(2011) 07 CAL CK 0050

Calcutta High Court

Case No: Income Tax A. No. 218 of 2001

Dheeraj Construction and Industries Ltd.		APPELLANT
	Vs	
Commissioner of Income Tax		RESPONDENT

Date of Decision: July 1, 2011

Acts Referred:

- Income Tax Act, 1961 - Section 113, 132, 132A, 143(1), 260A

Citation: (2011) 244 CTR 71

Hon'ble Judges: Raghunath Bhattacharyya, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: N.K. Poddar, Vineet Tibrewal and Dilip Kumar Kadel, for the Appellant; Sailen Dutt and Aniket Mitra, for the Respondent

Final Decision: Partly Allowed

Judgement

Bhaskar Bhattacharya, J.

This appeal u/s 260A of the income tax Act is at the instance of an Assessee and is directed against order dated March 30, 2001, passed by the income tax Appellate Tribunal, "E" Bench, Calcutta, in income tax Appeal bearing IT (SS) A No. 69/(Cal) of 1997 for the block-period April 1, 1985 to February 12, 1996.

2. Being dissatisfied, the Assessee has come up with the present appeal. The facts giving rise to filing of the present appeal may be summed up thus:

a) During the previous year ended March 31, 1993 relevant to the Assessment Year 1993-94, the Assessee allegedly purchased for the purpose of resale 141.075 M Ts of HTS wire from M/s. D. K. Hardware Stores at the cost of Rs. 39,78,315/-. Payment in respect of the said purchase was made by account payee cheques partly during the previous year ended March 31, 1993 and partly during the subsequent year. The entire quantity of 141.075 M Ts was allegedly sold during the previous year ended

March 31, 1993 to M/s. Sahuwala Cylinders Limited for a total price of Rs. 42,67,518.75p. giving rise to a profit of Rs. 2,89,203.75p. The entire sale-price was allegedly received by the Assessee during the previous year ended March 31, 1993 itself by account payee cheque deposited into the bank on 31st March, 1993.

b) The said transactions relating to purchase and sale of HTS wire were duly accounted in the regular books of account for the previous year ended March 31, 1993, relevant to the Assessment Year 1993-94 and those were reflected in the Assessee''s audited profit and loss account for the previous year ended March 31, 1993.

c) The income tax return for the Assessment Year 1993-94 showing an income of Rs. 3,41,570/- was filed on June 16, 1994 along with, inter alia, audited balance sheet and profit and loss account for the previous year ended March 31, 1993. In respect of the said return, intimation u/s 143(1)(a) of the Act was issued by the Assessing Officer on August 22, 1994.

d) In course of an operation of search and seizure on December 21, 1995, a copy of the Assessee''s audited account for the previous year ended March 31, 1993 which was already on the record of the department was seized. Upon scrutiny of the said audited account, the Assessing Officer required the Assessee to furnish details in respect of the transactions with M/s. D. K. Hardware Stores which was shown as a creditor in the said account for the balance amount due to the said party. The Assessee furnished to the Assessing Officer copies of the bills and challans relating to the alleged purchase made from the said party as also details of payment made.

e) The Assessing Officer caused enquiry to be made through Departmental Inspector who could not find the person at the relevant address mentioned in the documents. The Assessee, however, explained to the Assessing Officer that the entire materials purchased from the said party were sold by the Assessee during the previous year ended March 31, 1993 itself and furnished to the Assessing Officer copies of its sale-bills and evidence to show that the sale-price had been received by cheque and those transactions were duly recorded in the books of account for the relevant previous year. The Assessing Officer, however, proceeded on the assumption as if the material was shown in the Assessee''s account as consumed in the fabrication work. The Assessing Officer held that the Assessee did not require HTS wire for the fabrication work and as such, concluded that the Assessee had inflated its expenses by claiming bogus purchases to the extent of Rs. 39,78,315/-. The Assessing Officer, thus, treated the said sum of Rs. 39,78,315/- as undisclosed income for the Financial Year 1992-93 for inclusion in the block assessment.

f) Another issue arose in course of the block assessment proceedings as regards to two payments of Rs. 10 lakh each shown in the regular books of account allegedly made to M/s. Faissan Construction and M/s. Sakti Construction Co. on August 24, 1995 and August 25, 1995 respectively. The books of account reflecting the said

payments were seized in course of the search. The search took place as indicated earlier on December 21, 1995 before the close of the Financial Year 1995-96 and the Assessee''s return for the Assessment Year 1996-97 relevant to the Financial Year 1995-96 was due to be filed much later.

g) The Assessing Officer asked the Assessee to explain as to why the payments in the names of the parties should not be treated as fictitious. According to the Assessing Officer, the payments were shown as against old dues but the two parties were not shown as Sundry Creditors as on March 31, 1995. One Sri Umesh Narayan Jha, an employee of a proprietary concern of the Managing Director of the Assessee was shown as the proprietor of M/s. Sakti Construction Company, trade license relating to which was found in the Assessee''s office. It was duly explained to the Assessing Officer that the cheques issued in the names of the said parties were "Account Payee" but the endorsement in this behalf was cancelled and cash was drawn against the cheques by the Assessee''s cashier which was thereafter sent to Budge Budge site for payment of wages to the contractors and labourers where its receipts and subsequently disbursements were duly recorded which was duly verified by the Assessing Officer. The Assessing Officer, however, held that the payments were fictitious and bogus and included the same as undisclosed income for the Financial Year 1995-96 in the block assessment.

