

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.12.2014

CORAM

THE HON'BLE **MR.JUSTICE R.SUDHAKAR**
AND
THE HON'BLE **MR.JUSTICE R.KARUPPIAH**

T.C.(A).Nos.932 and 875 of 2014

M/s.India Trimmings P. Ltd.,
6/36, Pillaiappanpalayam
Annur - 641 653

.. Appellant in the above T.Cs

Vs.

The Assistant Commissioner of Income Tax
Company Circle IV(2)
Coimbatore

.. Respondent in the above T.Cs

PRAYER: Appeals under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal 'A' Bench, Chennai, dated 02.05.2014 in I.T.A.No.1865/Mds/2011 and the order dated 25.7.2014 made in M.P.No.95/Mds/2014 for the assessment year 2007-08.

For Appellant : Mr.S.Sridhar

For Respondent : Mr.T.R.Senthilkumar
Standing Counsel for
Income Tax

COMMON JUDGMENT

(Delivered by *R.SUDHAKAR, J.*)

These appeals are filed by the assessee challenging the order of the Income Tax Appellate Tribunal 'A' Bench, Chennai, dated 02.05.2014 in I.T.A.No.1865/Mds/2011 and the order dated 25.7.2014 made in

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M.P.No.95/Mds/2014 for the assessment year 2007-08, raising the following substantial questions of law:

T.C.(A)No.932 of 2014:

- (i) Whether the Income Tax Appellate Tribunal is correct in law in setting aside the assessment framed by the respondent which assessment order was framed without adhering to the prescriptions of section 144C of the Act, thereby proving and establishing the lapse committed was fatal and not curable?
- (ii) Whether the Appellate Tribunal was correct in law in expanding the scope of the appeal of the Revenue before them for considering and for passing the order setting aside the assessment framed by the respondent for adhering to the prescriptions of the section 144C of the Act in spite of the non consideration of the arguments of both sides on the plea for admission of the additional grounds of appeal filed which proved perversity in the order passed by them?

T.C.(A)No.875 of 2014:

- (i) Whether the Appellate Tribunal is correct in law in not entertaining the plea for recall of the original order passed within the scope of section 254(2) of the Act in spite of the mistake apparent from the record/order in not adjudicating the plea relating to the admission of additional grounds of appeal for expanding the scope of the appeal before them?
- (ii) Whether the Appellate Tribunal is correct in law in setting aside the assessment framed by the respondent which assessment order was framed

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without adhering to the prescriptions of section 144C of the Act, thereby proving and establishing the lapse committed was fatal and not curable?

(iii) Whether the Appellate Tribunal was correct in law in expanding the scope of the appeal of the Revenue before them for considering and for passing the order setting aside the assessment framed by the respondent for adhering to the prescriptions of section 144C of the Act in spite of the non consideration of the arguments of both sides on the plea for admission of the additional grounds of appeal filed which proved perversity in the order passed by them?"

2. The following facts as found in the assessment order will be relevant in disposing the above appeals.

The appellant/assessee is a wholly owned subsidiary of Conso International Corporation, USA and is engaged in the manufacture of Decorative Trimming, such as, Tie Backs, Tassels, Trimmings etc. and is a 100% Export Oriented Unit. The assessee company has filed their return of income for the assessment year 2007-08 on 31.10.2007 admitting a total income of Rs.1,37,520/- and value of fringe benefits of Rs.16,16,630/-. The book profit under Section 115JB, as returned by the assessee, worked out to Rs.1,50,066/-. After processing the return under Section 143(1), as the case was selected for scrutiny through CASS, notice under Section 143(2) was issued to the assessee.

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3. As international transactions were involved in this case, the case was referred to the Transfer Pricing Officer, Chennai in order to compute the Arms Length Price with the approval of the Commissioner of Income Tax-II, Coimbatore. It appears that the Transfer Pricing Officer has passed an order on 28.10.2010 in terms of Section 92CA(3) of the Income Tax Act, which is recorded in the Assessment order, reads as follows:

"8. Vide her order in F.No.1510/TPO-IV/AY 2007-08 dt: 28-10-2010, the Transfer Pricing Officer -IV, Chennai, has directed the Assessing Officer to adjust upwardly the total income of the assessee by Rs.1,77,80,447/- (Rs.1,05,80,652 + Rs.71,99,795) on account of determination of Arms Length Price of transaction relating to payment carriage outward costs and volume discount at Nil."

4. Thereafter, the Assessing Officer proceeded to pass an order under Section 143(3) of the Income Tax Act and accordingly passed the assessment order on 30.12.2010, which includes the regular assessment and the order of the Transfer Pricing Officer after affording opportunity to the Authorised Representative of the assessee. The assessment order came to be challenged by the assessee before the Commissioner of Income Tax (Appeals) contending that the order of the Transfer Pricing Officer should have culminated into a draft assessment order in terms of Section 144C(1) of the Income Tax Act and since the Assessing Officer has not passed the assessment order on the basis of the draft assessment order, the proceedings under Section 143(3) passed by the Assessing Officer dated

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30.12.2010 was bad.

