnataka).

20. The learned counsel for the respondent specifically submits that under Article 226 of the Constitution of the India, and it has been held in Tata Cellular V. Union of India, (1994) 6 SCC 651] that while exercising the jurisdiction under Article 226 of the Constitution of India, the Court have to examine the followings:

77. The duty of the court is to confine
itself to the question of legality. Its

concern should be:

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law.
3. Committed a breach of the rules of natural justice.
4. Reached a decision which no reasonable tribunal would have reached or,
5. Abused its powers.

21. Since none of the above situations are attracted, the learned counsel for the respondent submits that the writ petition was liable to be dismissed.

22. She further submits that the Hon'ble Karnataka High Court in the above cited case has dismissed the case on the ground that the assessee erred in invoking the jurisdiction of the Chief Commissioner of Customs under Section 264 of the Income Tax Act instead of filing a regular appeal before the Commissioner of Income Tax (Appeal) as the case may be. She submits that the Hon'ble Karnataka High Court in *Nataraju (HUF) Vs. Principal Commissioner of Income Tax, Mysuru* [2018] 91 taxmann.com 467 (Karnataka) has held as follows:

"10. Even otherwise, the ignorance of law is no excuse and no such presumption as prayed for, can be drawn in favour of the petitioners-assessee. The remedy by way of a revision under Section 264 of the Act obviously lies in a narrow compass and the said remedy cannot be treated as a regular remedy by passing the regular remedy of appeals against the impugned assessment orders and one cannot be allowed to avail the said revisional remedy under Section 264 of the Act in a routine manner by passing the requirement of payment of tax and allowing the regular appellate authorities to apply their minds to the relevant facts and evidence on record."

23. On merits, the learned counsel for the respondent submits that the petitioner was required to file regular returns under Section 139 of the Income Tax Act, even if the petitioner was making a loss and therefore the petitioner cannot make a virtue out of a situation where the petitioner did not file regular returns under Section 139, after Assessment Year 2001-2002.

24. She further submits that for the Assessment order for the Assessment year 2001-2002, as the last Assessment order was

passed under Section 143(1). There was no scrutiny. She therefore submits that the second respondent had correctly allowed depreciation in Explanation 5 to Section 32 of the Income Tax Act, 1961 while computing the tax liability.

25. The learned counsel for the respondent further submits that the first respondent could not have examined the issue on merits under Section 264 of the Income Tax Act, 1961 as the content of the returns filed by the petitioner which has been extracted in the order passed by the second respondent also does not disclose as to whether depreciation was confined only to old furniture and miscellaneous assests or to the other assets other than the buildings.

26. Since the scope of Revision under Section 264 of the Income Tax was limited, she further submits that the order passed by the first respondent was liable to be confirmed and the present writ petition liable to be dismissed.

27. By way of rejoinder, the learned counsel for the petitioner submits that the decision followed by the Hon'ble Allahabad High Court in Aja Kumar Singh Khaldelial Vs. Principal Commissioner of Income Tax [2020] 122 taxmann.com 103 (Allahabad) itself states that the Writ Petition can be entertained where the orders passed on account of error on law.

28. I have heard the learned counsel for the petitioner and the learned counsel for the respondent Income Tax Department. Facts are not in dispute. The petitioner had filed last returns of income or for the assessment year 2001-2002 on 21.04.2001 and thereafter had not filed any returns for the subsequent assessment year till returns were filed for the assessment year 2014-2015. In the returns filed for the assessment year 2000-2001, the petitioner claims to have declared rental income from these properties located in Chennai and Hyderabad.

29. Similarly, in the returns filed for the assessment year 2001-02 also the petitioner has shown rental income from these properties. The petitioner has purportedly claimed depreciation on some of the assets and declared the written down value of the property as on 31.03.2001.

30. These properties were reportedly auctioned and sold during the financial year 2013-2014 and therefore liable to tax under the corresponding assessment year 2014-2015. The petitioner therefore filed a return on 29.07.2014 for the assessment year 2014-2015.

31. In the returns filed by the petitioner for the assessment year 2014-15 on 29.07.2014, the petitioner declared a

total income of Rs.7,79,98,230/-. The petitioner claimed long term capital gains. The entire income from the sale of the four house property were shown as long-term capital gains in the hands of the petitioner. The returns were also processed accepting the income return by an order dated 22.04.2015 under Section 143(1) of the Income Tax Act, 1961.

32. Thereafter, an assessment order dated 21.2.2016 came to be passed and the total income was re-determined as Rs.12,41,30,000/- by computing the income from the sale of a house properties as short term capital gains in the hands of the petitioner.

33. The petitioner thereafter preferred an application under section 264 of the Income Tax Act, 1961 before the first respondent for revision of the aforesaid assessment order dated 21.12.2016, instead of filing an appeal against the said order under Section 246 of the Income Tax Act, 1961 before the Commissioner of Income Tax (Appeals), within the limitation prescribed under the Act.

