
(2003) 01 DEL CK 0087

In the Delhi High Court

Case No : Income Tax A. No. 327 of 2002

Commissioner of Income Tax

APPELLANT

Vs

Naresh Khattar (HUF)

RESPONDENT

Date of Decision : 28-01-2003

Acts Referred:

Income Tax Act, 1961 — Section 69B

Citation : (2003) 183 CTR 317 : (2003) 130 TAXMAN 15

Hon'ble Judges : Madan B. Lokur, J;D.K. Jain, J

Bench : Division Bench

Advocate : Prem Lata Bansal, for the Appellant; None, for the Respondent

Judgement

D. K. Jain, J.—This appeal by the Revenue u/s 260A of the Income Tax Act, 1961 (for short "the Act"), is directed against the order of the Income Tax Appellate Tribunal, New Delhi (for short "the Tribunal"), dated June 21, 2002, in I. T. A. No. 953/Delhi of 2002, pertaining to the assessment year 1998-99. The following questions, stated to be substantial questions of law, have been proposed in the appeal :

"(a) Whether the Income Tax Appellate Tribunal was justified in law in deleting the addition of Rs. 8.01 crores made by the "Assessing Officer on account of unexplained investment in the Mussoorie project u/s 69B of the Income Tax Act ?

(b) Whether the Income Tax Appellate Tribunal was correct in deleting the addition of Rs. 8.01 crores only on the ground that the statement made by counsel is not conclusive, altogether ignoring the other evidence gathered by the lower authorities ?

(c) Whether the Income Tax Appellate Tribunal was correct in holding that the statement made by the senior standing counsel in the proceedings other than Income Tax proceedings before the court is not the statement at the Bar and is not conclusive ?

(d) Whether the Income Tax Appellate Tribunal was correct in holding that the addition u/s 69B cannot be made in the assessment year 1998-99 ?

(e) Whether the Income Tax Appellate Tribunal was correct in holding that the Assessing Officer had not rejected the books of account of the assessed when the Assessing Officer had made the specific query with regard to the omissions made in the balance-sheet and the profit and loss accounts ?

(f) Whether the Income Tax Appellate Tribunal was correct in deleting the addition of Rs. 2.99 crores when there was enough material to uphold the addition of Rs. 8.01 crores ?

(g) Whether the order of the Income Tax Appellate Tribunal is perverse in law and on facts when it had altogether ignored the evidence gathered by the lower authorities ?"

2. Briefly stated, the material facts leading to the appeal are :

The respondent-assessed is a Hindu undivided family engaged in the business of development, construction, sale and leasing of flats, etc., under the name and style of Empire Builders, a proprietary concern of the said Hindu undivided family. For the relevant assessment year, for which the previous year ended on March 31, 1998, the assessed filed its return of income declaring a total income of Rs. 5,29,500. During the course of assessment proceedings, the Assessing Officer noticed that in the balance-sheet and profit and loss account of Empire Builders for the year ending March 31, 1997, an amount of Rs. 2,92,79,574 was shown as closing work-in-progress of the Mussoorie project. However, the same amount did not appear as pending work-in-progress as on April 1, 1997, in the balance-sheet of Empire Builders for the period ending March 31, 1998. Nor did it appear as sales made during the year ending March 31, 1998. The assessed was required to explain as to why the sale value of the closing stock in progress be not treated as its undisclosed income. In response thereto, it was explained by the assessed that Empire Builders had entered into an agreement dated February 2, 1996, with one Hotel Hans Private Limited for undertaking the development of a time share project in Mussoorie jointly. The same was to be initially started between the said two concerns. In terms of the said agreement a private limited company was to be formed jointly by the said two concerns and the Mussoorie project was to be transferred to the new company. As per the said agreement one Avion Resorts Private Limited was incorporated on June 4, 1996, having representatives of both the groups. The Mussoorie project was accordingly transferred to the said Avion Resorts for a sum of Rs. 3,37,24,920 as, according to the assessed, it belonged to this company and they were doing only job work for them for which the assessed had charged a sum of Rs. 6,47,500 during the previous year, which was shown as income. However, some disputes had arisen between the assessed and Hotel Hans Private Limited, which were ultimately resolved by way of arbitration. It was stated that since the project was transferred during the previous year, inadvertently it was not reflected in the

opening work-in-progress as well as closing work-in-progress and only the differential amount of Rs. 6,74,500 was taken in the profit and loss account.

