(2011) 11 KAR CK 0051

In the Karnataka High Court

Case No : ITA No. 1099 of 2006

CIT APPELLANT

Vs

Sheela S. Kotecha RESPONDENT

Date of Decision : 22-11-2011

Acts Referred:

Citation : (2011) 11 KAR CK 0051

Hon'ble Judges : V.G. Sabhahit, J;S.N. Satyanarayana, J

Bench : Division Bench

Advocate : M. Thirumalesh, for the Appellant; A. Shankar and M. Lava, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal by the Revenue is filed being aggrieved by the order dt. 23-2-2006 passed by the Income Tax Appellate Tribunal in No. IT(SS) A.No. 29/Bang/2001 for the block assessment period 1-4-1987 to 28-1-1998 on the file of Income Tax Appellate Tribunal, Bangalore B Bench (ITAT for short), wherein the appeal filed by the revenue is dismissed and the cross objection is allowed. The material facts leading up to this appeal are as follows:

The assessee is a dealer in Supari business in the name and style of M/s. Balaji Enterprises at Puttur, Dakshina Kannada District. She is doing business since 1994 and regularly assessed to income tax. She has filed return of income up to assessment year 1997-98. Consequent to the information in the departments possession and reason to believe that the assessee is in possession of money, assets, properties and such money, assets and properties represent either wholly or partly income, which has not been or would not be disclosed for the purpose of Income Tax Act, 1961 (hereinafter referred to as the Act) a search and seizure u/s 132 of the Act (sic Chapter XIV-B) was conducted in the business place as well as residential premises of assesses on 28-1-1998. Thereafter, the proceedings u/s 14-B of the Act was initiated by issuance of notice u/s 1158BC / BD dt. 17-8-1998, The said notice was served on the assessee on 20-8-1998 requiring the assessee to furnish the return of income in the prescribed Form No. 2B. The assessee filed returns on 21-10-1998 by declaring the undisclosed income of Rs. 1,00,000 for the assessment years 1997-98 and 1998-99 and according to the assessee, the said amount was representing the furnishings made in her house and unaccounted jewellery, if any. Thereafter, notices under sections 142(1) and 143(2) of the Act were issued.

2. After hearing the assessee, the assessing officer by order dt. 30-3-2000 held that the amount involved for the construction of commercial complex was undisclosed and the particulars of the same had not been furnished at the time of regular assessment. Further, in view of the material found during the search comprising of agreement entered into by the assessee with the contractor for construction of the commercial complex with an estimate value of Rs. 30,00,000 and the letter written on 16-9-1997 by the assessee to KSFC intimating that the estimate of the construction of the complex was increased to Rs. 85,00,000 he got the valuation of the building done and thereafter, on the basis of said valuation and also after adding certain amounts held that the assessee had the undisclosed income to the extent of Rs. 84,43,964. Accordingly, assessed the said income to tax and ordered issuance of demand notice arid also initiated penalty proceedings u/s 158BFA(2) of the Act, separately. Being aggrieved by the said order, the assessee preferred appeal before the Commissioner of Income Tax (Appeals) II, Bangalore.

3. The Commissioner of Income Tax (Appeals) after considering the grounds raised in the appeal and also the contentions of the learned Counsel appearing for the parties held that the addition of amount made in a sum of Rs. 84,43,964 as undisclosed income and tax imposed thereon cannot he sustained, as the same is not based upon the material seized and the said valuation is made at the instance of the assessing officer and also certain amounts added by the assessing officer. Accordingly, the Commissioner of Income Tax allowed the appeal filed by the assessee and set aside the order passed by the assessing officer. Being aggrieved by the order passed by the first appellate authority the revenue preferred appeal before the ITAT. The assessee had also filed cross objection being aggrieved by certain findings given by the first appellate authority.

4. The ITAT after considering the material on record and the contentions of the learned Counsel appearing for the parties held that the first appellate authority has rightly held that there was no material found in the course of search to sustain the addition. The addition was based upon the two documents as referred to above and further an addition was made by the assessing officer in addition no the valuation made by the DVO. Therefore, the addition could not be sustained and accordingly, confirmed the order passed by the first appellate authority and the tribunal also held that in the cross objection the assessee had supported the finding recorded by the appellate authority and no new ground has been raised. In the result, the appeal preferred by the revenue is dismissed and the cross

objection filed by the assessee is allowed. Being aggrieved by the said order dt. 23-2-2006 dismissing the appeal of the revenue this appeal is filed by the revenue which was admitted for consideration of the substantial questions of law raised in the memorandum of appeal by order dt. 5-12-2006.

5. The substantial questions of law raised in the appeal are as follows:-

(1) Whether the appellate authority and Tribunal were correct in holding that provisions of section 158BC and 158BD were not applicable to the assessee?

(2) Whether provisions of section 158BD require the assessing officer to have material other than what was found during the search operations to invoke the said provisions?

