
(2013) 10 P&H CK 0019
In the Punjab And Haryana At Chandigarh
Case No : IT Appeal No. 806 of 2010

Dr. Raghuveendra Singh

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 10-10-2013

Acts Referred:

Citation : (2014) 267 CTR 376

Hon'ble Judges : Jaspal Singh, J;Ajay Kumar Mittal, J

Bench : Division Bench

Judgement

Ajay Kumar Mittal, J.—This appeal has been preferred by the assessee under s. 260A of the I.T. Act, 1961 (in short, "the Act") against the order dt. 31st March, 2010, Annex. A3, passed by the Tribunal, Amritsar Bench, Amritsar in ITA No. 30/Asr/2010, for the asst. yr. 2007-08. It was admitted on 28th Aug., 2012 to consider the following substantial questions of law:

(1) Whether the Tribunal has erred in law by failing to appreciate that the disclosure of Rs. 22 lacs made by the assessee in the course of the search and seizure proceedings towards investment in construction of the hospital premises, which thereafter stood duly reflected by the assessee in his "balance sheet" filed along with the I.T. return for the year under consideration, was to be duly considered at the time of calculating the impugned difference between the investment made by the assessee as in comparison to the estimate of the "Valuation Cell"?

(2) Whether the Tribunal is right in law in sustaining the substitution of the impugned difference/deficit of Rs. 7,76,259 as stood calculated by comparing the aggregate of investment as stood reflected by the assessee as in comparison to that as stood estimated by the "Valuation Cell", by an amount of Rs. 10,01,325 which stood calculated by the AO by applying "Cost inflation index" to the impugned difference/deficit pertaining to the asst. yrs. 2005-06 and 2006-07?

(3) Whether the Tribunal is right in law in transgressing its arena of jurisdiction

therein dismissing the appeal of the assessee on an entirely different ground which was neither pleaded nor raised by the assessee, nor any cross-objection as regards the same was ever filed by the Revenue/Department, therein placing the assessee-appellant in a situation worse than where he was prior to filing of the appeal?

(4) Whether the Tribunal has erred in law in failing to appreciate that in light of meager difference/deficit as regards the investment made by the assessee in construction of the hospital premises as in comparison to the estimate of the "Valuation Cell" which had been adopted in entirety as such by the AO, the same being below 15 per cent, therein no adverse inferences as regards the same were liable to be drawn in the hands of the assessee?

Briefly, the facts necessary for adjudication of the controversy involved, as narrated in the appeal, may be noticed. The appellant is a doctor by profession. He is running a hospital under the name and style of M/s. India Kidney Centre at Jalandhar. Search and seizure operations under s. 132 of the Act were conducted at the business-cum-residential premises of the appellant on 17th Nov., 2006. In response to the notices issued by the Revenue under s. 153A of the Act, the assessee filed his I.T. return for the year under consideration on 24th Oct., 2007, declaring an income of Rs. 44,04,250 including an amount of Rs. 40,00,000 which was surrendered by the assessee during the course of search proceedings. The return was processed under s. 143(1) of the Act. Thereafter, notices under ss. 143(2) and 142(1) of the Act were issued to the assessee which were duly complied with by him. During the course of assessment proceedings, the AO in exercise of powers vested with him under s. 142A of the Act referred the valuation of the hospital premises, as had been constructed by the assessee in the asst. yrs. 2005-06, 2006-07 and 2007-08, to the Valuation Cell. The Valuation Cell estimated the investment made by the assessee towards construction of the said hospital premises at an amount of Rs. 66,73,500 as against the investment of Rs. 58,97,241 as disclosed by him which included amount of Rs. 22 lacs surrendered by the assessee towards investment in the construction of the hospital during the course of search and seizure operations. The difference was Rs. 7,76,259 which was about 11.63 per cent. The AO applied cost inflation index to the said difference and raised the same from Rs. 7,76,259 to Rs. 10,01,325. The assessee submitted before the AO that the said difference was still lower than 15 per cent. The AO treated the said difference as unexplained investment of the assessee. On appeal, the CIT(A) vide order dt. 17th Nov., 2009, Annex. A2 sustained the addition of Rs. 10,01,325 made by the AO. Aggrieved thereby, the assessee filed appeal before the Tribunal. Vide order dt. 31st March, 2010, Annex. A3, the appeal was dismissed. Hence the instant appeal by the assessee.

