(2003) 01 KAR CK 0053

In the Karnataka High Court

Case No : Income-tax Appeal No. 147 of 2002

Deputy Commissioner of Income Tax — APPELLANT

Vs

H.V. Shantharam — RESPONDENT

Date of Decision : 22-01-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Income Tax Act, 1961 — Section 132, 132 (4), 132 A, 158 BC, 158 BFA

Citation : (2003) 180 CTR 300 : (2003) 261 ITR 435

Hon'ble Judges : S.B. Majage, J;G.C. Bharuka, J

Bench : Division Bench

Advocate : Ranjit Kumar Murarka and E.R. Indra Kumar, for the Appellant; G. Sarangan and E.S. Kiresur, for the Respondent

Final Decision : Allowed

Judgement

G.C. Bharuka, J.—This Departmental appeal has been filed u/s 260A of the Income Tax Act, 1961 (in short "the Act"), against the order dated October 31, 2001, passed by the Income Tax Appellate Tribunal, Bangalore Bench "B", in I. T. (SS) A. No. 12/Bang of 1999. It pertains to a block assessment made against the assessee for the period 1989-90 to 1999-2000 made u/s 158BC of the Act. The substantial question of law which has fallen for our consideration is--"Whether, on the facts and circumstances of the case, the findings arrived at by the Tribunal for cancelling the block assessment in question are perverse being contrary to the materials on record and have been arrived at on conjectures and surmises ?"

Foundational facts :

2. The assessee is an individual. At the material time he was the managing director of Mayura Hotels Pvt. Ltd. and Swathi Hotels Pvt. Ltd., Bangalore. He was also a partner in Hotel Mayura in Bellary and Shanthakumar Ganeshlal Enterprises, Bangalore. He was also carrying on a proprietorship hotel business in the name and style New Prakash Bhavan at Bangalore as a karta of his Hindu

undivided family. He was being regularly assessed for the income derived from these concerns as also the other sources disclosed by him.

3. On the basis of some information that the assessee had made unaccounted investments, search u/s 132 of the Act was conducted in his premises on May 27, 1998. During the search, unaccounted investments in the form of shares, cash certificate, Indira Vikas Patras and fixed deposits were found. Therefore, all such certificates and deposit receipts were seized. Photo copies of the inventory prepared at the time of seizure containing details of investments, the date of such investments and the amounts, have been placed before us. These details are not in dispute.

4. On June 5, 1998, the statement of the assessee was recorded u/s 132(4) of the Act wherein he admitted that he had made undisclosed investments during the block period. Based on his statement, a further search was conducted in his premises on July 9, 1998. Subsequently, a notice was issued to him u/s 158BC of the Act requiring him to file return for the block period in question. The return was filed on October 27, 1998, in Form No. 2B as prescribed under the Income Tax Rules, 1962 (in short, "the Rules"), showing Rs. 72,00,000 as the total undisclosed income of the block period. For computing the undisclosed income, the assessee had taken into account the income assessed for the assessment years 1989-90 to 1997-98 and the income of of Rs. 1,11,92,450 for the assessment year 1998-99 for which he was yet to file his regular return and Rs. 5,00,000 estimated income for the assessment year 1999-2000.

5. Two days later, on October 29, 1998, the assessee filed his regular return for the assessment year 1998-99 as well showing his total taxable income at Rs. 1,11,92,450. The Assessing Officer completed the regular assessment for the assessment year 1998-99 by accepting the returned income u/s 143(3) of the Act. Still the assessee preferred an appeal against the order which was dismissed by the Commissioner of Income Tax (Appeals). The assessee did not prefer to go in any further appeal Therefore, the regular assessment order for the year 1998-99 attained its finality.

6. So far as the block assessment is concerned, after due notice to the assessee and on hearing him, the assessment order was passed on January 27, 1999, assessing him on a total income of Rs. 80, 81,358. The assessee assailed the block assessment order before the Commissioner of Income Tax (Appeals), who granted partial relief by order dated April 23, 1999. Consequent to this relief, the income from undisclosed sources reduced to Rs. 77,51,986. The assessee questioned the order of the Commissioner of Income Tax (Appeals) before the Tribunal. The Tribunal accepting the plea of the assessee that the entire undisclosed income was covered by the regular assessment made for 1998-99, cancelled the block assessment.

