(2011) 11 MAD CK 0210

In the Madras High Court

Case No : Tax Case (Appeal) No''s. 15, 16 and 2083 of 2008

CIT — APPELLANT

Vs

Rex Rotary India (P.) Ltd. — RESPONDENT

Date of Decision : 08-11-2011

Acts Referred:
Income Tax Act, 1961 — Section 143(1), 234B, 234D, 256, 260A

Citation : (2011) 11 MAD CK 0210

Hon'ble Judges : Elipe Dharma Rao, J;D. Hariparanthaman, J

Bench : Division Bench

Advocate : T. Ravikumar, for the Appellant; R. Sivaraman, for the Respondent

Judgement

Elipe Dharma Rao, J.—The respondent/assessee is engaged in the business of distributorship of photocopier, officer automation equipments, multi-function devices in digital imaging, copying and duplication, data transmission equipment, visual imagine system with digital project, etc., since 1993. The order in ITA No. 49/Mad/2008, under challenge in Tax Case (Appeal) No. 2083 of 2008, has been passed by the Tribunal, following its common order in ITA Nos. 2098/Mad/2006 and 2413/Mad/2006 (subject-matter of appeal in Tax Case (Appeal) Nos. 15 and 16 of 2008). Therefore, we take up Tax Case (Appeal) Nos. 15 and 16 of 2008) for assessment of the factual matrix of the case, to the extent needed for disposal of these appeals.

2. The return of income for the assessment year 2003-04, declaring an income of Rs. 28,95,696 was filed by the assessee on 11-11-2003. During scrutiny, the AO disallowed the whole of the claim, amounting to Rs. 1,84,62,749 made by the assessee under the head Sales commission and sales promotion expenses. The scrutiny assessment resulted in raising of a demand of Rs. 92,78,865, against the assessee, including levy of interest under sections 234B and 234D of the IT Act, 1961 (hereinafter referred to as the Act).

3. According to the assessee, the impugned expenditure claimed by them was

paid to M/s. Sonal Vyapar Ltd. (M/s. SVL, in short), having registered office at No. 110/2, Nattamangalam Main Road, Post Box No. 282, Nethimedu, Salem--636020, in connection with services rendered by the said company for augmenting the sales of the assessee companys products and identifying the customers for effecting sales. The abovesaid expenditure claimed by the assessee consisted of two parts, as mentioned below:

But the AO did not accept the claim of the assessee on the ground of being in the nature of colourable device, only with an intention to reduce the tax liability.

4. Aggrieved the assessee preferred an appeal before the CIT(A), who has analysed the entire facts and circumstances of the case, in the light of the evidence available on record. The CIT(A), on re-analysis of the entire materials placed on record, has concluded that the AO has proceeded on conjectures and surmises, without properly assessing the evidence made available on record and has thus, ultimately, set aside the finding of the AO with regard to the aspect of sales commission and sales promotion expenses. He has, accordingly, allowed the claim of the assessee on this count.

5. The CIT(A) has concurred with the findings of the AO, with regard to the disallowance made by the AO, under the head Product promotion expenses of Rs. 65,00,000 claimed to have been paid by the assessee to M/s. CMS Computers Ltd., but on his own reasonings.

6. The assessee claimed exemption from the levy of interest u/s 234D of the Act, as not applicable to their case, on the ground that the said section having been introduced by the Finance Act, 2003 w.e.f. 1-6-2003, will have only prospective operation i.e. from the assessment year 2004-05. But, the CIT(A) has disagreed with this contention of the assessee and while concurring with the decision of the AO on this aspect also, he upheld the charging of interest u/s 234D.

7. Aggrieved over the above decision of the CIT(A) with regard to disallowance of one-time commission of Rs. 65,00,000 paid to M/s. CMS Computers Ltd. by the assessee and levy of interest u/s 234D, the assessee has preferred an appeal in ITA No. 2058/Mad/2006 before the Tribunal. Likewise, the Revenue has preferred another appeal in ITA No. 2413/Mad/2006, aggrieved over the decision of the CIT(A) in deleting the disallowance of commission payment of Rs. 1,19,62,749 to M/s. SVL.

