(2011) 08 KL CK 0102

In the High Court Of Kerala

Case No : IT Appeal No. 305 of 2010 (A.Ys. 1997-98 to 1999-2000)

Commissioner of Income Tax APPELLANT

Vs

T.O. Abraham RESPONDENT

Date of Decision : 02-08-2011

Acts Referred:

Customs Act, 1962 — Section 107, 108, 138B
Foreign Exchange Regulation Act, 1973 — Section 67
Income Tax Act, 1961 — Section 69

Citation : (2012) 347 ITR 378 : (2011) 202 TAXMAN 632

Hon'ble Judges : P.S. Gopinathan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : P.K.R. Menon and Jose Joseph, for the Appellant; V.V. Asokan and R. Jaikrishna, for the Respondent

Final Decision : Allowed

Judgement

Ramachandran Nair, J.—The only question raised in the five connected appeals filed by the Revenue is whether the Tribunal was justified in cancelling assessments on the respondent assessees made on unexplained investment u/s 69 of the income tax Act (hereinafter referred to as the Act for short). We have heard learned Standing Counsel appearing for the appellant Revenue and learned counsel appearing for the assessee, Shri. T.O. Abraham. Even though notice was served on this assessees brother, Shri. T.O. Alias, he has not chosen to engage a counsel or appeared in Court. However, we do not think there is any need to keep ITA Nos.97 & 99 of 2011 in which Shri. T.O. Alias is the respondent assessee, pending any longer because the issue involved is one and the same and the learned counsel appearing for the respondent assessee in the connected appeals exhaustively argued the matter.

2. The facts leading to the disputed assessment on the respondent assessees pertain to sale of 29.5 cents of land in a prime location on the side of M.G. Road, Ernakulam, Cochin city. The property was jointly owned by family members, the

eldest of whom is one Shri. M. Gopinath, who is an educated man engaged in shipping business at Cochin. One of the joint owners happened to be a Non Resident Indian and unexplained Indian Rupees credited in his Bank account led to FERA enquiry. Before the Chief Enforcement Officer, Shri. M. Gopinath, the eldest member of the family who negotiated the sale of the property with the respondent assessees, and Shri. Jayakumar brother of Mr. Gopinath gave statements, which were recorded in their own handwriting to the effect that the above referred land belonging to their family were sold on a sale consideration of Rs. 16,00,000/- (Rupees sixteen lakhs only) per cent even though in the sale deeds the value declared is only Rs. 4,00,000/- (Rupees four lakhs only) per cent. Based on the statements recorded by the Chief Enforcement Officer, the Income Tax authorities issued notice to Shri. M. Gopinath, who wrote Annexure-C letter followed by Annexure-D to the Deputy Commissioner of Income Tax in his own letter head, which are produced in ITA No. 305/2010. In Annexure-C letter, Shri. Gopinath reiterates all what he has stated before the Chief Enforcement Officer that the land belonging to the family members was sold at an agreed price of Rs. 16,00,000 (Rupees sixteen lakhs only) per cent. However, in Annexure D letter, Shri. Gopinath expressed his fears that if the contents of Annexure C letter are leaked out, there may be problem for sale of the balance portion of the property. Admittedly, the property was sold in different pieces and under different documents and it may probably to suit the convenience of the parties to make payment in black and white. Shri. Gopinath has also furnished entire details of the deposits of sale consideration made by him in Bank accounts and he has filed return after paying advance tax of Rs. 7,60,000/- (Rupees seven lakhs and sixty thousand only) for the income partly accounted as capital gains and partly as income from other sources. Other family members who sold the land clearly stated before the Income Tax Officer that Shri. Gopinath being the eldest member of the family negotiated for sale of the property and what he has stated are true facts. Based on the statements recorded by the Chief Enforcement Officer and the letter written by Shri. Gopinath to the Deputy Commissioner, assessment was initiated against the respondent assessees who are brothers who purchased the property in pieces from the sellers. However the respondent assessees denied payment of any amount towards the sales consideration over and above the sale price shown in the documents. The Income Tax Officer gave an opportunity to the respondents to cross-examine Shri. Gopinath and other sellers, and the respondents declined to avail the opportunity probably because by then they had coerced Shri. Gopinath to backtrack from his letters and statements by stating before the Income Tax Officer that the cash credited in his Bank accounts is income from other sources which are commission and other brokerage received by him from the shipping business, about which no detailed explanation was offered. The Income Tax Officer overruled the objection raised by the respondents and based on the evidence available in the form of written statements recorded by the Chief Enforcement Officer from two of the joint sellers - and Annexure C letter written by Shri. Gopinath and corroborative evidence of credits in the joint account of

Shri Gopinath and his wife and the return filed and payment of tax by Shri. Gopinath, assessments were made u/s 69 of the Act on the excess amount paid by the respondents over the value accounted in the sale deeds by the respondents in the purchase of property.

