
(2008) 03 AHC CK 0244
In the Allahabad High Court

Commissioner of Income Tax

APPELLANT

Vs

B.K. Agarwal

RESPONDENT

Date of Decision : 27-03-2008

Acts Referred:

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

Citation : (2009) 227 CTR 173 : (2009) 183 TAXMAN 434

Hon'ble Judges : S.S. Chauhan, J;Rajes Kumar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Rajes Kumar, J.—The present appeal u/s 260A of the Income Tax Act, 1961 (hereinafter referred to as the "Act") is directed against the order of the Tribunal dated 31-5-2001 relating to block assessment for the period 1-4-1985 to 31-3-1995 and 1-4-1995 to 8-8-1995. The appeal has been admitted on the following two questions of law:

1. Whether on the facts and circumstances of the case Hon"ble Tribunal was justified in holding that where income does not fall within Section 158B the same should not be brought to tax u/s 158BA even though covered u/s 158BB(c).

2. Whether on the facts and circumstances of the case Hon"ble Tribunal was justified in holding that report of valuation officer obtained by Assessing Officer cannot be taken into consideration for block assessment unless it is co-related with some seized material.

2. In brief, the facts of the case are that a search and seizure u/s 132 was carried out in the group consisting of (i) Disinfecto Chemical Industries (P.) Ltd. (ii) Disinfecto Chemical Industries, Prop. Smt. Padmawati Agrawal, wife of Shri B.K. Agrawal, (Hi) Shri B.K. Agrawal and (iv) Shri Karunesh Agrawal, S/o Shri B.K. Agrawal and Smt. Radhika Singhal, wife of Shri Karunesh Agrawal. Shri B.K. Agrawal is working as Chemist and also looking after the business affairs of M/s. Disinfecto Chemical Industries, Prop. Smt. Padmawati Agrawal, wife of Shri B.K.

Agrawal. Shri Karunesh Agrawal is also getting salary, interest and commission from M/s. Disinfecto Chemical Industries. Smt. Radhika Singhal is enjoying income from house property and other sources. Shri B.K Agrawal besides enjoying salary was also in receipt of commission, interest and rent from M/s. Disinfecto Chemical Industries. During the course of search, assets were found as detailed in assessment order in para 3 and besides the same, the assessee was found to be owner of house-property situated at 43, Cantt. Road. While considering the income, the Assessing Officer observed that remuneration for services rendered by an employee in terms of the contract of employment on percentage of turnover achieved, it partakes the character of salary in view of the provisions contained in Rule 2(h) of Part A of 4th Schedule to the Act. Therefore, the payment of commission was assessed as salary as has been done by the assessee himself for the earlier assessment years 1993-94 and 1994-95. The assessee did not file return of income for the assessment year 1995-96 within due date on account of search and seizure operations as the books of account and other details were in the possession of the revenue but the Assessing Officer determined the entire income for the assessment year 1995-96 under the heads "Salary" and "Commission", the income from house property, capital gains and the income from other sources as undisclosed income of the assessee.

3. The assessing authority has further made an addition of Rs. 5,12,400 being the investment in the house property situated at 43, Cantt. Road, Lucknow as unexplained investment for the assessment years 1992-93 to 1995-96 at Rs. 1,28,100 for each year. The addition has been made by the assessing authority on the basis of Departmental Valuation Officer's Report (hereinafter referred to "DVO's Report").

4. In first appeal, both the aforesaid additions have been upheld. Being aggrieved by the order the appellant filed appeal before the Tribunal.

5. The contention of the assessee was that the assessee has been filing return of income and disclosing income under the heads "Salary" and "Commission", house property and other sources, for which a reference was made to pages 93 to 113 of the paper book containing computation of income for the assessment year 1991-92 and the assessment order of the Assessing Officer u/s 143 of the Income Tax Act and also the order of the CIT u/s 263 of the Income Tax Act. In view of the same, Counsel of the appellant-assessee contended that since the assessee had been filing regular return of income and disclosing therein the income enjoyed under the various heads, therefore, there is no question of considering the same as undisclosed income of the assessee for the assessment year 1995-96 merely because the return of income could not be filed on or before the due date, specially when the delay took place on account of the search and seizure operations as the books of account and relevant papers necessary for the preparation of return of income were taken away by the Search Party and it took some time to obtain copies of details for computation of the