8. The Tribunal has taken up both the matters together and by the common order dated 25-1-2007, it has dismissed the appeal of the Revenue, thus upholding the decision of the CIT(A) in deleting the disallowance of commission payment of Rs. 1,19,62,749 to M/s. SVL.

9. With regard to the challenge made by the assessee about the disallowance of one-time commission of Rs. 65,00,000 paid to M/s. CMS Computers Ltd. by the assessee, the Tribunal, holding that the advantage that the assessee was seeking to obtain by the expenditure was merely for facilitating the assessees trading

operations and cannot be said to be in capital field, has set aside the order of the CIT(A) on this point and has allowed the claim of the assessee in this regard.

10. With regard to the question of levy of interest u/s 234D of the Act, on refund, the Tribunal, holding that since this provision of law came into effect only from 1-6-2003 and the assessment year in question being 2003-04, the question of levy of interest u/s 234D does not arise in the facts of the case.

11. Aggrieved by the decision of the Tribunal in ITA No. 2098/Mad/2006 (with regard to disallowance of one-time commission of Rs. 65,00,000 paid to M/s. CMS Computers Ltd. by the assessee and levy of interest u/s 234D), the Revenue has filed Tax Case (Appeal) No. 15 of 2008. And, with regard to the decision of the Tribunal in ITA No. 2413/Mad/2006 (with regard to deleting the disallowance of commission payment of Rs. 1,19,62,749 to M/s. SVL), it (Revenue) has preferred Tax Case (Appeal) No. 16 of 2008. Both these appeals were admitted by this Court on 9th Jan., 2008, for determination of the following substantial questions of law:

1. Whether the Tribunal, on the facts and in the circumstances of the case, was correct in treating the one time commission payment to M/s. SVL Ltd. as a revenue expenditure?

2. Whether on the facts and in the circumstances of the case, the Tribunal was right in deleting the interest u/s 234D of the Act even for the period subsequent to the introduction of the section, on the ground that the assessment years were prior to the introduction of the section?

12. During pendency of these two appeals on the rolls of this Court, since the AO has disallowed the claim of the assessee under the head Sales commission and sales promotion expenses paid to M/s. SVL and M/s. Sahuwala Flour Mills Ltd. for the assessment year 2004-05, the assessee has filed an appeal before the CIT(A), who, following the order of the Tribunal, passed with regard to the preceding assessment year (subject-matter in Tax Case (Appeal) Nos. 15 and 16 of 2008) has allowed the appeal of the assessee, which, on appeal by the Revenue, was upheld by the Tribunal, by its order dated 13-5-2008. Against this order of the Tribunal, Tax Case (Appeal) No. 2083 of 2008 has been preferred by the Revenue. This Court admitted this appeal (Tax Case (Appeal) No. 2083 of 2008) on 22-12-2008 for determination of the following substantial questions of law:

1. Whether in the facts and circumstances of the case, the Tribunal was right in allowing the claim of sales commission payment to SVL, Sahuwala Flour Mills in respect of sales of the assessees product to M/s. Godrej & Boyce Manufacturing Company Ltd., when the assessee had not adduced any evidence to show that the expenditure was wholly and exclusively for its business?

2. Whether in the facts and circumstances of the case, the Tribunal was right in deleting the disallowance of one-time commission payment towards product

promotion expenses for sales to be effected through Mumbai based CMS Computers Ltd.?

Substantial question of law No. 1 in Tax Case (Appeal) Nos. 15 and 16 of 2008 and substantial question of law No. 1 in Tax Case (Appeal) No. 2083 of 2008:

13. The question that is required to be decided is whether the claim of sales commission paid by the assessee to M/s. SVL and M/s. Sahuwala Flour Mills Ltd. in respect of the sales of the assessees product to M/s. Godrej & Boyce Manufacturing Company Ltd. is a revenue expenditure or a capital expenditure as has been contended by the Revenue.

