(2008) 04 DEL CK 0174

In the Delhi High Court

Case No : IT Appeal No. 545 of 2007

Commissioner of Income Tax — APPELLANT

Vs

Rajesh Kumar — RESPONDENT

Date of Decision : 04-04-2008

Acts Referred:
Income Tax Act, 1961 — Section 54F, 68, 69

Citation : (2008) 218 CTR 691 : (2008) 306 ITR 27 : (2008) 172 TAXMAN 74

Hon'ble Judges : Vidya Bhushan Gupta, J;Madan B. Lokur, J

Bench : Division Bench

Advocate : P.L. Bansal, for the Appellant; Rakesh Gupta and Poonam Ahuja, for the Respondent

Judgement

1. The Revenue is aggrieved by an order dt. 22nd Sept., 2006 passed by the Income Tax Appellate Tribunal, Delhi Bench ''D'', New Delhi (the Tribunal'') in ITA No. 5425/Del/2004 relevant for the asst. yr. 1996-97.

2. The present appeal has arisen out of reassessment proceedings. The reopening is not under challenge because that was decided in favour of the Revenue. The dispute is on the merits of the controversy that is concerning an addition of Rs. 4,89,325 made u/s 69 of the IT Act, 1961 (the ''Act'') as income from undisclosed sources.

3. It appears that the assessee had claimed a deduction u/s 54F of the Act in respect of a long-term capital gain of Rs. 4,89,325 on account of sale of shares of M/s Nilamber Holdings Ltd. and the amount was invested in the purchase of a house property.

4. The AO was of the view that the earning of capital gains through the sale of shares was not genuine. He based his view on a report received from Dy. Director of IT (Inv.), Gurgaon [DDIT (Inv.)] to the effect that the assessee had taken a cheque/draft for an amount of Rs. 4,89,325 from one Shankar Hari Maheshwari out of his bank account No. 8327 drawn on Punjab National Bank,

Karol Bagh, New Delhi.

5. During the reassessment proceedings, the assessee was issued an office letter by the AO on 5th March, 2003 in which the assessee was asked to explain why an addition on account of alleged capital gain be not made. The contents of the letter are of some importance and they read as follows:

1. I intend to make addition on account of alleged capital gain along with estimated amount of premium paid, as your income, as per material available with the undersigned.

2. In addition to the information already called for vide the various order sheet entries of this office issued to you or your Authorized Representative, it is further requested to prove the genuineness of the shares transactions made by you during the year under consideration. Because as per the report of the Dy. Director of IT (Inv.), Gurgaon, it is alleged that you entered in the bogus share transaction through M/s Maheshwari & Sons and claiming exemption u/s 54F of the IT Act. In this regard, you are requested to furnish the following further information with supporting evidence if any as why these transactions not be treated unexplained in the light of the provision laid down u/s 68/69 of the IT Act:

(i) Name of the person/company with complete address from whom alleged shares were purchased. Complete identity of the purchaser/seller of these shares may kindly be intimated.

(ii) No. of shares purchased and value thereof.

(iii) Mode of payment by the cash/cheque and source thereof.

(iv) Prevailing rate of the shares as per stock exchange in the open market on the date of alleged transaction and for the last 2 years as per rates quoted in the stock exchange as per taxman.

(v) Please furnish the photocopies of shares certificates purchased, date when transferred in your name and copies of debit/credit notes.

(vi) Please furnish copy of your bank accounts from 1st April, 1994 to 31st March, 1995.

The assessee furnished all the details as required in the letter.

6. In the assessment order, the AO makes a reference to the statement of Maheshwari that was recorded on 8th Dec, 1999 in which he stated that he had nothing to do with the bank account from which the cheques were issued to the assessee. Further investigations made by the Revenue, pursuant to the statement made by Maheshwari on 8th Dec., 1999 reveal that one Hasija Gulati and Parveen Mittal had apparently opened a bank account in the name of Maheshwari in Karol Bagh, New Delhi, and it is through this bank account that some allegedly bogus sale and purchase of shares were conducted. One of the alleged bogus sale of shares was in respect of the shares of M/s Nilamber

Holdings Ltd. with which we are concerned for the time being.

7. The AO has noted towards the end of the assessment order that the assessee was asked to furnish documentary evidence and source for the purchase of house property and the assessee had filed the necessary information including a copy of the purchase deed of the property. Earlier in the order it has been mentioned that the information asked for was in fact given by the assessee. The AO then concluded that considering all the facts and circumstances of the case and the details and documents furnished by the assessee, the transaction was not genuine. It is quite obvious that reliance was placed by the AO for arriving at the conclusion on the statement of Maheshwari recorded on 8th Dec, 1999 and the material collected as a result of enquiries made from Hasija Gulati and Parveen Mittal.

8. The assessee preferred an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)], which was dismissed on the ground that the assessee had not asked for the statements of any of the persons, that is, Maheshwari, Hasija Gulati or even Parveen Mittal.

9. Against the order of the CIT(A), the assessee preferred an appeal before the Tribunal. It was the contention of this assessee before the Tribunal (and which has been accepted) that the statement of Maheshwari recorded on 8th Dec., 1999 was not made known to the assessee nor was supplied to the assessee. The assessee was not aware that such a statement was made because this fact was not known to the assessee. It appears that even the statement and the material gathered as a result of inquiries made into the affairs of Hasija Gulati and Parveen Mittal were not made known to the assessee and, therefore, the assessee could not put up any defence in respect of the allegations that have been made by the AO in the assessment order.

10. There is no dispute that all the information asked for in the letter dt. 5th March, 2003 was supplied by the assessee. This letter does not advert to any statement of Maheshwari or Gulati or Mittal. Clearly, there was no way that the assessee could have known about any statements recorded of these persons. The version given by the assessee, therefore, is correct or at least plausible.

11. The Tribunal has on these facts rightly come to the conclusion that since the Revenue relied upon the statement of Maheshwari, it should have been made available to the assessee with an opportunity of cross-examine him. This was not done by the AO. It clearly shows that the principles of natural justice have been violated.

We do not find any infirmity in the view taken by the Tribunal on the facts of the case. It is quite clear that material collected by the Revenue behind the back of the assessee was used against him without disclosing that material to him or giving any opportunity to the assessee to cross-examine the person whose statement has been used by the Revenue against the interest of the assessee. No substantial question of law arises. Dismissed.