3. In the case of Shri. T.O. Abraham, assessments were made based on payments made for the assessment years 1997-98, 1998-99 & 1999-2000 and in the case of his brother Shri. T.O. Alias, assessments were made only for 1997-98 & 1998-99 as payments made by him were only for these two years.

4. The appeals filed by both the assessees were heard by different Commissioner (Appeals). While one Commissioner through a detailed order confirmed the assessment and dismissed the appeal in the case of Shri. T.O. Abraham for the assessment year 1997-98 vide Annexure G order produced in ITA No. 305/2010, the Commissioner who considered other appeals allowed the same by vacating the assessment. On further appeals by the assessees as well as by the Revenue, the Tribunal decided the case in favour of the respondent assessees by deleting the addition. It is against these orders, the Department has filed separate appeals for restoration of the assessments.

5. Learned Standing Counsel appearing for the Revenue referred to the provisions of the FERA Act, which in section 67 incorporates the provisions of the Customs Act, 1962, namely Sections 107, 108, 138B, and submits that the statements recorded have evidentiary value. In this case, admittedly, Shri. Gopinath the eldest member of the family, who contracted the sale of the property with the respondents clearly gave statement in his own handwriting stating that the land involved was sold at a price of Rs. 1 6,00,000/- (Rupees sixteen lakhs only) per cent. Shri. Gopinath is an educated person and he has no dealings in foreign exchange and he had nothing to conceal from the Enforcement Department. So is the position with his brother Shri. Jayakumar, who also gave confirmatory statement to the effect that the entire amount credited in the Bank account is sales proceeds received from the sale of their family property. Besides the statements given to the Chief Enforcement Officer, Shri. Gopinath through Annexure-C above referred wrote a letter to the Deputy Commissioner of Income Tax in his own letterhead stating true facts that sale of the property is at the rate of Rs. 16,00,000/- (Rupees sixteen lakhs only) per cent. The genuineness of this letter and the correctness of the contents therein are reconfirmed in Annexure D letter, wherein he expressed his fears that if the true facts stated by him confidentially to the Department are leaked out that will lead to problem in the sale of balance portion of the family property. We do not think any more evidence is required to accept the correctness of the contents of the letter written by Shri. Gopinath voluntarily to the Deputy Commissioner of Income Tax. It is seen that besides the statements recorded by the Chief Enforcement Officer and the letter written by Shri. Gopinath, his statements are corroborated with other evidence i.e. credits of corresponding amount in the Bank accounts of Shri. Gopinath and his wife every details of which were

discussed in the assessment order as well as in the order of the CIT produced as Annexure G in ITA No. 305/2010. Therefore, we do not want to discuss the factual position in detail because Shri. Gopinath besides making statement, gave details of various deposits made in each and every Bank and he had even paid advance tax of Rs. 7,60,000/- (Rupees seven lakhs sixty thousand only) followed by filing of return and payment of balance tax on the sale transactions. However, in order to save the respondents, Shri. Gopinath returned the income as income from other sources, which is an after thought after sending letters to the Deputy Commissioner of Income Tax. We are of the view that the contrary oral statements given by Shri. Gopinath to the Deputy Commissioner of Income Tax is only an attempt to save the respondents, and the Assessing Officer rightly rejected it.

6. Above all, this Court has taken note of the notorious fact that invariably in every sale deed, sale consideration declared is much below the market value, which is mainly to avoid huge stamp duty and registration charge totalling 13.5% of the value. In this case, it is seen that the property sold is situated in the most prime location in Ernakulam city i.e. on the side of M.G. Road, where the value shown is only Rs. 4,00,000/- , which everyone knows is notoriously low. When sellers are only interested to receive market value for their land, they are unconcerned whether there is evasion of income tax or stamp duty by the purchasers. In this case, the seller happened to be an honest man though he was later forced to make contrary statements and he has in fact deposited the cash received in Bank accounts and paid tax also arising therefrom. Therefore, we only conclude that the orders of the Tribunal are perverse and unrealistic and cannot survive in the light of the clear evidence available in the form of admissions made by one of the sellers of the property, who being the senior member of the family arranged sale of the family property to the respondents. These appeals are consequently allowed by vacating the orders of the Tribunal and by confirming Annexure G order of the CIT (Appeals) in the case of Shri. T.O. Abraham for the year 1997-98 and by reversing the orders of the CIT(Appeals) in the case of both the assessees for all the remaining years.