14. The terms capital expenditure and revenue expenditure are not defined in the Act. But both these terms are well explained by the Hon''ble Apex Court in Assam Bengal Cement Co. Ltd. Vs. The Commissioner of Income Tax, West Bengal, in the following terms:

If the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business it is properly attributable to capital and is in the nature of capital expenditure. If on the other hand it is made not for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view to produce the profits, it is a revenue expenditure.

15. With the above authenticated definitions rendered by the Hon''ble Apex Court in hand, we shall now proceed to deal with the other aspects needed to answer these substantial questions of law.

16. With regard to this aspect, it is the case of the assessee that to augment their business and out of sheer business necessity and interest, they have paid sales commission and sales promotion expenses to both the abovesaid companies and since the same is only for the development of their business, it should be treated only as revenue expenditure. However, the AO did not agree with the assessee and has disallowed the claim of the assessee on the ground that it is a colourable device, to reduce tax liability. On appeal, the CIT(A), on reassessment of the entire evidence made available on record, has come to the conclusion that the AO has proceeded on surmises and conjectures. The findings of the CIT(A) are extracted hereunder for better understanding:

... After taking into account all the relevant evidences placed before me vis-?-vis the material on record relied upon by the AO, I am of the opinion that the payment of commission by the appellant to M/s. SVL arose out of appellants sheer business necessity and there is not an iota of evidence to prove that the transaction amounted to a colourable device as interpreted by the AO. While disallowing the claim, the AO has merely resorted to surmises and conjectures, but not to an in depth probe. The addition made by the AO is not found to be based on a sound footing. Moreover, it is seen that during the financial years 2001-02 and 2003-04, the appellant company had paid commission to M/s. SVL to the tune of Rs. 2,81,76,214 and Rs. 73,89,717 respectively and that the same were claimed as deductible expenditure in the respective returns of income. In the assessment years 2002-03 and 2004-05 these commission claims of the appellant company have not been disallowed by the AO. Under these circumstances, I have no hesitation in deleting the addition of Rs. 1,19,62,749 made on account of commission payment. While doing so, I have also derived support from the Hon''ble Supreme Courts decision in the case of Union of India & Anr. v. Azadi Bachao Andolan & Anr.

17. While arriving at this decision, the AO has, on re-analysis of the evidence placed on record, has also observed that:

Perusal of the correspondences between the appellant and M/s. SVL also reveals that M/s. SVL had played a distinct role in extracting orders for the appellant from M/s. Godrej & Boyce Manufacturing Company Ltd. The learned Authorised Representative has also filed copies of accounts maintained by the appellant company for M/s. SVL which were found to be duly certified by the said commission agent. Further, M/s. SVL is found to have duly accounted for the commission receipts in its books of account and the IT returns.

18. From this it is clear that the receiving company viz., M/s. SVL has also duly accounted for the commission receipts in its books of account and the IT returns. Had it been the case of colourable device, as has been wrongly termed by the AO, these commission receipts would not have been accounted for in the books of accounts of the receiving company viz., M/s. SVL. The fact of genuineness of M/s. SVL and M/s. Sahuwala Flour Mills Ltd. and the further fact that their services were engaged by the assessee for augmenting its business and payments were also effected to these companies by the assessee, which are also reflected in the returns of the receiving companies, are not in dispute and in fact, have been upheld by both the fact-finding authorities. Further, it has also been concluded by both the fact-finding authorities that because of engaging the services of these two companies by the assessee company, the volume of business and profitability of the assessee have increased manifold and the same has also been reflected in their tax returns.

19. In Ramanlal Kamdar Vs. Commissioner of Income Tax, a Division Bench of this Court dealing with similar question has held as follows:

Where it is found that the recipient entity is genuine, and has rendered service and the remuneration paid is not patently excessive, it would be improper to disallow the amount either on subjective standards or from extraneous considerations.

