

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई।
**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: CHENNAI**

श्री जॉर्ज माथन, न्यायिक सदस्य एवं
श्री ए. मोहन अलंकामणी, लेखा सदस्य के समक्ष

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER, AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA Nos.819 & 820/Mds/2016
निर्धारण वर्ष /Assessment Years: 2001-02 & 2002-03

M/s.Marg Limited (Formerly Marg
Construction Ltd.), Marg Axis,
No.4/318, Rajiv Gandhi Salai,
Kottivakkam, Chennai-600 041.

Vs. The Dy. Commissioner of
Income Tax, Company Range
IV (1), Chennai.

[PAN: AACCM 8770 G]

(अपीलार्थी/**Appellant**)

(प्रत्यर्थी/**Respondent**)

अपीलार्थी की ओर से/ Appellant by

: Mr.D.Anand, Adv.

प्रत्यर्थी की ओर से /Respondent by

: Mr.AV.R.Sreenivasan, JCIT

सुनवाई की तारीख/Date of Hearing

: 14.08.2017

घोषणा की तारीख /Date of Pronouncement

: 14.08.2017

आदेश / O R D E R

PER GEORGE MATHAN, JUDICIAL MEMBER:

ITA No.819/Mds/2016 is an appeal filed by the assessee against the Order of Commissioner of Income Tax (Appeals)-8, Chennai, in ITA No.107/2014-15 dated 31.12.2015 for the AY 2001-02. ITA No.820/Mds/2016 is an appeal filed by the assessee against the Order of

Commissioner of Income Tax (Appeals)-8, Chennai, in ITA No.01/2005-06 dated 31.12.2015 for the AY 2002-03.

2. Mr.AV.R.Sreenivasan, JCIT represented on behalf of the Revenue and Mr.D.Anand, Adv. represented on behalf of the assessee.

3. As both the appeals are related to the same assessee and being inter-connected, both the appeals are disposed of by this common order.

ITA No.819/Mds/2016 for the AY 2001-02

4. It was submitted by the Ld.AR that the assessee is a company, which was doing construction business. During the relevant AY, the assessee had purchased 5000 solar lanterns and had leased the same to five different persons. It was a submission that the assessee had claimed depreciation in respect of the said solar lanterns purchased by the assessee and given on lease. It was a submission that in the course of the assessment, the AO held that the purchase of solar lanterns by the assessee and the same being leased out was a sham transaction. It was a submission that the same had been upheld, on appeal by the ITAT and by the Hon'ble Jurisdictional High Court of Madras. It was a submission that though the transaction has been treated as a sham transaction, the lease rentals received by the assessee has been taxed. The Ld.AR placed before us copy of the balance sheet and P&L account, wherein for the relevant

AY under the schedule-J, the lease rentals from the solar lanterns is shown at Rs.57,534/-. It was a submission that the transaction was not a sham transaction. It was a further submission that the whole assessment is based on a statement recorded from the seller whose statement not been put the assessee for cross-examination. It was a further submission that for the AY 2002-03, the assessee has shown lease rentals of Rs.30.60 lakhs. It was a submission that just because, the assessee was unable to prove the transaction, that would not make the transaction or the claim of the assessee's depreciation, concealment of income or furnishing of inaccurate particulars of income. It was a further submission that the loan which had been given by IREDA for the purchase of the solar lanterns was also not considered by the AO. It was a submission that the IREDA was a Government of India Enterprise which provided loans only for procuring renewable energy equipment. It was a submission that the penalty u/s.271(1)(c) was not leviable on the said transaction. It was a further submission that in the course of the assessment, the AO had disallowed and advance shown under the name of M/s.DAS Largerway Windfarm Limited. It was a submission that the assessee had entered into contract with M/s.DAS Largerway Windturbines Limited and had shown amounts received from the said concerned as advances, as there was a litigation between the assessee and the said firm. It was a submission that after the litigation was settled, the assessee had offered the income for the AY 2006-07. It was a submission that the AO had obtained a letter from M/s.DAS Largerway Wind Windturbines Limited wherein the said