2. Learned counsel for the assessee submitted that since the books of account were never rejected and there was no specific order passed by the AO rejecting the books of account, therefore, no reference could be made to the Departmental

Valuation Officer (DVO) and as a consequence thereof, no addition could be made on account of construction of the hospital. Reliance was placed upon judgments in (2010) 328 ITR 513 (SC) , CIT vs. Chohan Resorts (2012) 253 CTR (P & H) 106 : (2012) 76 DTR (P & H) 163 and Nirpal Singh vs. CIT, I.T. Appeal No. 522 of 2009, decided on 16th Sept., 2013 [reported at (2013) 96 DTR (P & H) 385--Ed.]. It was submitted by the counsel that though this point was never raised before the Tribunal but this being a pure question of law, in view of sub-s. (6) and (7) of s. 260A of the Act, this Court could permit the appellant to raise such a plea. Support was drawn from judgment of the Karnataka High Court in I.T. Appeal No. 313 of 2002, CIT & Anr. vs. Distillers Co. Ltd., decided on 4th Dec., 2003 and judgment of Calcutta High Court in C.C.A.P. Ltd. Vs. Commissioner of Income Tax, . Lastly, it was submitted that since there was less than 15 per cent variance in the report of the DVO and the cost of construction as shown in the books of account after including sum of Rs. 22 lacs which was surrendered at the time of search and seizure, which was within the permissible limit and thus, no addition was called for.

3. On the other hand, learned counsel for the Revenue besides supporting the orders passed by the AO, CIT(A) and the Tribunal, submitted that the assessee before the CIT(A) had accepted that discrepancies, if any, on account of construction may be considered in this year on accredited basis and adjusted with Rs. 22 lacs surrendered in the course of search proceedings. It was submitted that the total addition was required to be made in this year itself.

4. After hearing learned counsel for the parties, we do not find any merit in the appeal.

5. It would be apposite to first examine whether the appellant was entitled to raise objection with regard to validity of the reference to the DVO without there being any specific order of rejection of books of account. In this regard, reference is made to the decisions rendered by the Karnataka and Calcutta High Courts.

6. The Karnataka High Court in Distillers Co. Ltd.'s case (supra) delving into this issue had noticed as under:

5. From a reading of sub-s. (1) of s. 260A of the Act, it is clear that an appeal is provided to the High Court from every order passed by the Tribunal, the case involves substantial question of law. Therefore, the conditions that are required to be satisfied for entertaining the appeal are--(1) that the order appealed against should arise out of an order made by the Tribunal; and (2) that the case involves substantial question of law. Therefore, if the case or a proceeding, out of which an appeal is presented before the High Court involves substantial question of law, such an appeal would be maintainable before the High Court under s. 260A of the Act. Therefore, even if the contention is not urged before the appellate authority, but on the basis of the records, without investigation of any facts, if the substantial question of law is made out by the appellant before the

High Court, in our view, it would be permissible for the High Court to entertain an appeal for consideration of such a question. Therefore, as noticed by us earlier, the language employed under sub s. (1) of s. 260A of the Act is that the case should involve a substantial question of law. The meaning attached to the words "substantial question of law", in our view, should not be given a restricted meaning to understand it as should involve substantial error of law in the order. While interpreting a provision which provides for a right of appeal, the Court should not narrow down the scope of right of appeal provided to the parties. Sub-s. (2) of s. 260A of the Act cannot be read de hors sub-s. (1) of s. 260A of the Act. Sub-s. (1) of the said section confers power on the High Court to entertain an appeal against every order passed by the Tribunal. Sub-s. (2) of the said Act provides for a right to a party to file an appeal. Therefore, reading of sub-ss. (1) and (2) of s. 260A of the Act make it clear that if the CIT or the assessee is aggrieved by an order passed by the Tribunal, he could prefer an appeal to the High Court provided the case involves substantial question of law. As noticed by us earlier, while interpreting the provision relating to right of appeal, the Court should not impose a restricted meaning limiting the power given to the appellate Court to interfere against the orders passed by the subordinate Courts or Tribunals. Therefore, in our considered view, if a question urged before this Court involves a substantial question of law, even if it is not raised before the Tribunal, the said question could be raised and urged before this Court and in that event the same is required to be considered by this Court. Therefore, in the light of the discussion made above, we do not find any merit in the preliminary objection raised by Sri Prasad, referred to above.

7. Similarly, the Calcutta High Court in C.C.A.P. Ltd.'s case (supra) had observed as under:

13. In any event, even if it is assumed that the Tribunal could not have passed any order since no appeal was preferred and no cross-objection was filed, even then in an appeal under s. 260A in which the CPC is applicable as far as possible in view of sub-s. (7) of s. 260A and by reason of the provisions contained in s. 260A(6), this Court is empowered to pass appropriate order in an appeal. Under Order 41, r. 33 of the CPC, this Court is empowered to pass any order in an appeal before it and grant relief to a party even though such party may not have filed cross-objections or preferred any appeal or appeal was preferred against a part of the order. Therefore, there is no bar on this Court in exercise of power under s. 260A to pass appropriate order as would be necessary in this appeal having regard to the facts and circumstances of the case. Since by reason of sub-s. (7) of s. 260A this principle is attached in an appeal under s. 260A, and we find that the learned Tribunal was wrong in affirming the order of the CIT(A), we are inclined to pass appropriate order.