taxable income for the purpose of filing of the return of income. The Counsel for the assessee also referred to pages 1 to 7 of the paper book indicating payment of advance tax for the current year at Rs. 59,120 including tax deducted at source for the assessment year 1995-96 and also indicating that Rs. 3,663 was paid as self-assessment tax and in view of the same, whether the income of the assessee under the head "Salary, Commission", income from house property, capital gains and income from other sources for the assessment year 1995-96 should be considered as undisclosed income. Income of the assessee from these various sources earned from M/s. Disinfecto Chemical Industries were well-known as the department is regularly assessing the firm and during the course of assessment proceedings, these facts are well before the Assessing Officer. Moreover, after paying advance tax including TDS and self-assessment tax, the income for the assessment year 1995-96 cannot be said to be escaping for the purpose of income. The counsels also submitted that the assessee being an employee of M/s. Disinfecto Chemical Industries, the details of payments are being disclosed by the employer through reports u/s 44AB of the Income Tax Act. Therefore, there is no question of not disclosing or not filing the return of income by the assessee, which could have resulted in escapement of Income Tax. It was further submitted that before income could be assessed as undisclosed income u/s 158BC of the Income Tax Act, it should first be covered by the provisions of Section 158B(b) which defines undisclosed income. Therefore, merely because the return was filed late it could not be said that the assessee could not have disclosed the said income. So far as the disclosure of income for the purpose of the Act is concerned this would also mean disclosure by the employer and the Employer filed details as per paper book pages 104 to 113 containing statements u/s 40A(2)(b) of the Income Tax Act and these details were there for the assessment years 1992-93 to 1996-97. Since the assessee was disclosing its income regularly, there is no question of hiding any fact regarding the same. Since the audit of the firm in which the assessee was employed, was not completed as per the provisions of Section 44AB of the Income Tax Act, therefore, the figures of commission to be received from the firm could not be computed and subsequently all the books of account and documents were seized by the Department and copies of the same as soon as were made available to M/s. Disinfecto Chemical Industries, the figures of commission was finalized and the appellant-assessee also furnished the return of income. In support of his contention, reliance was placed in L.R. Gupta and Others Vs. Union of India and Others, Smt. Sita Devi Daga v. Asstt. CIT (supra) ; Vaidya Madan Lal Malani v. Asstt. CIT (2000) 72 ITD 552 and in view of the same, Shri Kanchan Kaushal reiterated that the income of the appellant-assessee cannot be treated as undisclosed.

6. The contention of the assessee was that the land was purchased in the year 1967 for a sum of Rs. 25,000 and the building was constructed in the year 1970. The additions and renovations were carried out subsequently up to the year 1982 on which the expenses were incurred to the extent of Rs. 78,000 and no material

was found during the course of the search or any information received which could suggest that any investment towards addition or renovation was made during the year 1992-93 to 1995-96 and, therefore, the reference to the valuation cell was illegal and the addition of Rs. 5,12,400 on the basis of the valuation report in which it has been held that the construction took place from 1992-1995 was unjustified.

7. The Tribunal allowed the appeal on the aforesaid two issues and deleted the addition. The Tribunal held as follows:

We have considered the rival submissions as well as the relevant details placed before us in the form of paper book. After going through the case law as well as the scheme of the Act and the relevant papers before us, especially the evidence that the details of payments of salary and commission etc., were not only available as per the record of the employer for the purpose of audit u/s 44AB of the Income Tax Act, but also in view of the fact that the tax was deducted at source and the assessee also paid advance tax and even the balance amount was paid as self-assessment tax. Therefore, there could be no intention on the part of the assessee for hiding the same from Income Tax Department. Under the facts and circumstances, and material particulars, as referred to above, the income of the assessee cannot be treated as undisclosed income. After consideration of the scheme of Chapter XIV-B of the Income Tax Act, Section 158BA is a charging Section and in case of conflict, this Section will prevail over the Sections indicated in Chapter XIV-B Sub-section (i) of Section 158BA which empowers the Assessing Officer to proceed to assess the undisclosed income in accordance with the provisions of Chapter XIV-B. Section 154BB provides how to compute such income and Section 158B defines undisclosed income and if the income does not fall within the ambit of Section 158B then question of computation thereof does not arise in view of the provisions of Section 158BA, which prevails over the procedural provisions of Section 158BB. We are in agreement with the view taken by the Pune Bench of the ITAT in the case of *Prakash Foods Ltd. v. Dy. CIT* 64 ITD 396 . This view was also supported by the decision of Delhi High Court reported in *L.R. Gupta and Others Vs. Union of India and Others*, and also by Mumbai Bench decision in the case of *Sunder Agencies* reported in 63 ITD 245. The view of Pune Bench regarding the disclosure that even disclosure by the employer for the purpose of Section 44AB is a disclosure. Moreover, the income of the assessee under these heads is being regularly assessed year after year and for the assessment year 1995-96, the assessee has also paid advance tax and TDS leaving a small portion of the tax to be paid as self-assessment tax. Therefore, in such circumstances, it cannot be said that the assessee had not or could not have disclosed such income to the Income Tax Department.

