

(2014) 01 KAR CK 0045

In the Karnataka High Court

Case No : I.T.A. No. 369 of 2007 (Block Assessment Period 1-4-1989 to 28-1-2000)

Commissioner of Income Tax and Another

APPELLANT

Vs

Vasudev Construction

RESPONDENT

Date of Decision : 30-01-2014

Acts Referred:

Income Tax Act, 1961 — Section 132, 132A, 133(6), 142(1), 143(2)

Citation : (2014) 363 ITR 247

Hon'ble Judges : Dilip B. Bhosale, J; B. Manohar, J

Bench : Division Bench

Advocate : K.V. Aravind, Advocate for the Appellant; Vani H, Advocate for the Respondent

Judgement

B. Manohar, J.—The Revenue has preferred this appeal u/s 260A of the income tax Act 1961 (for short "the Act"), being aggrieved by the order dated September 22, 2006, made in I.T. (SS) A No. 186/Bang/2002 passed by the income tax Appellate Tribunal, Bangalore Bench-B, (hereinafter referred to as "the Tribunal" for short) whereby the Tribunal dismissed the appeal filed by the Revenue and confirmed the order passed by the Commissioner of income tax (Appeals) (hereinafter referred to as "first appellate authority" for short), setting aside the order passed by the assessing authority pertaining to the block period from April 1, 1989, to January 28, 2000. The brief facts of the case are as follows:

The respondent is a partnership firm, engaged in the business of construction of building and development of properties. The firm came into existence from January 28, 1998. A search was conducted on January 28, 2000, u/s 132 of the Act in the business premises and residence of the managing partner of the respondent-firm, Sri Nagendra Baliga, who is a jeweller by profession. During the search, certain documents like bills of material purchased, labour charges paid and the cheques relating to the assessee-firm were found and seized. On the

basis of the said records, notice u/s 158BD was issued calling upon the respondent-firm to file its returns for the block period from April 1, 1989, to January 28, 2000. The assessee-firm filed return of income on November 30, 2000, declaring "nil" income. On the basis of the said returns, a notice u/s 143(2) and 142(1) of the Act was issued calling upon the assessee to produce necessary documents. An authorized representative of the assessee appeared and produced the computerized books of account. As per the records produced by the assessee, the assessee-firm had started constructing two buildings, i.e., Vasudev Towers and Vasudev Plaza. Vasudev Towers was nearing completion and Vasudev Plaza was just started at the time of search. The assessee contended that the building is yet to be completed. The expenditure incurred for construction of the building has been mentioned in the books of account. The authorized representative of the company contended that they have incurred expenditure of Rs. 42,15,111 towards the construction of Vasudev Towers and Rs. 4,49,386 towards Vasudev Plaza as on the date of search. The Assessing Officer in order to verify the expenditure incurred for the construction of buildings, referred the matter to the District Valuation Officer (for short "the DVO"). The DVO submitted a report estimating the cost of construction of the two buildings at Rs. 64,71,483 and Rs. 4,72,426, respectively. The Assessing Officer taking into consideration the difference of cost of construction of the buildings as undisclosed income at Rs. 20,97,351 and assessed to tax for the block assessment period by its order dated June 28, 2002.

2. The assessee being aggrieved by the order passed by the assessing authority preferred an appeal before the appellate authority in I.T.A. No. 236 of 2002-03, contending that the order passed by the assessing authority is contrary to law. The report submitted by the DVO is also contrary to law. The appellate authority, after considering the matter in detail, held that the difference between the valuation adopted by the assessee and the DVO was a matter of opinion based upon which, the undisclosed income computed on such opinion cannot be brought to tax in the block period. Accordingly, by its order dated September 16, 2002, allowed the appeal in part and set aside the order in so far as the block assessment period is concerned.