8. In view of the above, in our opinion, the High Court in an appropriate case where no dispute arises on factual ground but purely legal issue arises in the case, may consider a substantial question of law even though it may not have

been raised/adjudicated before the Tribunal.

9. Adverting to the submission made by the learned counsel for the appellant on merits, that in the absence of any specific order rejecting the valuation of the cost of construction as shown in the books of account, reference under s. 142A of the Act was unjustified and no addition could be made, the following facet would be required to be examined:

the scope and circumstances in which the AO can invoke provisions of s. 142A of the Act.

10. It would be expedient to notice s. 142A of the Act. Sec. 142A of the Act was inserted by Finance (No. 2) Act, 2004 w.e.f. 15th Nov., 1972. At the relevant time, it read thus:

142A(1). For the purpose of making an assessment or reassessment under the Act, where an estimate of the value of any investment referred to in s. 69 or s. 69B or the value of any bullion, jewellery or other valuable article referred to in s. 69A or s. 69B is required to be made, the AO may require the Valuation Officer to make an estimate of such value and report the same to him.

(2) The Valuation Officer to whom a reference is made under sub-s. (1) shall, for the purposes of dealing with such reference, have all the powers that he has under s. 38A of the WT Act, 1957 (27 of 1957).

(3) On receipt of the report from the Valuation Officer, the AO may, after giving the assessee an opportunity of being heard, take into account such report in making such assessment or reassessment.

11. A plain reading of the provision shows that an AO wherever considers fit to estimate the value of any investment referred to in s. 69 or s. 69B or the value of any bullion, jewellery or other valuable article referred to in s. 69A or s. 69B may require the Valuation Officer to make an estimate of such value and report the same to him.

12. The scope and rationale of the new provision was explained by the Central Board of Direct Taxes (in short, "the Board") in Circular No. 5 of 2005 dt. 15th July, 2005 (2005) 197 CTR (St) 1 : (2005) 276 ITR (St) 151 as under:

Clarificatory amendments regarding estimates toy Valuation Officer in certain cases

The existing provisions of s. 131 provide that the AO shall have the same powers as are vested in a Court under the CPC, 1908, when trying a suit. One such power which has been provided in cl. (d) of sub-s. (1) of s. 131 is the power to issue commissions. Sec. 75 of CPC and Order XXVI of the Schedule thereto lays down the power of "issuing commission", which inter alia empowers the Court to make a local investigation and also "to hold a scientific, technical and expert investigation". Using this power, the AO has been making a reference to the Valuation Officer for estimating the cost of construction of properties.

The scope of power vested in an AO under s. 131 to make a reference to the Valuation Officer for estimating the cost of construction of properties has been a subject-matter of litigation.

A new s. 142A has been inserted by the Finance (No. 2) Act, 2004 to specifically provide that an AO has the power to make a reference to the Valuation Officer for estimating the value of investment, expenditure etc. This section has been inserted with retrospective effect from 15th Nov., 1972 to save the cases where such references have been made in the past and are still pending in litigation at one stage or the other.

Sub-s. (1) of the new section provides that where an estimate of the value of any investment referred to in s. 69 or s. 69B or the value of any bullion, jewellery or other valuable article referred to in s. 69A or s. 69B is required to be made for the purposes of making any assessment or reassessment, the AO may require the Valuation Officer to make an estimate of the same and report to the AO.

Sub-s. (2) of the new section provides that the Valuation Officer to whom such a reference is made under sub-s. (1) shall, for the purpose of dealing with such reference, have all the powers that he has under s. 38A of the WT Act, 1957.

Sub-s. (3) of the new section provides that on receipt of the report from the Valuation Officer, the AO may after giving the assessee an opportunity of being heard, take into account such report in making such assessment or reassessment.

It has been provided in the proviso to the new section that the provisions of the same shall not apply in respect of an assessment made on or before the 30th day of September, 2004 and where such assessment has become final and conclusive on or before that date, except in cases where a reassessment is required to be made in accordance with the provisions of s. 153A.

This amendment takes effect retrospectively from 15th Nov., 1972.

