

(2008) 05 DEL CK 0220
In the Delhi High Court
Case No : ITA No. 36 of 2008

Dharam Pal Dhingra, Prop. Dharampal Dhingra Electronics	APPELLANT
Vs	
Commissioner of Income Tax	RESPONDENT

Date of Decision : 28-05-2008

Acts Referred:

Income Tax Act, 1961 — Section 132, 254(2), 260A

Citation : (2008) 05 DEL CK 0220

Hon'ble Judges : Manmohan Singh, J; Madan B. Lokur, J

Bench : Division Bench

Advocate : Abhishek Maratha, for the Appellant; Rashmi Chopra, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Singh, J.—This appeal is preferred u/s 260A of the Income Tax Act, 1961 (the Act) against the order dated 9th February 2007 passed by Income Tax Appellate Tribunal (ITAT) in the M.A. No. 791/(Del)/2006 in IT(SS) NO. 269/(Del)/2001 for the block period 01.04.1988 to 28.09.1996, whereby ITAT dismissed the M.A. No. 791/(Del)/2006 of the appellant and allowed the M.A. No. 626(Del)2006 filed by the Department as consolidated order.

2. Brief facts relevant for the purpose of deciding this appeal are that the appellant is the sole proprietor of M/s Dharampal Electronics with his business premises situated at 33, Old Lajpatrai Market, Delhi-6. The residence of the appellant is located at U-153, Shakarpura, Delhi-92 and he is engaged in the business of trading as wholesaler of CDs and audio cassettes. During the search and seizure operation u/s 132 of the Act on 28th September, 1998, a diary and loose papers were seized by the Income Tax Department from the residential premises of the appellant which contained some entries written by Jitender Dhingra, the son of the Assessee. The assessee addressed a letter to the Assessing Officer on 19th September, 2000 stating that the total sales worked out at Rs. 3,74,138/- may be assessed as the assessee's income from

undisclosed sources.

3. The Assessing Officer held that the total amount of Rs. 3,74,138/- be added as undisclosed income of the Appellant, vide the assessment order dated 27th September, 2000. Appellant preferred an appeal against the order of Assessing Officer to the Commissioner of Income Tax (Appeals) who held that only 2.5% of the total amount of sales i.e. Rs. 3,74,138/- be computed and taxed as undisclosed income in the hands of Appellant.

4. The Department aggrieved by this order preferred an appeal before ITAT. After hearing the said appeal, the ITAT accepted the appeal of the Department and held the total amount of sale to be undisclosed income of the Assessee. The reasons for allowing the appeal given by the ITAT are mentioned in para 5 of the said order. The relevant part of the said order is given hereinbelow:

5. We have carefully considered the rival submissions. Search in the case of the assessed was conducted on 24.9.1998. After about two years the assessed addressed a letter to the AO on 19.9.2000, inter-alia, stating that the total sales worked out at Rs. 3,74,138/- may be assessed as the assessor's income from undisclosed sources. This letter was further reinforced by a letter of the same date addressed to the AO by the son of the assessee. By this admission the assessed pre-empted further enquiry and probe into the affairs by the AO and the matter was treated as concluded. Generally, an admission is the best evidence that an opposing party may rely upon though not conclusive. Reference in this respect may be made to the judgments reported in Rameshchandra and Company Vs. Commissioner of Income Tax, . Hon''ble Delhi High Court in the case of Durga Timber Works Vs. Commissioner of Income Tax, and Hon''ble Punjab & Haryana High Court in the case of Mahavir Metal Works Vs. Commissioner of Income Tax, have held that where an assessed himself voluntarily concedes that a particular item represented his income and surrender such income for the purpose of assessment, there is nothing further left for the Department to prove it as assessor's income. It is no doubt true that the presumption raised by an admission is not irrebutable. It is open to a party to show the contrary by adequate evidence. Until the presumption is rebutted the fact admitted by the party must be taken to be established. In the instant case no material has been brought on record by the assessed to show that there were corresponding purchases also outside the books of accounts. It is also not proved by the assessed that the sales do not comprise of purchases already debited to the assessor's books of accounts.

Before ITAT and in this Court the Department has relied upon a judgment of this Court in Commissioner of Income Tax, Delhi-III, New Delhi Vs. M/s. La Medica, Delhi, .

5. Thereafter, it appears that the assessed did not challenge the order dated 20.4.2005 of the ITAT but initiated proceedings u/s 254(2) of the Income Tax Act, 1961 by filing an application being M.A. No. 791/(Del)/2006. The said M.A.

No. 791/(Del)/2006 was dismissed by the ITAT in IT (SS) No. 269/(Del)/2001 vide order dated 9th February, 2007.

6. It was argued by the appellant in the rectification proceedings in M.A. that the addition of the whole amount of sale as undisclosed income without deducting the amount of the undisclosed purchase amounts to an error apparent on the face of the record and is Therefore liable to be rectified u/s 254(2) of the Act. Learned Counsel for the Appellant relied upon the judgment of High Court of Madhya Pradesh in Commissioner of Income Tax Vs. Balchand Ajit Kumar, and the judgment of High Court of Gujarat in Commissioner of Income Tax Vs. President Industries, . It was contended that undisclosed income liable to be taxed should only be 2.5 % i.e the gross profit rate and not the whole amount of sales. In Balchand Ajit Kumar Case (supra) it was held that total sale could not be regarded as profit of the assessed and the gross profit rate has to be adopted. It was further contended that La Medica's case doesn't apply to the facts of present case, it is entirely different from the present case in facts and the issue involved as well.

7. We are of the view that the judgments cited by the appellant were not applicable in the facts and circumstances of the present case on the ground that there was an admission on the part of the assessed about the undisclosed sale which was further re-enforced by a letter of his son addressed to the Assessing Officer. It was also categorically observed by the Tribunal that there was no material brought on record by the assessed to show that there was corresponding purchase also outside the books of accounts.

8. We consider that where there is no evidence produced by the assessed for undisclosed purchases, there can be no presumption regarding undisclosed purchases, in favor of the Assessee. As there is no detail regarding unaccounted purchases corresponding to the unaccounted sales, whole amount of undisclosed sale i.e Rs. 3,74,138/- will be added in the undisclosed income of the Assessee. There will be no question of applying gross profit rate of 2.5 % of the undisclosed sales as the undisclosed purchases have not been proved.

9. In view of the above facts and circumstances of the case no substantial question of law arises for consideration against the impugned order dated 9th February, 2007 passed by ITAT in M.A. No. 791/(Del)/2006. Hence the appeal is dismissed but no order as to costs.