In our opinion and in view of the discussion made above, in genuine case like this, wherein the income does not fall within the provisions of Section 158B the same should not be brought to tax u/s 158BA even though covered u/s 158BB(c). As there cannot be any intention on the part of the assessee, not to

disclose such income and pay tax thereon, specially when the payment of advance tax and TDS is there and only a small portion remained to be paid as self-assessment tax and the same has also been paid. Under the facts and circumstances, the assessee's income under the head "Salary, commission, rent and other sources" or from the firm and also income from other sources and capital gains could not be said to be the income which the assessee would not have disclosed. Therefore, the Assessing Officer is directed not to treat the income of the assessee under the head "Salary, commission, house property, capital gains and income from other sources" as undisclosed income and is directed to exclude the same from the block assessment.

We have considered the rival submissions and the relevant details and the case laws. Since the Assessing Officer and the DVO has not referred to any seized material on the basis of which cost of construction regarding the addition and alteration could be co-related within the block period, therefore, the valuation report regarding the estimate of construction as adopted by the DVO and taken into consideration by the Assessing Officer cannot be upheld, specially when the DVO and the Assessing Officer has not properly considered the approved valuer's report dated 26-4-1983, which only covers the construction pertaining to additions and alterations carried out up to 1982-83, which is beyond the block period. Therefore, the action of the DVO in estimating the cost of alteration and addition in the absence of documentary evidence and treatment thereof as undisclosed investment in the construction cannot be upheld. In view of various case laws relied upon as referred to above, therefore, the addition which is based on the DVO's report and the Assessing Officer who has not brought any material on record that the appellant-assessee incurred any expenditure during the block period addition of Rs. 5,12,400 as undisclosed investment cannot be justified within the meaning of Section 158BB of the Income Tax Act. Therefore, we direct the deletion thereof.

8. Heard Sri D.D. Chopra, learned Standing Counsel for the revenue and learned Counsel appearing on behalf of the assessee.

9. It would be relevant to reproduce Section 158B, Section 158BA and Section 158BB(c) as below:

158B. Definitions. - In this Chapter, unless the context otherwise requires,

(a) "block period" means the period comprising previous years relevant to six assessment years preceding the previous year in which the search was conducted u/s 132 or any requisition was made u/s 132A and also includes the period up to the date of the commencement of such search or date of such requisition in the previous year in which the said search was conducted or requisition was made:

Provided that where the search is initiated or the requisition is made before 1-6-2001, the provisions of this Clause shall have effect as if for the words, "six assessment years", the words "ten assessment years" had been substituted;

(b) "undisclosed income" includes any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions, where such money, bullion, jewellery, valuable article, thing, entry in the books of account or other document or transaction represents wholly or partly income or property which has not been or would not have been disclosed for the purposes of this Act, or any expense, deduction or allowance claimed under this Act which is found to be false.

158BA. Assessment of undisclosed income as a result of search- (1) Notwithstanding anything contained in any other provisions of this Act, where after 30-6-1995 a search is initiated u/s 132 or books of account, other documents or any assets are requisitioned u/s 132A in the case of any person, then, the Assessing Officer shall proceed to assess the undisclosed income in accordance with the provisions of this Chapter.

(2) The total undisclosed income relating to the block period shall be charged to tax, at the rate specified in Section 113, as income of the block period irrespective of the previous year or years to which such income relates and irrespective of the fact whether regular assessment for any one or more of the relevant assessment years is pending or not.

Explanation. - For the removal of doubts, it is hereby declared that-

(a) the assessment made under this Chapter shall be in addition to the regular assessment in respect of each previous year included in the block period;

(b) the total undisclosed income relating to the block period shall not include the income assessed in any regular assessment as income of such block period;

(c) the income assessed in this Chapter shall not be included in the regular assessment of any previous year included in the block period.

