
(2014) 09 MAD CK 0028

In the Madras High Court

Case No : Writ Petn. Nos. 22965 and 22966 of 2014

Chandrabai and Others

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 02-09-2014

Acts Referred:

Citation : (2015) 278 CTR 365

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Advocate : R. Sivaraman, Advocate for the Appellant; T. Pramod Kumar Chopda, Advocate for the Respondent;

Judgement

V. Ramasubramanian, J.

1. The petitioners have come up with the above writ petitions challenging the orders passed by the respondents, refusing to withdraw the notices for reopening the assessment in respect of the asst. yr. 2003-04. Heard Mr. R. Sivaraman, learned counsel for the petitioners. Mr. T. Pramod Kumar Chopda, learned standing counsel for the Department takes notice.

2. The petitioners, along with two others purchased land and building No. 87, Mint Street, Sowcarpet, Chennai-1, during the asst. yr. 2000-01. They demolished the existing building and started constructing a new building during the financial year 2001-02. It appears that the petitioners showed a particular amount in the asst. yr. 2004-05 as their share of investments towards the purchase of the land and the cost of construction. The petitioners accordingly filed their return of income for the asst. yr. 2004-05.

3. It also appears that in the course of assessment proceedings of one of the co-owners by name Shivlal, the AO concerned required details of the cost of construction and the assessee produced a detailed valuation report from a registered valuer. The registered valuer valued the building at Rs. 72,22,621. Thereafter, a reference was made to the Departmental Valuation Officer. He

valued the building at Rs. 1,74,20,000, by his report dt. 29th Dec., 2006. Consequently, the AO of that co-owner, adopted 1/4th of the said value for that assessee.

4. Based upon the information provided by the AO of that co-owner by name Shivalal, a notice under s. 148 was issued to the petitioners on 11th March, 2008. The AO's passed an order dt. 18th Dec., 2008 under s. 143(3) r/w s. 147(a), determining a particular amount as unexplained investment under s. 69B.

5. Aggrieved by the said order, the petitioners filed first appeals before the CIT(A). By an order dt. 15th June, 2009, the CIT(A) allowed the appeals on the ground that the reopening of assessment under s. 148 was not justified.

6. As against the said orders, the respondents preferred two appeals before the Tribunal in ITA Nos. 1370 and 1371/Mad/2009. The Tribunal allowed the appeals by an order dt. 20th Nov., 2009 and remitted the matter back to the appellate authority for a consideration on merits.

7. The CIT(A) thereafter considered the matter on merits and passed orders on 13th Dec., 2011 and 15th Dec., 2011 respectively holding that 20 per cent deduction had to be given from the value determined by the Departmental Valuation Officer, to arrive at the State PWD rates. Accordingly, the appellate authority determined the cost of construction at a particular amount and held that the cost of construction could be apportioned or spread over between two years namely asst. yrs. 2003-04 and 2004-05 in the ratio of 63.63 per cent and 36.37 per cent respectively. Aggrieved by the order of the CIT(A), the Department filed appeals and the petitioners also filed cross-objections. The Tribunal, by its order dt. 11th Oct., 2012, set aside the orders of the appellate authority and remitted the matter back to the file of the AO for a fresh consideration on the aspect of cost of construction.

8. It appears that the Department had taken up the matter further and filed a tax case appeal before this Court under s. 260A. It is now pending. At this stage, the respondents issued the notices under ss. 148 r/w 150(1) of the Act on 21st March, 2014. The petitioners filed objections requesting the respondents to furnish reasons for reopening the assessment. In reply, the respondents furnished reasons.

9. Thereafter, the petitioners filed detailed objections on 11th June, 2014. By the said objections, the petitioners requested the respondents to withdraw the notices, on the ground that the notice under s. 148 is barred by time and that it is not saved by s. 150(1). But, by the impugned orders dt. 10th July, 2014, the respondents refused to withdraw the notices. Therefore, the petitioners have come up with the above writ petitions.

