(2011) 05 KAR CK 0016

In the Karnataka High Court

Case No : IT Appeal No. 1285 of 2006 A.Y. 2001-02

CIT and Another — APPELLANT

Vs

Ganjam Nagappa and Sons (HUF) — RESPONDENT

Date of Decision : 26-05-2011

Acts Referred:

Income Tax Act, 1961 — Section 147, 148

Citation : (2011) 05 KAR CK 0016

Hon'ble Judges : V.G. Sabhahit, J;Ravi Malimath, J

Bench : Division Bench

Advocate : K.V. Aravind for M.V. Seshachala, for the Appellant; D.S. Anirudha, for the Respondent

Final Decision : Allowed

Judgement

V.G. Sabhahtt, J.—This appeal by the revenue has been admitted for consideration of the following substantial question of law :

Whether the Tribunal was right in holding that the assessing authority cannot reopen the proceedings in relation to the escaped income in exercise of the powers u/s 147 of the Act and whether the same amounts to taking different opinion having accepted the return submitted by the assessee for the financial year ?

The assessee filed a return declaring the income of Rs. 4,27,598 on 15-3-2002 for the asst. yr. 2001-02. However, he filed a revised return claiming loss of Rs. 3,62,411 on 18-9-2002. The AO in exercise of the powers u/s 148 of the Act issued a notice u/s 148 of the Act reopening the assessment and the assessee opposed, reopening and the AO by order dt. 17-12-2004 held that in the statement of the total income enclosed to the return the business loss of Rs. 5,26,182 was arrived and it was not clear either from the P&L a/c or the final statement of income about the nature of the business carried on by the assessee. Further, the rental income is shown as Rs. 60,000 only and there was no evidence available on record about the rental receipt of Rs. 60,000 and all the expenses were debited against (he rental receipt and arrived at a gross loss of Rs. 13,16,142. As per the provisions of section 24 the deductions available to the assessee are municipal taxes, 1/4th for repairs and interest on borrowed capital, whereas the assessee has arrived at a loss of Rs. 13,16,142 as against the income of Rs. 45,000 from house property. Accordingly, the AO held that there is a valid ground for reopening the assessment and further held that the depreciation that was available was 50 per cent (sic-5 per cent) on the total value and not 10 per cent as claimed by the assessee as per section 32(1) of the IT Act according to Expln. 5 to section 43(1) of the Act. The AO further held that an amount of Rs. 1,28,638 is liable to be disallowed and added back to the total income of unexplained expenditure u/s 69 of the IT Act and accordingly passed an assessment order. Being aggrieved by the same, the assessee filed an appeal before the CIT(A)-IV, Bangalore in IT Appeal No. 69 R-8 CIT(A)IV of 2004-05 and the said appeal was dismissed by the appellate authority. Being aggrieved by the same, the assessee preferred an appeal before the Tribunal. Bangalore, in ITA 1417/Bang/ 2005., It was urged before the Tribunal that the AO was not justified in reopening the order of assessment as there was only change of opinion and no ground whatever was made and accepted the contention of the assessee and held that the reopening of the order of assessment itself was based on change of opinion only and there was no valid ground for reopening the assessment and therefore set aside the order of assessment passed by the appellate authority confirming the order of assessment and cancelled the assessment. Since reopening itself could not have been done it did not go into the merits of the claim of the parties and accordingly allowed the appeal. Being aggrieved by the said order of the Tribunal dt. 12-5-2006 this appeal is filed and the appeal has been admitted to consider the aforesaid substantial question of law.

2. We have heard the learned counsel appearing for the appellants and the learned counsel appearing for the respondent.

3. The learned counsel appearing for the appellants has taken us through the reasoning recorded by the AO for reopening the order of assessment and also the order of the appellate authority wherein reopening of the assessment was upheld and also the order of the Tribunal that the reopening of the assessment has been set aside and he further submitted that the reasoning assigned by the AO would show that while passing the order for reopening of the assessment order valid reasons were given by the AO and it was not a mere change of opinion or on the basis of suspicion reopening of the case gets vitiated and the same was confirmed by the appellate authority and the order of the Tribunal is contrary to the material on record and therefore it is liable to be set aside. The Tribunal has not gone into the merits of the claim of the parties.

4. The learned counsel appearing for the respondent submitted that the reasons assigned by the AO which have been confirmed by the appellate authority are only a mere change of opinion or suspicion and there is no ground made out for

reopening the order of assessment and therefore the order of the Tribunal is justified and since the Tribunal upheld the contention of the assessee that the order of assessment could not be reopened the appeal has been allowed without going into the merits of the claim of the parties.

5. We have given careful consideration to the contentions of the learned counsel appearing for the parties.

6. The principle regarding reopening of the order of assessment u/s 147 has been considered by the Honble Supreme Court in the case Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, wherein the Honble Supreme Court has clearly laid down that a mere suspicion or change of opinion is not a ground for reopening the order of assessment and there should be tangible material to come to the conclusion that there is escapement of income from assessment; reasons must have a live-link with the formation of the belief. The contention of the learned counsel appearing for the parties is considered in the light of the provisions of section 147 as interpreted by the Honble Supreme Court in the above-said CIT vs. Kelvinator of India Ltd. (supra) case. It is clear that having regard to the reasons disclosed by the AO for reopening the order of assessment are not inferrable only to the change of opinion or suspicion in the order of assessment but there are valid tangible grounds for reopening the order of assessment and reasons assigned by the AO which have been confirmed to form a link to the formation of opinion.

7. As it is clear from the perusal of the observations made by the AO regarding the reasons for reopening the assessment that he has assigned detailed reasons about the depreciation claim in respect of building, u/s 32(1) of the Act, at 10 per cent though it was only 5 per cent to be admissible as per the section and in respect of income of Rs. 60,000, the total expenditure of Rs. 13,16,142 was shown and deductions available u/s 24 were for the municipal taxes and l/4th for repairs and interest on borrowed capital. The said finding on the question of fact has been affirmed by the appellate authority. However, the Tribunal has proceeded to interfere with the concurrent finding on the question of fact on the ground that the reopening of the assessment order was only on the basis of suspicion and it is clear from the order passed by the Tribunal that no cogent reasons are given for interfering with the concurrent finding of fact or to set aside the reasons given by the AO for reopening the order of assessment and therefore the order passed by the Tribunal cannot at all be sustained and the same is liable to be set aside. However, since the Tribunal has not gone into the claim of the parties regarding the depreciation claim and the deduction claim in the return as the same is a question of fact the matter has to be remitted to the Tribunal to pass fresh orders on merits and in accordance with law. Accordingly, the finding of the Tribunal that there is no ground for reopening the order of assessment is set aside and the finding of the appellate authority confirming the order of the AO reopening the order was justified is restored. The appeal is restored with a direction to the Tribunal to dispose of the appeal on merits and in

accordance with law.

8. Accordingly, we answer the question of law in favor of the revenue and against the assessee and pass the following order :

(1) The appeal is allowed.

(2) The order passed by the Tribunal. Bangalore Bench B in ITA No. 1417/ Bang/2005, dt. 12-5-2006 is set aside and ITA No. 1417/Bang/2005, is restored to the file of the Tribunal to dispose of the appeal on merits and in accordance with law.