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In the Madras High Court

Case No : Tax Case (Appeal) No. 279 of 2010

Commissioner of Income Tax — APPELLANT

Vs

V. Sivakumar — RESPONDENT

Date of Decision : 11-02-2013

Acts Referred:

Income Tax Act, 1961 — Section 269SS, 269T, 271D, 273B

Citation : (2013) 262 CTR 109 : (2013) 354 ITR 9

Hon'ble Judges : R. Banumathi, J;K. Ravichandrabaabu, J

Bench : Division Bench

Advocate : N.V. Balaji, for the Appellant; M.P. Senthil Kumar, for the Respondent

Judgement

R. Banumathi, J.—The Revenue has preferred this appeal on the following substantial question of law:

Whether, on the facts and in the circumstances of the case, the income tax Appellate Tribunal was right in law in deleting the levy of penalty by the

Assessing Officer u/s 271D of the income tax Act, 1961, even though the advance has been accounted as loan and interest debited?

The assessee was a partner in four firms and a proprietor in Reliance Realtors. In the assessment year 2005-06, the assessee had taken loan from

the four firms which were found to be in cash. The Assessing Officer initiated penalty proceedings u/s 271D of the income tax Act and imposed

penalty of Rs. 18 lakhs. The Commissioner of income tax (Appeals) dismissed the appeal (I.T.A. No. 68 of 2007-08) and the assessee preferred

a further appeal (I.T.A. No. 142/Mds/08) before the income tax Appellate Tribunal. The Tribunal remitted the matter to the Assessing Officer to

give a definite finding whether the transaction was between the firm and partner. The Assessing Officer passed a fresh order (July 17, 2008) that the assessee individual was a partner in four firms from where funds had been advanced to the assessee and imposed a penalty of Rs. 18 lakhs. In

the appeal (I.T.A. No. 89/08-09) preferred by the assessee, the Commissioner of income tax (Appeals) allowed the appeal holding that the

transactions between the partner and the firm do not partake of the character of a loan or deposit and, therefore, there is no applicability of the

provisions of section 269SS of the Act. The further appeal (I.T.A. No. 408/ Mds/2009) preferred by the Revenue was dismissed by the Tribunal

on the finding that the assessee acted bona fide and that there was a reasonable cause within the meaning of section 273B of the Act.

2. Mr. N.V. Balaji, learned counsel for the Revenue, submitted that though the assessee is a partner of the firms, he has taken loan from the firms

by cash in his capacity as a proprietor of Reliance Realtors and the Assessing Officer had recorded a factual finding and in view of the

consequences of violation of section 269SS, justified in imposing penalty u/s 271D of the Act. Learned counsel for the Revenue endeavoured to

distinguish the cases relied upon by the Tribunal and submitted that the Assessing Officer has recorded factual finding that money has been

advanced from the firms as loan and the same was debited from the accounts of the proprietary concern which would show that the transactions

between the firms and the assessee were not in his capacity as a partner and while so, the Commissioner of income tax (Appeals) and the Tribunal

were not correct in saying that the transactions were between firms and partner and prayed that the substantial question of law be answered in

favour of the Revenue.

3. We have heard Mr. M.P. Senthil Kumar, learned counsel appearing for the assessee.

4. The assessee had taken the amounts from four firms which were found to be in cash and the Assessing Officer has considered these payments

were in violation of section 269SS of the Act. The stand of the assessee is that the amounts were taken in his capacity as a partner and it cannot be

taken as an independent transaction and there is no violation of section 269SS of the Act. The partnership firm has no separate legal entity. There

is no separate identification between the firm and the partner. The Tribunal relied upon the decision in Commissioner of Income Tax, Madras Vs.

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R.M. Chidambaram Pillai and Others, wherein the hon''ble Supreme Court held that ""there cannot be a contract of service in strict law, between a

firm and one of its partners, so as to consider the salary paid to the partner as income from the salary and held that for the purpose of sections

269SS and 269T, the firm and partners cannot be considered to be separate entity"". The hon''ble Supreme Court further held that ""payment of

salary to a partner represents a special share of the profits and salary paid to a partner retains the same character of the income of the firm"" and

deleted the penalty.

5. In Commissioner of Income Tax Vs. Lokhpat Film Exchange (Cinema),), it was held that partnership firm is not a juristic person and for inter

relationship different remedies are provided to enforce the rights arising out of their inter se transactions and that the inter se transactions between

the partner and firm are not governed by the provisions of sections 269SS and 269T of the Act.

6. Relying upon the decisions in Commissioner of Income Tax, Madras Vs. R.M. Chidambaram Pillai and Others,); Assistant Director of

Inspection Investigation Vs. Kum. A.B. Shanthi, Commissioner of Income Tax Vs. Lokhpat Film Exchange (Cinema), the Tribunal confirmed the

finding of the Commissioner of income tax (Appeals) that partnership firm is not a juristic person and there is no separate identity for the firm and

partners and that the transactions between the firm and the partner cannot be brought within the meaning of section 269SS of the Act.

7. Apart from the issue about the separate entity, being a partner the asses-see had drawn amounts from the firms and there are no reasons to

doubt the genuineness of the transactions. This court in Commissioner of Income Tax Vs. Kundrathur Finance and Chit Co., following the decision

of the hon''ble Supreme Court in Assistant Director of Inspection Investigation Vs. Kum. A.B. Shanthi, held that ""if there was genuine and bona

fide transaction and the taxpayer could not get a loan or deposit by account payee cheque or demand draft for some bona fide reason, the

authority vested with the power to impose penalty has a discretion not to levy penalty"".

8. In Commissioner of Income Tax Vs. Deccan Designs (India) P. Ltd., (Mad.), loans were taken from sister concern under condition business

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exigency. Referring to Commissioner of Income Tax Vs. Kundrathur Finance and Chit Co., ; CIT v. Balaji Traders, (2008) 303 ITR 312 (Mad)

and Commissioner of Income Tax Vs. Ratna Agencies, the Division Bench of this court dismissed the appeal holding that ""there were enough

reasons offered by the assessee to justify the cash transactions which is made with its sister concern"" and that consequences of violation of section

269SS is not attracted.

9. In Commissioner of Income Tax Vs. Lakshmi Trust Co., the Division Bench of this Court held that ""if there were genuine and bona fide

transactions and the taxpayer could not get a loan or deposit by account payee cheque or demand draft for some bona fide reason, the authority

vested with the power to impose penalty has a discretion not to levy penalty"". Referring to Commissioner of Income Tax, Madras Vs. R.M.

Chidambaram Pillai and Others, ; Assistant Director of Inspection Investigation Vs. Kum. A.B. Shanthi, Commissioner of Income Tax Vs.

Lokhpat Film Exchange (Cinema), , the Tribunal held that there is no separate identity for the partnership firm and that the partner is entitled to use

the funds of the firm and that the assessee acted bona fide and that there was a reasonable cause within the meaning of section 273B of the Act.

We do not find any error or legal infirmity in the order of the Tribunal warranting interference. The substantial question of law raised in this appeal

is answered in favour of the assessee and the tax case (appeal) stands dismissed. No costs.

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