

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.01.2021

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MS.JUSTICE R.N.MANJULA

Tax Case Appeal No.496 of 2020

Principal Commissioner of Income Tax
Central - I,
No.108, Nungambakkam High Road,
Chennai - 600 034. ...Appellant

Vs

Shri M.Kiran Kumar,
123, Usman Road,
T.Nagar, Chennai - 600 017.
PAN: ACHPM2247E ...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 29.10.2020 made in S.P.No.184/Chny/2020 in ITA.No.3374/Chny/2019 on the file of the Income Tax Appellate Tribunal, Madras 'C' Bench, for the assessment year 2015-16.

Preferred against the order of the Commissioner of Income Tax (Appeals)-18. Chennai, order dated 14/11/2019 made in ITA.No.510/16-17 Din ITBA/AP2/H/250/2019-2020/1020398688(1) preferred against the order of the Assistant Commissioner of Income Tax, Central circle-4(4), Chennai order dated 30/12/2016 made in PAN.NO.ACHPM22476 for the Assessment year 2015-2016.

For Appellant : Mr.T.R.Senthil Kumar
Senior Standing Counsel

For Respondent : Mr.Baskar

JUDGMENT

(Judgment was delivered by T.S.Sivagnanam,J)

This appeal, filed by the Revenue under Section 260A of the Income Tax Act, 1961 ('the Act' for brevity), is directed against the order dated 29.10.2020 passed by the Income Tax Appellate Tribunal, Madras "C" Bench ('the Tribunal' for brevity) in S.P.No.184/Chny/2020 in ITA.No.3374/Chny/2019 for the assessment year 2015-16.

2. The Revenue has raised the following substantial questions of law for consideration:

"1. Whether the Appellate Tribunal was correct in extending the stay beyond a period of 185 days, when the delay in disposing of the appeal is attributable to the assessee, which is contrary to Section 254(2A) of the Income Tax Act?

2. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in extending stay of collection of demands beyond six months, without looking into the jurisdictional High Court and Supreme Court rulings, simply passed the impugned order which is perverse in nature?

3. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was correct in directing the Revenue from taking any coercive action without appreciating that the assessee has not made out the case before the first appellate authority and also not paid any tax dues beyond 20% of confirmed demand, when the issues in questions are covered by the judgments of Hon'ble Supreme Court of India?"

3.The assessee is an individual engaged in the business of trading in gold jewellery and bullion. A search and seizure operation was conducted in the business premises of the assessee and group companies on 02.09.2014 as well as the residential premises of the assessee, who was the Managing Director of one of the group companies. For the assessment year under consideration (AY 2015-16), the assessee filed return of income admitting a total income of Rs.1,42,42,750/- in response to a notice issued under Section 153A of the Act. Upon completion of such assessment, the taxable income was computed to Rs.113,96,27,822/- against the income which was returned, namely Rs.1,42,42,750/- with a consequent net demand of Rs.46,30,29,450/-.

4. The Assessing Officer made disallowance under three heads, namely,

- (1) Excess claim of wastage on old gold - Rs.20,00,00,000/-.
- (2) Disallowance u/s 2(22)(e) of the Act - Rs.76,19,00,000/-.
- (3) Disallowance of capital gains exemption - Rs.16,24,68,072/-.

5. A sum of Rs.20 crores was added as undisclosed income of the assessee since the assessee had surrendered the same during the course of search under Section 132(4) of the Act. Further, during the search operation, it came to light that there was no evidence that was produced by the assessee with regard to the amount claimed for wastages on melting and purification of old gold purchased. Furthermore, payments were also made in cash of less than Rs.20,000/- by splitting the bills. A sum of Rs.76.19 crores was added as deemed dividend under Section 2(22)(e) of the Act, being the cumulative credit balance in the books of the group companies, in the hands of the assessee, for the reason that the assessee had indirectly borrowed funds from the company through the books of other group companies, which according to the department were only "paper" concerns.

6. The Assessing Officer further held that 98% of the shares held by the assessee in the private limited company should be treated as deemed dividend. The claim for exemption of Long Term Capital Gains (LTCG) under Section 10(38) of the Act to the tune of Rs.16.24 crores was disallowed for the reason that the gains computed were unrealistic (Penny Stock) with the market conditions and the returns earned by the assessee were 2613% of the investments.