h) Being dissatisfied, the Assessee preferred an appeal before the Incometax Appellate Tribunal and the Tribunal by the order impugned in this appeal upheld both the additions made by the Assessing Officer.

i) Being dissatisfied, the Assessee has come up with the present appeal. A Division Bench of this Court at the time of admission of the appeal formulated the following substantial questions of law:

i) Whether sum of Rs. 39,78,315/- and Rs. 20.00 lakh reflected in the regular books of account relating to the assessment years 1993-94 and 1996-97 could form subject matter of the block assessment.

ii) In the event, the answer to Question No. 1 is in the affirmative, whether the purported findings of the Tribunal upholding the disallowance of purchase of Rs. 39,78,315/- for the financial year 1992-93 are arbitrary unreasonable and perverse.

iii) If the answer to Question No. 1 is in the affirmative whether the purported findings of the Tribunal upholding the addition of Rs. 20.00 lakh for the financial year 1995-96 are arbitrary, unreasonable and perverse.

iv) Whether in the case of block assessment, the income tax payable on the undisclosed income @60% as specified in Section 113 of the income tax, 1961, can be increased by the levy of any surcharge.

3. Mr. Poddar, the learned Senior Advocate appearing on behalf of the Appellant, has raised a pure question of law in support of the present appeal. According to Mr.

Poddar, aforesaid two transactions being reflected in the return of the Assessee and being also supported by the entries made in the books of account produced by the Assessee, there was no justification of making assessment in respect of those transactions in block assessment. In other words, according to Mr. Poddar those two items of transactions being reflected in the account of the Assessee, if those were disbelieved and treated to be fictitious, at the most, the Assessing Officer could pass necessary order in the regular assessment, but there was no scope of passing such order in block assessment when the findings recorded by the Assessing Officer were not based on any material recovered at the time of search and seizure. Mr. Poddar submits that it appears from the materials on record that in course of search and seizure, no incriminating papers were recovered from the office of the Assessee and as such, the findings in respect of the aforesaid two items, are not based on any documents seized in course of search and seizure. In support of such contention, Mr. Poddar relies upon the following decisions:

1. Assistant Commissioner of Income Tax and Another Vs. Hotel Blue Moon,

2. Commissioner of Income Tax Vs. Bimal Auto Agency,

3. Commissioner of Income Tax Vs. P.K. Ganeshwar,

4. The Commissioner of Income Tax Vs. Balaji Wire Pvt. Ltd.,

5 Commissioner of Income Tax Vs. Jupiter Builders Pvt. Ltd.,

6. Commissioner of Income Tax Vs. Shri Vishal Aggarwal,

7. Commissioner of Income Tax Vs. Khushlal Chand Nirmal Kumar,

8. Commissioner of Income Tax, Delhi-II Vs. Ravi Kant Jain,

9. Bhagwati Prasad Kedia Vs. Commissioner of Income Tax,

10. Commissioner of Income Tax Vs. N.R. Papers and Boards Ltd.,

4. Mr. Dutt, the learned Advocate appearing on behalf of the Revenue, has, on the other hand, opposed the aforesaid contention of Mr. Poddar and has contended that in the case before us pursuant to a notice issued for block assessment, the Assessing Officer had every right to pass the order impugned in block assessment. In support of his contention, Mr. Dutt relies upon the following decisions:

1. V.I.S.P. (P) Ltd. Vs. Commissioner of Income Tax and Another,

2. Sundar Lal Jain Vs. Commissioner of Income Tax,

3. McDowell and Co. Ltd. Vs. Commercial Tax Officer,

5. Mr. Dutt, therefore, prays for dismissal of the appeal.

6. Therefore, the questions that arise for determination in this appeal is, first, whether the findings recorded by the Assessing Officer in respect of the aforesaid

two transactions are based on any document recovered in course of search and seizure and secondly, if those findings are not so based, whether the Assessing Officer was justified in making assessment in the block assessment. So far the finding of the Assessing Officer that the Assessee did not require HTS wire for the fabrication work and consequently, the Assessee had inflated its expenses by claiming bogus purchases to the extent of Rs. 39,78,315/- is concerned, we find that such finding of the Assessing Officer is not based on any material obtained during search and seizure but is founded on the documents reflected in the return of the Assessee and further enquiry made by the Assessing Officer indicating that no such persons existed at the address given by the Assessee.