10. The short ground on which the petitioners challenge the initiation of proceedings for reassessment is that the time-limit stipulated under s. 149(1) for issuing a notice under s. 148 has already expired and that the case cannot come

under s. 150(1). Under cl. (a) of sub-s. (1) of s. 149, the time-limit is normally four years unless the case falls under cl. (b) or cl. (c). The time-limit is six years under cl. (b), if the income chargeable to tax, which has escaped assessment amounts to or is likely to amount to Rs. 1 lakh or more for that year. We are not concerned with cl. (c), since it relates to an asset including financial interest in any entity located outside India. Under s. 150(1), a notice under s. 148 may be issued at any time, notwithstanding anything contained in s. 149, if it is for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under the Act.

11. Sec. 150 requires reproduction and, hence, it is reproduced as follows:

"150. Provision for cases where assessment is in pursuance of an order on appeal, etc.--(1) Notwithstanding anything contained in s. 149, the notice under s. 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision or by a Court in any proceeding under any other law.

(2) The provisions of sub-s. (1) shall not apply in any case where any such assessment, reassessment or recomputation as is referred to in that sub-section relates to an assessment year in respect of which an assessment, reassessment or recomputation could not have been made at the time the order which was the subject-matter of the appeal, reference or revision, as the case may be, was made by reason of any other provision limiting the time within which any action for assessment, reassessment or recomputation may be taken."

12. As seen from a bare reading of the provision, the requirement of s. 150(1) is that to escape the limitation stipulated in s. 149, the reopening of assessment should be in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under the Act. There are two limbs to s. 150(1), either of which should be satisfied for invoking s. 150(1). They are (i) reopening of assessment should be in consequence of an order passed by an authority in any proceeding under the Act by way of appeal, reference or revision or by a Court in any proceeding under any other law; alternatively (ii) the reopening of assessment should be for the purpose of giving effect to any finding or direction contained in any order passed by any authority in any proceeding under the Act by way of appeal, reference or revision or by a Court in any proceeding in any other law.

13. In the case on hand, the reopening of assessment is proposed to be made in relation to the asst. yr. 2003-04. Therefore, the period of six years prescribed under s. 149, is already over. Hence, the Department should establish that this case falls within any one of the two requirements of s. 150(1).

14. The respondents rely upon the order passed by the Tribunal on 11th Oct.,

2012, setting aside the orders of the appellate authority and remitting the matter back to the AOs for a fresh consideration on the aspect of cost of construction. This was in relation to an order of assessment relating to the asst. yr. 2004-05.

15. A brief history of what happened in two rounds of litigation that went upto the Tribunal may be necessary at this juncture. As stated earlier, the petitioners along with two others including a person by name Shivilal purchased land and building during the previous year relevant to the asst. yr. 2000-01. All the co-owners demolished the building and started new construction in the financial year 2001-02. The AO concerned called upon the other co-owner Shivilal to furnish details of the cost of construction. Not satisfied with the valuation report given by him, the AO concerned made a reference to the DVO. On the basis of the valuation made by the DVO the AO concerned arrived at the investment made by Shivilal. Based upon the assessment made in respect of Shivilal, the AOs of the petitioners herein reopened their assessments, for making an addition of unexplained investment in the house property. The orders of the AOs were challenged by the petitioners before the CIT(A). The CIT(A) allowed the appeals and held that the AOs ought not to have reopened the assessment, on the ground that the valuation report made by the DVO could not be a conclusive material.

16. The above decision of the CIT(A) was challenged in two appeals by the Department in ITA Nos. 1370 and 1371/Mad/2009. The appeals were allowed by the Tribunal by an order dt. 20th Nov., 2009 and the matter was remitted back to the CIT(A) to be dealt with on merits.

