

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 20.09.2018
CORAM
THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM
&
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

T.C.(A)No.1522 of 2007

M/s.Magna Credit & Financial Services Limited
A-4/4, Krishna 2nd Main Road,
G.O.C.H.Colony,
Chennai - 600 090. ... Appellant / Appellant

Vs.

The Deputy Commissioner of Income-tax,
Company Circle IV (3),
Chennai - 600 006. ... Respondent / Respondent

Tax Case Appeal has been filed under Section 260A of the Income Tax Act, 1961, to frame the Substantial Question of Law and to answer the same in favour of the appellant with costs.

For Appellant : M/s.Sree Lakshmi Valli
For Respondent : Mr.Karthik Ranganathan

JUDGMENT

V.BHAVANI SUBBAROYAN, J.

The present tax appeal is filed against the order passed by the Income Tax Appellate Tribunal, Bench "B", Chennai, in I.T.A.NO.642/Mds/2002 for the assessment year 1996-1997.

2. This appeal has been admitted on the following substantial question whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in confirming the levy of penalty of Rs.5,31,800/- under Section 271(i)(c) of the Income tax Act?

3. The appellant claims to be a company registered under the Companies Act, 1956. They claim that they were the owners of Air Pollution Controller 2 Nos, Solid waste controller and Waste heat recovery which are stated to have been purchased from New Shorrock Mills (a division of M/s.Mafatlal Industries Limited) and they entered into a lease transaction with the said M/s.Mafatlal Industries Limited by lease agreement dated 25.03.1996, by which, the above mentioned assets were leased out for a period of 3 years to M/s.Mafatlal Industries limited. The

company had claimed 100% depreciation on machinery worth Rs. 25,00,000/-. The depreciation claimed by the company being Rs.12,50,000/- each for assessment year 1996-1997 and 1997-1998. There were certain irregularities found by the Revenue with regard to the lease of machinery by the appellant. The Assessing Officer by its assessment order for the assessment year 1996-1997, has disallowed the said claim of depreciation, and assessment was completed under Section 143(3) of the Income Tax Act. Independently, penalty proceedings under Section 271(i)(c) was initiated. As against the assessment order, the assessee preferred appeal before the Commissioner of Income Tax (Appeals) [CIT (A)], who by order dated 21.05.2000, deleted certain additions, but did not consider the issue of dis-allowance of depreciation. The assessee filed petition under Section 154 of the Act to rectify the error in the order, which was rejected by order dated 13.02.2001, confirming the dis-allowance of 100% depreciation.

4. The show cause notice issued as to why penalty under Section 271(1)(c) should not be imposed was adjudicated and the Assistant Commissioner Income Tax, by its order dated 31.07.2001, held that it is a fit case to levy penalty under Section 271(i)(c) of the Act on the appellant company for concealment of income, thereby, levied a sum of Rs.5,31,800/- as penalty under Section 271(i)(c) of the Income Tax Act. The appellant preferred an appeal before the Commissioner of Income Tax (Appeal - V), who in turn by its order dated 20.02.2002, confirmed the order passed by the Assistant Commissioner Income Tax.

5. As against which, the appellant moved the Income Tax Appellate Tribunal in I.T.A.No.642/MDS/2002. The Income Tax Appellate Tribunal upheld the levy of penalty as there was no satisfactory explanation given by the assessee/appellant herein for the said lease transaction to be a bonafide transaction, as against which, the present tax appeal has been filed.

6. The learned counsel for the appellant submitted that the Tribunal has failed to appreciate the genuineness of the sale and lease back transactions which was substantiated by supporting documents and invoices. It was also further contended by the appellant that the lease denials have been exceeded to tax as revenue receipts and in the hands of the lessee. The sale of assets has been reduced from the WDV of the respective blocks of assets and lease rental paid by the appellant has been allowed as revenue deductions. In this context, the appellant bonafidely believed that the transaction was a genuine one. Further, it was contended that merely on suspicion and surmises, the depreciation cannot be denied. Even otherwise, the depreciation claimed under transaction even if it is disallowed, does not warrant levy of penalty.

7. The learned counsel appearing for the appellant, in support of her contention, has relied on the case reported in (2013) 359 ITR 0565 (Karnataka), Commissioner of Income Tax and Others Vs. Manjunadha Cotton and Gining factory, for the proposition penalty proceedings under Section 271(i)(c) of Income Tax Act, - existence of such condition should be discernible from the Assessment Order or Order of the Appellate or Revisional Authority and whether it is for concealment of Income of furnishing of incorrect particulars of income.

