(2011) 06 KAR CK 0034

In the Karnataka High Court

Case No : IT Appeal No''s. 1176 and 1190 of 2006 (Block period 1st April, 1991 to 30th May)

CIT and Another — APPELLANT

Vs

H.M. Constructions — RESPONDENT

Date of Decision : 08-06-2011

Acts Referred:
Income Tax Act, 1961 — Section 113, 132, 158 BA, 260 A

Citation : (2011) 06 KAR CK 0034

Hon'ble Judges : V.G. Sabhahit, J;B. Manohar, J

Bench : Division Bench

Advocate : M.V. Seshachala, for the Appellant; Abhinav R., for the Respondent

Judgement

V.G. Sabhahit, J.—These two appeals are filed by the Revenue u/s 260A of the IT Act, 1961 (hereinafter called the Act). They have been admitted to consider the following substantial questions of law on 29-8-2007 :

(1) Whether the Tribunal was right in holding that cash credit of Rs. 65 lakhs and the loss to the extent of Rs. 1,21,80,315 detected during the course of search generated from sham land dealing transactions should be brought to tax in regular assessment and not block assessment ?

(2) Whether the Tribunal was right in holding that the return declared beyond due date a sum of Rs. 24,82,420 for the assessment year 2000-01 pursuant to search cannot be brought to tax in the block assessment ?

When the matter was posted for hearing on 3-3-2001, after hearing learned counsel appearing for the parties, another substantial question of law has been framed as follows :

Whether the finding of the Tribunal that surcharge cannot be levied under proviso to section 113 of the IT Act, 1961 is contrary to law in view of the decision of the Honble Supreme Court in Commnr. of Income Tax, Jalandhar-I Vs. Shri Rajiv Bhatara, and liable to be set aside ?.

2. The material facts of the case leading up to these appeals with reference to the rank of the parties before the Tribunal are as follows :