(3) Whether the Appellate Authority and the Tribunal were correct in applying the ratio of the Hon''ble Bombay High Court in the matter of Commissioner of Income Tax Vs. Vinod Danchand Ghodawat,

6. The learned Counsel appearing for the appellants submitted that the assessee had in his returns for relevant assessment years in his accounts showed the expenses incurred towards the construction as Rs. 79,00,000, whereas in the agreement dt. 28-11-1995 entered into between the assessee and the contractor which was found during search would clearly show that the construction value of the commercial building complex according to the estimate was at Rs. 80,00,000 and the other document found during seizure i.e. the letter addressed to the KSFC by the assessee would clearly show that the estimate cost was increased to Rs. 85,00,000, wherein assessee had also sought for further release of financial assistance from the KSFC. Further the valuation made by the DVO as on the date of the inspection with relevant material as also the amount added by the assessing officer could not be said to be arbitrary and not based upon the material seized during search. Therefore, the appellate authority and Income Tax Appellate Tribunal were not justified in holding that the addition is not based upon the material seized during search.

7. On the other hand, the learned Counsel appearing for the respondent submitted that the assessment u/s 158BFA provides for the enquiry and assessment after the return is filed and the additional assessment can be made. It is in the nature of additional assessment and it can be made only on the basis of the material found during search and not on the basis of any document, which was not found during the search. In support of his contention he has relied upon the decision of the Hon''ble Supreme Court in Assistant Commissioner of Income Tax and Another Vs. Hotel Blue Moon, the decision of the Bombay High Court in the matter of Commissioner of Income Tax Vs. Vinod Danchand Ghodawat, and the decision of the Calcutta High Court in the matter of Commissioner of Income Tax Vs. Ashim Krishna Mondal,

8. The learned Counsel further submitted that the amount mentioned in the agreement entered with the contractor on 23-11-1995 was only an estimate

value and cannot be said to be the exact value of construction and even while mentioning the expenses already incurred towards the construction of building estimate cost of Rs. 85,00,000 was given to the KSFC seeking for further financial assistance and Rs. 79,00,000 has been shown as expenses incurred towards the construction of building. He submitted that the addition of Rs. 84,43,964 is not at all based upon the material seized during the search and therefore, unsustainable and therefore, no assessment for the block period could be done and no proceedings could he instituted under Chapter 14-B of the Act.

9. We have given careful consideration to the contentions of the learned Counsel appearing for the parties and scrutinised the material on record. In the decision of the Supreme Court in Hotel Blue Moons case relied upon by the learned Counsel appearing for the respondent the scope of assessment under Chapter 14-B has been reiterated as follows in paragraph 12 of the judgment:

12. Chapter XIV-B provides for an assessment of the undisclosed income unearthed as a result of search without affecting the regular assessment made or to be made. Search is the sine qua non-for the block assessment. The special provisions are devised to operate in the distinct field of undisclosed income and are clearly in addition to the regular assessments covering the previous years falling in the block period. The special procedure of Chapter XIV-B is intended to provide a mode of assessment of undisclosed income, which has been defected as a result of search. It is not intended to be substituted for regular assessment. Its scope and ambit is limited in that sense to materials unearthed during search. It is in addition to the regular assessment already done or to be done. The assessment for the block period can only be done on the basis of evidence found as a result of search or requisition of books of account, or documents and such other materials or information as are available with the assessing officer, Therefore, the income assessable in block assessment under chapter XIV-B is the income not disclosed but found and determined as the result of search u/s 132 or requisition u/s 132A of the Act.

10. The material facts in the case has to be considered in the light of the principles laid down by the Supreme Court as referred to above. The fact that assessee had filed returns showing the expenses of Rs. 79,00,000 towards expenditure for construction of commercial complex is not in dispute. The fact that assessee had filed returns for the year 1997-98 in time is also not in dispute. It is further not in dispute that the assessment order has been passed on the basis of the material found during search. There is no dispute that only two documents were seized during search in the business premises and the residence of the assessee and they are, one, agreement dt. 23-11-1995 wherein in column 2 it shows that the contractor will erect and build commercial building according to estimate valued at Rs. 30,00,000 and the only other document is the letter dt. 16-9-1997 addressed by the assessee to the Managing Director KSFC, wherein KSFC has been informed that the total cost of the project is increased to Rs. 85,00,000 and sought for further additional loan of Rs.

25,00,000. Apart from these two documents, there are no other material found during search and the un-disclosure of income had to be considered only with reference to said two documents with reference to the expenses disclosed in the returns. Therefore, the assessing officer was not at all justified in passing the order of his assessment on the basis of DVOs report and adding some more amount on his own to the said valuation made by the DVO, which was as on the date of inspection of the premises constructed by the assessee. Therefore the finding of the appellate authority and the ITAT that the assessment made under Chapter 14B is not based upon the material seized during search is justified and no other conclusion could have been arrived at having regard to the documents seized during search. Accordingly, we hold that the appeal is devoid of merits and answer the substantial questions of law against the revenue and in favour of assessee and pass the following:

ORDER

The appeal is dismissed.