20. A Division Bench of the Calcutta High Court in Commissioner of Income Tax Vs. Hindusthan Development Corpn. Ltd., and that of this Court in Commissioner of Income Tax Vs. Textool Co. Ltd., have also held in the same lines.

21. The findings recorded by both the fact-finding authorities that the

reasonableness of the expenditure has to be judged from the point of view of the businessman and not that of the Revenue, are also well in tune with the law laid down by the Hon''ble Apex Court in catena of cases, vide, Commissioner of Income Tax, Bombay Vs. Walchand and Co. Private Ltd., J.K. woolen Manufacturers Vs. Commissioner of Income Tax, U.P.,) etc. wherein it has been held:

Whether the expenditure was wholly and exclusively laid out for business, reasonableness of the expenditure has to be adjudged from the point of view of businessman and not of Revenue and it is not open to the Department to adopt a subjective standard of reasonableness and disallow a part of business expenditure as being unreasonably large, or decide what type of expenditure the assessee should incur and in what circumstances.

22. These well justifiable reasons offered by the fact-finding authority CIT(A), have been upheld by the Tribunal the last fact-finding authority on further assessment of the evidence available on record. Thus, there is concurrent finding of fact by both the fact-finding authorities with regard to these questions framed by this Court. When, thus, the amounts claimed by the assessee are found to be for running the business or working it with a view to produce the profits, in terms of the judgment of the Hon''ble Apex Court in Assam Bengal Cement Co. Ltd. v. CIT (quoted supra), it should be treated only as a revenue expenditure as has been properly treated, in a concurrent manner, by both the CIT (A) and Tribunal. Further, when both the fact finding authority, CIT(A) and the last fact finding authority Tribunal have found that there is ample evidence on record in support of the claim of the assessee and have also discussed in their orders, threadbare, as has been extracted and discussed by us supra, we cannot say that such a fact-finding recorded by both the authorities below is bereft of evidence.

23. The learned counsel for the assessee would contend that since both the fact finding authorities below have concurrently recorded factual matrix, this Court should not interfere with the same. In support of his contentions, he has relied on a judgment of the Hon''ble Apex Court in Aluminium Corporation of India Ltd. Vs. Commissioner of Income Tax, West Bengal, wherein a three Judge Bench of the Hon''ble Apex Court has held as follows:

The High Court has no power of review on facts found by the Tribunal and the inferences drawn by it there from unless properly challenged by party aggrieved. The jurisdiction of High Court in a reference is advisory and not appellate.

24. This judgment relied on by the learned counsel for the assessee is with regard to the powers of the High Court in a matter of reference. Since s. 256 of the Act regarding reference to High Court, has now been omitted by the National Tax Tribunal Act, 2005 and further the cases on hand being appeals preferred under s. 260A of the Act, this judgment relied upon by the learned counsel for the assessee has no application to the facts of the case.

25. We are quite aware of our duties, responsibilities and powers under s. 260A

of the Act and the well established legal principle of law that while dealing with a matter u/s 260A of the Act, the High Court should not interfere with the findings of fact.

26. In M. Janardhana Rao Vs. Joint Commissioner of Income Tax, a three Judge Bench of the Hon''ble Apex Court, dealing with the powers of the High Court u/s 260A of the IT Act, has held:

... In exercise of powers u/s 260A, the findings of fact of the Tribunal cannot be disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in section 260A must be strictly fulfilled before an appeal can be maintained u/s 260A. Such appeal cannot be decided on merely equitable grounds.

27. In Commissioner of Income Tax, Kolkata Vs. Mukundray K. Shah, also, the Hon''ble Apex Court has reiterated this legal principle in the following words:

High Court should not interfere with findings of fact in appeal u/s 260A.

28. In view of our above elaborate discussions, we have no hesitation to hold that only on discussing the evidence available on record, threadbare, both the fact finding authorities have arrived at the decision of allowing the claim of the assessee. In the absence of demonstrated perversity in the findings of the fact finding authorities, interference therewith by this Court, while exercising the powers u/s 260A of the Act, is unwarranted. Therefore these substantial questions of law are answered against the Revenue and in favour of the assessee.

