(2003) 06 KL CK 0062

In the High Court Of Kerala

Case No : IT Ref. No. 300 of 1997

B. Indira Devi — APPELLANT

Vs

Commissioner of Income Tax — RESPONDENT

Date of Decision : 17-06-2003

Acts Referred:
Income Tax Act, 1961 — Section 142(2), 55A

Citation : (2003) 184 CTR 441 : (2004) 270 ITR 44

Hon'ble Judges : J.M. James, J;G. Sivarajan, J

Bench : Division Bench

Advocate : P. Balachandran and T.N. Seetharaman, for the Appellant; P.K.R. Menon and K. George, for the Respondent

Judgement

G. Swarajan, J.—The Tribunal, Cochin Bench, has referred the following question of law u/s 256(2) of the IT Act, 1961 (for short ''the Act''), at the instance of the assessee, pursuant to the direction issued by this Court in the judgment dt. 14th July, 1994 in OP No. 58 of 1985 :

"Whether, the Tribunal was right in holding that the ITO was justified in referring the question of cost of construction of a building belonging to the appellant to the Departmental Valuation Officer ?"

2. The applicant is an individual, who is an assessee under the Act. The assessment year concerned is 1977-78. The AO referred the question of cost of construction of a building constructed by the assessee during the relevant accounting period ended on 31st March, 1977, to the Executive Engineer, Valuation Cell, Thiruvananthapuram. The said officer had valued the cost of construction of the building at Rs. 3,53,000, as against the cost of construction of Rs. 2,09,094 furnished by the assessee in her return. Based on the valuation made by the Executive Engineer, the AO sought to take the difference between the cost of construction of the building valued by the Executive Engineer and that admitted by the assessee, amounting to Rs. 1,43,906 as unexplained investment of the assessee. The AO had also furnished a copy of the valuation report of the

Executive Engineer along with the pre-assessment notice, and called for objections from the assessee. The assessee had filed her objections and also produced a valuation report of a registered valuer in support of her case. The AO then forwarded the objections furnished by the assessee to the Executive Engineer for his remarks and later, after considering the valuation report and the objections taken by the assessee, adopted the cost of construction at Rs. 3,15,498. Based on the said valuation, the difference came to only Rs. 1,06,400. The AO treated the said amount as assessee''s unexplained investment and brought the same to tax. Being aggrieved by the said assessment, the assessee filed appeal before the AAC, Thiruvananthapuram. A contention was taken in the appeal that the reference of the question of cost of construction of the building by the AO to the Executive Engineer, Valuation Cell, Thiruvananthapuram, was without jurisdiction. The first appellate authority considered the said question in para. 3 of the appellate order. The first appellate authority accepted the contention of the assessee that there is no provision as such in the Act for reference of the cost of construction of a building except for the purpose of determining the capital gain contained in Section 55A of the Act. The first appellate authority, however, held that the provisions of Section 142(2) of the Act gave sufficient power to the AO to make such enquiry as he considers necessary for the purpose of obtaining full information in respect of the income or loss of any person, According to the first appellate authority, this power conferred u/s 142(2) of the Act enables the AO to refer the cost of construction of the building to the departmental valuer, since the AO does not have the expertise to arrive at the cost of construction independently. The first appellate authority, accordingly, rejected the contention of the assessee that the AO has no jurisdiction to refer the question of cost of construction of the building to the Executive Engineer, Valuation Cell. This finding of the first appellate authority was affirmed by the Tribunal in its appellate order dt. 26th Oct., 1983, at p. 12. We find that the Tribunal has also rested its conclusion with reference to the provisions of Section 142(2) of the Act relied on by the first appellate authority.

3. We have heard Shri P. Balachandran, learned counsel for the applicant, and Shri George K. George, learned standing counsel, Government of India (Taxes), appearing for the respondent.

4. Counsel for the applicant submitted that the provisions of Section 55A of the Act, which provides for reference of the question of valuation by the AO to the departmental valuer arises only for arriving at the fair market value of the property for the purpose of capital gains tax and that there is no question of using the said provision for any other purpose. Counsel, in support of the said contention, relied on the decision of this Court in Commissioner of Income Tax Vs. Dr. C. Ashokan Nambiar, . Standing counsel further submitted that there is no provision in the Act enabling the AO to refer the question of cost of construction to find out as to whether there is any unexplained investment. He also submitted that the reliance placed on the provisions of Section 142(2) of the Act by the two appellate authorities are not justified.

5. Learned standing counsel for the Revenue, on the other hand, submits that the provision of Section 55A of the Act, providing for valuation of the cost of construction of an asset for the purpose of capital gains would equally apply for determination of the cost of construction of a building for other purposes also. He further submitted that even assuming that Section 55A is not attracted, Sections 131, 133(6) and 142(2) of the Act enables the AO to collect a valuation report in respect of the cost of construction of a building by making a reference to the Departmental Valuation Officer. Counsel also submits that the material so gathered by the AO does not have any binding effect and that it will only have the effect of materials gathered in an enquiry u/s 142(2) of the Act. He further submitted that the AO has put the entire materials collected and afforded reasonable opportunity to the applicant to show-cause against the same and, it was only after due consideration of all these matters, the AO has fixed the cost of construction of the building in question. Standing counsel also relied on the decision of the Madras High Court in C.T. Laxmandas Vs. Asst. Commissioner of Income Tax and another, and the decision of the Andhra Pradesh High Court in Daulat Ram v. ITO, (1990) 181 ITR 119 (AP) , standing counsel also relied on the decision of the Full Bench of the Punjab and Haryana High Court in Jindal Strips Ltd. Vs. Income Tax Officer, Central Circle III, New Delhi and Another, as also the decision of the Guwahati High Court in Income Tax Officer Vs. Gita Rani Banik, .