Reasons assigned by the Tribunal :

7. It is not in dispute that the assessee had produced a cash book/day book

before the Assessing Officer for the period April 1, 1997, to March 31, 1998, being the previous year pertaining to the assessment year 1998-99. This book contained two entries on April 7, 1997. The credit side showed cash receipts of Rs. 90 lakhs and the debit side reflected the investment of the entire Rs. 90 lakhs in the form of bank F.Ds., IVPS and other investments. This entry reads as under :

Receipts

Payments

7.4

To Profit A/c. bank F. D., Indira Vikas Patras and other investments

90,00,000

Bank F. D. Indira Vikas Patras and other investments

90,00,000

8. It is of relevance to notice here that while recording the statement of the assessee u/s 132(4) of the Act on June 5, 1998, the DDIT by specifically bringing the above entries to the notice of the assessee enquired from him whether these pertained to unaccounted investments found during the search and seizure effected on May 27, 1998. The questions and answers in this regard have been duly noticed by the Commissioner of Income Tax (Appeals) in para. 4.3 of his order. The sum and substance of the answer given by the assessee was that the investments found during the search and seizure were not covered by the above entry dated April 7, 1997, made in the cash book/day book produced by him which he had shown as income in his regular return filed for the assessment year 1998-99.

9. Admittedly, none of the investments discovered during the search and seizure were made on April 7, 1997. All such undisclosed investments were made either prior to April 1, 1997, or in the month of June, 1997, and thereafter. Therefore, if the books of account claimed to have been maintained by the assessee in his regular course are accepted as genuine, then the undisclosed investments cannot be co-related with the entry made on April 7, 1997. On the other hand, if the entry is held to be an afterthought or bogus then also the investments detected during the search and seizure remained unaccounted.

10. Though in the assessment order there was no discussion about the correctness or otherwise of the above entry, the Commissioner of Income Tax (Appeals) considered this aspect in all possible details in paragraphs 13 and 14 of his order. Keeping in view the materials on record, the Commissioner of Income Tax (Appeals) held that the entries relating to Rs. 90 lakhs made in the cash book produced by the assessee were interpolated after search. But, curiously, the Tribunal in paragraph 24 of the order has recorded a finding that--". . . the assessee, in this case, has recorded on April 7, 1997, and again on March 31,

1998, as already stated, the disputed investment as also the income from such investments." We hardly find any ground to sustain this finding because, admittedly, none of the investments detected during the search and seizure can be co-related with the entry made on April 7, 1997. Further, admittedly, undisclosed income has not been found recorded in the books of account so produced.

11. The Tribunal, in order to cancel the block assessment has relied on the following circumstances :

(i) The assessee was under tremendous mental tension after seizures were effected, therefore he had filed a wrong return for the block period showing undisclosed income of Rs. 72 lakhs ;

(ii) The admission so made in the return cannot be held to be conclusive ;

(iii) The assessee cannot be subjected to double taxation."

12. In our considered opinion, none of the above circumstances can be of any avail to the assessee because even if the assessee is found to be suffering from "tremendous mental pressure", the fact remains that he had made investments worth Rs. 72 lakhs and those were not recorded in the books of account. This being the situation, the assessee clearly became liable to be assessed for the block period in question in terms of the provision contained in Chapter XIV-B which contains sections 158B to 158BH.

13. Clause (a) of Section 158B as it stood at the material time reads as under :

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

(a) ''block period'' means the previous years relevant to ten assessment years preceding the previous year in which the search was conducted u/s 132 or any requisition was made u/s 132A, and includes, in the previous year in which such search was conducted or requisition made, the period up to the date of commencement of such search or, as the case may be, the date of such requisition ; . . ."

14. In the present case, the search was conducted on May 27, 1998, and July 9, 1998. Therefore, the block period for the assessment contained all the ten assessment years being from 1989-90 to 1999-2000.

15. Further, Clause (b) of Section 158B defines "undisclosed income" and the same reads as under :

"(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."

16. Section 158BA provides for assessment of undisclosed income as a result of search. This provision reads as under :

"158BA. Assessment of undisclosed income as a result of search.--(1) Notwithstanding anything contained in any other provisions of this Act, where after the 30th day of June, 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."

17. In the present case, the assessee, in order to escape the liability of tax under block assessment, heavily relied on Sub-section (3) of Section 158BA. According to this sub-section, if the assessee is able to satisfy the Assessing Officer that the income referred to in Sub-section (1) of Section 158BA related to an assessment year for which the previous year had not ended or the date of filing of the return of income under Sub-section (1) of Section 139 for any previous year had not expired, and, such income or transactions relating to such income were recorded on or before the date of search or requisition of books of account, the said income shall not be included in the block period.

