

आयकर अपीलिय अधिकरण, 'सी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.:175/CHNY/2021

निर्धारण वर्ष /Assessment Year: 2015-16

Shri Sa. Duraisamy,
No.62, 1st Mainroad,
CIT Nagar,
Chennai – 600 035.

The ACIT,
vs. Central Circle 1(3),
Chennai.

PAN: AFUPD 6476L

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

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आयकर अपील सं./ITA No.:175/CHNY/2022

निर्धारण वर्ष /Assessment Year: 2015-16

&

C.O No.12/CHNY/2022

[in I.T.A. No.175/CHNY/2022]

The ACIT,
Central Circle 1(3),
Chennai.

Shri Samiappa Gounder
vs. **Duraisamy,**
No.62, 1st Mainroad,
CIT Nagar,
Chennai – 600 035.

(अपीलार्थी/Appellant)

PAN: AFUPD 6476L
(प्रत्यर्थी/Respondent)

निर्धारिती की ओर से/Assessee by

: Shri S.Sridhar & Shri N.Arjun Raj,
Advocates

राजस्व की ओर से /Revenue by

: Shri M. Rajan, CIT

सुनवाई की तारीख/Date of Hearing

: 13.12.2022

घोषणा की तारीख/Date of Pronouncement

: 13.12.2022

आदेश / O R D E R**PER MAHAVIR SINGH, VICE PRESIDENT:**

Out of these three appeals, one appeal by the assessee in ITA No.175/Chny/2021 is against the quantum addition and is arising out of the order of Commissioner of Income Tax (Appeals)-18, Chennai in ITA No.90/2019-20/CIT(A)-18 dated 22.03.2021. The assessment was framed by the ACIT, Central Circle-1(3), Chennai for the assessment year 2015-16 u/s.143C r.w.s. 153A r.w.s.143(3) of the Income-tax Act, 1961 (hereinafter the 'Act') vide order dated 31.12.2018.

2. At the outset, the Id.counsel for the assessee stated that the CIT(A) has dismissed the appeal of assessee in limine and without admitting the same as he has not condoned the delay by stating that the assessee failed to explain sufficient cause for not presenting this appeal within the stipulated period enunciated in section 249(2) of the Act. According to CIT(A), the delay is inexplicable and hence, did not condoned. The Id.counsel further stated that the CIT(A) first not admitted the appeal vide para 10, which reads as under:-

"10. In view of the discussion, I am of the view that the appellant fails on first step of not filing the appeals in time; and that the appellant has not

satisfactorily explained that it had sufficient cause for not presenting it within the stipulated period enunciated in sec.249(2) of the Act. Hence, I hold that the delay is inexplicable and hence, cannot be condoned. Thus, the appeal is not admitted in terms of provisions of sec.249(3) of the Act.”

The Id.counsel in view of the above stated that the CIT(A) also adjudicated on merits and confirmed the addition made of Rs.1,92,81,361/- being difference between the guideline value of the property fixed by the Sub-Registrar on the basis of circle rates and the sale consideration recorded in the sale deed of sale of impugned property. The Id.counsel for the assessee stated that once the CIT(A) has not condoned the delay of 202 days in filing of this appeal by assessee, he cannot enter into merits of the case. The Id.counsel explained the reasons for delay of 202 days in filing of appeal by assessee before CIT(A). He narrated the fact that the assessment order u/s.153C r.w.s 153A r.w.s. 143(3) of the Act dated 31.12.2018 was to be filed within 30 days of receipt of order. As per Form No.35, the date of service of assessment order and demand notice is 01.01.2019 and appeal before CIT(A) was filed on 20.08.2019. Therefore, the CIT(A) computed the delay from 01.01.2019 to 20.08.2019 and thereby there is a delay of 202 days. These are admitted facts and there is no dispute about it. The assessee before CIT(A) filed affidavit stating the reasons and the

reasons recorded in affidavit [which is reproduced in the order of CIT(A)] reads as under:-

“I am fully acquainted with the facts and competent to swear to this affidavit. The assessment was completed by the AO u/s 153C rws 143(3) of the Act, vide his order dated 31.12.2018 determining the total income at Rs.38,55,51,930/- wherein the addition was made u/s.50C being the difference between guideline value and sale consideration received. On receiving the assessment order, I handed over the copy of the order to one of the Manager working in the office for taking further appropriate action in the aforesaid case. However, the Manager kept the above mentioned order in the drawer and forgot to file the appeal in the above mentioned case. Later on, when I enquired from the accountant regarding the status of the appeal to be filed, it came to light at that time, that the manager to whom the order was handed over has not filed the appeal against the order of the AO order. Thereafter I immediately took sets to file this appeal before the CIT(A). If the due date for filing the appeal is to be reckoned from 01.01.2019 (i.e., 1 days after it posted) then there is a delay of 202 days in filing this appeal which has arisen due this omission on the part of the manager working in my office.