concerned had confirmed that there was no money or material due to the assessee. This was during the pendency of litigation. It was a submission that income having been offered during the assessment year 2006-07 and the amount received by the assessee having been shown as advance during the relevant AYs, there was no concealment of income or furnishing of inaccurate particulars. It was a submission that no penalty was leviable on this count. It was a further submission that in the course of the assessment proceedings in respect of both the additions, there is no satisfaction record as to whether the assessee has concealed his income or has furnished inaccurate particulars of his income. It was a submission that on the last page of the Assessment Order, it is mentioned that penalty has been initiated separately. The Ld.AR placed before us a copy of the notice u/s.271 r/w 274 dated 31.03.2004. It was a submission that even in the show cause notice, it has not been mentioned as to whether the penalty is being levied for concealment of particulars of income or for furnishing of inaccurate particulars of his income. The Ld.AR further drew our attention to the Penalty Order at Para No.6.5 to submit that in the said paragraph, the AO submits that the assessee has furnished inaccurate particulars of income and in Para No.7, the AO talks of concealment of income. The Ld.AR placed before us a copy of the decision of the Hon'ble Karnataka High Court in the case of M/s.SSA's Emerald Meadows in ITA No.380/2015 wherein the Hon'ble Karnataka High Court vide Order dated 23.11.2015, wherein Para No.3, the Hon'ble High Court has held as follows:

3. The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act') to be bad in law as it did not specify which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the case of COMMISSIONER OF INCOME TAX VS-MANJUNATHA COTTON AND GINNING FACTORY (2013) 359 ITR 565.

5. The Ld.AR further placed before us a copy of the Order of the Hon'ble Supreme Court in respect of SLP in CC No.11485/2016 dated 05.08.2016 wherein the SLP against the said order of the Hon'ble High Court has also been dismissed. It was a submission that on merits and on technicality, no penalty was leviable with assessee u/s.271(1)(c).

6. In reply, the Ld.DR submitted that in respect of the claim of the depreciation, the transaction was a sham transaction and the same has also been upheld by the Hon'ble High Court. It was a further submission that in respect of the credit shown in the name of M/s.DAS Largerway Windfarm Limited, the letter of DAS Largerway itself shows that the contract was completed and no amount was due to the assessee or from the assessee. It was a further submission that the assessee was a shell company and the penalty was liable to be confirmed.

7. We have considered the rival submissions. The fact that the lease rentals have been offered by the assessee in respect of the lease transaction of the assessee in respect of the solar lanterns is a fact in

support of the assessee. It is further noticed that in the transaction of the assessee, all the purchase and lease of the solar lanterns is financed by IREDA which is a Government of India Enterprise. IREDA, we are sure would not involved itself in such a sham transaction. Even assuming that the lease transaction was a paper transaction still the same would have to be considered as a financial transaction. However, we would not like to dwell on this merits of this issue in so far as the Co-ordinate Bench of this Tribunal has already upheld the transaction to be a sham one which has also found favour with the Hon'ble Jurisdictional High Court. In respect of the issue of credit standing in the name of M/s.DAS Largerway Windfarm Limited, it is noticed that this is not a case of concealment of income in so far as the assessee has disclosed the transaction in its return and it is only the nature of the transaction which has been altered to treat the same as income. We must mention here that the income from the said transaction has been offered by the assessee in his return for the AY 2006-07. The return for the AY 2006-07 has been accepted by the Revenue, though admittedly, u/s.143(i). The time limit for re-opening of the said assessment is long over and consequently the returned income would be considered as final. Thus, by the said addition the Revenue has taxed the same income twice, one in the form of disallowance during the impugned AY and second time on account of the income being offered by the assessee for the AY 2006-07. Thus, it cannot be said that the assessee has concealed its particulars of his income or has furnished inaccurate particulars of its income. However, even on this issue we would not like

to go into on merits in so far as the Co-ordinate Bench of this Tribunal has upheld the addition and the said order has also been confirmed by the Hon'ble Jurisdictional High Court of Madras.