7. Aggrieved by the additions, the assessee preferred appeal before the Commissioner of Income Tax (Appeals) - 18, Chennai (hereinafter referred as CIT(A)). When the appeal was pending before the CIT(A), the assessee approached this Court by filing W.P.No.13319 of 2019 praying for an issuance of Writ of Certiorarified Mandamus to quash the order passed by the CIT(A) dated 25.03.2019 and for a consequential direction upon the Assessing Officer to restrain him from enforcing the demand raised on the petitioner, vide demand notice dated 30.12.2016, pending disposal of the appeal before the CIT(A). The writ petition was disposed of by order dated 11.06.2019, by setting aside the order passed by the Commissioner of Income Tax, Central-1, dated 25.03.2019 and directing the CIT(A) to dispose of the main appeal within a time frame. Thereafter, the appeal has been heard and dismissed by order dated 14.11.2019. Aggrieved by the same, the assessee preferred an appeal before the Tribunal.

8. In terms of the directions issued in the writ petition in the stay petitions filed therein, a sum of Rs.3 crores was paid

by the assessee. Before the Tribunal, the assessee filed stay petitions praying for stay of the demand of Rs.37,05,16,734/- on the ground that the assessee has already paid 20% of the demand, namely, Rs.9,25,12,716/-. The Tribunal passed an order in the stay petition on 20.12.2019, whereby the Tribunal thought fit to fix the hearing of the main appeal itself at an early date and till then directed the Revenue not to initiate coercive action against the assessee for recovery of the outstanding demand. The Tribunal has referred to the arguments of the learned counsel for the assessee, who placed challans for the payment of taxes to the tune of Rs.9.26 crores post assessment framed by the Assessing Officer.

9. We find from the order that there is no discussion as to how the Tribunal was satisfied in directing the Revenue not to initiate coercive action against the assessee for recovery of outstanding demand. The power to be exercised by the Tribunal should be in accordance with Section 254(2A) read with the proviso thereunder. We find the order to be devoid of reasons though the order is a four page order, substantial part of the order is only the submissions made by the assessee, which are touching upon the merits of the matter and while holding that the order is devoid of reasons, we find that the Tribunal was justified in observing that they are not commenting upon the merits of the matter involved in the main appeal. Further, we note that the Tribunal finally disposed of the stay petition by order dated 20.12.2019, after noting that the appeal is fixed for hearing before the Regular Bench on 13.01.2020.

10. Under normal circumstances, if the appeal is to be heard by a different Bench than the Bench which is hearing the stay petition and the case is set out for hearing on a particular date, Courts normally do not dispose of the interlocutory applications, but would direct the application to be called on the date when the appeal is heard. However, the Tribunal chose to follow a different procedure in the instant case. It appears that the appeal was not listed before the Regular Bench of the Tribunal on 13.01.2020. Thus, the assessee had an unfair advantage in the sense that there was a protection granted to the assessee by default, because the appeal has not been taken up on 13.01.2020. The Tribunal thereafter issued a Corrigendum order and from the copy furnished in the typed set of papers at page 105, we find that there is no date mentioned in the said order, but the Tribunal chose to exercise its power and rectify the earlier order dated 20.12.2019 by suo motu correcting the order. Since the copy of the order furnished to us does not contain the date, we are not clear as to whether the Corrigendum order/suo motu order was passed by the Tribunal before 13.01.2020 or after 13.01.2020. In fact, we have seen several orders where the Tribunal refused to exercise its power when an application is filed for rectification of mistake. That apart,

it is not very clear that whether the Revenue was heard before such a rectification was done. Nevertheless, the appeal continued to remain pending and not taken up for disposal.

11. We deprecate the practice adopted by the Tribunal in exercising its suo motu power for issuing a Corrigendum to an order which has already been signed and the petition having been disposed of. The Tribunal becomes a functus officio and they can exercise their power of rectification under Sub-Section (2) of Section 254, if the mistake is brought to its notice by the assessee or the Assessing Officer and the procedure to be followed while exercising the power is provided in the first and second proviso under Sub-Section (2) of Section 254. Therefore, we are at a loss to understand as to how the Tribunal exercised its power in issuing a suo motu Corrigendum, that too by an undated order without hearing the Revenue or the Assessing Officer. As mentioned above, the appeal was not taken up for hearing on 13.01.2020 and obviously, the protection granted by the Tribunal in its interim order dated 20.12.2019 enured in favour of the assessee and the Revenue is right in its argument that the order of stay was in force beyond the period provided in the proviso to Section 254(2A) of the Act.