7. As regards the finding of the Assessing Officer in respect of the two payments of Rs. 10 lakh, each shown in the regular books of account and made to M/S Faissan Construction and M/S Sakti Construction on August 24, 1995 and August 25, 1995 respectively are concerned, we had initially some doubts in our mind and for that reason, after conclusion of the hearing, we again fixed the matter to enable Mr. Dutt, the learned Advocate for the Revenue to produce the records relating to search and seizure for the purpose of ascertaining whether there was any material seized which could be linked with the payment of the aforesaid sum of Rs. 20 lakh. Those records were placed before us. We find that in course of search and seizure, a certificate of license showing that Shri Umesh Narayan Jha as proprietor of Sakti Construction who was found to be an employee of the propriety concern of D. K. Goyal was recovered. The Photostat certified copy of the cheque which was encashed after deleting the account payee mark in favour of Sakti Construction and making it a self drawn one has been placed before us by Mr. Poddar showing that the same was not seized at the time of search and seizure. Moreover, the payment by the said cheque was not made to Sakti construction and it was a self paid bearer cheque encashed by the drawer himself. Thus, merely because a license in the name of Sakti Construction was recovered from the office of the Assessee, such fact has nothing to do with the said encashment in favour of the drawer. Thus, the addition of Rs. 20 lakh which is shown in the regular books of account as payment made to M/S Faissan Construction and M/s. Sakti Construction as cash payment of Rs. 10 lakh each on August 24, 1995 and August 25, 1995 respectively as fictitious entry in block assessment was patently illegal as it had no connection with the search and seizure.

8. We, therefore, find that the finding as regards bogus purchases to the extent of Rs. 39,78,315/- and at the same time, the other finding as regards the alleged fictitious entry of Rs. 20 lac were based on no material recovered from search and seizure.

9. The next question is whether in view of our aforesaid finding the addition of Rs. 39, 78,315/- and a further sum of Rs. 20 lac can be made in block assessment.

10. The scope of block assessment has since been clarified by the Supreme Court in a recent decision in the case of CIT v. Hotel Blue Moon (supra) with the following

observations:

Chapter XIV-B provides for an assessment of the undisclosed income unearthed as a result of search without affecting the regular assessment made or to be made. Search is the sine qua non for the block assessment. The special provisions are devised to operate in the distinct field of undisclosed income and are clearly in addition to the regular assessments covering the previous years falling in the block period. The special procedure of Chapter XIV-B is intended to provide a mode of assessment of undisclosed income, which has been detected as a result of search. It is not intended to be a substitute for regular assessment. Its scope and ambit is limited in that sense to materials unearthed during search. It is in addition to the regular assessment already done or to be done. The assessment for the block period can only be done on the basis of evidence found as a result of search or requisition of books of accounts or documents and such other materials or information as are available with the assessing officer. Therefore, the income assessable in block assessment under Chapter XIV-B is the income not disclosed but found and determined as the result of search u/s 132 or requisition u/s 132-A of the Act.
(Emphasis supplied by us).

11. By applying the aforesaid test to the facts of the present case, we find that the finding as regards addition of Rs. 39, 78,315/- and a further sum of Rs. 20 lac is not based on any materials unearthed on search and seizure and thus, not liable to be assessed on block assessment under Chapter XIV B of the Act but should be subject to regular assessment.

12. As regards the two decisions relied upon by Mr. Dutt of Madhya Pradesh High Court and the Allahabad High Court (supra), we find that those dealt with the provisions contained in Section 68 of the Act. We do not for a moment dispute the principles laid down therein but we fail to appreciate how the said decision can have any application for resolving the question as to whether block assessment is applicable even if the finding is not based on any material unearthed in search and seizure. We thus hold that those decisions are irrelevant for our purpose.

13. Similarly, the principle laid down in the case of Mc Dowel and Co. Ltd. (supra), has no application in deciding the dispute involved herein. It is absurd to suggest that even though the finding of fictitious claim is not based on any material discovered during search and seizure, by taking aid of the decision in the case of Mc Dowel and Co. Ltd. (supra), the special rate of tax specified in Section 113 of the Act would be applicable to such assessment instead of the rate fixed for regular assessment. We, therefore, find that the decisions cited by Mr. Dutt do not help his client in any way.

14. As regards the last point formulated by the Division Bench, we find that the said question has already been answered by the Supreme Court, in the case of

Commissioner of Income Central II Vs. Suresh N. Gupta, thereby holding that the proviso to Section 113 of the Act is curative in nature. We, therefore, hold that surcharge is applicable to the Income tax fixed u/s 113 of the Act even though the search and seizure took place before insertion of the proviso to Section 113 of the Act.

15. On consideration of the entire materials on record, we thus modify the order passed by the Tribunal by directing that so far as the addition of Rs. 39, 78,315/- and a further sum of Rs. 20 lac are concerned the same should not have been assessed in block assessment under Chapter XIV B of the Act as the said findings resulting in those additions are not based on any material recovered as a result of search and seizure. We do not touch the other part of the assessment order under block assessment impugned herein.

16. The appeal is allowed in part by answering the first question as regards the amount of Rs. 39,78, 315/- and Rs. 20 lac in the negative and against the Revenue. In view of our above finding, the second and the third questions have become redundant. The fourth questions should be answered in the negative and against the Assessee.

17. In the facts and circumstances, there will be, however, no order as to costs.

Raghunath Bhattacharyya, J.

18. I agree.