IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.06.2013

CORAM:

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN
and
THE HONOURABLE MS.JUSTICE K.B.K.VASUKI

Tax Case (Appeal) No.184 of 2010

The Commissioner of Income Tax
Chennai. .. Appellant

versus

M/s.Rayala Corporation P. Ltd.
144/7, Old Mahabalipuram Road
Kottivakkam, Chennai-41. .. Respondent

PRAYER: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, 'B' Bench, Chennai, dated 29.05.2009 passed in ITA No.309/Mds/2009.

For appellant : Mr.N.V.Balaji

For respondent : Mr.C.V.Rajan
for Mr.R.Venkata Narayanan

JUDGMENT

(Judgment of the Court was delivered by CHITRA VENKATARAMAN,J.)

The Revenue is on appeal as against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench, dated 29.05.2009 in ITA.No.309/Mds/2009 relating to the assessment year 2001-02, raising the following substantial questions of law:

"1. Whether on the facts and the circumstances of the case, the Tribunal was right in holding that claim of deduction of interest, in the return which was allowed to become non est, by opting not to rectify the defects, pursuant to notice under Section 139(9) cannot be treated as disallowance of deduction?

2. Whether on the facts and circumstances of the case, the Tribunal was right in consequently holding that the interest waived by the bank for the prior period pertaining to assessment years 1994-95 to 1998-99 during financial year pertaining to assessment year 2001-02 cannot be assessed as income that arose due to cessation of liability under Section 41(1) of the Act?"

2. The assessment year under consideration herein relates to 2001-02. The assessee herein derived income from leasing of properties. It is seen from the facts narrated that the Assessing Officer brought to tax the amount waived by Canara Bank amounting to Rs.3.81 crores on the income chargeable under Section 41(1) of the Income Tax Act, 1961 (hereinafter called the "Act"). It is seen from the facts that during the assessment year under consideration, the assessee availed one-time settlement scheme of Canara Bank, by which the Bank waived the interest portion accrued and payable by the assessee, relating to the assessment years 1988-89 to 1998-99, which the assessee had claimed deduction in the return filed for the respective years. On account of the waiver granted by the Bank, the said interest amount became assessable as income as per Section 41(1) of the Act. According to the assessee, since the returns filed for the assessment years 1994-95 to 1998-99 were held as non-est, the interest claimed as deduction in those returns had to be held as not allowed. Hence, the said interest for those period could not be treated as income that arose on account of cessation of liability under Section 41(1) of the Act. The Assessing Officer rejected the said contention that it was the assessee who had not responded to the notice issued under Section 139(9) offered to rectify its returns. In the absence of specific order on disallowance, the said interest relating to the period 1994-95 to 1998-99 was liable to be included as income under Section 41(1) of the Act.

3. The assessee went on appeal before the Commissioner of Income Tax (Appeals). It is seen from the facts stated that on the issue of interest waiver and added under Section 41(1) and the disallowance of set off of brought forward loss, the Commissioner of Income Tax (Appeals) allowed the relief for Rs.58,71,867/- for the assessment year 1999-2000 and Rs.76,73,156/- for 2000-2001. It was pointed out that since no deduction was granted on the interest payable to Canara Bank, the question of bringing the interest waived by Canara Bank relevant to the assessment years could not be brought to tax under Section 41(1) of the Act. The assessee went on appeal before the Income Tax Appellate Tribunal. By order dated 26.04.2007 in ITA No.103/Mds/05, the Tribunal set aside the order of the Commissioner of Income Tax (Appeals) and restored the matter to the Assessing Officer with a direction to decide the issue afresh after providing adequate opportunity. Thus the Assessing Officer passed fresh assessment order, holding that even though the return for the assessment years 1994-95 to 1998-99 was non-est in the eye of law, when the assessee had not complied with the intimation under Section 139(9) of the Act, the claim of the assessee for deduction of interest for the assessment years 1994-95 to 1998-99 was deemed to have been allowed. However, the assessee was not allowed to carry forward the loss on account of the amount treated as non-est. Thus, the income deemed in terms of Section 41(1) of the Act relating to the interest was added.