17. By orders dt. 13th Dec., 2011 and 15th Dec., 2011, the CIT(A) went into the merits of the case, compared the cost of construction as estimated by the DVO with the State PWD rates and arrived at the addition to be made towards unexplained investment. After doing so, the CIT(A) directed the amounts to be spread over for two assessment years namely 2003-04 and 2004-05 in the ratio of 63.63 per cent and 36.37 per cent respectively. As against the orders of the CIT(A), one set of appeals were filed by the ITO and one set of cross-objections were filed by the assessees. All the appeals and the cross-objections were heard together and by a common order dt. 11th Oct., 2012, the Tribunal remitted the matter back to the AOs for a fresh consideration regarding the cost of construction.

18. It is seen from the order of the Tribunal that the grievance of the Revenue was that the CIT(A) should not have adopted the State PWD rates and should not have allowed spreading over of investment for two years. The grievance of the assessees was that the CIT(A) ought not to have given any direction other than for the original assessment year and that the actual amount spent as reflected in the books of account should have been believed. After considering the materials before them and the law laid down by various Courts, the Tribunal found that for determining the cost of construction, the matter required a revisit by the AOs.

19. On the second grievance of the Department that spreading over ought not to have been permitted, the Tribunal relied upon the decision of the Supreme Court in *Rajinder Nath and Others Vs. Commissioner of Income Tax , Delhi*, and held that when the assessee themselves claimed that the cost of construction was spread over to 2-3 years, the finding that the unexplained cost of construction should also be spread over cannot be found fault with. Therefore, the Tribunal rejected in para 17, the objection of the Department that the CIT(A) had no power to direct spreading of unexplained portion of investment.

20. In the light of para 17 of the order of the Tribunal dt. 11th Oct., 2012, it is contended by Mr. T. Pramod Kumar Chopda that there was a finding/direction by an authority under the Act and that therefore, this case is covered by the requirements of s. 150(1).

21. But, it is contended by Mr. R. Sivaraman, learned counsel for the petitioners that the appeals and the cross-objections before the Tribunal arose out of reopening of assessment for the year 2004-05 and that eventually, the Tribunal set aside all the orders and remitted the matter back to the AOs for a fresh consideration on the cost of construction. Therefore, the learned counsel contends that once the orders of the CIT(A) had been set aside and the matter remitted back with respect to the asst. yr. 2004-05, there was no finding or direction that was available for the Department to invoke s. 150(1).

22. I have carefully considered the above submissions.

23. Since the question raised in these writ petitions revolves around the order of the Tribunal and since the question as to whether the requirements of s. 150(1) are satisfied or not, has to be found out only from the order of the Tribunal, it is necessary to have a look at paras 17 and 18 of the order of the Tribunal. Hence, they are extracted as follows:

"In the result, we are not agreeing with the argument of learned Departmental Representative that CIT(A) had no such power to direct spreading of the unexplained portion of investment, if any, to the period of construction.

Nevertheless, in view of the factual situation of the case, we are setting aside the orders of authorities below and remitting the issue back to the file of the AO for consideration afresh. The AO has to consider the aspect of cost of construction in accordance with law and he has to give an opportunity to the assessee to explain their case and justify the cost of construction as returned by them."

24. From the operative portion of the order of the Tribunal extracted above, it is seen that the Tribunal remitted the matter back to the AOs for a fresh consideration on the aspect of cost of construction. But at the same time, the Tribunal also rejected the stand taken by the Department that spreading over is not possible. Therefore, the AOs are now required to do two things namely (a) to arrive at the correct cost of construction and find out whether there is any unexplained portion of investment; and (b) to allow the assessee to have the

benefit of spreading the unexplained portion of investment over two assessment year namely 2003-04 and 2004-05.

25. In case the assesseees do not want the benefit of spreading over, the AOs may simply arrive at the cost of construction and load the unexplained portion of investment on the declared income of the asst. yr. 2004-05. In case the assesseees choose to have the spread over, the AOs are now bound to grant the benefit, in view of the observations made by the Tribunal in para 17 of its order. In such circumstances, what is recorded in para 17 of the order of the Tribunal, is actually a finding. As I have pointed out earlier, the necessity to reopen the assessment beyond the period of six years may arise, by invoking s. 150(1), either as a consequence of an order passed or in pursuance of a finding or direction by an authority.

