IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.02.2020

CORAM:

THE HON'BLE MR.JUSTICE N.KIRUBAKARAN
and
THE HON'BLE MR.JUSTICE P.VELMURUGAN

T.C.A.No.7 of 2020

The Commissioner of Income Tax
Chennai ..Appellant/Respondent.

-Vs-

M/s.A.R.Builders & Developers P Ltd.,
No.148, Acropolis Building
Dr.Radhakrishnan Salai
Mylapore, Chennai-600 004
PAN: AABCE3953A ..Respondent /assessee/appellant

Prayer:Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961, against the order made in ITA.No.3298/Chny/2018 relating to the Assessment Year 2014-15.

For Appellant : Ms.Hemalatha

For Respondent : Mr.A.S.Sriiraman

JUDGMENT

P.VELMURUGAN,J.

The Tax Case Appeal is filed by the Revenue as against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench dated 20.03.2019 passed in ITA.No.3298/Chny/2018 for the assessment year 2014-2015.

2.1 The facts of this case is that the assessee/company filed its original return for the assessment year 2014-15 on 22.11.2014 disclosing income of Rs.79,29,320/-. Thereafter, the assessee filed the revised return on 23.11.2014 admitting a total income of Rs.4,34,23,280/-. The case was selected for scrutiny and notice under Section 143(2) dated 03.09.2015 was served and notice under Section 142(1) was also issued calling for details. The assessment was completed on 30.12.2016 under Section 143(3) of the Act accepting the returns filed.

2.2 The Principal Commissioner of Income Tax, Chennai-1, considering that the order passed by the Assessing Officer is prejudicial to the interests of the revenue, issued notice dated 17.10.2018 to the assessee to show cause as to why the giving effect order passed by the Assessing Officer on 30.12.2016 should not be set aside invoking provisions of Section 263 of the Act.

2.3 The assessee filed reply dated 07.11.2018. Taking into account the reply of the assessee and also considering the scope of Section 263 of the Act, the Principal Commissioner of Income Tax-1, Chennai, passed an order under Section 263 of the Act on 13.11.2018, holding that there was a lack of application of mind on the part of the Assessing Officer while passing the assessment order and in view of the fact that the

assessment order passed was erroneous and prejudicial to the interest of the revenue, set aside the assessment order dated 30.12.2016 and directed the assessing officer to examine the aspects stated in Section 263 of the order in respect of indexing cost and pass fresh order, after affording opportunity to the assessee.

2.4 Aggrieved by the said order of the Principal Commissioner of Income Tax-1, Chennai, the assessee had preferred an appeal before the Income Tax Appellate Tribunal and the Tribunal allowed the appeal filed by the assessee on the ground that when two views were possible and the Assessing Officer had taken one such view and the Commissioner of Income Tax did not agree but the same would not be the reason for treating the order of the Assessing Officer as erroneous and prejudicial to the interest of the revenue. Holding so, the Tribunal set aside the order of Principal Commissioner of Income Tax-I, under Section 263 of the Act.

2.5 Aggrieved by the said order of the Income Tax Appellate Tribunal, the revenue has filed the present Tax case Appeal before this court.

3.1. The learned Standing counsel appearing for the appellant/Revenue would submit that the Assessing Officer has passed

one page order and there is no reason given for accepting the income tax returns filed by the assessee. The order of the Assessing Officer is a non-speaking order. Further, she would submit that the order of the Assessing Officer was cryptic. The assessing officer had not examined how the original cost was computed. The learned Assessing Officer had simply accepted the claim of the assessee without verifying it and the order of the assessing officer is erroneous and prejudicial to the interest of the revenue. Further, she would submit that the indexed cost claimed by the assessee should be from the date of the original sale from the year 2004-2005, but not from the year 2011-2012 since actual sale has not been taken place in 2011-12, but only share alone has been transferred. Property has not been transferred during the assessment year 2011-12. Transfer of property was effected only in the year 2004-05 as per the Transfer of Property Act. The property was actually transferred in the Financial Year 2004-05 and not in the Financial Year 2010-11. Therefore, calculating the indexed cost of acquisition for the purpose of capital gain tax adopted by the assessing officer is erroneous. Even the Assessing Officer has not given any reason as to why they have not taken the original sale of the year 2004 but adopted for the year 2010-11.

3.2. The learned Standing counsel further submits that the learned Commissioner of Income Tax passed the order under Section 263 of

the Act and has rightly held that for the purpose of computing the indexed cost of acquisition of the land, it should be with reference to the year of acquiring the land i.e., 2004-05 and not 2010-11, however, the learned Income Tax Appellate Tribunal (ITAT) misapplied the decision of the Honourable Supreme Court and also the decisions of High Courts and set aside the order of the learned Principal Commissioner of Income Tax passed under Section 263 of the Act and therefore, the appellant/Revenue has filed this appeal by raising the following substantial question of law:

> *"Whether on the facts and in the circumstances of the case, the Tribunal was right in setting aside the order passed by the Commissioner of Income tax under Section 263?"*

3.3 In support of her contention, the learned counsel for the appellant/Revenue placed reliance on the following judgments:-

(1) [2000] 109 Taxman 66 (SC) ***Malabar Industrial Co. Ltd., Vs. Commissioner of Income Tax ;***

(2) [2019] 102 taxmann.com 55 (Karnataka) ***V.K.Bharathi Vs. Commissioner of Income Tax, Bengaluru***.

4.1. The learned counsel for the respondent/assessee would submit that the order of the learned Principal Commissioner of Income Tax is erroneous. The Assessing Officer had taken one of the plausible two views

after verifying the long term capital gain returned by the assessee. The assessee company shares had changed hands in the year 2010-11 and new share holders paid prices for acquiring shares considering the revaluation done on the land. The sellers of shares have paid the appropriate capital gains tax that corresponds to the revaluation reserve and if the corresponding cost is not allowed to the present owner, it would result in double taxation of the sale amount. The only income returned by the assessee for the assessment year was towards capital gains arising out of the sale of the land. Further he would submit that the land under consideration was originally owned by M/s.Ecci Koya Ltd., in the year 2005-06. Since there were no other assets in the above mentioned company, the land was revalued to the market price and sold to the respondent company during the assessment year 2011-12. During the Assessment Year 2011-12 relevant to the Financial year 2010-11, by way of shares purchase agreement, the said transaction was duly reported by the company as well as the outgoing share holders who have paid capital gains tax on the same for the consideration paid by the respondent. The said transaction was also accepted by the department during the said assessment year.

4.2. During the assessment year under consideration 2014-15, the respondent had sold property and offered capital gains tax on the sale

proceeds while calculating the cost on acquisition of property for the purpose of computing the capital gains under Section 48 of the Act. The respondent/assessee had taken into consideration the revalued sum through which the said land was purchased and reported for taxation during the assessment year 2011-12. Under section 48 of the Income Tax Act, the cost of the acquisition will be increased by applying cost inflation index [CII]. Once the cost inflation index is applied to the cost of acquisition, it becomes indexed cost of acquisition, since the said sale of land construed the only income of the respondent/assessee during the assessment year under consideration. The said aspects were examined and accepted by the Assessing Officer during the course of the original assessment proceedings dated 30.12.2016. The said order was sought to be revised by invoking the provisions under Section 263 of the Act so as to take the value of the purchase of the previous owner made during the assessment year 2005-2006, for the purpose of computing the indexed cost of acquisition. He would further submit that scope of revision under Section 263 of the Income Tax Act, 1961, is narrow and using the power of revision, there cannot be substitution of view taken by the Assessing Officer on the issue on hand. The power of revision cannot be assumed for reviewing the order of the Assessing Officer in as much as the power of revision cannot be stretched so as to include power of review.

4.3. Further the learned counsel would submit that the purchase cost in the hands of the share holders is fully disclosed and it is reflected in the balance sheet of the respondent. The sellers of shares having paid appropriate capital gains tax fortifying the adoption of cost at the increased value, which is not notional but actual. Further it is the attempt to restrict the cost of land to the extent of the value of land in the hands of the previous owner. The 100% share holding of the company viz., M/s.Ecci Koya Ltd., was acquired and therefore, there is a complete change in the ownership of the company. It is not the case of succession. Cost to the previous owner would be cost to the successor only when transactions are covered by modes specified under Section 49(1) of the Act. The transfer in the case under consideration is not governed by any of the modes specified under Section 49(1)(i) to 49(1)(iv). Therefore, when the capital asset has become the property of the assessee in modes other than the ones mentioned under Section 49(1), adopting the cost of the previous owner to be that of the present owner is incorrect. He would further submit that seller of the shares had paid tax on capital gains that corresponds to the revaluation reserve and if the corresponding cost is not allowed to the present owner, it would tantamount to taxation of the same income twice, firstly, in the hands of sellers of shares and once again in the hands of the successor. The intention of the statute is not to impose tax on the same income twice. The Income Tax Appellate Tribunal has

gone through the above mentioned factual position in the impugned order and held that the said transaction has been scrutinised originally by the Assessing Officer and that the capital gains has been duly collected by the Department from the shareholders during the assessment year 2011-12 itself. Therefore, the action of the appellant in invoking revisional jurisdiction under Section 263 of the Act is wrong on account of the absence of cumulative satisfaction of error and prejudice in the original assessment order since the assessing officer adopted one possible view in law factually.

