IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.11.2014

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THE HONOURABLE MR.JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR.JUSTICE R.KARUPPIAH

Tax Case (Appeal) No.614 of 2013

S.Sathyanarayanan .. Appellant

-vs-

The Assistant Commissioner of Income Tax
Central Circle I(5)
Income Tax Department
Main Building IV Floor
121, M.G.Road
Nungambakkam
Chennai 600 034 .. Respondent

Memorandum of Grounds of Tax Case Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai 'B' Bench dated 18.3.2013 made in I.T.A.No.2300/Mds/2012 for the assessment year 2005-06.

For Appellant : Mr.S.Sridhar

For Respondent : Mr.T.R.Senthilkumar

JUDGMENT
(Judgment of the Court was delivered by R.SUDHAKAR, J.)

This is an appeal at the instance of the assessee against the order of the Income Tax Appellate Tribunal pertaining to the assessment year 2005-06. The case of the assessee is that pursuant to a search operation conducted in the premises of Mr.K.Sundarraj, the father of the appellant, on 21.9.2005, an assessment order under Section 153C read with Section 153A read with Section

143(3) of the Income Tax Act, 1961 was passed on 31.12.2007 determining the total income of Rs.1,71,92,686/- as against the total income of Rs.1,47,08,820/- admitted by the assessee, taking into account the following four additions:-

> "(i) Unexplained investment and expenditure to the tune of Rupees 1,33,11,147/-
> (ii) Deemed dividend
> (iii) Unexplained investment in bank account
> (iv) Rupees 6,48,950/- which was shown as an agricultural income was treated as income from undisclosed source."

The additions made in the said assessment order were accepted and the tax was also paid. Thereafter, the Assistant Commissioner of Income Tax sought to initiate penalty proceedings under Section 271(1)(c) of the Act, for which a notice was served and the assessee also filed his objections. On 30.6.2008, the Assistant Commissioner of Income Tax imposed penalty in respect of the first and third additions mentioned above, as against which the matter came to be pursued before the Commissioner of Income Tax (Appeals), the Tribunal as well as before this Court unsuccessfully. So far as the second and fourth additions referable to deemed dividend and agricultural income are concerned, penalty proceedings were kept in abeyance in view of the pendency of an appeal. However, as the appeal preferred by the assessee was dismissed subsequently, penalty proceedings were pursued by the Assistant Commissioner and an order came to be passed on 30.3.2010 holding as follows:-

> "Tax sought to be evaded is calculated as hereunder:
>
> Assessed income including
> concealed income Rs.1,65,91,759/-
> Tax thereon Rs.56,02,830/-
> Income excluding income
> particulars of which is concealed

(1,65,91,759-6,48,950-1,50,000/-)
Rs.1,57,92,809/-
Tax thereon Rs.52,86,687/-
Tax sought to be evaded Rs.3,16,143/-

Minimum penalty being 100% of tax sought to be evaded comes to Rs.3,16,143/-

Considering the facts and circumstances of the case, I impose minimum penalty of Rs.3,16,143/- u/s 271(1)(c) of the Income Tax Act, 1961."

2. As against the above order, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) by specifically contending that since the original authority had not imposed any penalty at the first instance in respect of the addition of Rs.1,50,000/- towards deemed dividend and there was no deferment, the impugned order imposing penalty was bad. Having regard to the said plea raised by the assessee, the Commissioner of Income Tax (Appeals) finally held as follows:-

> "6. .....As regards the penalty in respect of addition of agricultural income is concerned, it may be stated that similar issue had come up for consideration in appellant's own case for A.Y.2001-02 in ITA No.206/10-11. After considering the facts of the case, submission of the Ld.AR, the decisions relied on by the appellant and after detailed discussion, the issue was decided in favour of the appellant in ITA No.206/10-11 dated 29.10.2012. Since the facts are similar, following the reasons given in the above order, the ground is allowed.
>
> 7. As regards levy of penalty on the addition of

> deemed dividend of Rs.1,50,000/- it may be stated that the appellant has not been able to offer any explanation. Therefore, the AO has rightly levied the penalty because the conditions of section 271(1)(c) and the Explanation of that section are clearly satisfied in the instant case....... Hence, I am of the considered view that it was an deliberate act on the part of the appellant to conceal its income and deprive the department of its legitimate due....In view of the above factual and legal positions, I am of the considered opinion that the AO has rightly levied penalty u/s 271(1)(c) in respect of the additions of Rs.1,50,000/- towards deemed dividend. The ground is accordingly dismissed."

3. Aggrieved by the above order, the assessee raised a similar plea before the Tribunal, among other grounds, contending that the Commissioner of Income Tax (Appeals) failed to appreciate that the penalty proceedings are invalid, without jurisdiction and beyond reasonable time. However, the Tribunal summarily rejected the said plea by holding as follows:-

> "12. In these cases, both parties agree that I.T.A.Nos.2293, 2295, 2299, 2296, 2300 & 2301/Mds/2012 pertain to penalties confirmed in assessment proceedings finalized under section 153C r.w.s.153A r.w.s. 143(3) of the “Act”, whereas, in I.T.A.No.2299/Mds/2012, the assessments have been completed under section 147 r.w.s.153C r.w.s. 153A of the "Act". The ld. representatives also state that since there is no explanations offered by the assessee in any of the penalty proceedings, the facts are similar to

> those in I.T.A.Nos.2298 & 2294/Mds/2012 (supra) decided hereinabove.
>
> 13. We have considered the fair submissions advanced by both parties and gone through all case files. In these cases as well, since the assessee has not offered any explanation in penalty proceedings, we rely in the case law of CIT v. Mak Data Ltd. (supra) and confirm the orders under challenge passed by the CIT(A)."

Challenging the above order, the present tax case appeal has been filed.

4. The learned counsel for the appellant submitted that so far as the issue of deemed dividend is concerned, when a specific plea was raised both before the Commissioner of Income Tax (Appeals) as well as the Tribunal that the penalty proceedings under Section 271(1)(c) cannot be pursued when the said plea was specifically abandoned at the first instance without reserving any right pending appeal, the impugned orders of both the first and second appellate authorities cannot be sustained, as the said point had not been considered at all.

5. We also heard the learned counsel for the Revenue on this issue.

6. We find much force in the contention of the learned counsel for the appellant, as the proceedings of the Commissioner of Income Tax (Appeals) and the Tribunal only state that the explanation offered by the assessee was not correct, meaning thereby that both the authorities went into the merits of the explanation offered by the assessee on penalty and not on the issue whether the original authority had reserved his right to proceed under Section 271(1)(c) of the

Act relating to the deemed dividend. Since there is no consideration by the Tribunal on the ground raised by the assessee as above, we are inclined to remand the matter to the Tribunal to consider the scope of the second penalty order now under challenge in the light of the earlier order dated 30.6.2008. The tax case appeal stands allowed by way of remand. Consequently, M.P.No.1 of 2013 is closed. No costs.

Index : no (R.S.J.,) (R.K.,J.)
Internet: yes 12.11.2014

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To

1. The Income Tax Appellate Tribunal
Chennai 'B' Bench
Chennai

2. The Assistant Commissioner of Income Tax
Central Circle I(5)
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Chennai 600 034

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and
R.KARUPPIAH,J.

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