26. In *Rajinder Nath vs. CIT (supra)*, the Supreme Court was concerned with the definition of the expressions "finding" and "direction". The Supreme Court held that a finding given in an appeal, revision or reference arising out of an assessment must be a finding necessary for the disposal of the particular case that is to say in respect of the particular assessee and in relation to the particular assessment year. The Supreme Court pointed out that to be a necessary finding, it must be directly involved in the disposal of the case. If, in order to render a finding in respect of A, a finding in respect of B is also called for, such a finding may only be an incidental finding.

27. But, insofar as the case on hand is concerned, what was observed by the Tribunal in para 17 is not merely incidental, but is actually consequential. It may be seen from the observations of the Tribunal in para 15 of its order that the assessee himself appears to have claimed that the construction was spread over to 2-3 years. This is why the Tribunal upheld the orders of the CIT(A) granting the benefit of spread over.

28. If we go back once again to the order of the CIT(A) dt. 13th Dec., 2011 and 15th Dec., 2011 respectively, the assesseees themselves claimed that the construction was spread over for two years namely during the asst. yrs. 2003-04 and 2004-05 as per the valuation report in a particular proportion. This is why the CIT(A) directed the spreading over at the ratio of 63.63 per cent and 36.37 per cent. The petitioners herein are the beneficiaries of this finding rendered by the CIT(A). This finding has been upheld by the Tribunal. Therefore, the contention of the learned counsel for the petitioners that there was no finding or direction and that the Tribunal had set aside the orders of the CIT(A), cannot be accepted.

29. In *Income Tax Officer, A-Ward, Sitapur Vs. Murlidhar Bhagwandas, Lakhimpur Kheri*, the Supreme Court held that the expressions "finding" and "direction" can be given full meaning and that the finding is a finding necessary for giving relief in respect of the assessment of the year in question and a direction is a direction, which the appellate or revisional authority is empowered to give. In so far as the

words "in consequence of and to give effect to" are concerned, the Supreme Court pointed out that they have to be collated with and cannot enlarge the scope of the finding or direction under the second proviso to s. 34(2) of the 1922 Act. Similarly, in *Bhanji Bagawandas Vs. Commissioner of Income Tax, Madras*, the Supreme Court reiterated the very same principles and held that a finding could only be that which was necessary for the disposal of an appeal in respect of an assessment of a particular year. Again in *Daffadar Bhagat Singh and Sons Vs. The Income Tax Officer, A-Ward, Ferozepore*, and in *Commissioner of Income Tax, U.P. Vs. Mohd. Shakoor Mohd. Bashir*, the Supreme Court reiterated the same principles.

30. If we have a look at the orders of the CIT(A), a portion of which alone was set aside by the Tribunal, it could be seen that the CIT(A) rendered a finding that the unexplained investment should be allowed to be spread over. That finding is upheld by the Tribunal, though the ultimate conclusion of the CIT(A) was set aside on a different aspect.

31. Therefore, the contention of Mr. T. Pramod Kumar Chopda, learned standing counsel for the Department that there was a finding and that this has led to the reopening of the assessment, has to be upheld. As a matter of fact, the reopening of assessment is a natural consequence of the claim for spread over. Suppose the AOs arrive at a cost of construction in pursuance of the order of remand now passed by the Tribunal, the AOs are obliged, by virtue of the orders of the CIT(A) and the Tribunal, to allow the assesseees to spread it over. At that stage, the reopening becomes inevitable. Hence, I do not find any justification to interfere with the impugned orders. Therefore, the writ petitions are liable to be dismissed. Accordingly, they are dismissed. No costs. Consequently, the above miscellaneous petitions are also dismissed.