6. As already noted, the only question that arises for consideration in this case is as to whether the AO in the instant case had jurisdiction under the Act to -refer the question of cost of construction of a building constructed by the assessee to the Departmental Valuation Officer.

According to the assessee, the AO has no such jurisdiction, since there is no statutory provision enabling such reference. True, there is no such specific provision under the Act for reference of the question of cost of construction of a building to the departmental valuer for the purpose of finding out whether there is any unexplained investment in the building. The only specific provision available in the Act for reference to the departmental valuation officer to ascertain the cost of construction of a building is contained in Section 55A of the Act. Admittedly, such a reference is required only for the purpose of arriving at the fair market value of an asset for the purpose of capital gains tax. In fact, a Division Bench of this Court in Dr. C. Ashok Nambiar''s case (supra) has held that Section 55A has application only to transaction involving capital gains. Of course, the Madras High Court in C.T. Taxmandas''s case (supra) took the view that the scope of Section 55A of the Act cannot be restricted to assessment of a particular category of income alone, which would defeat the very object of enacting such a provision. It is also seen that the Madras High Court had relied on the decision of the Andhra Pradesh High Court in Daulatram''s case (supra) and also the Full Bench decision of the Punjab and Haryana High Court in Jindal Strips Ltd.''s case (supra). We also find that the Guwahati High Court in Gita Rani Banik''s case (supra) has taken the view that the AO would be competent in making an enquiry relating to the cost of construction of a building constructed by the assessee, and to call for a report on the valuation of the cost of construction from the valuation officer u/s 55A of the Act. However, since this Court has taken the view that Section 55A of the Act is not available for purposes other than capital gains tax, we are bound by the said decision.

7. We also notice that the Guwahati High Court decision mentioned above relies on the provisions of Sections 131, 133(6) and 142(2) of the Act, enabling the AO to make such enquiry, which will take in the power to collect materials in the form of valuation report from the departmental valuer. The Andhra Pradesh High Court in Daulatram''s case (supra) also relied on the provisions of Sections 131, 133(6) and 142(2) of the Act and has taken the view that a reference is permissible u/s 142(2) of the Act.

8. Since the two appellate authorities have only relied on the provisions of Section 142(2) of the Act to justify the reference of the question of cost of construction of the building by the AO to the Executive Engineer, Valuation Cell, Thiruvananthapuram, we will also advert to the said provision. The heading of Section 142 reads, "Enquiry before assessment", and Sub-section (2) thereof reads thus :

"(2) For the purpose of obtaining full information in respect of the income or loss of any person, the ITO may make such enquiry as he considers necessary."

In the instant case, as already noted, the assessee had furnished the cost of construction of the building at Rs. 2,09,094. The AO wanted to ascertain the correctness of the said valuation. Since the Executive Engineer, Valuation Cell is the competent authority under the Act for valuation of the assets, the AO thought that it would be better that a report is obtained from the said authority regarding the cost of construction of the building. For that purpose, the AO has referred the matter to the said authority, The said authority conducted inspection of the building and submitted a report to the AO. The AO had put the said report, along with a pre-assessment notice, to the assessee for her objection. As already noted, the assessee had submitted her objections and, after consideration of the materials, the AO has estimated the cost of construction. As already noted. Section 142(2) enables the AO to conduct such enquiry as he considers necessary for obtaining full information in respect of the income or loss of any person. Certainly, the cost of construction of the building was a relevant matter in respect of the income or loss of the assessee. Necessarily, therefore, the AO has to conduct an enquiry. As already noted, since the AO did not have the expertise in the matter of valuation of the building, he had chosen to obtain a report from the competent person. Here, it must be noted that the reference was not with notice to the assessee, nor was the assessee given any opportunity by the Executive Engineer before preparing the report. This is virtually a collection of information behind the assessee with regard to the cost of construction of the building. In such circumstances, the assessee can legitimately contend before the AO that the information regarding the cost of construction, thus gathered behind the assessee, should be furnished to the assessee so as to enable the assessee to file objections. There is no dispute that all such opportunities have been given and the AO has, after considering the objections, modified the estimation by way of deleting certain expenses incurred. According to us, Section 142(2) of the Act enables the AO to refer the question of cost of construction of a building for the limited purpose of gathering information regarding the cost of construction. It did not have any binding effect on the AO. It only had the effect of information gathered in an enquiry.

In these circumstances, we are of the view that the AO was well within his power to gather information regarding the cost of construction by making a reference to the Executive Engineer, Valuation Cell. This view of ours is supported by the decisions of the Guwahati and Andhra Pradesh High Courts supra. In these circumstances, we answer the question referred in the affirmative, i.e., in favour of the Revenue and against the assessee.