5. The Commissioner of Income Tax (Appeals), by order dated 30.08.2011, set aside the order of the Assessing Officer in entirety holding as follows:

"6. As per the provisions of section 144 C, the Assessing Officer shall "notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment order (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the first day of October, 2009 in variation in the income or loss returned which is prejudicial to the interest of such assessee, the other sub-sections of section 144 C mention about the further procedure of completion of assessment and the reference to the Dispute Resolution Panel. As seen from the assessment order, it was passed on 30.12.2010 without giving a draft of the proposed order of assessment to the assessee, since there was a variation in the income which is prejudicial to the interest of the assessee. The Assessing Officer has directly passed the Order u/s 143(3) thereby denying an opportunity to the appellant to file his objections before the Dispute Resolution Panel and also the Assessing Officer. Since the Assessing Officer has not followed the provisions of section 144 C thereby denying the opportunity to the appellant to approach the Dispute Resolution Panel, the order u/s 143(3) is bad in law. In view of this, the grounds of appeal as per additional grounds are allowed."

(6)

6. Aggrieved by the order of the Commissioner of Income Tax (Appeals), the Department filed an appeal on 18.11.2011 before the Income Tax Appellate Tribunal raising the following grounds:

"1. The order of the learned Commissioner of Income-tax (Appeals) is against facts and circumstances of the case.

2. The learned Commissioner of Income-tax (Appeals) erred in deleting the entire additions made in the assessment on the ground that the order was not passed in pursuance of the directions of DRP u/s 144C of the Act.

3. The learned CIT(A) ought to have deleted the addition made by the Transfer Pricing Officer rather than deleting all the additions including additions made by the Assessing Officer."

7. The Tribunal, by order dated 24.4.2012, disposed of the appeal exparte by way of remand. However, at the behest of the assessee, who filed an application to recall the exparte order on account of the non-appearance, the Tribunal was inclined to accept the plea and the order dated 24.4.2012 was recalled and the appeal was restored to file. At that juncture, the Department has raised additional grounds raising a new plea, which was vehemently opposed by the appellant/assessee stating that it was belated. The said additional grounds and the objections of the assessee are as follows:

*"During the course of the hearing the revenue filed the **additional grounds of appeal** which was served on the Respondent on 01.04.2014 after lapse of more than 2 years*

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(appeal filed on 18.11.2011) and admittedly there was no petition for condoning the delay in filing the said additional grounds of appeal.

The Respondent vehemently had objected to the admission of the additional grounds of appeal especially to change their stand totally in the present appeal proceedings. For sake of easy reference, the said additional grounds of appeal filed by the revenue is re-produced below:

"2. The learned Commissioner of Income Tax (Appeals) erred in cancelling the assessment, since the provisions of sec.144C was not followed.

3. The learned Commissioner of Income Tax (Appeals) ought to have observed that non issue of draft order u/s. 144C of the Act was on a procedural irregularity."

On a plain reading of the said grounds of appeal it is crystal clear that the revenue has put up a different case without explaining bona fide reasons for belated change of their stand and on the contrary revenue relied on two decisions to press their plea for adjudication of the revised grounds of appeal so as to get another round of proceedings for the Assessing Officer."

8. In effect, when the appeal was originally filed, the objection of the Department was that the Commissioner of Income Tax (Appeals), while passing the order dated 30.8.2011 ought not to have deleted the entire addition on the premise that the procedure prescribed under Section 144C was not followed. It is the contention of the appellant/assessee that the grounds of appeal by the Department is that the jurisdiction of the Commissioner of Income Tax (Appeals) to set aside the assessment order

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passed under Section 143(3) dated 30.12.2010 should be limited to the issue with regard to the order of the Transfer Pricing Officer and not otherwise. Nevertheless, it is also the contention of the appellant that they are entitled to object the appeal filed by the Department on the ground of violation of the procedure and requirement under Section 144C of the Income Tax Act.

9. This issue that was canvassed vehemently by the appellant was brushed aside by the Tribunal and we find that the first order of the Tribunal dated 02.05.2014 is merely proceeded on the basis that there was a concession by the Authorised Representative of the assessee and magnanimously agreed by the Department Representative in remanding the matter and therefore, the Tribunal passed the following order:

"4. At the time of hearing the Ld. A.R., conceded for remitting the case back to the file of Ld. Assessing Officer for hearing the case afresh. The Ld. D.R. magnanimously agreed for the same.

5. Considering the facts and circumstances of the case, and in accordance with the request of both the parties, we hereby remit back the matter to the file of Ld. Assessing Officer for denovo consideration. We also make it clear that the assessee shall co-operate with the Revenue in their proceedings promptly without seeking unnecessary adjournments in order to expedite the orders of the Revenue.

6. In the result, the appeal of the Revenue is allowed for statistical purposes."

(9)

10. Aggrieved by this order of the Tribunal the assessee filed an appeal before this Court in T.C.(A)No.932 of 2014 raising the above-mentioned substantial questions of law.