4. It is seen from the order of assessment that from the details given as regards the interest debited and concession allowed by the Bank on the One Time Settlement claim relating to the assessment years 1988-89 to 1993-94 totalling to a sum of Rs.55,58,381/-, the assessee itself admitted that this amount of Rs.55,58,381/- could be considered for the purpose of assessment under Section 41(1) of the Act. The interest referable to the assessment years 1999-2000 and 2000-2001 of a sum of Rs.58,71,867/- and Rs.76,73,196/- respectively were disallowed and hence, not added back under Section 41(1) of the Act. The assessee, however, contended that there being no assessment in respect of the remission of liability for the assessment years 1994-95 to 1998-99, no addition could be made under Section 41(1) of the Act. In this connection, the assessee placed reliance on the decision of this Court in the case of Narayanan Chettiar Industries Vs. ITO reported in 277 ITR 426 (Mad) as well as the decision of the Supreme Court in the case of Tirunelveli Motor Bus Services Co. Pvt. Ltd. Vs. CIT reported in (1970) 78 ITR 55 and held that there could be no addition by invoking Section 41(1) of the Act.

5. The claim of the assessee that there could be no question of invoking Section 41(1) of the Act in the absence of explicit consideration of disallowance of interest in the assessment years was,

however, negatived by the Assessing Officer. He viewed that in spite of informing the assessee to rectify the defect under Section 139(9) of the Act, the assessee had not chosen to rectify the defects in the returns; in the background of this fact, it was not open to the assessee to turn around and claim that there being no deduction allowed in the assessment, the question of invoking Section 41(1) of the Act does not arise. In other words, the assessee could not take advantage of his own conduct read against the applicability of the provisions of the Act.

6. Aggrieved by this, the assessee went on appeal before the First Appellate Authority, who dismissed the appeal, holding that the claim of interest cost in the books of account for the previous years would constitute an allowance or deduction of expenditure or trading liability incurred by the assessee in those years offered; even though the returns filed for these years were treated as non-est returns by the Department, yet, waiver of interest during the period under consideration could also constitute a benefit received in respect of such trading liability by way of remission or cessation thereof; consequently, waiver of interest granted by Canara Bank was treated as deemed income for the year under consideration.

7. Aggrieved by this, the assessee went on further appeal before the Income Tax Appellate Tribunal. Referring to the first round of litigation, the Tribunal held, on the admitted fact, that the returns were treated as non-est in the eye of law. There being no consideration on the granting of allowance or deduction by the Assessing Authority, there could be no addition under Section 41(1) of the Act. Thus, the assessee's appeal was allowed. Aggrieved by this, the present appeal has been filed by the Revenue.

8. Learned Standing Counsel appearing for the Revenue placed heavy reliance on the opening part of Section 41(1) of the Act and submitted that the expression "Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee" has to be read as a claim made in the accounts and it need not be followed by an assessment order. He further submitted that when the expression used in the Section does not contemplate an order to be passed on the claim, a mere entry made in the self-assessment made by the assessee in the account would be sufficient enough to invoke Section 41(1) of the Act; in other words, even in the absence of an assessment order passed on the question of allowance or deduction, the expression "where an allowance or deduction made for any year" has to be considered as a claim made per se. He further pointed out that on the facts of this case, the assessee's returns were treated as non-est as per Section 139(9) of the Act; however, considering Section 140A of the Act, which provides for self-assessment, the assessee had remitted the tax based on self-assessment on the state of affairs. Thus, even in the absence of returns, the self-assessment being an assessment made for any year, the Income Tax Appellate Tribunal committed serious error in allowing the appeal filed by the assessee.

9. We do not subscribe to this submission of the learned Standing Counsel appearing for the Revenue. As rightly submitted by the learned counsel for the assessee, in the decision in the case of Tirunelveli Motor Bus Service Co. P. Ltd. Vs. Commissioner of Income Tax, Madras reported in 78 ITR 55, a similar contention was taken on the interpretation of Section 10(2A) of the Indian Income Tax Act, 1922, which is in pari materia with the present provision under Section 41(1) of the Act. The facts in the reported decision were that in the accounts relating to the year 1950-51, the assessee claimed establishment charges, which included annual bonus payable to the employees. Since the assessee ran into financial difficulty, the bonus remained unpaid for some years. However, in respect of assessment year 1957-58, the assessee arrived at one time settlement on the bonus payable at Rs.17,470/- which was paid to the employees in full settlement and the balance of Rs.54,479/- was credited to the profit