The CIT(A) was not convinced with the reasons given in the affidavit explaining the delay that the assessee has not even given the name and address of the concerned manager in his affidavit.

3. Now before us, the Id.counsel for the assessee stated that these are actual reasons and the manager is not in service now and it is not possible to obtain affidavit at this stage. Even that manager was sacked from the services after this event and he will not file any affidavit or will not give any evidence in favour of assessee.

4. On the other hand, the Id.CIT-DR strongly relied on the order of CIT(A) but when it was pointed out to him that the CIT(A) has made mistake in first not admitting the appeal on the count of delay and also entering into merits, once, he has not condoned the delay, which is not the right course. On this, the Bench proposed to Id.counsel for the assessee that in case, the delay is condoned the same is to be condoned with a cost of Rs.25,000/- to be paid to Tamil Nadu State Legal Services Authority at Hon'ble High Court of Madras. On this preposition, the Id.CIT-DR could not state anything.

5. After hearing both the sides and going through the facts, we are of the view that it is too late in a day to examine to manager even if he is available and he has already been sacked by assessee from his services as argued by Id.counsel, in that eventuality, we are imposing a cost of Rs.25,000/- on assessee for this delay, which is to be paid to Tamil Nadu State Legal Services Authority at Hon'ble High Court of Madras and in that eventuality, we condone the delay and remand the matter back to the file of CIT(A) to adjudicate the issue on merits after allowing reasonable opportunity of being heard

to the assessee. Accordingly, the order of the CIT(A) is set aside and appeal of the assessee is allowed for statistical purposes.

6. As regards to Revenue's appeal in ITA No.175/Chny/2022 and cross objection raised by assessee in CO No.12/Chny/2022 is as regards to the order of Commissioner of Income Tax (Appeals)-18, Chennai in ITA No.67/19-20/CIT(A)-18 dated 07.01.2022. The impugned penalty was levied by the ACIT, Central Circle 1(3), Chennai u/s.271(1)(c) of the Act vide order dated 28.06.2019.

7. Brief facts are that a search and seizure operation u/s.132 of the Act was conducted in the case of Sri Vetri Duraisamy on 11.09.2016 in the residential premises of Shri Vetri Duraisamy at No.28, 1st Main Road, CIT Nagar, Chennai -35. During the course of search, the Income-tax Department found one sale deed executed by Shri SA Duraisamy father of Sri Vetri Duraisami dated 25.04.2014 which was seized. As per sale deed, the assessee Shri S.A. Duraisamy sold a landed property along with building to Subhasree Realtors Pvt. Ltd., for total consideration of Rs.60 crores. The assessee has not filed his return of income for the relevant assessment year 2015-16 either before the due date as per section

139(1) of the Act or before the date of search. Subsequently, the assessee filed return of income on 21.03.2017 admitting long term capital gain at Rs.36,68,52,738/- and thereby declaring total income at Rs.36,62,70,569/-. Subsequently, notice u/s.153C of the Act dated 15.10.2018 was issued to the assessee and in response to the same, the assessee again filed return of income on 29.11.2018, admitting the same total income of Rs.36,62,70,570/- which included the same long term capital gain arising out of sale of Rs.36,68,52,738/-.

8. The AO during the course of scrutiny of this return noted that as per sale deed, the guideline value of the property sold was assessed and stamp duty value was assessed at Rs.61,92,89,361/- as against the sale consideration recorded by assessee at Rs.60 crores. The AO asked the assessee to explain as to why this amount of Rs.1,92,89,361/-being excess of guideline value over the sale consideration would not be brought to tax as per the provisions of section 50C of the Act. Accordingly, assessment was framed on the differential amount and Rs.1,92,89,361/- was added to the returned income of the assessee and penalty proceedings u/s.271(1)(c) of the Act was initiated for furnishing of inaccurate

particulars of income and concealment of particulars of income. The assessee before AO contended that there is no concealment of income in the return of income filed and the addition is due to additional value added by the AO on the basis of stamp duty value assessed on the basis of circle rates. The AO also raised the issue of non-payment of taxes as regards to admitted long term capital gain of Rs.36,68,52,738/- and that no return of income u/s.139 of the Act was filed by the assessee. Accordingly, the AO levied penalty on the admitted long term capital gain of Rs.36,68,52,738/- also, differential amount of Rs.1,92,89,361/- being the difference between the excess guideline value assessed by stamp valuation authority and sale consideration declared in the sale deed. Therefore, the AO levied minimum penalty of Rs.8,73,66,067/-. Aggrieved, assessee preferred appeal before CIT(A).