8. A perusal of the show cause notice u/s.271 r/w 274 clearly shows that the AO has not specified as to which limb of Sec.271(1)(c), the penalty proceedings has been initiated. This being so, in view of the principles laid down by the Hon'ble Karnataka High Court in the case of M/s.SSA'S Emerald Meadows referred to supra approved by the Hon'ble Supreme Court by dismissal of the SLP referred to supra, we are of the view that the penalty u/s.271(1)(c) of the act cannot be levied in the case of the assessee. In these circumstances, the penalty as levied by the AO and confirmed by the Ld.CIT(A) stands deleted.

9. In the result, the appeal filed by the assessee is stands allowed.

ITA No.819/Mds/2016 for the AY 2001-02

10. It was submitted by the Ld.AR that the issues in the assessment were in respect of the disallowance of the depreciation claimed in respect of the leased solar lanterns which had been disallowed by the AO for the AY 2001-02 holding the same to be a sham transaction and in respect of advance shown in the name of M/s.DAS Largerway Wind Windturbines Limited which had also been disallowed for the immediately preceding AY

2001-02. It was submitted by the Ld.AR that during the relevant AY the assessee had offered an amount of Rs.30.60 lakhs as its lease rentals and the same has also been accepted by the AO. It was a submission that 50% depreciation in respect of the leased solar lanterns had been disallowed by the AO following the Assessment Order for the immediately preceding AY. It was a further submission that in respect of the receipts from M/s.DAS Largerway Windfarm Limited the income from the said transaction had been offered in the return for the AY 2006-07. It was a submission that the assessee had no objection, if the issues were restored to the file of the AO for re-examination.

11. In reply, the Ld.DR submitted that in respect of the depreciation on the solar lanterns the Hon'ble Jurisdictional High Court has already confirmed the stand of the AO that the transactions were sham transactions. It was a further submission that in respect of the advance shown from M/s.DAS Largerway Wind Windturbines Limited, it was a submission that the assessment for the immediately preceding year had also been confirmed by the Co-ordinate Bench of this Tribunal. It was a submission that the order of the Ld.CIT(A) was liable to be confirmed.

12. We have considered the rival submissions. It is an admitted fact that the Hon'ble Jurisdictional High Court has upheld the finding of the AO that the transaction of purchase and lease of the solar lanterns is a sham

transaction. However, a perusal of the Assessment Order shows that the AO has brought to tax, the lease rentals received by the assessee in respect of the business of purchase and lease of the solar lanterns. If the transaction itself is disbelieved and treated as a sham transaction admittedly the income offered by the assessee in respect of the said transaction cannot be treated as income of the assessee. This has not been considered or verified by the AO. In respect of the issue of advance received from M/s.DAS Largerway Wind Windturbines Limited, it is stated by the assessee that the income from the said transaction has been offered during the AY 2006-07. Further, the AO has brought to tax the amounts standing in the name of the said creditor in the AY 2001-02 holding that the transaction is complete. If this is so, then how was additional advance given during the impugned assessment year? This has also not been examined by the AO. In these circumstances, we are of the view that the issues must be restored to the file of the AO for re-adjudication and we do so. In respect of the transaction of the purchase and lease of the solar lanterns, the AO has to verify as to whether the assessee has offered the lease rentals in respect of the said solar lanterns and has to adjudicate on this issue after such verification. In respect of the issue of the advance shown from M/s.DAS Largerway Windfarm Limited, the AO is to examine as to whether the assessee has offered the income from the said transaction for the AY 2006-07. If the income has been offered during the AY 2006-07, then no addition is called for in the hands of the assessee in the impugned Assessment Order. With these

directions, the issues are restored to the file of the AO for re-adjudication after granting the assessee adequate opportunity to substantiate his case.

13. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the Open Court on August 14, 2017, at Chennai.

Sd/-
(ए. मोहन अलंकामणी)
(A. MOHAN ALANKAMONY)
लेखा सदस्य/**ACCOUNTANT MEMBER**

Sd/-
(जॉर्ज माथन)
(GEORGE MATHAN)
न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: August 14, 2017.

TLN

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF