

(2013) 07 DEL CK 0101
In the Delhi High Court
Case No : ITA 155 of 2011

CIT

APPELLANT

Vs

Ajay Kapoor

RESPONDENT

Date of Decision : 24-07-2013

Acts Referred:

Income Tax Act, 1961 — Section 132, 158BC, 260A

Citation : (2013) 07 DEL CK 0101

Hon'ble Judges : Sanjiv Khanna, J;Sanjeev Sachdeva, J

Bench : Division Bench

Advocate : Sanjeev Rajpal, for the Appellant; Kaanan Kapur, for the Respondent

Judgement

Sanjiv Khanna, J.—This appeal by the Revenue u/s 260A of the Income Tax Act, 1961 (Act, for short) raises the following the substantial question of law:-

Whether the Income Tax Appellate Tribunal was right and not perverse in holding that no addition should be made on account of unrecorded purchases and sales as unaccounted income of Rs. 21,90,685/- has been brought to tax?

The impugned order passed by the tribunal is dated 16th April, 2010 and relates to the block period ending 6th November, 2001.

2. Search and seizure action u/s 132 of the Act was carried out in the residential and office premises of respondent-assessee on 6th November, 2011. The respondent was a dealer in dyes and chemicals. At the time of search, cash of Rs. 17,43,180/- was found in the residential and office premises of respondent. Out of the said cash amount, Rs. 16,14,200/- was seized. Jewellery worth Rs. 20,40,688/- was also found, but no seizure of jewellery was made.

3. In response to the notice u/s 158BC, the respondent filed his return declaring undisclosed income of Rs. 18,00,000/-. The Assessing Officer in the assessment order dated 28th November, 2003 made several additions and assessed the total income of the respondent-assessee at Rs. 9,91,63,790/-. The aforesaid addition

included additions on the basis of a document mentioning undisclosed sales of Rs. 9,73,63,789/- between the period 1st April, 2001 to 6th November, 2001. This document was accepted by the respondent-assessee in their letter dated 6th June, 2000 as a record of their unaccounted sales. The Assessing Officer made addition on account of unrecorded purchases of Rs. 4,50,17,616/- on the basis of the said paper. The Assessing Officer held that the difference between unrecorded purchases (Rs. 450,17,616/-) and unrecorded sales figures (Rs. 9,73,63,789/-) i.e. Rs. 5,23,46,173/- should be treated as undeclared profit earned during the block period. Thus two additions of Rs. 4,50,17,616/- and Rs. 5,23,46,173/- were made.

4. Respondent substantially succeeded in the first appeal as the Commissioner of Income Tax (Appeals) in his order dated 5th November, 2004 observed that the profits of the block period between 1st April, 2001 to 6th November, 2001 of Rs. 5,23,46,173/- as calculated by the Assessing Officer was abnormally high and gross profit rate 53.76% (G.P. rate) had been applied on a turnover of Rs. 9.73 crores. He referred to the GP rate of the assessee during the period 1996-97 to 2000-2001 which was between 1.92% to 2.83% giving an average GP rate of 2.19%. In the preceding assessment year i.e. 2001-02, the GP rate declared was 2.25%. By applying the GP rate of 2.25%, CIT (Appeals) came to the conclusion that undisclosed income from unrecorded sales was Rs. 21,90,685/-.

5. CIT (Appeals) also deleted the entire addition of Rs. 4,50,17,616/- on account of investment in unaccounted purchases observing that the assessee had been making unrecorded sales out of the accounted stock kept by the assessee for his regular business. The assessee used to replenish the stock by making unrecorded purchases to make good the short fall in the accounted stock. The exact findings, recorded by the CIT (Appeals) reads:

5(iii) Now another question which is to be decided is the investment made by the appellant for effecting unrecorded sales. The AO has added a sum of Rs. 4,50,17,616/- i.e. the entire purchases as worked out by the assessee from the seized material. The assessee's contention is that he had been making unrecorded sales out of the accounted stock kept by the assessee for his regular business. It has been explained that in the course of making unrecorded sales when the accounted stock falls below a limit the assessee used to replenish the stock by making unrecorded purchases to make good short fall in the accounted stock. This explanation was given to the AO. The AO has rejected the explanation on the ground that no day to day stock statements have been maintained by the assessee. It was also explained to the AO by the assessee that there was no necessity of making separate investment for effecting unaccounted sales because item dealt in by the assessee both for accounted sales and unaccounted sales are same and there is no distinction between the categories of sales on the basis of the items dealt. The explanation of the assessee was rejected by the AO on the ground that stock register is not maintained by the assessee on day to day basis. The argument of the Ld. AR that as the assessee was dealing in same items for

making the recorded and unrecorded sales and the regular stock sold outside the books used to be replenished out of sales proceeds of unrecorded sales as some merit in it because no excess stock was found during the course of search operation. Also, no evidence or material has been referred to or relied upon for adopting the figure of Rs. 4,50,17,616/- for making investment. Thus, there was no material before the AO to hold that the assessee made an undisclosed investment to that extent. For any addition to be made in the block assessment it has to be based on material found during the course of search or in the course of post search proceeding. The addition in the block assessment cannot be made only on guess work basis or surmises. For the proposition that investment in stock has to be based on material found during the course of search or post search enquiries or any other positive material pointing to the factum of investment in stock, the following case law are relied upon:

- i) Ashok Kumar Rastogi Vs. Gotan Lal Khanji Udyog CIT 100 CTR 204 (All)
- ii) Commissioner of Income Tax Vs. Balchand Ajit Kumar,
- iii) Commissioner of Income Tax Vs. President Industries,
- iv) Commissioner of Income Tax Vs. S.M. Omer,
- v) ITO Vs. Gurbachansingh Juneja 54 TTJ (Ahm.) T.M.P. No. 1

In these circumstances the addition made by the AO is deleted.

6. It is clear from the order of the CIT (Appeals) that he referred to the explanation of the assessee and the stand of the Revenue and thereafter observed that the addition was a guess work or surmises and there should have been positive material to show that there was in fact investment in stocks. Explanation of the assessee that there was no necessity to make separate investment for unaccounted sales should be accepted.

7. Tribunal in the impugned order has recorded the contention of the Departmental Representative that the gross profit in unaccounted business was always more than profits in the regular business recorded in the books of account. Revenue had submitted that the assessee had not maintained day-to-day stock book and, therefore, it was not possible to accept that unrecorded sales were made out of regular stock, which was later on replenished. He had also referred to the peak investment which had occurred on 29th September, 2001 of Rs. 17,03,546/- and had stated that at least this amount should be added and brought to tax as unaccounted investment. There was substantial investment made in the form of unaccounted purchases as per seized documents.

8. Tribunal in the impugned order has mentioned that the unrecorded sales to the extent of Rs. 9,73,63,789/- were made by the respondent-assessee and this figure had not been challenged by the respondent/assessee. This factum is recorded in para 5.1 and it was observed that this figure had become final figure. The first question examined by the tribunal was whether the GP rate applied by

the CIT (Appeals) was correct. They observed that the GP rate of the recorded transactions of various years was a fair indicator of the gross profit, which would have been earned by the respondent in unrecorded transactions. The tribunal distinguished their earlier decision in the case of Vijay Protein Ltd. on the ground that in the said case the assessee had not been able to produce any evidence regarding purchases made from 33 parties. The books of account were rejected in the said case, with the tribunal holding that 25% of the purchase price accounted for in the books through invoices could be disallowed for working out the income. Tribunal accordingly affirmed the view taken by the CIT (Appeals) directing the Assessing Officer to adopt gross profit rate of 2.25% and thus upheld and maintained the addition to the extent of Rs. 21,90,685/- as against Rs. 5,23,46,173/- made by the Assessing Officer.

9. On reading the reasoning given by the tribunal, we are not inclined to interfere with the said part of the order on the ground that it is perverse. We may have some reservations, but the basic facts have been noticed and form the core and foundation of the order. These include the GP rate of the respondent-assessee as recorded in the books of accounts for this year and the earlier years. We have some reservations on the observation made by the tribunal that as it was a case of unrecorded sales, benefit of tax was passed on the third parties. Further, observation of the tribunal that the Assessing Officer had not analyzed the item-wise purchase and sale price though the documents seized reflect the item-wise sales and purchases is debatable. Nevertheless, there are substantial and good reasons for adopting the GP rate of 2.25%, as it is apparent that GP rate of 53.76% adopted by the Assessing Officer is too high and unacceptable.

10. However, on the next issue whether any addition should have been made on account of unaccounted investment, we are unable to comprehend the reasoning and logic given by the tribunal. They have recorded that the respondent-assessee did not maintain day-to-day stock record/register and, therefore, it cannot be said that unrecorded sales could not have been of accounted stock, which was later on replenished from the sale proceeds of unrecorded sales. Thus, the respondent-assessee had not made any investment for the unrecorded transactions. It is held that no evidence of unaccounted investment was found at the time of search. Once the stock register was not there as recorded by the tribunal in its order, the said finding itself apparently is contradictory. The finding that no incriminating document regarding investment was found is contradictory because the tribunal has accepted and admitted that the assessee had himself confirmed that he had made sales of Rs. 9.73 crores outside the books of accounts. These were unaccounted sales. Thereafter, it was for the assessee to explain and state the source/funds for conducting and entering into the said transaction. In other words, the assessee had unaccounted turnover of approximately Rs. 5 lacs per day during the period 1st April to 6th November, 2001. Transactions of such value do require investment. Plea of the assessee that existing or available investment in the books was sufficient, has to be made good with material and proof by the assessee. The assessee had to explain that

purchases recorded in the books were sufficient after adjustment of the recorded sales. In cases of unaccounted sales and purchases all documents may not be available and certain amount of guess work is always required as noticed earlier but a realistic and common sense approach is required. To say that there was no evidence to show that the assessee had made unexplained investment would be to write off and erase the earlier finding of the tribunal that the assessee had made unaccounted sales of Rs. 9.73 crores. Unrecorded purchases as mentioned in the seized document were more than Rs. 4.50 crores. We also do not agree with the finding recorded by the tribunal that proof of unaccounted purchases did not prima facie indicate or show that unaccounted investment was made, as there was other apparent evidence to the contrary. Onus, in such cases, is on the assessee to show that unaccounted investment was made out of accounted stock. There cannot be any assumption or presumption that unaccounted sales must be from accounted purchases. Unaccounted sales may result and can contribute towards the investment, but there has to be initial investment. Profits and income earned are also used for personal needs and are taken out of business.

11. On the question whether the peak credit should be added and brought to tax, tribunal has held as under:-

6.1 Coming to the alternative submission that at least peak of unaccounted investment, worked out on the basis of unrecorded purchases should have been brought to tax, we have only to mention that the same could be taxed only if there is some evidence on record regarding undisclosed income in the seized material or otherwise. There is no such evidence and, therefore, in view of arguments in paragraph 6 (supra), the stand of the learned DR cannot be accepted. Notwithstanding this argument, the working of peak submitted by the Id. DR at Rs. 17,03,546/- is lower than the unaccounted income brought to tax by the Id. CIT(Appeals) at Rs. 21,90,685/-. The Id. DR has not been able to show that the peak exceeded the unaccounted profit in any year. Therefore, it is held that the assessee was in possession of money by way of profit on unrecorded sales, which could have been used for funding the purchases.

12. First part of the reasoning has been dealt with above and it has been recorded that onus has been wrongly placed on the Revenue. Once unaccounted for turnover of Rs. 9.73 crores is accepted, then the assessee must explain the source of investment. The true facts were in his knowledge. We do not agree with the tribunal that as unaccounted income of Rs. 21,90,685/- has been brought to tax, no addition on account of peak investment of Rs. 17,03,546/- is justified. This figure of Rs. 21,90,685/- represents the gross profits earned in the block period. Further, the profit earned from unaccounted transactions can be and are used and consumed by the assessee for their own personal uses. We do not think that the tribunal dealt with the second issue in right perspective by placing the onus on the Revenue to explain the source of investment made by the assessee though there were unaccounted sale transactions. It has ignored

relevant and material facts and has gone on a tangent without examining the real issue and the controversy, i.e., has the assessee explained the source of funds required for making investment to have turnover of Rs. 9.73 crores. We are, therefore, constrained to hold that this part of the order is perverse and cannot be accepted.

13. Perversity, in the present case, is occasioned due to two reasons: firstly, by wrongly placing onus on the revenue though the facts were in personal knowledge of the assessee, and secondly, by ignoring the admission of the respondent that they had indulged in unaccounted sales of Rs. 9.7 crores. In spite of admission and the seized document, it has been observed that there was no material with the revenue to prima facie justify any addition towards unrecorded investment in stock. Allegations, in the present case, are not based upon weighing of evidence but for altogether a wrong decision. The decision suffers from vice of irrationality, rendering it infirm in law. In *Municipal Committee, Hoshiarpur Vs. Punjab State Electricity Board and Others*, it has been held that:

28. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law. If the findings of the Court are based on no evidence or evidence which is thoroughly unreliable or evidence that suffers from the vice of procedural irregularity or the findings are such that no reasonable person would have arrived at those findings, then the findings may be said to be perverse. Further if the findings are either ipse dixit of the Court or based on conjecture and surmises, the judgment suffers from the additional infirmity of non-application of mind and thus, stands vitiated. (*Vide Bharatha Matha and Another Vs. R. Vijaya Renganathan and Others*,

14. Earlier in *Dhirajlal Girdharilal Vs. Commissioner of Income Tax, Bombay*, it was observed:-

...if the court of fact, whose decision on a question of fact is final, arrives at this decision by considering material which is irrelevant to the enquiry, or by considering material which is partly relevant and partly irrelevant, or bases its decision partly on conjectures, surmises and suspicions, and partly on evidence, then in such a situation clearly an issue of law arise....

...It is well established that when a court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises.

15. In *Commissioner of Income Tax (Central), Calcutta Vs. Daulat Ram Rawatmull*, it has been held that onus of proving what is apparent is not real is on the party who claims it to be so. There should be direct nexus between the

conclusions of fact arrived at, or inferred, and the primary facts upon which the conclusion is based. When irrelevant consideration and extraneous materials form the substratum of an order, or the authority has proceeded in a wrong presumption which is erroneous in law, as in the present case, question of law arises and when the said contention is found to be correct, then the order is perverse. A factual decision is perverse when it is without any evidence or when the factual decision, in view of the fact on record, cannot be reasonably entertained. Finding based upon surmises, conjectures or suspicion or when they are not rationally possible have to be struck down. In *The Commissioner of Income Tax, Bihar and Orissa, Patna Vs. S.P. Jain*, it has been observed that a factual conclusion is regarded as perverse when no person duly instructed or acting judicially could upon the record before him, have reached the conclusion arrived at by the tribunal/authority.

16. In view of the aforesaid position, we partly answer the question of law mentioned above in affirmative i.e. in favour of the appellant and against the respondent. The respondent will pay costs of Rs. 20,000/- to the appellant. To expedite and curtail further delay, the parties it is directed, will appear before the tribunal on 26th August, 2013, when a date of hearing will be fixed. We further clarify that the observations made in this order are for the purpose of disposal of this appeal and the tribunal will reconsider the matter objectively keeping in view the contentions of the parties.