and loss account. This was treated as deemed profit under Section 10(2A). The Tribunal held that there was nothing on record to indicate that in estimating the income for 1950-51, the Income Tax Officer had made any allowance in respect of bonus and unless the Department could identify the items as having been actually allowed as a deduction in the earlier assessment year, conclusively, Section 10(2A) was not available for recoupment. The Apex Court pointed out that Section 10(2A) was not attracted. Reversing the decision of the High Court, the Apex Court held "the question whether the allowance had been granted or deduction made in respect of trading liability was to be decided by referring to the order relating to the assessment year 1950-51 and it could not be determined by drawing inferences from what was done in respect of earlier year." Thus, the Apex Court held that the reversal of recoupment of the relief granted would be available under Section 10(2A) if and only there had been deliberate act on the part of the Assessing Officer in considering such claim for deduction in the assessment.

10. Applying the said decision to the facts of the case, we find that the order of Income Tax Appellate Tribunal does not call for any interference. Section 10(2A) of the Indian Income Tax Act, 1922, reads as under:

" Business.--

(1) ...

(2A) Where for the purpose of computing profits or gains under this section, an allowance or deduction has been made in the assessment for any year in respect of any loss, expenditure or trading liability incurred by the assessee and, subsequently during any previous year, the assessee has received, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or has obtained some benefit in respect of such trading liability by way of remission or cessation thereof, the amount received by him or the value of the benefit accruing to him shall be deemed to be profits and gains of business, profession or vocation and to have accrued or arisen during that previous year. "

11. Section 41(1) of the Income Tax Act, 1961, as is relevant for the present case, reads as under:

"41. Profits chargeable to tax.--(1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,--

... "

12. Even though learned Standing Counsel appearing for the Revenue does not dispute the similarity of the provisions between the Indian Income Tax Act, 1922 and the Income Tax Act, 1961, yet, he emphasizes that the payment of tax being one under self-assessment and even though the return is non-est in the eye of law, by virtue of Section 139(9) of the Act, yet, one cannot ignore the state of affairs as regards the deduction claimed leading to the payment of tax.

13. We do not agree with the said view of the learned Standing Counsel appearing for the Revenue. A reading of Section 140A of the Act shows that while sub section (1) imposes an obligation on an assessee to pay tax on self assessment basis, sub section (2) provides that after a regular assessment under Section 143 or 144 is made, the tax so paid will be deemed to have been paid towards such regular assessment. Thus, when an assessee makes a self-assessment under Section 140A of the Act and pays the tax thereon, this self-assessment under Section 140A is for expediting collection of tax. This, however, cannot stand in the way of determination of the liability to tax at the time of making the regular assessment. Thus, the assessment made by an assessee as to his taxable income does not mean an assessment to be made by a competent authority under the provisions of the Act.

14. As far as the present case is concerned, in the context of Section 139(9) of the Act, with the return filed treated as non est in the eye of law, we hold that the expression "where an allowance or deduction has been made in the assessment for any year" has to be read as any allowance or deduction considered in the assessment for the purpose of invoking Section 41(1) of the Act. For the applicability of Section 41(1) of the Act, the prerequisite condition is that an allowance or deduction has been made in the assessment for any of the years in respect of an expenditure, loss or trading liability incurred by the assessee and subsequently during any previous year, the assessee has received remission or obtained refund of the said amount. Thus Section 41(1) creates a legal fiction and hence, has to be strictly complied with if any addition to the income is sought to be made by the Revenue - (Refer [2005] 277 ITR 426 (Narayanan Chettiary Industries v. Income-tax Officer). Thus unless the amount had been allowed as a deduction in the earlier years, the question of invoking Section 41(1) does not arise.

15. In the circumstances, the Tax Case Appeal fails and the same is dismissed. The order of the Income Tax Appellate Tribunal is confirmed. No costs.

Index: Yes / No (C.V.,J.) (K.B.K.V.,J.)
Internet: Yes / No 18.06.2013
nvsri/ksv
To
To

1. The Commissioner of Income Tax, Chennai.

2. The Commissioner of Income Tax (Appeals), Chennai.

3. The Income Tax Appellate Tribunal
Chennai Bench 'B', Chennai.

CHITRA VENKATARAMAN,J.
and
K.B.K.VASUKI,J.

nvsri/ksv

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