

आयकरअपीलीयअधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, CHENNAI

श्री जी मंजूनाथा, लेखासदस्य, एवं श्री राहुल चौधरी, न्यायिक सदस्य के समक्ष
BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER AND
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

आयकरअपीलसं./I.T.A No.:115/CHNY/2018
निर्धारणवर्ष/Assessment Year: 2014 - 2015
&

आयकरअपीलसं./I.T.A No.:3129/CHNY/2018
निर्धारणवर्ष/Assessment Year: 2015 – 2016

M/s Bharat Promoters,
No. 42/43, Kavignar Bharathidasan Road,
SIET College Road, Chennai - 600018
PAN: AAIFB7735P

..... अपीलकर्ता/Appellant
Vs

The Assistant Commissioner of Income Tax,
Non-Corporate Circle-3,
121/108, M.G. Road, Nungambakkam,
BSNL Building, Tower-I, No. 16,
Greams Road, Chennai - 600034

..... प्रत्यर्था/Respondent

Appearances:

For the Appellant/Assessee : S Sridhar, Advocate
For the Respondent/Department : V. Sreedevi, JCIT
Date of conclusion of hearing : 02.06.2022
Date of pronouncement of order : 26.08.2022

आदेश /ORDER

Per Rahul Chaudhary, Judicial Member:

1. These are two appeal pertaining to Assessment Year 2014-15 and 2015-06 filed by the Appellant/Assessee involving identical issues which were heard together and are, therefore, being disposed by way of a common order.

ITA No 115/CHNY/2018 (Assessment Year 2014-15)

2. By way of the present appeals the Appellant/Assessee has challenged the order, dated 20.09.2018, passed by the Learned Commissioner of Income Tax (Appeals)-4, Chennai [hereinafter referred to as the 'the CIT(A)'],

dismissing the appeal against the Assessment Order, dated 31.12.2017, passed under Section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] for the Assessment Year 2014-15.

3. The Appellant has raised 10 grounds of appeal. Ground No.1 and 10 being general in nature do not require adjudication. We would 1st take up ground No. 2 to 6 which go to the root of the matter and directed against the order of CIT(A) enhancing the income of the Appellant to INR 5,46,06,718/- holding the same to the business income, as against Capital Gains Income of INR 4,80,58,290/- returned by the Appellant which was assessed at INR 5,18,39,068/- (after making disallowance of index cost of acquisition of INR 37,80,778/-) by the Assessing Officer under Section 143(3) of the Act.
4. The relevant facts, in brief, are that the assessee, a limited liability partnership, filed return of income declaring capital gains income of INR 4,80,58,290/-. In the assessment framed under Section 143(3) of the Act, the Assessing Officer accepted the income chargeable to tax under the head capital gains. The Assessing Officer only made addition of INR 37,80,778/- holding the same to be excess indexed cost of acquisition claimed by the Appellant.
5. Being aggrieved, the Appellant carried the issue in appeal before the CIT(A) claiming that the Assessing Officer has erred in disallowing the index cost of acquisition claimed by the Appellant without calling for any clarifications from the Appellant during the assessment proceedings. In the appellate proceedings before CIT(A), it was contended on behalf of the Appellant that Assessing Officer had failed to consider stamp duty expenses, registration charges and other incidental expenses directly attributable to the acquisition of the asset such as payment to Chennai Metropolitan Development Authority (CMDA) contractors and interest on capital. Therefore, the CIT(A) called for a remand report from the Assessing Officer. In the Remand Report, dated 19.07.2017, while examining the claim of INR 30,60,909/- made by the Appellant in respect of interest on capital to the partners, the Assessing Officer reported that as per the return of income for the Assessment Year 2010-11, the aforesaid amount

has been shown as a business loss. The Assessing Officer pointed out that in the earlier years the asset transferred during the relevant previous year was held by the Appellant as stock-in-trade. The CIT(A), taking note of the aforesaid observations of the Assessing Officer in the remand report, issued notice under Section 251(1) of the Act for enhancement of income by treating the same as business income instead of capital gains income as offered by the Appellant and accepted by the Assessing Officer. In reply, the Appellant filed submissions, dated 20.10.2017, objecting to the proposed enhancement. However, the CIT(A) rejected the objections raised by the Appellant and proceeded to enhance the income of the Appellant by invoking provisions of Section 251(1) of the Act. The CIT(A) allowed deduction for INR 57,64,174/-, being the proportionate purchase cost of the asset computed at INR 8,53,05,640/- (after including stamp duty of INR 62,61,800/- and registration fee of INR 7,80,840/-), from the total sale consideration of INR 6,03,70,892/- to arrive at net profits from sale of asset at INR 5,46,06,718/- and assessed the same as business income taxable in the hands of the assessee during the relevant previous year.