5. Heard the learned counsel on either side and perused the records.

6. On a perusal of the entire records, it is not in dispute that the assessee had revalued the land during the Financial Year 2010-11 and computation of indexed cost of acquisition for the purpose of working of capital gains, started with the revalued amount. It is also not disputed that the only income of the assessee for the impugned assessment year was capital gains arising on the sale of the land. Further, it is also not in dispute that the erstwhile share holders of M/s.Ecci Koya Ltd., as it was known earlier had paid capital gains tax on the consideration received by them from sale of shares, after reckoning the revised value of the land in the hands of the assessee company.

7. Though the assessing officer has not passed any detailed order, the authority had accepted the returns filed by the assessee. The present share holders of the assessee company paid capital gains tax considering the market value of the aforesaid landed property. The assessing officer has accepted the claim of the assessee that the calculation from the revised value is correct. In such view of the matter, the contention of the learned counsel for the appellant/Revenue that there is no speaking order and that order of the assessing officer was cryptic is not acceptable one. Though the Principal Commissioner of Income Tax has got power under Section 263 of the Act, to revise the order, if he considers that the Assessing Officer has not properly examined the materials or not properly calculated the income of the assessee, when the plausible two views are possible and the assessing officer adopted one of the views, the Principal Commissioner of Income Tax should not interfere with the order passed by the Assessing Officer.

8. In this case, even though there is no transfer of property by excluding the sale deed, but at the same time, the property has been revalued in accordance with law and capital gains tax also paid on the revised value. It is not the case of the department that for the purpose of evading the income tax, the assessee company has wrongly calculated the value of the lands which is less than the market value. Therefore, as

pointed out by the Income tax Appellate Tribunal and the reliance placed in the case of ***CIT Vs. Max Inda Ltd., 295 ITR 282,*** referred to by the learned counsel, it is very clear that time and again, as held by the Honourable Supreme Court as well as this court, when two views are possible, if the Assessing Officer had taken one of the plausible views, the CIT has no authority to set aside the order of the Assessing Officer and adopt its one of the other views. Therefore, the citation above referred to reported in ***295 ITR 282*** is squarely applicable to the facts of the present case and the Principal Commissioner of Income Tax could not substitute a lawful view taken by the Assessing Officer.

9. Though the learned counsel for the appellant/Revenue referred to decision of the Karnataka High Court in the case of ***V.K.Bharathi Vs. Commissioner of Income Tax, Bengaluru*** and stated that in similar situation, the Karnataka High Court, set aside the order of the Assessing Officer and sent for re-determination by the Assessing Officer stating that the issues to be reconsidered and in the other decision rendered by the Honourable Supreme Court reported in ***[2000] 109 Taxman 66 (SC) [Malabar Industrial Co.Ltd., Vs. Commissioner of Income-tax]***, justifying the order of the CIT, both decisions would go to show that when two views are possible, if the assessing officer taken one of the plausible views, the CIT has no authority to take other view and set aside the order

of the Assessing Officer unless it found that the order of the Assessing Officer is perverse. The facts of the abovesaid referred cases would make it clear that in the absence of any supporting material and without making any inquiry and on such facts, the conclusion of the CIT that the order of the ITO was held to be erroneous, was held to be justified by the High Court as well as Honourable Supreme Court.

10. Admittedly in this case, the assessing officer has accepted the returns filed by the respondent/assessee company and the respondent/assessee company has also given reason for adopting the revised value and also pointed out that except the said property, the company has no other property for income and also the entire shares has been transferred and also the value of the land were revised and revalued and capital gains tax also paid. Therefore, under these circumstances, this court do not find any valid reason to interfere with the order passed by Income Tax Appellate Tribunal. The substantial question of law raised by the appellant/revenue is answered accordingly. Thus, we find no good reason to admit the Tax Case (Appeal) filed by the Revenue. Consequently, the Tax Case (Appeal) stands dismissed. No costs.

INDEX:Yes/No [N.K.K.,J] [P.V.,J]

Internet:Yes/No 25.02.2020

nvsri

To

1.The Commissioner of Income Tax,
Chennai.

2.The Principal Commissioner of Income Tax,
Chennai-1
Chennai-34.

3.The Income Tax Appellate Tribunal, A Bench, Chennai.

N.KIRUBAKARAN, J.

and
P.VELMURUGAN, J.

nvsri

T.C.A.No.7 of 2020

25.02.2020