The assessee is a partnership firm having two partners with 50 per cent share each, carrying on the business in real estate. The premises of the assessee was searched u/s 132 of the Act. Proceedings u/s 158BC of the Act was initiated for the block period 1-4-1991 to 29-5-2001 having regard to the material found at the time of search and satisfaction was recorded by the assessing officer. It was found that assessing officer found that assessee had filed original return showing fixed deposits as security for the assessment year 1995-96 for availing the loan and these fixed deposits were found to be in fictitious names and the same was treated as undisclosed income of the assessee by the assessing officer. The assessee had earned interest on fixed deposits and the same had not been declared in the original return and this was treated as undisclosed income of the assessee amounting to Rs. 9,05,894. It was found in the course of search that assessee when purchasing Sy. Nos. 59, 62, 71 and 73 of Huskur village, Bangalore, had registered the sale deeds for Rs. 8,25,000 (Rs. 3 lakhs per acre). As per the agreement to sell, the sale price was fixed for Rs,. 13 lakhs per acre and this was admitted by the sellers. Therefore, difference of money between the agreement of sale and sale deed was brought to lax as undisclosed income in a sum of Rs. 30,35,750. It was also found that the assessee, for the assessment year 1999-2000 declared a sum of Rs. 38,15,000 by filing return of income and the premises No. 7/1, Sampangi Tank Road. Bangalore was purchased by the assessee as per the return on 25th March, 1995 for Rs. 2,23,27,309 and was shown as stock-in-trade at Rs. 2,27,13,565. In the return for the assessment year 1999-2000, assessee showed No. 7/1, Sampangi Tank Road, Bangalore to have been sold for Rs. 1,05,33,250 and claimed a loss of Rs. 1,21,80,315 and a sum of Rs. 65 lakhs was shown as advance received. The claim that the property was sold to four persons Sri Sharavana, Sri Venkatesh, Smt. Saroja and Sri G Anand was found to be false. In fact, amount of Rs. 65 lakhs was received from these persons. The property continuing in possession of the assessee and no registered sale deed had taken place. These four persons stated that the transaction was sham. It was also found that development agreement was prepared to avoid tax and the loss claimed was found to be false. Further, the amount was received by the assessee. Both the amounts were treated as undisclosed income under sections 158B(b) and 158BB of the Act and brought to tax in the block period amounting to Rs. 1,21,80,315 and Rs. 65 lakhs respectively. The assessing officer found that the belated returns were filed declaring the amount of Rs. 24,82,420 and the amount declared in the belated return was treated as undisclosed income as per section 158BB of the Act in a sum of Rs. 24,82,420. Being aggrieved by the order passed by the assessing officer dt. 29-5-2003, the appeal was preferred before the CIT(A)-VI Bangalore in IT Appeal No. 263/Asstt. CIT CC-2(3)/CIT(A)-VI/2003-04. The appellate authority by order dt. 31st Dec, 2004 held that addition of Rs. 70 lakhs as undisclosed income should be deleted and treated as unexplained investment for the assessment year 1995-96, the interest on fixed deposit of Rs. 9,05,894 should be brought to tax by reopening assessments for the assessment year 1995-96 the addition of Rs. 30,35,750 regarding purchase of land as undisclosed income was upheld and regarding bogus losses amounting to Rs. 1,21,80,315 + Rs. 65 lakhs, was upheld and the amount declared in the belated return amounting to Rs. 24,82,420 was upheld and the finding of the assessing officer that the said amount should be treated as undisclosed income was confirmed. Being aggrieved by the said order passed by the appellate authority dated 31-12-2004, the appeals were filed by the Revenue in ITA No. 533/Bang/2005 and IT(SS)A No. 21/Bang/2005 and cross-objections were filed by the assessee in C.O. No. 66/Bang/2005. The Tribunal by order dated 21-4-2006 upheld the finding of the appellate authority that addition of Rs. 70 lakhs as undisclosed income should be deleted and treated as unexplained investment for the asst. yr. 1995-96. The finding that the interest on fixed deposit (Rs. 9,05,894) should be brought to tax by reopening the assessments for the assessment year 1995-96 was upheld and so far as money payment made for purchase of land amounting to Rs. 30,35,750, the matter was remitted back to the assessing officer to reconsider the evidence and record the fresh finding. So far as bogus loss and cash amounting to Rs. 1,21,80,315 + Rs. 65,00,000, the matter was remitted back to the assessing officer to reconsider the evidence and permit cross-examination and to redo the issues in regular assessment and not block assessments, The Tribunal held that amount declared in the belated return amounting to Rs. 24,82,420 should not be brought to tax in block assessments and further held that search was conducted on 1-6-2002 and in view of proviso to section 113 of the Act, no surcharge could be levied and set aside the order passed by the appellate authority and the assessing officer. Being aggrieved by the order passed by the Tribunal, these appeals are filed by the Revenue.

3. We have heard the learned counsel appearing for the parties.

4. The learned counsel appearing for the Revenue submitted that substantial questions of law (1) and (2) are to be answered in favour of the Revenue as the order of the Tribunal holding that bogus loss and receipt of cash amounting to Rs. 1,21,80,315 and Rs. 65,00,000 should be treated in regular assessments and not in block assessments and in setting aside the order passed by the appellate authority and the assessing officer treating the amount declared in the belated return in a sum of Rs. 24,82,420 as undisclosed income are clearly erroneous. He has taken us through the order passed by the assessing officer, appellate authority and the Tribunal pertaining to the above two substantial questions of law. He further submitted that so far as exemption of surcharge is concerned, the decision rendered in Commr. of Income Tax-I, New Delhi Vs. Vatika Township P. Ltd., is referred to a Larger Bench and appropriate orders can be passed subject to the result of the said decision.

The learned counsel for the revenue has relied upon the decision in Commnr. of Income Tax, Jalandhar-I Vs. Shri Rajiv Bhatara, wherein it has been held that even without the proviso to section 113 of the Act which was inserted vide Finance Act, 2002 with effect from 1-6-2002 surcharge was leviable on the tax and the proviso to section 113 is clarificatory in nature.

5. The learned counsel appearing for the respondent submitted that (he finding of the Tribunal that the amount of Rs. 1,21,80,315 and Rs. 65,00,000 regarding bogus loss and cash should be considered in the regular assessment and not in Block assessments is justified as the material on record would show that the said claims pertain to the assessment year 1999-2000 and therefore could not be determined in the block period. He further submitted that addition of Rs. 24,82,420 showed in the belated return could not be treated as undisclosed as the assessing officer has not shown any material to show that such income was undisclosed income. Therefore, the order passed by the Tribunal is justified. He has also submitted that in view of the decision relied on by the Tribunal the order deleting imposition of surcharge is also justified and therefore the substantial questions of law may be answered against the Revenue and in favour of the assessee.

Learned counsel appearing for the respondent has relied on the following decisions :

(1) Commissioner of Income Tax Vs. Kewal Krishan Baweja,

(2) Commissioner of Income Tax Vs. J.K. Narayanan,

(3) CIT v. Tirupati Enterprises (2008) 10 DTR (Raj) 17

(4) CIT v. Vatika Township (P) Ltd. (supra)

In CIT v. Vatika Townships (P) Ltd. (supra) the question as to whether the provisions of section 113 of the Act which was introduced by Finance Act, 2002 with effect from June, 2002 is clarificatory or retrospective in nature has been referred to a Larger Bench.

6. We have given careful consideration to the contentions of learned counsel appearing for the parties and scrutinised the material on record.

7. The material on record would clearly show that during search of the premises of the assessee, certain documents were found in the premises which provided reasonable grounds to satisfy the assessing officer to initiate proceedings u/s 158BC of the Act and proceedings were initiated for the block period 1-4-1991 to 29-5-2001. The material found has been referred to in the order of assessment passed by the assessing officer pertaining to the abovesaid period. It is clear from the order passed by the assessing officer that assessing officer found that assessee had declared a sum of Rs. 38,15,000 by filing return of income during the year 1999-2000 and property bearing No. 7/1, Sampangi Tank Road, Bangalore was purchased by the assessee on 25-3-1995 for Rs. 2,23,27,309 and was shown as stock-in-trade. In the return for the assessment year 1999-2000, assessee showed property No. 7/1 Sampangi Tank Road, Bangalore to have been

sold for Rs. 1,05,33,250 and claimed a loss of Rs. 1,21,80,315 and a sum of Rs. 65,00,000 was shown as advance amount and therefore the assessing officer found that the claim that property that was sold to four persons i.e., Sri Sharavana, Sri Venkatesh, Smt. Saroja and Sri G. Anand was found to be false and the amount of Rs. 65 lakhs was received from these persons. The property is continued to be in possession of the assessee and no sale deed has been registered and these four persons stated that the transaction was sham. Therefore, the amount of Rs. 1,21,80,315 and Rs. 65 lakhs was treated as undisclosed income by the assessing officer. So far as the amount declared in the belated return amounting to Rs. 24,82,420 was treated as undisclosed income u/s 158BB of the Act. Being aggrieved by the said order passed by the assessing officer assessee preferred an appeal before the appellate authority and the appellate authority by order dt. 31-12-2004 confirmed the addition of amount of undisclosed income of Rs. 1,21,80,315 and Rs. 65 lakhs which was bogus loss and cash and also treated the amount claimed in the belated return of Rs. 24,82,420 as undisclosed income u/s 158BB of Act. Being aggrieved by the said findings and also other findings of the appellate authority, the appeal was preferred by the Revenue and the assessee before the Tribunal. The Tribunal, taking into consideration material facts pertaining to the case, in respect of Rs. 1,21,80,315 + Rs. 65 lakhs, remitted the matter to the assessing officer to reconsider the evidence and permit cross-examination and redo the regular assessment and not block assessment. The Tribunal further held that Rs. 24,82,420 as declared in the belated return cannot be brought to tax in block assessment and since search was conducted before 1-6-2002, proviso to section 113 of the Act was not applicable and no surcharge can be levied.

8. We answer the substantial questions of law (1) and (2) in favour of the Revenue and against the assessee and answer substantial question of law (3) against the Revenue and subject to result of the decision of the larger bench of the Supreme Court for the following reasons :

Re : Substantial question of law (1) :

9. This substantial question of law relates to the undisclosed amount of Rs. 65 lakhs and loss to the extent of Rs. 1,21,80,815 detected during the course of search generated from sham land dealing transaction. The assessing officer has passed the detailed order as to how the transaction pertain to the agreement of sale dt. 25-3-1995 and the sale deed dt. 2-11-1996 as sham and receipt of Rs. 65 lakhs and therefore the AO held that the said transaction as sham and included Rs. 1,21,80,315 and Rs. 65 lakhs as undisclosed credit. Having regard to the detailed reasoning assigned by the assessing officer and also the appellate authority, it is clear that the said concurrent findings on the question of fact by the assessing officer and the appellate authority in respect of the addition to be made in respect of sum of Rs. 1,21,80,315 and Rs. 65 lakhs is well founded and the said finding on the question of fact was also not disputed before the Tribunal and the Revenue had no objection for considering the said addition in regular

assessment. However, the Tribunal found that the finding of the assessing officer and the appellate authority holding that sufficient opportunity was given for cross-examination of the persons whose statements were recorded pertaining to the said transaction and the same was not availed by the assessee, is liable to be set aside and the Tribunal having regard to the fact that admittedly, the assessing officer has relied upon the statement of the persons who was not cross-examined, held that the matter is required to be remanded to the assessing officer and accordingly the matter was restored back on the file of the assistant CIT for fresh consideration and ordered Rs. 1,21,80,315 and Rs. 65 lakhs as additions to be made. However, the Tribunal directed that the said addition shall be considered in regular assessment and not in block assessment as per the finding given in IT Appeal No. 533 of 2005.

10. Therefore, it is clear that the only question that is required to be considered by this court as to whether the direction issued by the Tribunal that the issue pertaining to the addition of Rs. 1,21,80,315 and Rs. 65 lakhs restored back on the file of the assessing officer is to be considered in regular assessment or in the block assessment (1-4-1991 to 30-5-2001). It is clear from the perusal of the scrutiny of the material on record that during search, incriminating documents were found pertaining to the transactions for various years and notice was issued for making the assessment u/s 158AB as to why their assessment should not be made for the block year 1-4-1991 to 30-5-2001 and the assessee replied to the said notice. It is clear from the finding given by the assessing officer that the material found during search on 29-5-2001 did not pertain to that assessing year alone as it is the case of the Revenue that assessee purchased the property located at No. 7/1. Sampangi Tank Road, Bangalore from Sri Kodanda Ganapathy Firhad Cariappa for consideration of Rs. 2,23,27,300 by agreement of sale dt. 25-3-1995 which was registered in sub-registrars office on 2-11-1996 and the said fact has been confirmed by the encumbrance certificate produced by the assessee. The property was held as stock-in-trade as reflected in the return filed for the assessment year 1999-2000 and was shown at Rs. 2,27,13,565 obviously including cost and registration charges. However, in the returns filed for assessment year 1999-2000 as on 29-2-2000 the assessee had shown to have sold the said property for consideration of Rs. 1,05,83,250, thus, claiming loss of Rs. 1,21,80,315 (Rs. 2,27,13,565 (-) Rs. 1,05,33,250). The material on record would further show that the assessee continued to be in possession of the property and therefore it is clear that the finding of the Tribunal that the assessment has to be made not in the block period but for the assessment year cannot at all be sustained and is liable to be set aside. The decision relied on by the learned counsel for the respondent in support of his contention would not help him in the present ease as it is clear on the material on record that during search, material pertaining to the various period prior to the assessment year was found and having regard to the facts referred to above, we hold that direction issued by the Tribunal that issue relating to addition of Rs. 1,21,80,315 and Rs. 65 lakhs shall be considered for the assessment year and

not for the block period cannot be sustained and the said direction is liable to be set aside by holding that the assessing officer shall consider the said additions for the block period i.e. 1-4-1991 to 29-5-2001.