6. Being aggrieved the Appellant as now before this appeal against the order of CIT(A) enhancing income of the Appellant from 5,18,39,068/- to INR 5,46,06,718/- and treating the same as business income.
7. The Learned Authorised Representative for the Appellant appearing before us challenged the order of CIT(A) primarily on the ground that the CIT(A) had exceeded his jurisdiction by considering a new source of income which was not subject matter of consideration for the purpose of assessment before the Assessing Officer. He further submitted that the CIT(A) did not have any power to discover a new source of income. According to him business income arising in the hands of the Appellant from sale of the asset constituted a new source of income and therefore, the enhancement made by the CIT(A) was liable to be struck down in view the following judgments/decisions - CIT Vs. Shapoorji Pallonji Mistry: 44 ITR 891 (SC), CIT Vs Sundari Lal & Co.: 251 ITR 864 (Del HC), and Dr. L. Siarvanan Vs.

ITO: ITA No. 1617/2018 (Tribunal – Chennai). He further submitted that even the Assessing Officer had exceeded his jurisdiction by including in the Remand Report observations on the issues on which remand was not sought by the CIT(A). In relation to merits of the addition, the learned Authorised Representative for the Appellant submitted that the Assessee had by mistake reflected the transaction of purchase of asset under the head 'stock-in-trade' and when this mistake was discovered during the previous year relevant to the Assessment Year 2014-15, the Appellant corrected the same by disclosing the asset under the correct head 'Investment' as it was always the intention of the Appellant to hold the asset as an investment.

8. The Department Representative countering the submissions advanced by the Learned Authorised Representative, vehemently contended that the Appellant always had the intention to hold the asset as 'stock-in-trade' and therefore, disclosed the same under the head 'stock-in-trade' ever since the year of purchase of the asset. He submitted that the Appellant had, as a matter of afterthought, with the sole intention of avoiding tax liability transferred the assets to the head 'investment' during the relevant previous year. In order to support the aforesaid contention the learned Department Representative took us through paragraph 11, 23 to 27 and 29 of the order passed by the CIT(A). He further submitted that the Assessing Officer was duty bound to bring to the notice of the CIT(A) any lapse or omission in assessment, whereas the CIT(A) was duty bound to exercise the jurisdiction to examine the issue to ensure that the assessment framed was just and proper. In this regard he relied upon the judgment of Hon'ble Kerala High Court in the case of Popular Automobiles Vs CIT: 187 ITR 86.

9. We have heard the rival contentions and perused the material on record. Section 251 deals with the powers of the CIT(A) and reads as follows:

251. Powers of the Commissioner (Appeals).—(1) In disposing of an appeal, the Commissioner (Appeals) shall have the following powers—

- (a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment ;
 - (b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty ;
 - (c) in any other case, he may pass such orders in the appeal as he thinks fit.
- (2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.

Explanation.—In disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant."

10. On perusal of the above extracted provisions of Section 251 of the Act, it is evident that the CIT(A) has been given powers to confirm, reduce, enhance or annul assessment. The only pre-condition mentioned for exercising the powers to enhance the income is that the same could be done only after providing adequate opportunity of hearing to the assessee. Keeping in view the plain language of Section 251 of the Act and the interpretation given to it by the Hon'ble Kerala High Court in the case of Popular Automobiles (*supra*), the power to enhance income can be exercised by the Commissioner of Income-tax (Appeals) even on information furnished by assessing officer. [*Goel Die Cast Ltd. v. CIT: (2008) 297 ITR 72 (P&H) @ para 6 & 8*]. Further, there is no requirement that the CIT(A) must call for a remand report on the issue on which he proposes to make enhancement. So long as subject matter of enhancement does not call into question the taxability of income from a new source of income which was not subject matter of consideration before the Assessing Officer, the CIT(A) has the power to enhance the income of an assessee after giving the assessee a notice in terms of Section 251 of the Act.