9. The CIT(A) deleted the penalty levied by AO on admitted long term capital gain of Rs.36,68,52,738/- by observing that Explanation 5A to section 271(1)(c) of the Act has no application to other person to whom notice issued u/s.153C of the Act because no search is conducted by the Department on the other person. The CIT(A) relied on the decision of Hon'ble High Court of Madras in the

case of CIT vs. SDV Chandru, 266 ITR 175 and observed in para 6.2

as under:-

6.2 The next ground is related to the due date mentioned in Explanation 5A to section 27 1(1) (c). The argument of the assessee is that the due date referred to in that section would cover the returns of income filed u/s 139(4) of the Act also and for this, he relied on the decisions in the cases of Rakesh Nain Trivedi and Ashwani Jaipathy (supra). The assessee also relied on the decision of the Hon'ble Madras High Court in the case of CIT Vs Shri SDV Chandru in 266 ITR 175 Mad dated 09.12,2003 wherein the Court has held that In cases where the assessee had not disclosed his income in the returns filed for the previous year which have ended prior to the date of search and, in the statement given under Section 132(4), the assessee admits the receipt of undisclosed income for those years and also specifies the manner in which such income had been derived, and thereafter pays the tax on that undisclosed income with interest, such undisclosed income would get immunized from the levy of penalty'.

The decision of the Madras High Court is not applicable to the facts of the case since it is related to AYrs 1985-85 & 1986-87 and the decision was rendered by the Court on the basis of the provisions of Explanation 5 to Section 271(1)(c) (which is no more in vogue) whereas the applicability of Explanation 5A is the question to be considered here.

In the assessment order, the AO has observed as under:

"Paragraph 1.1 - "Sri Sa. Duraisami, hereinafter referred to as the assessee filed the original return of income for the AY 2015-16 on 21.03.2017, admitting income of Rs.6, 62, 70, 570/-. The return was not processed u/s 143(1). Scrutiny assessment u/s 143(3) was not completed in this case'.

Paragraph 1.5 – ".. notice u/s 153C dated 15.10.2018 was issued to the assessee. In response to the notice, the assessee filed the return of income on 29.11.2018, admitting total income of Rs. 36,62,70,570/-.. "

Thus, in this case the first return was filed on 21.03.2017, which is before the due date u/s 139(4) and the second return of income has been filed u/s 153C and in the both these returns of income, the assessee has admitted income of Rs.36,62,70,570/- which included the long term capital gains of Rs.36,68,52,738/- on sale consideration of Rs.60 crores.

On appreciation of the facts mentioned above, it is clear that the assessee has admitted the capital gains on the sale consideration of Rs.60 crores in the return of income filed within the due date u/s 139(4) of the Act and therefore, decision of the ITAT in the case of ITO vs Gope M Rochlani (supra) is squarely applicable to the case of the assessee. The Hon'ble ITAT has categorically held that "where the Legislature has provided the consequences of filing of the return of income under section 139(4), then the same has also been specifically provided. For e.g., section 139(3), provides that for the purpose of carry forward losses under sections 72 to 74A, the return of income should be filed within the time-limit provided under section 139(1), otherwise losses cannot be set-off. In absence of such a restriction, the limitation of time of 'due date' cannot be strictly reckoned with section 139(1). Thus, the meaning of the words 'due date', means any limitation or restriction as given in clause (b) of Explanation 5A, cannot be read as 'due date' as provided in section 139(1). The words due date' therefore, can also mean date of filing of the return of income under section 139(4)." As a sub-ordinate authority to the Hon'ble ITAT, I am bound by the decision of the Tribunal given that the facts of the assessee's case is similar to the facts in the case before the Tribunal. Moreover, this return was also filed before the date of initiation of search as per first proviso to Section 153C.[Date of filing of return by the assessee is 21.03.2017. Date of initiation of search applying the first proviso to Section 153C is 12.10.2018. Notice u/s 153C issued to the assessee on 15.10.2018.]

Hence, duly following the decision of the ITAT in the aforesaid case and also considering the fact that the assessee has disclosed the amounts in the return filed before the issue of notice u/s 153C of the Act, I delete the penalty levied on Rs.36,62,70,569/- under Explanation 5A to section 271(1)(c).

