

REPORTABLE

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IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 811 OF 2007, ITA 818 OF 2007,
ITA 378 OF 2008, ITA 742 OF 2007
ITA 416 OF 2008

Judgment reserved on: 30.09.2010
Judgment delivered on: 29.11.2010

(1) ITA 811 OF 2007

COMMISSIONER OF INCOME TAX . . . APPELLANT
Through: Mr. N.P. Sahni, Advocate.

VERSUS

A.T. INVOIFIN INDIA (P) LTD. . . .RESPONDENT
Through: Mr. Ajay Vohra, Advocate with Ms.
Kavita Jha, Ms. Akansha Aggarwal
and Mr. Somnath Shukla,
Advocates.

(2) ITA 818 OF 2007

COMMISSIONER OF INCOME TAX . . . APPELLANT
Through: Mr. N.P. Sahni, Advocate.

VERSUS

MEHROTRA INVOFIN INDIA (P) LTD. . . .RESPONDENT
Through: Mr. Ajay Vohra, Advocate with Ms.
Kavita Jha, Ms. Akansha Aggarwal
and Mr. Somnath Shukla,
Advocates.

(3) ITA 378 OF 2008

COMMISSIONER OF INCOME TAX . . . APPELLANT
Through: Mr. N.P. Sahni, Advocate.

VERSUS

CELLPHONE CREDIT & . . .RESPONDENT
SECURITIES INDIA (PVT.) LTD.
Through: Mr. Ajay Vohra, Advocate with Ms.
Kavita Jha, Ms. Akansha Aggarwal
and Mr. Somnath Shukla,
Advocates

(4) ITA 742 OF 2007

COMMISSIONER OF INCOME TAX . . . APPELLANT
Through: Mr. N.P. Sahni, Advocate.

VERSUS

INTEL INVOFIN INDIA (P) LTD.

...RESPONDENT

Through: Mr. Ajay Vohra, Advocate with Ms. Kavita Jha, Ms. Akansha Aggarwal and Mr. Somnath Shukla, Advocates.

(5) ITA 416 OF 2008

COMMISSIONER OF INCOME TAX

. . . APPELLANT

Through: Mr. N.P. Sahni, Advocate.

VERSUS

CELLCAP INVOFIN INDIA (P) LTD.

...RESPONDENT

Through: Mr. Ajay Vohra, Advocate with Ms. Kavita Jha, Ms. Akansha Aggarwal and Mr. Somnath Shukla, Advocates

CORAM:-

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. In all these appeals, common question of law arises for determination. The question of law which was framed in ITA 811/2007 runs as follows:-

“Whether on the facts of the present case, the Tribunal was justified in law in deleting the addition of Rs.8,67,010 made as undisclosed income of the assessee for assessment year 1999-2000 under Section 158BC of the Act?”

2. Except the difference of amount which is deleted in other cases, the question of law is identical. Therefore, we are proceedings to discuss the question of law on the basis of facts appearing in ITA

811/2007. Record of factual matrix does not need a large canvas. Succinctly stated, the facts are that on 13th January, 2000, a search and seizure operation was carried out on Shyam Telecom Group of Companies (to which these assessee group of companies belonged). There was no specific search warrant in the name of the assessee company. However, according to the department, since the papers relating to the assessee company were also seized during the course of the search, notice under Section 158 BC read with Section 158 BD of the Income-Tax Act (hereinafter referred to as 'the Act') was also issued to the assessee for the block assessment period 1st April, 1989 to 13th January, 2000. The assessee in response thereto filed its return declaring undisclosed income at 'nil'. The assessment was however framed determining undisclosed income at ₹ 8,67,010/- for the assessment year 1999-2000. While making this assessment, the Assessing Officer treated the long term capital gain on the sale of shares as undisclosed income. The CIT (A) confirmed the aforesaid order of the Assessing Officer. However, the ITAT has allowed the appeal of the assessee vide impugned judgment dated 12th October, 2006 thereby deleting the aforesaid addition.