11. Thereafter, an application was filed before the Tribunal under Section 254(2) by the assessee seriously contending that there was no concession at any point of time and the matter was persuaded vehemently. The appellant relied on the gist of arguments dated 05.04.2014 filed during the course of argument on 08.04.2014, which has been taken note of by the Tribunal. The assessee has also raised an objection on the ground that various legal facets of the case has not been considered by the Tribunal as has been pointed out earlier.

12. The Tribunal taking note of the said objection came to hold that the Tribunal had misunderstood the submissions and the gesture of the Authorised Representative, which made them to pass such an order. However, the Tribunal chose to rectify the order by passing a revised order on 25.7.2014, which reads as follows:

"5. We have heard both the sides and perused the materials on record. It appears that the Bench had misunderstood the submissions and gesture of the Ld. A.R at the time of hearing the appeal and had therefore observed in the order that the Ld. A.R had conceded for remitting the case back to the file of Ld. Assessing Officer for fresh hearing. Therefore paras-4 & 5 of the order of the Tribunal in ITA

No.1865/Mds./2011 is accordingly modified and shall be henceforth read as follows:-

"Para - 4 Ld. D.R taking cue from the observations of the Bench magnanimously conceded for remitting the case back to the file of the Ld. Assessing Officer for hearing the case afresh. Ld. A.R. on the other hand, stoutly opposed for remitting back the matter and relied on the order of Ld. CIT(A).

Para - 5 Considering the facts and circumstances of the case, we hereby remit back the matter to the file of Ld. Assessing Officer for denovo consideration (since the Ld. Assessing Officer had not followed the provisions of Sec.144C of the Act). We also make it clear that the assessee shall co-operate with the Revenue in their proceedings promptly without seeking unnecessary adjustment in order to expedite the order of the Revenue."

6. In the result, the Miscellaneous Petition of the assessee is allowed to the extent indicated herein above."

13. Aggrieved by this Miscellaneous order, the assessee filed an appeal before this Court T.C.(A)No.875 of 2014 raising the above-mentioned substantial questions of law.

14. Heard Mr.S.Sridhar, learned counsel appearing for the appellant and Mr.T.R.Senthilkumar, learned Standing Counsel appearing for the

Revenue and perused the materials placed before this Court.

15. At the outset we have to point out that there is totally non-application of mind by the Tribunal. The core issue raised in the appeal, the objections of the appellant and the non-consideration of the issue raised in appeal clearly makes the order of the Tribunal a non-speaking order.

16. We find from the arguments advanced by the appellant and the respondent that there is no scope for passing such a non-speaking order of remand, for which we record our reasons as under:

i) the order of assessment under Section 143(3) of the Income Tax Act dated 30.10.2010 is also in relation to the order passed by the Transfer Pricing Officer dated 28.10.2010 under Section 92CA(3) of the Income Tax Act and that was challenged before the Commissioner of Income Tax (Appeals), which was allowed in favour of the assessee. Against which, the Department filed an appeal to the Tribunal, the scope of which we have recorded earlier is limited to that portion of the order of the Commissioner of Income Tax (Appeals) interfering with the entire order passed under Section 143(3); in other words, it should be limited only to the order relating to the order of the Transfer Pricing Officer dated 28.10.2010. That matter was pending before the Tribunal for more than two years.

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Thereafter, additional grounds have been raised, which was objected to by the assessee saying that new plea was sought to be raised and that issue has not been addressed by the Tribunal;

ii) the core issue raised by the assessee is with regard to the order passed by the Assessing Officer under Section 143(3) read with Section 92CA(3) of the Income Tax Act; the contention of the assessee is that the requirement under Section 144C (1) of the Income Tax Act has not been followed and the Commissioner of Income Tax (Appeals) has accepted such a stand and it is for the Tribunal to consider the objection of the assessee in the light of the objection filed in relation to the non-compliance of Section 144C of the Income Tax Act. That aspect has not been considered by the Tribunal and therefore the question of law which is raised by the assessee ought to have been considered by the Tribunal and there was no scope for passing a non-speaking remand order; and

iii) The Tribunal ought to have considered the scope of such appeal, the additional grounds raised and the objections of the assessee and should have given a ruling on the same.

17. We, therefore, have no hesitation to hold, for the reasons stated above, that the order of the Tribunal is a non-speaking order and the Tribunal has not considered the issue raised and objected by either side.

(13)

Hence, we set aside the the order of the Tribunal and remand the matter to the Tribunal for passing fresh orders on merits.

18. In the result, both the appeals are allowed by way of remand. No costs.

(R.S.J.) (R.K.J.)
16.12.2014

Index : No
Internet : Yes
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To

1. The Assistant Registrar,
Income Tax Appellate Tribunal
Chennai Bench "A", Chennai.
2. The Commissioner of Income Tax (Appeals) -I,
Coimbatore.
3. The Assistant Commissioner of Income Tax
Company Circle IV(2), Coimbatore

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R.SUDHAKAR,J.
and
R.KARUPPIAH,J.

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