Substantial question of law No. 2 in Tax Case (Appeal) No. 2083 of 2008:

29. The CIT(A) himself has accepted the genuineness of the transaction but has disallowed the same only on the premise that the payment is capital in nature, in as much as the same has been made in lump sum and the benefit is enduring in nature.

30. In Assam Bengal Cement Co. Ltd. v. CIT (supra), the Hon''ble apex Court has held that:

Whether the expense is a periodic expense or a lump sum payment is immaterial for the purpose of determining its nature.

31. Further, since there is no dispute with regard to the fact that the said amount has been paid by the assessee company to the receiving company only with a view to produce the benefits, only to facilitate its trading operations, as has been held by the Hon''ble Apex Court in the very same judgment in Assam Bengal Cement Co. Ltd. v. CIT (supra) that if the expenditure is made not for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view to produce the profits, it is a revenue expenditure", this expenditure can be treated only as a revenue expenditure as

has rightly been held by the last fact-finding authority Tribunal. In view of these discussions and in view of our findings already arrived at with regard to substantial question No. in all these appeals, this substantial question of law is also answered against the Revenue.

Substantial question of law No. 2 in Tax Case (Appeal) Nos. 15 and 16 of 2008:

32. The assessee claimed exemption from the levy of interest u/s 234D of the Act, as not applicable to their case, on the ground that the said section, having been introduced by the Finance Act, 2003 w.e.f. 1-6-2003, will have only prospective operation i.e. from the assessment year 2004-05. But the CIT(A) has disagreed with this contention of the assessee and while concurring with the decision of the AO on this aspect, he upheld the charging of interest u/s 234D. But the Tribunal, on appeal, reversed the findings of both the AO and the CIT(A), holding that since this provision of law came into effect only from 1-6-2003 and the assessment year in question being 2003-04, the question of levy of interest u/s 234D does not arise.

33. This question of law is no more res integra as a Division Bench of this Court, speaking through one of us (Justice Elipe Dharma Rao), has already decided this question, in Tax Case (Appeal) No. 154 of 2008 (CIT v. Infrastructure Development Finance Co. Ltd., at. 8-9-2011), in the following manner:

When once the regular assessment is completed after the amended provision of law came into operation, we have no hesitation to hold that the assessee is liable to pay interest on the refunded amount, as contemplated u/s 234D of the IT Act. It is not the year of assessment that falls for consideration in such circumstances, but the date on which the regular assessment order has been passed. In the case on hand, though the assessment year is 2001-02, the regular assessment was made on 30-3-2004, by which time, the amended provision of law, having come into operation on and from 1-6-2003, is in force. Therefore, the order passed by the AO levying interest on the amount of refund is well within the parameters of law and the contra orders passed by the CIT(A) and the Tribunal, to the effect of ignoring this principle of law, are illegal and they are, accordingly, dismissed.

In the cases on hand, the return of income was filed on 11-11-2003 and the same was processed u/s 143(1) on 29-11-2003 as a result of which, refund amounting to Rs. 2,36,889 was granted to the assessee. The assessment order was passed on 29-3-2006 i.e. after the coming into being of section 234D on 1-6-2003. Therefore, reiterating the legal principle that it is not the year of assessment that falls for consideration in such circumstances, but the date on which the regular assessment order has been passed, which stood as a beacon light for disposal of many cases on that point, we have no hesitation to hold that the assessee is liable to pay the interest u/s 234D of the Act. The contra decision of the Tribunal is set aside. This substantial question of law is, accordingly, answered in favour of the Revenue.

In the result, Tax Case (Appeal) Nos. 15 and 16 of 2008 are allowed in part, in favour of the Revenue, with respect to their claim u/s 234D. Tax Case (Appeal) No. 2083 of 2008 is dismissed. No costs.