8. The learned counsel also relied upon the Judgment reported in 1980 AIR 1149 in the case of Anantharam Veerasingaiah and Company Vs. Commissioner of Income Tax, Andhra Pradesh, wherein, it has been observed as follows:-

"But while considering the legal principles involved in the application of Section 271(i)(c) the High Court, in our opinion, has erred in entering into the facts of the case and determining in point of fact that the assessee earned income during the relevant previous years and that he was guilty of concealing such income or furnishing inaccurate particulars of it. Having found that the legal basis underlying the order of the Appellate Tribunal was not sustainable, the High Court should have limited itself to answering the question raised by the reference in the negative, leaving it to the Appellate Tribunal to take up the appeal again and redetermine it in the light of the law laid down by the High Court. It is the Appellate Tribunal which has been entrusted with the authority to find facts. A High Court is confined to deciding the question of law referred to it on facts found by the Appellate Tribunal. That is the kind of order we now proposed to take".

9. With regard to the power of High Court in limiting itself in deciding the question of law referred to it on facts found by the Appellate Tribunal, the Appellant relied on the Judgment reported in AIR 2008 Supreme Court 1541, in the case of Thiruvengada Pillai Vs. Navaneethammal and Another, for the proposition execution of documentary instrument written on stamp paper purchased by the same person on different dates is not invalid.

10. The learned counsel for the appellant, to substantiate her contention, has relied upon the Judgment reported in (2012) 348 ITR 0574, in the case of Commissioner of Income Tax Vs. High Energy Batteries India limited, wherein, it has been held thus:-

12....."in the absence of any material to pronounce on genuineness of transaction, the mere fact that what has been purchased has been leased out to the vendor or that vendor had undertaken to pay the hire charges, cannot lead to the conclusion that the transaction is a sham one. It could be seen that the law recognises constructive delivery as an acceptable mode of delivery and possession. The fact that the assessee had not taken physical possession, per se, does not pronounce anything against the sale that took place between the assessee and the other M/s.Ponni Sugars and Chemical Limited. Thus, there are no material on record to show that the sale between the assessee and M/s.Ponni Sugars and Chemical Limited was a sham transaction. In the above circumstances, the genuineness of the said transaction cannot be questioned at all.

11. The learned counsel appearing for the Income Tax Department, vehemently contends that the sale cum lease back transaction referred by the appellant is nothing but simple financial transaction and it is a tailor made to suit the occasion for concealment of transaction, thereby, to claim depreciation.

12. The learned counsel would also argue that the quantum assessment cannot be challenged during the penalty proceedings. Further, the appellant seems to have filed certain documents regarding lease transaction and in which, most of them were found to be created only for the purpose of giving a colour of lease to a simple financial transaction.

13. Furthermore, the learned counsel for the Department, urged upon this Court that Section 271(1)(c) of the Act, clearly provides for penalty that too when there is concealment categorically found, based on which, the assessment order was passed, including the penalty, and the concurrent confirmation of the penalty by the authorities cannot be interfered.

14. The learned counsel for the Department would rely upon the Judgment, reported in [2014] 49 taxmann.com 129 (Karnataka), in the case of Commissioner of Income Tax Vs. BPL Sanyo Finance Limited, to substantiate that penalty under Section 271(1)(c) of the Income Tax Act, was legally sustainable for furnishing inaccurate particulars on concealment of Income. It was also further stated that by virtue of notice under Section 271(1)(c) of the Act, was put to notice that if the assessee does not prove in the circumstances stated in the explanation, that is failure to return his current income, was not due to fraud or neglect, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof and consequently, be liable to penalty provided by that Section.

15. The learned counsel for the Department, to substantiate his claim, would also rely upon the Judgment reported in [2014] 42 taxmann.com 491 (Delhi), in the case of Commissioner of Income Tax, Delhi - IV Vs. Goyal M.G.Gases Private Limited, where imposition of penalty for concealment of Income was justified under Section 271(1)(c) of the Income Tax Act, read with Section 13(2) of the Income Tax Act, 1961. It is submitted that the consequence would be that the persons who make claims of this nature actuated by a malafide intention to evade tax otherwise payable by them would get away without paying the tax legally payable by them, if their cases are not picked up for scrutiny. This would take away the deterrent effect, which these penalty provisions in the Act have and the penalty was restored.

16. The learned counsel for the respondent would further place reliance on the Judgment reported in [2015] 63 taxmann.com 244 (Madras), in the case of Indus Finance Corporation Limited Vs. Commissioner of Income Tax, Chennai, to substantiate that it is well within the assessee's knowledge that the income from the lease was to be treated as income from finance transaction in respect of same party. The new plea taken by the appellant that consequent to disallowance of depreciation, the income should also be deleted, has no legs to stand, and the claim was not accepted and held that plea taken by the said appellant that consequent to disallowance of depreciation, the income should also be deleted has no legs to stand.