3. We may note at this stage that the case of the assessee before the authorities below was that shares in question which were sold had already been disclosed to the department prior to the date of search. The assessee had earned capital gain which were reflected in the balance sheet as on 31st March, 1998 and the said balance sheet was filed with the department alongwith the return of income for the assessment year 1998-99. On this basis it was argued that when the investment in the shares in question on which capital gain

was realized by the assessee had been shown in the balance sheet filed by the assessee prior to the date of search, it could not be presumed that capital gain derived from the sale of said shares would not have been shown by the assessee. This plea of the assessee has been accepted by the Tribunal and validity of these reasons on which addition is deleted, is the question before us. Few dates which are relevant for this purpose are noted below:-

- Return for the concerned assessment year was due on - 31.12.1999
- Search operation carried out on -31.1.2000
- Return filed under Section 139 (4) of the Act on - 31.3.2000
This return was processed under Section 143 (1) of the Act.

4. Some of the provisions of Income Tax Act which are to be kept in mind while answering the questions are as under:-

(1)As per Section 139 of the Act, every person whose total income in respect of which he is assessable under the Act during the previous year exceeds the maximum amount which is not chargeable to income-tax, is required to file the income tax return on or before the due date in the prescribed form and verified in the prescribed manner.

(2)After the return is filed, for the purpose of making assessment, the Assessing Officer may serve notice under Section 142 (1) of the Act. However, if it is found that such a person has not made a return within the time allowed under sub Section (1) of Section 138, Clause (i) of sub Section (1) of Section

142 of the Act authorizes the Assessing Officer to serve a notice regarding such defaulting person to furnish a return of his income by the dates specified therein. If the return is not filed within the time allowed under Section 131 (1) or under a notice issued under Section (1) of Section 142, such person may still furnish the return of previous year at any time before the expiry of one year from the end of the relevant assessment year or before the completion of assessment, whichever is earlier.

5. Chapter-XIV B of the Act, which was inserted by the Finance Act, 1995 w.e.f. 1st July, 1995 deals with said procedure for assessment of search cases and it starts with Section 158B which provides certain definitions for the said Chapter. Clause (a) thereof defines 'block period'. Clause (b) gives the definition of 'undisclosed income' and reads as under:-

“‘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 purpose of this Act, or any expense, deduction or allowance claimed under this Act which is found to be false.”

6. Section 158BA deals with assessment of undisclosed income as a result of search Section 158BB enumerates the procedure for computation of undisclosed income for the block period. Sub Section (1) thereof mandates that the undisclosed income of the block period

shall be the aggregate of total income of the previous years falling within the block period computed, in accordance with the provisions of this Act, on the basis of evidence found as a result of search or requisition of books of accounts or other documents and such other material or information as are available with the Assessing officer and relatable to such evidence, as reduced by the aggregated of the total income, or as the case may be, as increased by the aggregate of losses of such previous years. Clause (c) of sub section (1) deals with the situation where the due date for filing a return has expired but no return of income has been filed. In that case income can be determined on the basis of the records mentioned therein.

7. In the present case, as noted above, due date by which the return was to be filed was 31st December, 1999 but return was not filed as on that date. Within a few days thereafter i.e. on 30th January, 2000 search operation was carried out. Return was filed on 31st March, 2000. However, it was within the time stipulated under Section 139 (4) of the Act. According to the Assessing Officer, since the return was not filed within the stipulated date, the disclosure of long term capital gain in the said return filed after warrants could not be taken into consideration, more so, as till the date of search no return was filed. In the opinion of the Assessing Officer, therefore, the assessment could be made under Section 158 BB of the Act on the basis of seized documents, as if no return was filed. The contention of the assessee that income may be treated as disclosed was not accepted on the basis of the following discussion:-

“I do not agree with the submission made by the assessee. A provision contained in a section under any chapter cannot be interpreted in isolation, rather it

should be interpreted keeping in mind all other provisions of that chapter. Provisions of section 158B are contained in Chapter XIV-B which also contains section 158 BA and 158 BB. Section 158 BA lays down procedure for assessment of undisclosed income as a result of search. The section starts with the words "Notwithstanding anything contained in any other provisions of this Act.... the Assessing Officer shall proceed to assess the undisclosed income in accordance with the provisions of this Chapter". Section 158 BB gives the procedure for computation of undisclosed income of the block period and is also contained in Chapter XIV-B. As per Section 158 BA therefore, the provisions of section 158 BB have to be applied for computation of undisclosed income. I will like to quote the decision of the Hon'ble Calcutta High Court in the case of Shaw Wallace & Co. Ltd. Vs. ACIT (1999, 238, ITR 13) which is as under:-

" It will be found from section 158 BB that the Assessing Officer is to compute total income twice. One has to emphasise the combination of words 'total income'. The *First* computation of total income under section 158BB is on an aggregate of materials including returns. The second computation of total income is as per direction and definition given in section 158 BB irrespective of whatever might be contained in the other provisions of the Act. That such computation of the second total income is to be made irrespective of other provisions is seen from the words of section 158BA, which states that the Assessing Officer must proceed to assess the undisclosed income as per section 158 BB notwithstanding any other provisions contained in the Act."