34. The first respondent has rejected the application for revision filed by the petitioner under Section 264 of the Income Tax Act, 1961 with the following observation:-

"(a) The assessee is a firm and ought to have filed return of income till its dissolution whether the firm incurred loss or profit. But the assessee firm has stopped filing its return of income from 2002-03. The reason for the same is not explained properly.

(b) The depreciation statement filed along with the income tax return for A.Y.2001-02 clearly shows that the four impugned properties sold during the F.Y.2013-14 are business assets and depreciation was claimed u/s.32 and the same allowed under limitation u/s. 143(1).

(c) the depreciation statement has not clearly mentioned the nature of land and building with the breakup of depreciable asset and non-depreciable within the block of assets".

(d) Authorised Representative's claim of the cost of depreciable asset of Rs.1,73,850/- is not acceptable as the record does not show any such break up relating to cost of land, building and other depreciable assets as per assessee's claim either before the Assessing Officer or before the undersigned.

35. Capital gain, arises when the net sale consideration of a capital asset is more than the "cost of its acquisition". Cost of acquisition is indexed to allow a taxpayer to factor the impact of inflation on the cost so as to allow a tax payer to pay tax on lower amount of capital gains than its historical cost. In this case, when the returns were taken up for scrutiny under section 143 (3) of the Income Tax Act, 1961 on 19.8.2016, petitioner's representative was called upon to explain the manner in which the claim was made.

36. During the course of the hearing the authorised representative the petitioner merely filed a copy of the depreciation statement as on 31.3.2001 which was purportedly filed along with the returns for the assessment year 2001-02.

37. The authorized representative of the petitioner was however unable to substantiate the claim vis-a-vis claim of expenditure towards cost of improvement in respect of the Aynavaram Property. Since the petitioner had failed to substantiate its claim with regard to the cost of acquisition and cost of improvement which was indexed to compute the taxable long-term capital gains, short term capital gains has been applied under Section 50 (2) of the Income Tax Act, 1961.

38. While it is not clear on what basis the first respondent has come to a conclusion that the properties that were sold in an auction during the financial year 2013-14 were business assets and therefore income from sale thereof were liable to tax as short term capital gain and only depreciation under section 32 of the Income Tax Act, 1961 was to be allowed by invoking section 50 (2) of the Income Tax Act, 1961, the fact that no periodical returns were filed by the petitioner does not raise an suspicion regarding the claim of the petitioner that the assets were house properties and not business assets.

39. If the properties were house properties fetching rental income, then the petitioner would have filed periodical returns year after year and claimed applicable depreciation/deduction in the returns. Thus, the inference that can be drawn is that the assets were indeed not house property and were not fetching any income and were a Business asset which were sold during 2013-14. Therefore, the petitioner could not claim long term capital gains.

40. The petitioner has now made several legal submission in the course of hearing of this writ petition. These were not the basis of the revision petition was filed before the 1st respondent. The petitioner ought to have filed an appeal against the assessment order dated 21.12.2016 of the 2nd respondent passed under Section 143(3). It is evident that having missing an opportunity to file an appeal under Section 246 of the Income Tax Act, 1961 before the Appellate Commissioner against the order dated 21.12.2016 the second respondent passed under Section 143(3) of the Income Tax Act, 1961, the petitioner approached 1st respondent under Section 264 of the Income Tax Act, 1961. However, the powers of the 1st respondent are limited. He cannot revise any order or against the order under the following cases:

- (a) where an appeal against the order lies to the Deputy Commissioner (Appeals)] or to the Commissioner (Appeals)] or to the Appellate Tribunal but has not been made and the time within which such appeal may be made has not expired or, in the case of an appeal to the Commissioner (Appeals) or] to the Appellate Tribunal, the assessee has not waived his right of appeal; or
- (b) where the order is pending on an appeal before the Deputy Commissioner (Appeals)] ; or
- (c) where the order has been made the subject of an appeal 3 to the Commissioner (Appeals) or] to the Appellate Tribunal.

41. Therefore, this Court cannot find any fault with the impugned order of the 1st respondent. Further, in the exercise of its power under Article 226 of the Constitution of India, this Court cannot give its verdict based on disputed question of facts. Since, the limitation to file had already expired, one last opportunity is given to the petitioner to file a statutory appeal under Chapter XX of Income Tax Act, 1961, before the Appellate Authority, within a period of 30 days from the date of receipt of this order against the assessment order dated 21.12.2016 of the 2nd respondent passed under Section 143(3) of the Income Tax Act.

42. If such an appeal is filed within a period of 30 days from the date of receipt of copy of this order before the Appellate Authority, the Appellate Authority shall dispose the appeal on merits in accordance with the law uninfluenced by any of the observation contained touching herein on the merits of the case.

43. This writ petition is disposed of with the above observation. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

ibm/drl
To

1.The Principal Commissioner of Income Tax-3
Room No.410, 4th Floor, Main Building,
121, Uthamar Gandhi Salai, Chennai - 34.

2.The Assistant Commissioner of Income Tax,
Non-Corporate Circle-10(1),
Chennai - 600 001.

+1cc to Ms.Hema Muralikrishnan, Advocate Sr.23074

W.P.No.16955 of 2018
and
M.P.No.20167 of 2018

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