17. The learned counsel for the respondent also relied on the Judgment, reported in [2018] 93 taxmann.com 250 (Madras), in the case of Sundram Finance Limited Vs. Assistant Commissioner of Income Tax, Co. Circle VI(4), Chennai, wherein, it has been observed that the authorities concurrently rejected the explanation offered by the assessee that the Court was in agreement with the factual findings rendered by the authorities since the petitioner is a leasing company as it is very hard to believe a case when the leasing company had made advances for leasing out a machinery, which was never in existence. That apart, the assessee therein had not mentioned either before the lower authorities or before this Court, as to what action they had

initiated against the lessee, who is alleged to have committed fraud. That the entire issue would not have come to light but for the search conducted in the case of Pioneering Engineering Company and when the assessee was confronted with the findings, they have voluntarily reversed the depreciation claimed by them. Thus, the Court has observed that the Tribunal has rightly held that the assessee was liable for penalty.

18. Heard the learned counsel for the appellant and the learned counsel for the respondent, and perused the materials available on record.

19. On careful perusal of the documents, it is not in dispute that the assets claimed to have been leased to the said Mafatlal Industries limited, were an integral part of the appellant's factory at Gujarat. The Appellate Authority while confirming the order passed by the Assessing Authority, has held that the machineries being incapable of commercial purchase and sale in the open market, already being an integral part of the factory of the vendor - lessee, and further held that the assessee had earlier also indulged in similar bogus sale and lease back transaction with A.T.V.Projects India Limited, Bombay in 1993 and had subsequently availed of VDIS in 1997, by withdrawing this depreciation. This suggests that the assessee is aware of such mechanism of claiming false depreciation and thus, concealing the income. The judgments referred to by the Revenue in the cases of Indus Finance Corporation Limited Vs. Commissioner of Income Tax, Chennai, reported in [2015] 63 Taxmann.com 244 (Madras), Commissioner of Income Tax, Delhi - IV Vs. Goyal M.G.Gases Private Limited, reported in [2014] 42 taxmann.com 491 (Delhi) and Commissioner of Income Tax Vs. BPL Sanyo Finance Limited, reported in [2014] 49 taxmann.com 129 (Karnataka) would fully support the case of the Revenue.

20. On appreciating the factual position, it is seen from the records that the transaction referred by the appellant claiming 100% depreciation on lease back transaction, enabling the appellant to claim 100% depreciation on the assets referred in the lease agreement. It could be seen that the 4 items referred in the lease agreement, cannot be detached as they are part of the bigger system of machinery being used by New Sharrock Mills, wherein, the Assessing Authority, based on the valuers report, had come to the conclusion that the asset is considered integral part of the factory as a whole, which makes it very clear that the assets mentioned in the lease are permanently fixed as an integral part of the factory which cannot be used by anyone else other than New Sharrock Mills. This would lead to the conclusion that the assets are not capable of being sold and sale exists only on paper and not in the real sense.

21. The Income Tax Appellate Tribunal, while confirming the orders of the 1st Appellate Authority, has given categorical finding on the concealment of Income, thereby, attracting penalty under Section 271(1)(c) of the Income Tax Act, 1961.

22. On a careful perusal of the entire circumstances, leads to the only conclusion that the Assessing Officer, Appellate Authority, and the Appellate Tribunal, has rightly rejected the claim of the appellant. In terms of 271(1)(c) of the Income Tax Act, 1961, it empowers the Income Tax Authority, to levy penalty under the Act, if the Assessing Officer or Commissioner of

Appeal, or the Principle Commissioner during the proceedings, is satisfied that the Assessee has concealed the particulars of Income or furnished inaccurate particulars of income. The Assessing Officer, has directed the assessee to pay by way of penalty, a sum which shall not be less than, but, which shall not exceed 3 times of amount of tax sought to be evaded by reason of concealment of particulars of income or furnished inaccurate particulars of income.

23. In this regard, the reliance placed by the appellant's counsel, on the decisions referred above have not come in the way to assist the appellant's case. The set of facts in the cases relied by the appellant, is totally different and distinguishable with the case on hand. That apart, it is clear from the documents available and the discussion made by the 1st Appellate Authority as well as the Appellate Tribunal that the said sale cum lease back transaction is to conceal a simple financial transaction, the documents produced by the appellant did not substantiate the claim made by the appellant in any justifiable manner claiming 100% depreciation. There is no proper justification placed by the appellant for us to consider or to disbelieve the transaction would not lead to a presumption of concealment of Income or suppression of fact, which is squarely covered under Section 271(1)(c) of the Income Tax Act, empowering the Assessing Authority to levy penalty.