Re : Substantial question of law (2) :

11. It is clear from the scrutiny of the material on record and the provisions of sections 158B and 158C of the Act that addition which is sought to be made on the belated return can also be treated as undisclosed income. Having regard to the facts of the present case, it is clear that the finding of the assessing officer and the appellate authority that the return for the assessment year 1999-01 was not filed in time and was filed belatedly amounting to Rs. 24,82,420. It is the case of the assessee that since the said income has been shown as addition, the same could not be treated as undisclosed income as addition cannot be undisclosed income. It is well settled that as on the date of search, in the instant case on 29-5-2001, due date for filing the return of income for the assessment year had already expired and due date in this context and as held by the Honble Supreme Court in the case of (2004) 266 ITR 1 the date specified in section 139(1) of the Act for filing the return of income and not the time-limit as prescribed u/s 139(4) of the Act and therefore the case of the assessee in the present case would fall into the provisions of 158BB(1)(a) read with section 158BB(3) of the Act and the income of the assessee for the assessment year 2000-01 is assessable as undisclosed income for the block period as per the provisions of section 158BB of the Act. Therefore, finding of the assessing officer as confirmed by the appellate authority that the income shown in the return filed belatedly for the assessment year 2000-01 i.e., Rs. 24,82,420 should be shown as income for the assessee for the block period as undisclosed income is justified. It is clear from the perusal of the order passed by the Tribunal that the Tribunal has not assigned the cogent reasons for setting aside the abovesaid concurrent finding of the assessing officer and the appellate authority that the said income of Rs. 24,82,240 should be treated as undisclosed income for the block period. It is clear from the perusal of the order passed by the Tribunal, no cogent reasons are assigned by the Tribunal that the return declared beyond the date is illegal as in the present case, return for the assessment year 2000-01 is not filed within the time prescribed for filing the return and therefore, in view of the finding that the facts would attract provisions of sections 158BA and 158BB of the Act, it is clear that finding of the Tribunal that the said income shown in the return filed cannot be treated as undisclosed income for the tax in block assessment cannot at all be sustained and the same is directed to be set aside and as such, we answer the said substantial question of law in favour of the revenue.

Re: Substantial question of law (3) :

12. The Tribunal has held in respect of levying of surcharge that assessee is not liable for surcharge as in this case, search was conducted on 29-5-2001 and proviso to section 113 of the Act has been inserted with effect from 1-6-2002

and therefore, following the earlier decision of the Bench, no surcharge can be levied in the instant case.

13. The learned counsel appearing for the appellant also relied upon the decision of the Supreme Court in Commissioner of Income Central II Vs. Suresh N. Gupta, and CIT v. Rajiv Bhatara (supra) wherein it has been held that even without the proviso to section 113 of the Act which was inserted vide Finance Act, 2002 with effect from 1-6-2002, surcharge was leviable on the tax and the proviso to section 113 of the Act is clarificatory in nature.

14. However, learned counsel for the respondent submitted that in CIT v. Vatika Township (P) Ltd. (supra), the Honble Supreme Court has come to the conclusion that in view of the fact that the proviso to section 113 of the Act introduced by the Finance Act, 2002 with effect from 1-6-2002 i.e., with prospective effect and having regard to the principles of law that the taxing statute should be construed strictly and ordinarily, should not be held to have any retrospective effect and has referred the question as to whether the said proviso is clarificatory or curative in nature and retrospective to a Larger Bench.

15. In view of the principles laid down by the abovesaid cases, it is clear that finding of the Tribunal that no surcharge is leviable in the instant case is set aside and we hold that in view of the decisions of the Supreme Court in CIT v. Suresh N Gupta (supra) and CIT v. Rajiv Bhatara (supra) the assessee is liable to pay surcharge and however, the same would be subject to the decision of the Larger Bench.

16. Accordingly, IT Appeal Nos. 1176 of 2006 and 1190 of 2006 are allowed in part as follows :

(i) The direction issued by the Tribunal that cash credit of Rs. 65,00,000 and loss to the extent of Rs. 1,21,80,315 detected during the course of search generated from sham land dealing transactions should be brought to tax in regular assessment is set aside.

(ii) It is ordered that the amount declared in the belated return in a sum of Rs. 24,82,240 shall be brought to tax in the block assessment from 1-4-1991 to 30-5-2001.

(iii) The assessee shall also be liable to pay surcharge under proviso to section 113 of the Act read with section 158B of the Act subject to the result of the decision of the Larger Bench of the Supreme Court.