11. We are of the considered opinion, keeping in view the facts of the present case, that the enhancement made by the CIT(A) in the present case does not pertain to a new source of income. Thus, none of the judicial precedents relied upon by the Appellant are of aid to the Appellant. In our view the CIT(A) has not exercised powers in respect of a new source of income. The CIT(A) has examined only the character of the income flowing from the same source which were subject matter of assessment and has concluded that the same was in the nature of business income and not in the nature of capital gains income.
12. We note that during the relevant previous year the Appellant had transferred the asset being area of land (hereinafter referred to as 'the Asset'). The CIT(A) has returned a finding that in the year of purchase the Asset was reflected under the head 'stock-in-trade'. The Learned Authorised Representative for the Appellant has explained this by submitting that by mistake the Asset was reflected under wrong head 'stock-in-trade' instead of correct head 'investment'. According to him when this mistake was discovered during the previous year relevant to the Assessment Year 2014-15, the Appellant corrected the same by disclosing the asset under the correct head 'Investment' as it was always the intention of the Appellant to hold the asset as an investment. We note that the Appellant is engaged in the business of real estate developer and promotes/develops/builds properties. The returns filed by the Appellant for the Assessment Year 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14 disclosed 'Nil' investment, whereas the aforesaid returns disclosed figures of opening and closing stock-in-trade and stock-in-progress. However, during the relevant Previous Year the Appellant has disclosed investments of INR 8,89,72,273/-, whereas the stock-in-trade and stock-in-progress were disclosed as 'Nil'. Further, the Appellant had claimed carry forward of business losses to the tune of INR 1,02,73,353/- during the previous year relevant to the Assessment Year 2014-15. However, the Appellant had capitalised the same while calculating the cost of acquisition and the index cost of acquisition for the purpose of computing capital gains. The books of account of the Appellant for the aforesaid assessment years were

audited for the Assessment Years 2009-10 to 2013-14, and no mistakes were discovered or pointed out during the finalization of accounts or during the audit. Keeping in view the aforesaid, the CIT(A) has returned a finding that the Asset was in the nature of 'stock-in-trade'. We do not find any infirmity in the order passed by the CIT(A) in bringing to tax the net income of INR 5,46,06,718/- arising from sale of the Asset as business income in the hands of the Appellant. We agree with the contention of Learned Department Representative that the Appellant has, as a matter of afterthought, categorised the asset under the head 'investment' with the object of avoiding taxes. The order of CIT(A) on this issued under consideration does not call for any interference.

13. In view of the above, Ground No. 2 to 6 raised by the Appellant/Assessee are dismissed. In view of the aforesaid, Ground No. 7 and 8 raised by the Appellant are disposed as being infructuous.

14. As regards Ground No. 9, having perused the material on record, we are of the view that there was no violation of principles of natural justice. Notice under Section 251(1) of the Act was issued to the Appellant and in response to the same the Appellant had filed reply dated 20.10.2017. The Appellant was granted reasonable opportunity to be heard and present his case. Accordingly, Ground No. 9 raised by the Appellant is without any merit and contrary to the material on record, and is, therefore, dismissed.

15. In view of the above, the appeal filed by the Appellant/Assessee is dismissed.

ITA No 3129/CHNY/2018 (Assessment Year 2015-16)

16. Both the sides agree that the in the appeal for the Assessment Year 2015-16 identical issues have been raised by the Appellant/Assessee which arise from factual matrix identical to those prevailing in Assessment Year 2014-15. Therefore, our finding in respect of appeal for the Assessment Year 2014-15 would apply mutatis mutandis to the appeal for the Assessment Year 2015-16. Thus, grounds raised by the Appellant are disposed off as under.

17. Ground No.1 and 10 do not require adjudication being general in nature. Ground No. 2 to 5 and 8 raised by the Appellant/Assessee are dismissed. Ground No. 6 and 7 raised by the Appellant are disposed as being infructuous. Ground No. 9 raised by the Appellant is dismissed as being without any merit and contrary to the material on record. In view of the aforesaid, the Appeal filed by the Appellant/Assessee is dismissed.

18. In result, both the appeals (ITA No. 115 & 3129/CHNY/2018) filed by the Appellant/Assessee are dismissed.

Order pronounced in the court on 26. 08.2022 at Chennai.

Sd/-

(जी मंजूनथ) (G. MANJUNATHA)

लेखासदस्य/ACCOUNTANT MEMBER
चेन्नई/Chennai,
दिनांक/Dated, the 26th August, 2022

Sd/-

(राहुल चौधरी) (RAHUL CHAUDHARY)

न्यायिकसदस्यएवं /JUDICIAL MEMBER

Alindra, PS

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्था/Respondent
3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR
6. गार्डफाईल/GF