24. In Goyal M.G. Gases (P) Ltd., (supra), the Assessing Officer disallowed depreciation on computers purchased by the assessee and leased back to another company and both companies being under the same Management. The CIT (A) confirmed the order as well as the Tribunal and the challenge to the said order before the High Court was rejected. Meanwhile, the Assessing Officer imposed penalty for understatement of income on sale of cylinders and for bogus claim of depreciation on computers. This order of penalty was confirmed by the CIT (A) and partially confirmed by the Tribunal and the matter was remanded permitting the assessee to cross examine certain persons. On de novo consideration, the Assessing Officer imposed penalty for furnishing inaccurate particulars of income in terms of Section 271(1)(c) of the Income Tax Act. The CIT(A) cancelled the penalty imposed by the Assessing Officer which was upheld by the Tribunal and the said order was challenged before the High Court. The Court after considering the factual aspects held that it is difficult to believe that the assessee would have known true nature of the transaction and that it was of the bonafide view that it actually owned and leased computers on which it claimed depreciation. It was further held that even though the assessee might have furnished all particulars for a tripartite transaction, the fact that what it put up in its return was a sham and mere paper transaction leading to the inevitable conclusion that the explanation of the assessee on the question of its ownership and use of the computers is unsubstantiated and malafide. Accordingly, the order passed by the Assessee Officer was restored.

25. The Assessing Officer while imposing the order of penalty pointed out that on a holistic examination of the transaction, it is apparent that it is not in the nature of a normal sale and lease back transaction, rather a hurriedly planned act towards the end of the financial year to claim 100% depreciation benefit and in that process, the Assessee has prepared extensive documentation and the documents, by themselves, do not mean much unless they are vouched by authentic transaction. After examining the nature of transaction, the Assessing Officer held

that the claim for depreciation is fraudulent. On appeal before the CIT(A), the factual details were pointed out as examined by the Assessing Officer with regard to certificate of installation and valuation report and fire insurance policy wherein, it was stated that the certificate of installation was obtained from the employee and therefore, it is not an independent evidence. Further, the valuation report has not considered the encumbrance on the assets. Further, the insurance policy also revealed several defects. After referring to the decisions, the CIT (A) confirmed the order passed by the Assessing Officer. Before the Tribunal, the assessee pointed out that the lease denials have been executed to exceed to tax as revenue receipts. In the hands of the lessee, the sale of the asset has been reduced from the written down value of the respective blocks of assets and the lease rental paid by them has been allowed as revenue deduction. The Tribunal examined the factual position and pointed out that the so called assets were part of integral factory owned by the sister concern of the lessee, Mafatlal Industries Ltd., namely New Shorrock Mills. The Tribunal referred to the valuation report and pointed out that when the assets were part of an integral factory they could not have been sold out to the assessee and leased out to different concern. Further, the Tribunal pointed out that it is not clear whether Mafatlal Industries Ltd., already borrowed certain monies against the assets because in the valuation report, the Assessing Officer has stated that the valuer has not been able to verify whether any encumbrances were made by way of mortgage hypothecation etc., to the bank or any financial institution. Further, the assessee could not explain as to why they were not in possession of the original insurance policy and why only copy was obtained from Mumbai. The discrepancy in the date of stamp paper was also pointed out. Thus, in our considered view three authorities have concurrently held on facts against the assessee. While examining the correctness of the order passed by the Tribunal under Section 260A of the Act, we cannot convert ourselves as a third appellate authority over the findings rendered by the Assessing Officer.

26. Under these circumstances, we find no merits to interfere in the order passed by the Income Tax Appellate Tribunal, confirming the order passed by the 1st Appellate Authority, based on the assessment order for the year 1996-1997 on the appellant's company. The questions of law is answered against the appellant and in favour of the Department. Accordingly, the appeal stands dismissed. No costs.

(T.S.S.J) (V.B.S.J)

20.09.2018

raja/pbn

Internet : yes/no

Speaking Order/Non-Speaking Order

Index : yes/no

To

The Deputy Commissioner of Income-tax,
Company Circle IV (3),
Chennai - 600 006.

T.S.SIVAGNANAM.J.,
and
V.BHAVANI SUBBAROYAN.J.,

raja/pbn

Pre-delivery Judgment in
T.C.(A)No.1522 of 2007

20.09.2018