13. Sec. 142A of the Act has been incorporated primarily for verification of the value of any investment in respect of cases enumerated therein. The AO would not be justified in invoking the aforesaid provision in every case and in a routine manner. Where the assessee maintains regular books of account for the purpose of construction of the asset and produces the vouchers, it would not be appropriate for the AO to refer the matter to the DVO without first rejecting the books of account by prima facie concluding that the valuation appears to be more than what has been depicted in the books of account. However, wherever the assessee has not maintained the regular books of account of cost of construction of the asset and claims its valuation on the basis of estimate of the report of the registered valuer, the AO is empowered to make a reference to the DVO after forming a prima facie opinion that the value of the investment is not genuinely disclosed and is required to be assessed for the purposes of s. 69, 69A or 69B of the Act. In other words, s. 142A of the Act, thus, cannot be invoked

where valuation of the cost of construction is bona fide and based on books of account which has not been rejected. The report of the DVO would be dealt with by the AO under sub-s. (3) of s. 142A of the Act. There is logic and reasoning for adopting the aforesaid view. There appears to be no occasion for the Revenue not to accept the valuation of the cost of construction of an asset without rejecting the books of account maintained by the assessee. It would not only be unfair but against the public policy as well to assume that the assessee is dishonest and he must have submitted an incorrect account of expenses/investment.

14. Having crystallised the legal position, one would be required to delve into the factual matrix in the present case. During the search operations carried out on the business and residential premises of the assessee on 17th Nov., 2006 which was concluded on 3rd Jan., 2007, an amount of Rs. 40,00,000 was surrendered by the assessee. It may be noticed that the assessee during the course of search on 17th Nov., 2006 had surrendered an amount of Rs. 22 lacs relating to asst. yr. 2007-08 on account of unaccounted amount utilized in the construction of the hospital.

15. Law protects those who are fair in their action and are co-operative with the Department. Where during search and seizure operation, disclosure of concealed income is made by way of surrender, it cannot be termed as voluntary disclosure because it is made under the constraint of exposure to adverse action by the Department. However, there being exception where the surrender is made "Voluntary" out of free will without any compulsion. In the present case, it was only during the search when the assessee had no other option that the amount was surrendered on account of unaccounted amount of Rs. 22 lacs utilised by him. The only inference in such circumstances would be that the cost of construction shown in the books of account was due to the fact that they were not properly maintained. The law nowhere envisages that there has to be specific format or an order rejecting the valuation of an investment in the books of account. It could be inferred from the facts as well. Once that is so, the reference by the AO to the DVO was justified and cannot be faulted. In *Sargam Cinema* (supra) and *Nirpal Singh's case* (supra), there was no search or seizure or surrender made by the assessee. The AO made reference to DVO without there being any material to reject the cost of construction shown in the books of account, which is not the case here. The said contention is thus, rejected.

16. Examining the last argument, the surrender of Rs. 22 lacs on account of unaccounted investment in the construction of the hospital could not be taken for purposes of determining 15 per cent variation as urged by the counsel for the assessee. The Tribunal had repelled similar contention with the following observations:

We have given our thoughtful consideration to the rival submissions, facts of the case, including the submissions filed by the assessee. We have also gone through the orders of the authorities below. The AO has recorded following findings in

paras 8.6 and 8.7 of his impugned order:

8.6 Going by the books of accounts as reproduced by the assessee for the asst. yrs. 2005-06 to 2007-08, the following conclusion is arrived at:

8.7 Thus the aggregate difference, duly accredited to asst. yr. 2007-08 comes to Rs. 32,01,325, against which Rs. 22,00,000 has been disclosed. Thus the balance of Rs. 10,01,325 is assessee's unexplained investment in construction of building which is added to his total income.

The addition made by the AO was confirmed by the learned CIT(A) by observing as under:

3.2 I have analysed the matter and find that in view of s. 142A which has been inserted with retrospective effect from 15th Nov., 1972, AO can require the Valuation Officer to make an estimate of value of any investment and report the same to him where such estimate is required to be made for the purpose of making an reassessment. It is also noted by me that the assessee failed to maintain quantitative details of major building material used in the construction of the building. Also as mentioned in the assessment order in the cross-objections filed to the valuation report the assessee did not agitate the issue of builder's efforts and rebate for self supervision and this assertion of the AO has not been contradicted by the appellant. In these circumstances, I am of the opinion that the addition has been rightly made by the AO and the same is upheld.

21.1 Further the contention of the assessee that the difference is less than 15 per cent is not factually correct in view of the cost of construction disclosed by the assessee in the regular books of account vis-?-vis the cost of construction determined by the DVO as is evident from the findings of the AO reproduced above. The assessee failed to rebut such findings of the AO. Thus, the case laws relied upon by the assessee are not applicable being factually different and distinguishable. Thus, the contention of the assessee is not accepted because he has included undisclosed part of the construction in the disclosed part of cost of construction.

Thus, it could not be said that the variance was within 15 per cent of the marginal limit. The Tribunal was thus, right in sustaining addition of Rs. 10,01,325 on account of unexplained investment in the construction of the hospital building.

In view of the above, we do not find any merit in the appeal and the same is hereby dismissed.