From the discussion above, I am of the view that the returned income of the assessee for A.Y. 1999-00 is to be taken at NIL for the purposes of calculating of undisclosed income under the provisions of section 158 BB (1)(c). This will result in determination of undisclosed income at ₹ 8,67,010/- calculated as under..."

8. The Income Tax Appellate Tribunal, on the other hand, has held that as a return of income was filed under Section 139 of the Act, wherein capital gains on the sale of shares were disclosed, it is to be treated as return filed within the permissible limits and the assessment could not take place under Section 158 BB (1) (c) of the Act.

9. The Tribunal relied upon the judgment of this Court in **CIT Vs. Mrs. Kum Kum Kohli**, 276 ITR 589. We may state at the outset that the decision of **Mrs. Kumkum Kohli** (*supra*) cannot be the sole basis for determining the real controversy. That was a case where this Court upheld the decision of the Tribunal in **Mrs. Kumkum** (*supra*). The assessee had paid advance tax much before the date of search and the capital gains earned during the assessment year, though the return was not filed and had also disclosed the said transaction in the books of accounts. On this basis, it was held that the income returned by the assessee disclosed the aforesaid income and thus the provisions of Chapter XIV B were not applicable as nothing new was found during the search.

10. Having regard to the fact that much before the date of search advance tax had been paid and, therefore, it cannot be said that the assessee would not have disclosed such amounts in the return to be filed, for which the period had not expired, it was observed as under:

“At the time of hearing, Id. AR for the assessee while taking us through the paper books demonstrated that the shares in question which were sold was already disclosed to the department prior to the date of search. The assessee earned capital gain which was reflected in the balance sheet as on 31.3.1998 and that the said balance sheet was filed with the department alongwith the return of income for the AY 1998-

99. Acknowledgement for filing of the return of income for the AY 1998-99 on 30th December, 1999 has been filed at page 39 of the paper book. In the circumstances, we are of the considered opinion that when the investment in shares in question on which capital gain was realized by the assessee had been shown in the balance sheet filed by the assessee, prior to the date of search, it cannot be assumed that capital gain derived on the sale of such shares would have been shown by the assessee. In the above circumstances, in view of the order of the Delhi High Court in the case of CIT Vs Mrs. Kumkum Kohli, 276 ITR 589 (Del) (supra), in our considered opinion, capital gains on such shares cannot be treated as undisclosed income of the assessee under Chapter XIV B of the Act. Hence, we set aside the orders of the Ld. CIT (A) and allow the ground of appeal of the assessee.”

11. In the present case, the search has taken place after the last date of filing the return under Section 139 (1) of the Act. There is no overt act on the part of the assessee which would indicate that assessee had the intention to disclose the income. On the contrary, when the aforesaid documents relating to the sale of shares leading to income in the form of long term capital gain were seized during the search on 13th January, 2000, it is thereafter that return was filed on 13.1.2000 disclosing this transaction. However, this return is filed under Section 139 (4) of the Act i.e. within the time stipulated in the notice issued by the Assessing Officer but after the date of search and after the expiry of normal date for filing the return. In such a situation, can it be said that the filing of the return relates back to the original date by which the return is to be filed. Answer to this has to be in the negative in view of the two judgments – one of Madhya Pradesh High Court and other of Madras High Court with which we concur. In the case of **Dr. Brijesh Lahoti Vs. CIT**, 282 ITR 349, Madhya Pradesh High Court, held as under:-

“9.Mr.Chaphekar, learned senior counsel appearing for appellant, submitted that there may be cases outside Sub-section (3) of Section 158BA of the Act where it can be held that income of the assessee has been disclosed. In fact, he relied on the Division Bench judgment of the Madras High Court in the case of A.R. Enterprises (supra) in support of his submission in which payment of advance tax before the date of search, even in a case where no return had been filed under Section 139(1) of the Act, has been held to be a case where income has been disclosed.