3. The Assessing Officer was not convinced with the Explanation furnished by the assessed. Inter alia, observing that at no point of time the assessed was interested in carrying out the job work for and on behalf of Avion Resorts and as per the memorandum of understanding the assessed was to develop and construct the property on their own, which was to be managed jointly, the Assessing Officer held that all the amounts spent for work-in-progress as on April 1, 1997, acquisition of land, improvement in right/title of the land and other miscellaneous expenses (duly supported by bills, etc.), totalling Rs. 2,92,79,574, were by the assessed itself, and, Therefore, the property belonged to it. After holding so, the Assessing Officer proceeded to determine the quantum of the total investment by the assessed in the said project. Though the Assessing Officer noticed that a sum of Rs. 29,27,952 was accounted for in the books of the assessed as on March 31, 1997, but in the month of May, 1997, senior counsel for the assessed had made a statement before the High Court in O. M. P. No. 13 of 1997 (proceedings arising out of the arbitration award) that the assessed had invested a sum of Rs. 13 crores in the said project. Taking the said statement as reflecting the actual amount invested by the assessed (Empire Builders) in the acquisition, development and construction of the Resort, the Assessing Officer came to the conclusion that the assessed had made substantial investment in the project from out of his undisclosed sources. He, accordingly, made an addition of Rs. 8,01,04,149 u/s 69B of the Act as investment from undisclosed sources.

4. Against the said addition, the assessed preferred appeal to the Commissioner of Income Tax (Appeals) but without any success. The matter was carried in further appeal to the Tribunal. By the impugned order, the Tribunal has deleted the said addition. For deleting the said addition, the Tribunal has taken into consideration the following facts, which according to it were not rebutted by the Departmental Representative :

"(i) The appellant had got the property in question valued by an approved valuer, who had worked out "a figure of Rs. 3.69 crores as on March 30, 1997". The assessed's request to the Assessing Officer to refer the matter to the valuation cell did not elicit any response and the Assessing Officer in his remand report to the Commissioner of Income Tax (Appeals) categorically stated that this could not be done "due to paucity of time" ;

(ii) The rateable value of the property fixed by the municipal authorities of Mussoorie was fair and reasonable with reference to the cost of construction shown and it did not take into account a figure which was anywhere in the region of Rs. 13 crores as the cost of construction/investment in property;

(iii) A reading of the interim order of the High Court coupled with the observations of the Assessing Officer in the assessment order and then again in the remand report clearly shows that the major development in the property and

the entire investment seems to have been done up to the period ending on March 31, 1997. In other words, the provisions of Section 69B are not attracted since the assessment year under appeal is 1998-99 ;

(iv) The assessed, i.e., the present appellant, before the Tribunal was not the only party to the Mussoorie project and one really wonders as to how the entire addition could be made in his hands and none of the other parties including Hotel Hans Pvt. Ltd., have been touched and this is going by the assumption that there was some investment outside the books of account. This fact has been emphasised even by the Assessing Officer in his remand report to the Commissioner of Income Tax (Appeals);

(v) Hotel Hans Pvt. Ltd., is stated to be a 50 per cent. partner in the project and it has accepted a sum of Rs. 3.45 crores including Rs. 45,00,000 as compensation to opt out and it is the assessed's stand before us and which is not rebutted by the learned Departmental Representative that the statement of the person concerned from Hotel Hans Pvt. Ltd. was recorded behind the back of the assessed and wherein the investment of unaccounted money was completely denied. Further it stands to no reason that a 50 per cent. owner should withdraw taking only Rs. 3.45 crores when there are allegations of a much larger investment in the property.

