(2010) 01 KL CK 0135

In the High Court Of Kerala

Case No : IT Appeal No. 748 of 2009

Commissioner of Income Tax — APPELLANT

Vs

K.V. Sudhakaran — RESPONDENT

Date of Decision : 07-01-2010

Acts Referred:
Income Tax Act, 1961 — Section 132, 158BB, 158BC, 158BD

Citation : (2011) 245 CTR 596 : (2012) 344 ITR 25

Hon'ble Judges : V.K. Mohanan, J;C. N. Ramachandran Nair, J

Bench : Division Bench

Advocate : P.K.R. Menon and Jose Joseph, for the Appellant; T.M. Sreedharan, Smt. C.K. Sherin and V.P. Narayanan, for the Respondent

Final Decision : Allowed

Judgement

C.N. Ramachandran Nair, J.—This appeal is filed by the revenue challenging the order of the Tribunal quashing the block assessment completed against the respondent-assessee for the block period 1.4.1987 to 10-3-1998 on the ground that the assessment made is not based on any material or evidence gathered in the course of search in the place of another person by name Sri Anandan, who along with the respondent-assessee was a partner in M/s. Hotel Indraprastha. We have heard senior counsel appearing for the revenue and Sri T.M. Sreedharan, counsel appearing for the respondent-assessee. The facts leading to the dispute are the following. The respondent-assessee was employed abroad for a long period and during his stay outside and after return he has made certain investments in business particularly in a bar hotel as its partner, along with one Sri Anandan, Respondent was not an assessee under the income tax Act and has not filed any returns under the income tax Act until notice was served u/s 158BC read with Section 158BC of the Act after search in the premises of one Sri Anandan. During search conducted in the business and residential premises of Anandan on 10.3.1998 certain documents were seized including the Balance Sheet of M/s. Hotel Indraprastha in which the respondent-assessee was a partner. From the Balance Sheet it was found that the assessee had contributed towards capital in the form of Rs. 1,50,000/- in March, 1995. The capital contribution was increased to Rs. 5,58,500 in May, 1997 and the same was increased to Rs. 5,89,500 in July, 1997. Based on the evidence gathered in the form of Balance Sheet of the firm. M/s. Hotel Indraprastha, the assessing officer issued notice u/s 158BC read with Section 158BD and the assessee was called upon to file written explanation for the investments. Even though the assessee filed "Nil" return, the assessing officer collected information and called upon the assessee to file cash flow statement showing investment and expenditure. Based on information gathered, the assessing officer made assessment for the block period from 1-4-1987 to 10-3-1998 determining the total undisclosed income for the block period at Rs. 8,02,635. The assessee challenged the assessment in appeal before the CIT (Appeals) on the ground that the proceedings u/s 158BD is not maintainable for the reason that income assessed is not based on any evidence or material gathered during search, but is based on cash flow statement, and therefore block assessment itself is without jurisdiction. The alternate contention was against various additions sustained in assessment. The CIT (Appeals) though upheld the assessment granted certain modifications to the amount assessed for the block period. The department filed appeal against the order of the CIT (Appeals) modifying the assessment and assessee file cross-objections challenging that part of the order of the CIT (Appeals) upholding block assessment. The Tribunal after hearing both sides allowed the cross-objections and since cross-objections was allowed cancelling the assessment, the departmental appeal for restoring the deletions made by CIT (Appeals) was rejected as infructuous. It is against this order of the Tribunal that the Department has filed this appeal raising question on the validity of assessment completed u/s 158BD of the Act.