3. Being aggrieved by the order passed by the appellate authority, the assessee-firm as well as the Revenue preferred appeals before the income tax Appellate Tribunal, Bangalore, in Appeal Nos. 186 of 2002 and 8 of 2003. The Tribunal, after considering the matter in detail, dismissed both the appeals filed by the Revenue as well as the assessee-firm upholding the order passed by the appellate authority. The Tribunal held that no material was found during the search to indicate that the assessee has not recorded the expenses incurred on construction in the books of account. In the absence of any seized materials, addition cannot be made only on the basis of the Valuation Officer's report which is less than 15 per cent, no addition can be made. Accordingly, dismissed the appeals by its order dated September 22, 2006. Being aggrieved by the said order, the Revenue has preferred this appeal.

4. Sri K.V. Aravind, learned counsel appearing for the appellant, contended that the order passed by the Tribunal as well as the first appellate authority is contrary to law. The finding of the Tribunal that the difference in the cost of construction of buildings as valued by the DVO and the value accounted by the assessee is less than 15 per cent is contrary to law. The Tribunal failed to appreciate that the percentage of difference should be reckoned with reference to the actual cost as per the assessee's books and not after giving effect of telescoping the suppressed sale consideration. The further finding of the appellate authority that the difference in the cost of construction based on the valuation report shall not constitute undisclosed income as per Chapter XIV-B is contrary to law. He relied upon a judgment reported in the case of Manish Maheshwari Vs. Asstt. Commissioner of Income Tax and Another, , and sought for allowing the appeal.

5. On the other hand, Smt. Vani H., learned counsel appearing for the assessee, supported the order passed by the Tribunal as well as the appellate authority and contended that the documents seized during the course of search are not incriminating in nature, but they were maintained in the normal course of business. No material was found at the time of search for initiating the proceedings u/s 158BD of the Act. The difference of valuation cannot be a ground to initiate proceedings u/s 158BD, i.e., block assessment period. In support of her contention, she relied upon the judgments reported in the case of Assistant Commissioner of Income Tax and Another Vs. Hotel Blue Moon, , Commissioner of Income Tax Vs. Vinod Danchand Ghodawat, , The Commissioner of Income Tax Vs. Shri. Ashok Khetrapal, and Commissioner of Income Tax Vs. Bimal Auto Agency, and sought for dismissal of the appeal.

6. The above appeal was admitted for considering the following substantial questions of law:

1. Whether the appellate authorities were correct in setting aside the block assessment based on the material detected in the course of search in the case of the partner who had informed that undisclosed income had been contributed by him in putting up Vasudev Towers which building on being valued by the District Valuation Officer, disclosed that there was a difference in the cost of construction from that which has been declared which had been brought to tax in the block period correctly by the Assessing Officer?

2. Whether the appellate authorities were correct in proceeding to hold that the valuation arrived at in respect of Vasudev Building by the District Valuation Officer was a mere opinion and the same cannot be taken in to account for the purpose of bringing the difference in the valuation of the building as the undisclosed income for the block period without actually examining the correctness of the finding recorded by the Valuation Officer?

3. Whether the appellate authorities were correct in failing to take into account the search proceedings initiated in the case of Sri Nagendra Baliga were

disclosures regarding the valuation of Vasudev Building were made and the order of the Tribunal made in that case is a subject matter of an appeal before the hon"ble High Court?

7. We have carefully considered the arguments addressed by the learned counsel for the parties and perused the orders impugned in the appeal.

8. The records clearly disclose that search was conducted in the residence and business premises of Sri Nagendra Baliga, who is one of the partners of respondent-firm. During the course of search, the said Nagendra Baliga made a statement that he has invested a sum of Rs. 65,00,000 for construction of the buildings. On the basis of bills of materials purchased, labour charges paid, cheques relating to the assessee-firm found during the search, a notice was issued u/s 158BD calling upon the assessee to file the return of undisclosed income for the block period April 1, 1989, to January 28, 2000. The assessee filed nil returns. Thereafter, a notice was issued u/s 143(2) and 142(1) of the Act. The construction of the buildings by the assessee-firm was referred to the DVO, for valuation u/s 133(6) of the Act and for estimating the cost of construction of the two buildings. The DVO submitted a report on April 15, 2002. There was a difference in valuation by the assessee-firm and the valuator to an extent of Rs. 20,97,351. The assessee-firm filed objections to the report of the DVO. Comments were called for from the DVO. The DVO by his further report dated September 12, 2002, rectified certain mistakes and gave certain benefits to the assessee and he had not offered any comments for some objections. In view of that, the Assessing Officer added the said sum of Rs. 20,97,351 to the undisclosed income and assessed for tax.