9.1 As regards to differential amount i.e., the value assessed by stamp valuation authority for the purpose of stamp duty collection and value recorded by assessee in sale deed i.e., sale consideration, the CIT(A) deleted the penalty by observing in para 6.3 as under:-

6.3 The next ground is related to the penalty levied on the addition made u/s 50C. The Calcutta High Court in the case of CIT, Kol-IV vs Madan Theatres Ltd in GA No 684 of 2013 dated 14.05.2013 has dealt with the issue of addition u/s 50C and observed that "Mr Niaumuddin, learned Advocate appearing for the Revenue, contended that the assessee had a choice to dispute the valuation of the basis of the deemed value, but the assessee did not take the opportunity. The assessee had a choice or he could have litigated, The fact remains that the actual amount received was offered for taxation. It is only on the basis of the deemed Consideration that the proceedings under Section 271 (1) (c) started. The revenue has failed to produce any iota of evidence that the assessee actually received one paise more than the amount shown, to have been received by him" and held that "We are, as such, of the opinion that there is no scope to admit the appeal Since the same does raise any question of law, substantial or otherwise. The appeal is, therefore, rejected." Though the Hon'ble Court did not decide any question of law, the facts of the case is identical to the facts of the assessee's case. In this case also, the assessee has accepted the valuation and offered the difference during the course of assessment proceeding. Perusal of the assessment order also did not show that any evidence for an higher amount than the sale consideration was received by the assessee. Hence, this case law is quite applicable to the facts and circumstances of assessee's case. Therefore, as a subordinate authority to the High Court, I consider that it is a fit case to apply the afore-mentioned decision of Hon'ble Calcutta High Court and accordingly, delete the penalty in relation to the amount of addition of Rs.1,92,81,361/- u/s 50C.

Aggrieved, now Revenue is in appeal before the Tribunal in appeal and assessee came in cross objection in support of the order of the CIT(A).

10. Before us, the Id.counsel for the assessee in regard to admitted income, submitted that it will not come within the purview of levy of penalty u/s.271(1)(c) of the Act for the reason that the Explanation 5A to section 271(1)(c) of the Act has no application to other person to whom notice is issued u/s.153C of the Act. According to Id.counsel, the Explanation 5A applies to searched person. For this, he relied on the decision of Hon'ble Supreme Court in the case of PCIT vs. Rajkumar Gulab Badgujar, [2019] 111 taxmann.com 257, wherein the Hon'ble Supreme Court dismissed the SLP of Revenue confirming the judgment of Hon'ble Bombay High Court in the case of PCIT vs. Rajkumar Gulab Badgujar, [2019] 111 taxmann.com 256, wherein the Hon'ble Bombay High Court has clearly held that Explanation 5A can be invoked in the case of searched person. For this, Hon'ble Bombay High Court laid down the principle in para 6 & 7 as under:-

6. In view of such facts, we find no error in the Tribunal holding that the penalty could not have been imposed. There was no question of the Assessee not declaring the income of the particulars of the income so as to invite penalty under Section 271C of the Act. The three returns had been filed even before issuance of notice under Section 153C of the Act and in other two cases as accepted by the Assessing Officer the Assessee had no taxable income. When there was no addition to the declared income in any of the years, penalty was correctly deleted by the Tribunal. Explanation 5A below Section 271 of the Act would apply only in case of searched person.

7. By virtue of such Explanation it may be open for the Revenue to levy penalty from such a person even in a case where there is addition to the income declared by the searched person in the return filed pursuant to search. Nevertheless this Section is confined to searched person and cannot be extended to the person other than the searched person.

11. After hearing rival contentions and going through the facts of the case, admitted fact is that the assessee is not a searched person. He is other person and assessment is also framed u/s.153C of the Act. We find that the proposition laid down by Hon'ble High Court of Madras in the case of SDV Chandru, *supra* and Hon'ble Bombay High Court in the case of Rajkumar Gulab Badgujar, *supra*, we confirm the order of CIT(A) deleting the penalty levied by the AO.

12. As regards to penalty deleted by CIT(A) in regard to differential amount of Rs.1,92,81,361/- i.e., difference between the stamp value assessed by the Sub-Registrar on the basis of guideline value fixed and the sale consideration as recorded in the sale deed, the quantum addition has already been remanded back to the file of the CIT(A), we remit this issue back to the file of the CIT(A) for fresh adjudication in term of the decision taken in quantum appeal and also as per law. The appeal of the Revenue is partly allowed for

statistical purposes and the cross objection of the assessee is dismissed as infructuous.

13. In the result, the appeal filed by the assessee in ITA Nos.175/CHNY/2021 is allowed for statistical purpose and the appeal filed by the Revenue in ITA No.175/CHNY/2022 is partly allowed for statistical purpose and the cross objection filed by the assessee in C.O. No.12/Chny/2022 is dismissed as infructuous.

Order pronounced in the open court on 13th December, 2022 at Chennai.

Sd/-

(मनोज कुमार अग्रवाल)

(MANOJ KUMAR AGGARWAL)

लेखा सदस्य /ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह)

(MAHAVIR SINGH)

उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,

दिनांक/Dated, the 13th December, 2022

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|-------------------------|------------------------------|
| 1. निर्धारिती/Assessee | 2. राजस्व/Revenue | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त /CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF. |