2. The question to be considered is whether assessment u/s 158BD is tenable in this case. Admittedly the proceedings initiated against the assessee are based on the Balance Sheet and other accounts of partnership firm, M/s. Hotel Indraprastha, seized in the course of search of residential and business premises of one Sri Anandan, who is another partner of the firm. Section 158BD authorises the assessing officer to proceed with block assessment against any person if the assessing officer is satisfied that any undisclosed income belongs to such person other than the person with respect to whom search was made u/s 132 based on the books of account, documents or assets seized in the course of search of such other person, to proceed first by issuing notice u/s 158BC to the person against whom information is gathered and to make assessment thereafter. In this case, the Assessing Officer, who conducted search of residential premises of one Anandan, u/s 158BC has jurisdiction to assess respondent-assessee as well and therefore he himself issued notice u/s 158BC read with Section 158BD against the respondent-assessee and made assessment based on the information available in the books of account seized particularly Balance Sheet of the firm, M/s. Hotel Indraprastha obtained in the search from the premises of one Anandan.

The contention raised by the assessee and found acceptance by the Tribunal was that the assessment is not based on any evidence or material gathered in the course of search conducted in the premises of Anandan. However, the case of the department is that for proceeding for assessment against the assessee u/s 158BD is the Balance Sheet and other documents seized pertaining to the firm, M/s, Hotel Indraprastha in which the respondent assessee had admittedly made investments and was earning share of profit. The assessee does not deny the investments made by him in the firm and his eligibility to earn profit therefrom. However, the assessees contention is that the assessment is based on cash flow statement furnished by him which cannot be the basis for making assessment u/s 158BD of the Act. Counsel appearing for the assessee relied on the decision of the Supreme Court in Manish Maheshwari Vs. Asstt. Commissioner of Income Tax and Another, and contended that the assessing officer has not stated his satisfaction for proceeding for assessment against the assessee u/s 158BD and so much so the assessment itself is rightly vacated by the Tribunal. Senior counsel appearing on behalf of the department submitted that recording of satisfaction for proceeding u/s 158BD arises only when the assessing officer who conducted the search is not the person who has jurisdiction to make assessment u/s 158BD and the requirement of Section 158BD is to transfer the file in such case to the officer having jurisdiction to assess the person against whom information is obtained in the course of search of another person. His contention is that in this case the Officer who made the search of residential premises of Anandan has jurisdiction to make assessment against the assessee, and the assessment made is based on the documents and evidence gathered on search and other materials and information collected by the assessing officer. We find that Section 158BB providing for computation of undisclosed income for block period states that undisclosed income of the block period shall be aggregate of the total income of the previous years falling within the block period computed in accordance with the provisions of the Act on the basis of evidence found as a result of search or requisition of books of account or other documents and such other materials or information as are available with the assessing officer and relatable to such evidence as reduced by the aggregate of the total income referred to in the clauses stated therein. The question to be considered is whether the Tribunals finding that assessment in this case is based on cash flow statement furnished by the assessee is correct or not. We have to necessarily disagree with the Tribunals finding because the main document based on which proceedings for assessment were initiated against the assessee is the Balance Sheet of the firm, M/s. Hotel Indraprastha seized from Anandan which showed substantial investment by the assessee during 1996-97 as stated above which is not denied by the assessee. In fact cash flow statements were called for from the assessee only to find out the source for investment and it is not as if the assessment is made based on cash flow statement. All what the assessing officer has done is rejection of cash flow statement and estimation of income based on investment made by the assessee in the Hotel business and once assessment proceedings are initiated u/s 158BD based on evidence found in the course of search about undisclosed income of the person other than the person searched, then it would be open to the assessing officer to make use of any other information available with him or collected by him for making block assessment for such period. Since the finding of the Tribunal that assessment is solely based on cash flow statement furnished by the assessee is factually incorrect and since the assessment is based on information collected in the form of Balance Sheet and other documents of the firm, M/s. Hotel Indraprastha seized from Anandan in the course of search carried out in his premises, the block assessment u/s 158BD read with Section 158BD is tenable as found by the CIT (Appeals).

We therefore allow the appeal by reversing the order of the Tribunal and restoring the appeal to the file of the Tribunal for decision on merits after hearing the assessee and the department. If there is any other issue raised in the cross-objections on merit on additions sustained by the CIT, the same shall stand restored to the Tribunal for consideration along with departmental appeal.