9. The records further disclose that during the course of search, no incriminating documents were traced. However, certain documents like bills of materials purchased, labour charges paid and some cheques issued by the firm were seized. The assessee-firm has only two partners, i.e., Nagendra Baliga and his wife. Construction of two buildings is the maiden project of the assessee-firm. As on the date of search, the building was not completed and there was no income from the building. There was no positive comments from the DVO with regard to suppression of material facts by the assessee which would amount to undisclosed income. The managing partner of the firm is primarily a jeweller by profession, constituted a firm to take up the work of construction of the buildings. The difference in the cost of construction cannot constitute undisclosed income for the block period. On verification of the revised report submitted by the DVO, the difference between the valuation of the assessee-firm and the DVO is less than 15 per cent. There is no specific finding by the Assessing Officer with regard to any concealment. Further, there was no material found during the search indicating that there were expenses incurred on construction by the assessee that were not recorded in the books of account. In the absence of any seized material and solely on the basis of the report of the DVO, there cannot be any finding with regard to the undisclosed income. No material has been found at the

time of search for initiating proceedings u/s 158BD of the Act. Solely on the basis of the valuation report, block assessment cannot be made. Further, it is relevant to mention that the assessee-firm came into existence on January 28, 1998. The firm does not have its own income. The managing partner of the assessee-firm is a jeweller by profession. His income was assessed and tax has been levied. Hence, it is not open to the appellant to tax once again in the guise of undisclosed income. The order passed by the Assessing Officer is contrary to the law laid down by the hon"ble Supreme Court in the cases referred to above by the advocate appearing for the respondent. The hon"ble Supreme Court in a judgment reported in Assistant Commissioner of Income Tax and Another Vs. Hotel Blue Moon, has clearly held that the undisclosed income unearthed as a result of search. The scope and its ambit is limited in that sense to materials unearthed during the search. Paragraph 12 of the judgment reads as under (page 368):

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 detected 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.

Further, in a judgment reported in Commissioner of Income Tax Vs. Bimal Auto Agency, , the Gauhati High Court held that, the report of the DVO does not constitute a material or information to the search. Paragraph 13 of the judgment reads as under (page 198):

...admittedly, no evidence or materials was discovered in the course of the search of the premises of the group to which the assessee belongs. The undisclosed income in so far as the building is concerned was solely made on the basis of the report of the Departmental Valuation Officer as obtained by the search party. The report of the Departmental Valuation Officer does not constitute materials or information relatable to the search. Such a view have been recorded in the judgments of the Madhya Pradesh High Court in Commissioner of Income Tax Vs. Khushlal Chand Nirmal Kumar, and Delhi High Court in Commissioner of Income Tax Vs. Manoj Jain, and The Commissioner of

Income Tax Vs. Shri. Ashok Khetrapal, . While expressing our respectful agreement with the said views, it has to be held that the determination of undisclosed income of Rs. 40,04,369 in respect of the building in question being solely on the basis of the report of the Departmental Valuation Officer was rightly interfered with by the learned Tribunal. The said conclusion of the learned Tribunal, therefore, will not be open to interference.

The appellate authority as well as the Tribunal after considering the matter in detail corrected the mistake committed by the Assessing Officer. We find, no infirmity or irregularity in the order passed by the appellate authority and the Tribunal. Hence, the appeal filed by the Revenue is liable to be dismissed. The substantial questions of law framed in this appeal are held against the Revenue. Accordingly, we pass the following:

ORDER

The appeal is dismissed.