12. It is not clear as to why the assessee moved a second stay application before the Tribunal in SP.No.50/Chny/2019. The said stay application was dismissed by order dated 14.02.2020, fixing the appeal for hearing on 25.02.2020. It was made clear that the assessee should not seek adjournment on the date of hearing and in case the Revenue seeks adjournment, the entire amount will be stayed automatically. On the date fixed for hearing, the matter was not heard by the Tribunal. From the order sheet dated 25.02.2020, it is seen that when the appeal was taken up, the assessee's counsel sought for a Passover and the matter was subsequently taken up at 12.15 PM and the learned counsel for the assessee submitted that he would take 2 hours to complete his arguments. The Tribunal has recorded that, since the matter could not be completed due to paucity of time, the case is adjourned to 17.03.2020 with consent of both the parties. The learned counsel for the assessee pleaded that the interim protection for recovery proceedings for the demand may be granted to the assessee. Accordingly, the Tribunal directed the Departmental representative to suitably inform the Assessing Officer, having jurisdiction over the assessee's case, not to initiate coercive measure for the recovery of the demand till the date of hearing on 17.03.2020 and the matter was adjourned to 17.03.2020.

13. In our considered view, the Tribunal, while issuing directions to the Departmental representative, not to exercise its jurisdiction against the assessee, should be traceable to the statutory provisions. We find that no such power has been conferred on the Tribunal under Section 254 of the Act.

Therefore, issuing such directions and restraining the Assessing Officer to exercise his statutory function is beyond the jurisdiction of the Tribunal and therefore, the order and direction issued to the Department through the Departmental representative is non-est in the eye of law. The learned Departmental representative has no jurisdiction to give any concession or consent on behalf of the Department without the written approval of the competent authority. Therefore, the stand taken by the learned Departmental representative is of little avail as he has no jurisdiction to agree to the directions issued by the learned Tribunal, which itself is without jurisdiction. Challenging the said order, the Revenue is before us by way of this appeal.

14. Subsequently, the assessee filed the third stay petition in S.P.No.184/Chny/2020, since a recovery notice was issued to the assessee on 20.10.2020. The Tribunal, by order dated 29.10.2020, disposed of the third stay petition, where it has noted that after the interim order was passed on 25.02.2020 and extended on 17.03.2020, the Tribunal did not function. The Tribunal has also noted that the assessee did not file any document establishing financial difficulties. However, it took note of the submission of the learned counsel for the assessee that due to pandemic, the assessee was unable to run his business and is facing difficulties to pay the outstanding demand. Considering the pandemic situation, the Tribunal fixed the date of hearing for the appeal on 07.12.2020 with a direction to the assessee as well the Department to cooperate for concluding the final hearing of the appeal. The Tribunal directed the Department not to take any coercive steps to recover the outstanding demand till the next date of hearing i.e. 07.12.2020. We are informed by the learned Senior Standing Counsel for the Revenue that the appeal was heard on 07.12.2020 and orders have been reserved on 07.12.2020 itself and orders are awaited.

15. We have elaborately set out the manner in which the Tribunal proceeded with the matter. It is no doubt true that the assessee cannot be blamed for the non-functioning of the Tribunal, which is also beyond the control of the Tribunal due to pandemic situation. But however, we are on a larger issue with regard to the power of the Tribunal to be exercised while granting interim orders. We find that the exercise of power by the Tribunal is not to be in accordance with Section 254(2A) of the Act. Further, we have also commented upon the direction issued by the Tribunal to the Department through its Departmental representative not to initiate coercive action.

16. In our opinion, the Tribunal has no such power to issue directions, but has got power to grant an interim order under Section 254, subject to the conditions stipulated therein. Therefore, we are compelled to answer the substantial questions

of law in favour of the Revenue and against the assessee. However, we do not wish to interfere with the impugned order which had been passed by the Tribunal, though we are deciding the substantial questions of law in favour of the Revenue on account of the fact that the Tribunal has already heard the appeal on 07.12.2020 and reserved orders and the issue regarding whether the assessee should be put on further condition etc., has become academic because the main appeal is to be disposed of shortly and we are informed by the learned Senior Standing Counsel for the Revenue that the Tribunal will dispose of the matter at the earliest, probably in the next two or three weeks.

17. For the above reasons, while declining to exercise jurisdiction and interfere with the impugned order, we answer the substantial questions of law in favour of the revenue. The appeal stands disposed of accordingly. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

hvk

To

1. The Income Tax Appellate Tribunal,
Madras 'C' Bench,
2. The Commissioner of Income Tax,
Chennai.
3. The Assistant Commissioner of Income Tax,
Central Circle-1 (4) (I-C), Chennai

+1cc to Mr.T. SENTHIKUMAR, Advocate, S.R.No.423

CP(CO)
SM/17/02/2021

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