(vi) The Assessing Officer himself has observed in the assessment order at page 6 that the amounts shown as having been invested in the Mussoorie project are supported by bills and evidence. We do not find any observation in the assessment order to the effect that the assessed's books of account are being rejected and it is stated before us and not rebutted by the learned Departmental Representative that the accounts of the assessed as also the other persons/ parties connected with the Mussoorie's project are audited; and

(vii) The assessed is also purported to have made an offer to the Department to have the property inspected so as to confirm for themselves as to what would be the probable investment thereof."

5. Relying on the remand report of the Assessing Officer, the Tribunal has also recorded a finding that the only basis for making the said addition was the statement of senior counsel before the High Court.

6. Hence, the present appeal.

7. We have heard Ms. Prem Lata Bansal, learned senior standing counsel for the Revenue. It is vehemently submitted by learned counsel that the Tribunal has misdirected itself in not taking into consideration the other material which had been referred to by the Assessing Officer while making the addition in question. It is urged that the Tribunal was wrong in proceeding on the basis that the addition had been made only on account of the statement of senior counsel before the court. She would assert that the entire order, being based on a wrong premise, namely, that the addition was made only on the basis of the statement

of counsel, is perverse and, Therefore, involves a substantial question of law.

8. We are unable to persuade ourselves to agree with learned counsel for the Revenue. As noticed above the Tribunal has recorded in very clear terms that it had been accepted by the Department that "the only basis for making the addition is the submission of learned senior advocate in the Delhi High Court". Although from the format of the questions proposed, it would appear that the Revenue has taken the stand that the addition was not based only on the stand of counsel in the High Court neither in the body of the petition nor before us has learned counsel for the Revenue been able to rebut the afore-quoted finding of the Tribunal by pointing out as to what other material has been brought on the record by the Revenue in support of the addition in question. If it was felt by the Revenue that the said finding, essentially one of fact, was not factually correct, it was open to it to take recourse to appropriate remedy before the Tribunal for getting it corrected. But no steps in this behalf seem to have been taken. In that view of the matter we are not convinced with the argument of learned counsel for the Revenue that the Tribunal has failed to take into consideration the relevant material, rendering its aforementioned findings as perverse.

9. Therefore, the only question which now survives for consideration is as to whether the Tribunal was justified in taking the view that a mere statement of counsel before the High Court in civil litigation between the parties was not conclusive and the material placed on record by the assessed had bearing on the question of investment in the property in question.

10. There is no gainsaying that to invoke the provisions of Section 69B of the Act, the burden is on the Revenue to prove that the real investment exceeds the investments shown in the books of account of the assessed. As observed by the apex court in *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, , to throw the burden of showing that there is no understatement of the consideration received, on the assessed would be to cast an almost impossible burden upon him to establish a negative, namely, that he did not receive any consideration more than what has been declared by him. Therefore, if the Revenue seeks to hold that the assessed has received more than what has been declared by him in respect of the assessment in question, the onus would lie on the Revenue to prove this fact by bringing some material on record.

11. In the instant case, the Tribunal has noted that before it the parties were *ad idem* that the addition in question was made only on the basis of the observations in the interim order passed by the court in a civil suit between the three parties, including the assessed. We feel that the Tribunal was correct in holding that merely because counsel for the assessed made a statement in a civil court that the total investment in the property was Rs. 13 crores and odd, it would not be sufficient material to come to the conclusion that the said figure represents the actual investment. There has to be something more than that. We are, Therefore, of the view that the Tribunal's finding that the Revenue has failed to place on record any material to show how the total investment of the assessed

was determined at Rs. 13 crores cannot be said to be perverse for having taken into consideration some irrelevant factors or that its decision is such that no reasonable person could have come to the same conclusion. In our opinion, while deleting the addition, the Tribunal has taken into consideration the relevant factors, extracted hereinabove. The issue raised by the Revenue essentially pertains to a question of fact and does not involve the application of any legal principles to the facts established by evidence.

12. Consequently, in our view, no question of law, much less a substantial question of law, arises from the impugned order of the Tribunal. We accordingly decline to entertain the appeal. Dismissed.