(3) Where the assessee proves to the satisfaction of the Assessing Officer that any part of income referred to in Sub-section (1) relates to an assessment year for which the previous year has not ended or the date of filing the return of income under Sub-section (1) of Section 139 for any previous year has not expired, and such income or the transactions relating to such income are recorded on or before the date of the search or requisition in the books of account or other documents maintained in the normal course relating to such previous years, the said income shall not be included in the block period.

Section 158BB(c), where the due date for filing a return of income has expired, but no return of income has been filed.-

(A) on the basis of entries as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition where such entries result in computation of loss for any previous year falling in the block period; or

(B) on the basis of entries as recorded in the books of account and other

documents maintained in the normal course on or before the date of search or requisition where such income does not exceed the maximum amount not chargeable to tax for any previous year falling in the block period;

(C) where the due date for filing a return of income has expired, but no return of income has been filed, as nil, in cases not falling under Clause (c).

10. Chapter XIV-B of the Act provides a special procedure for the assessment of search cases of undisclosed income found, as a result of search. Section 158BA of the Act contemplates the assessment of undisclosed income. Section 158B(b) defines undisclosed income which says any money, bullion, jewellery or other valuable article or thing which has not been or would not have been disclosed for the purposes of this Act or any expense, deduction or allowance claimed under this Act which is found to be false. Section 158BB provides the computation of undisclosed income of the block period and is of procedural in nature and cannot override the provision of Section 158BA. Therefore, under Chapter XIV-B of the Act, the assessment of only undisclosed income is contemplated. Therefore, for the purposes of making the assessment under this Chapter it is to be determined that what is the undisclosed income for the block period which will be followed by the computation as provided u/s 158BB of the Act. As per Section 158B(b) of the Act undisclosed income includes any money, bullion, jewellery or other valuable article or thing which has not been or would not have been disclosed for the purpose of this Act. In our view, relevant consideration is whether the assessee has an intention to disclose the income. If on the facts and circumstances, it is established that the intend was to disclose the said income, it cannot be said to be undisclosed income. The intention of the assessee is to be considered on the facts and circumstances of each case.

11. In the present case, Tribunal held that the details of the payment of salary and commission etc., was available as per the record of the employer for the purpose of audit u/s 44AB of the Act, the tax was deducted at source and the assessee also paid advance tax and even the balance amount was paid as self-assessment tax. Therefore, there could be no intention on the part of the assessee for hiding the said income from the Income Tax Department. Therefore, merely because the return for the assessment year 1995-96 could not be furnished within the specified period it cannot be said to be undisclosed income. In our opinion, the finding of the Tribunal is finding of fact based on the material on record.

12. In the case of Commissioner of Income Tax Vs. N. Vellaiyan, the Division Bench of the Madras High Court following its earlier decision in the case of The Assistant Commissioner of Income Tax Vs. A.R. Enterprises, held that the income in respect of which the advance tax has been paid cannot be said to be undisclosed income.

13. So far as second question is concerned, the Tribunal held that no material was found to show that any investment has been made towards construction or

renovation during the year under consideration and, therefore, in the absence of any material the addition on the basis of the valuer report is not justified. We are of the opinion that the view taken by the Tribunal is correct and in accordance to the law. The addition cannot be made on mere presumption. There must be some material found during the course of search to suggest any investment towards construction or renovation in the property and only on the basis of such material the matter could be referred to the Departmental Valuer. Mere on the basis of the opinion of the Departmental Valuer in the absence of any specific material it cannot be inferred that any expenditure has been incurred towards cost of construction or renovation during the period in dispute. Our view is supported by the Division Bench decision of Delhi High Court in the case of The Commissioner of Income Tax Vs. Shri. Ashok Khetrapal, in which it has been held that in the absence of material being found during the course of search that the assessee had made more investment in the properties than his declared value the addition was not justified. In the case of Commissioner of Income Tax Vs. Vinod Danchand Ghodawat, the Division Bench of Bombay High Court held that in the absence of any material being found during the course of search that any amount being spent on the construction of the bungalow no addition could be made on the basis of the report of the Departmental Valuer obtained subsequent to the order of regular assessment. It has been held that Chapter XIV-B of the Act had no application.

14. In view of the above, both question Nos. 1 and 2 are answered in favour of the assessee and against the revenue.

15. In the circumstances, the appeal is dismissed.