18. In the present case, so far as the investments which were made during the previous year pertaining to the assessment year 1998-99 and were detected

during the search are concerned, the last date for filing the return had not expired. But, as already noticed by us, the investments so detected were not found to have been recorded in the books of account produced by the asses-see. This being the factual situation, the assessee could not have escaped the liability of being assessed for the block period for all the investments detected during the search. The Tribunal has conveniently ignored this material aspect and by taking into account totally irrelevant consideration, has taken the view that the undisclosed income found during the search and set forth by the assessee in his block return, was squarely covered by the income disclosed by him in his regular return for the assessment year 1998-99. Consequently, the Tribunal took the view that sustaining the block assessment would amount to double taxation and, therefore, cancelled the block assessment in its entirety. The conclusion and finding arrived at by the Tribunal is clearly perverse and cannot be sustained in law.

19. Sri Sarangan, learned senior counsel appearing for the assessee, as a last limb of his argument submitted that the present appeal being one u/s 260A of the Act, it is not permissible for this court to interfere with the findings of the Tribunal which according to him are purely of facts. In support of his submission, he relied on the judgment of the Supreme Court in the case of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., . We entirely agree with Sri Sarangan that if the finding recorded by the Tribunal is of fact and is based on relevant materials on record and has been arrived at on appreciation of evidence, then certainly this court cannot interfere with such a finding. But, here, the situation is otherwise. In this case, the Tribunal has recorded a finding contrary to the documentary evidence available on record and further by acting on surmises and conjectures. Therefore, this finding falls in the realm of perversity which certainly gives rise to a question of law.

20. In the above context, Sri Ranjit Kumar Murarka, learned senior counsel appearing for the Department, has rightly brought to our notice a recent judgment of the Supreme Court in the case of Kulwant Kaur and Others Vs. Gurdial Singh Mann (dead) by Lrs. and Others etc., , wherein in the context of Section 100 of the Code of Civil Procedure, it has been held that (page 278 of [2001] 4 SCC 278) :

"... while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-a-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication--what is required is a categorical finding on the part of the High Court as to perversity . . .",

21. In support of the above proposition, the Supreme Court also referred to section 103 of the CPC which reads as under (page 279):

"103. In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,--

(a) which has not been determined by the lower appellate court or by both the court of first instance and the lower appellate court, or

(b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100."

22. The Supreme Court has taken the view that (page 279) :

"The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with."

23. Sri Murarka, learned senior counsel for the Department, submitted that in view of the above judgment of the Supreme Court, if this court comes to the conclusion that the finding of the Tribunal is perverse, then the law laid down in the context of Section 100 of the CPC equally applies to appeals preferred before this court u/s 260A of the Act.

24. In the context of the above jurisdictional issue, Sri Sarangan relied on Subsection (1) of Section 260A of the Act whereas Sri Murarka has relied on Subsection (7) thereof, we quote both the sub-sections :

"260A. (1) An appeal shall lie to the High Court from every-order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law ...

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section."

25. Keeping in view the above provisions, in our opinion, the law laid down by the Supreme Court in the case of Kulwant Kaur and Others Vs. Gurdial Singh Mann (dead) by Lrs. and Others etc., , clearly applies to appeals preferred before this court, u/s 260A of the Act as well.

26. Sri Sarangan, at the end, made efforts to persuade us to remand the case to the Tribunal for fresh consideration particularly in view of paragraph 28 of the Tribunal''s order which reads as under :

"In the light of the decision we have reached on the validity of the assessment made in this case, we do not feel it necessary to go into the merits of any of the additions or with regard to the levy of interest u/s 158BFA of the Act."

27. In our opinion, keeping in view the facts of the present case, there is no occasion on our part to remand the case to the Tribunal because when once it is found that the investments detected during the search have not at all been recorded in the books of account, there hardly remains any other aspect to be determined by the Tribunal on merits of the assessment. Similarly, the leviability of interest u/s 158BFA of the Act is merely consequential and confers no discretion on any authority to remit or reduce the same. For these reasons, nothing remains for the Tribunal to decide in the matter.

28. Accordingly, the order passed by the Tribunal is set aside. The appeal is allowed. The parties to bear their own costs.