10. We agree with Mr. Chaphekar, learned senior counsel for appellant, that where the assessee discloses his income to the Department before the date of search in some manner or the other, it may be difficult to hold that such income is to be treated as undisclosed income for the purpose of assessment in accordance with Chapter XIV-B of the Act. In A.R. Enterprises (supra), the Division Bench of the Madras High Court has found that search had taken place on 23rd Feb., 1996, but for the asst. yr. 1995-96 even though the assessee had not filed the return, it had paid advance tax of Rs. 4,80,000 in three instalments on 15th Sept., 1994, 12th Dec., 1994 and 15th March, 1995 much before search and the Division Bench accordingly held that the income of the assessee in that case cannot be treated to be as 'undisclosed income' for the purpose of assessment under Chapter XIV-B of the Act. But, in the present case, the search took place on 20th Dec., 1996 and there was no material to show that before 20th Dec., 1996 the appellant had in any manner disclosed his income to the authorities under the Act. Thus, even if we accept the contention of Mr. Chaphekar learned senior counsel, that Sub-section (3) of Section 158BA of the Act is not exhaustive of the cases in which income should not be treated as undisclosed income, in the present case, we find no material to establish that the appellant had, in any manner, disclosed his income for the purpose of the Act before the date of search on 20th Dec., 1996.

12. Before Madras High Court, the issue cropped up, *albeit* in other context where the provisions and constitutionality of Section 158 BB of the Act was challenged. It was argued that once the return is not filed after the due date under Section 139 (1), before the expiry of

period specified in Section 139 (4) and the search take place before filing of the return, the assessee would lose the benefit of filing the return under Section 139 (4) of the Act and therefore provisions of Section 158BB were ultra vires and unconstitutional. This contention was rejected and relevant observations of the Court dealing with this contention are as under:

“Learned counsel for the petitioner contended that this provision is unconstitutional as it has the effect of depriving an honest assessee the several deductions allowable under other provisions of the Act even in cases where an assessee has, by relying on Section 139(4), filed a return of income after the due date specified in Section 139(1), but before the expiry of the period specified in Section 139(4). Section 139(4) enables a person who has not filed a return within the time allowed under Section 139(1) or under a notice issued under Section 142(1) to furnish the return for any previous year at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier.

The petitioner in this case had not filed his return for the assessment year 1994-95 as also for the assessment year 1995-96 on or before August 31, 1994, and August 31, 1995, respectively. The search was conducted in his premises on January 18, 1996. Thereafter the assessment was made for the block period by taking into account the amount ascertained as having been not disclosed at the time of search and adding thereto, the income shown in the return filed by the assessee on March 29, 1996, after search. According to the assessee, the inclusion of the income shown in the returns filed within the extended date provided under Section 139(4) has the effect of depriving" the petitioner of the valuable right conferred on him by Section 139(4) and, therefore, Section 158BB(1)(c) is arbitrary, ultra vires the Act and unconstitutional.

The provision with which we are concerned is a provision in a taxing statute. It is open to Parliament to classify the taxpayers on any rational basis ; also treat the different classes of taxpayers differently. It is also permissible for Parliament to classify in a rational and non-arbitrary manner, the assessee further in relation to their conduct.

Parliament can legislate with respect to the assessee who complies with the requirements of law and extend such concessions as it deems fit to such assessee, which concessions it may choose to deny to those who have violated the law and such violations have been established by reason of the action taken by the authorities. It is in that background and with the object of laying down a special procedure for the assessment of the assessee who fails to comply with the law by not disclosing in full their taxable income and by not paying the taxes properly due from them that Chapter XIV-B consisting of sections 158B & 158BH was inserted in the Income-tax Act by the Finance Act, 1995, with effect from July 1, 1995.

The assumption made in the scheme of the Act that a person who comes forward with the return or with further information after a search, does so only on account of the detection already effected under the search and the likelihood of further exposure is a reasonable assumption and it can in no way be regarded as arbitrary. The special procedure provided in Chapter XIV-B is meant to apply to all such cases notwithstanding anything contained in any other provisions of the Act, as provided in Section 158BA(1), and the other provisions of the Act, therefore cannot control the contents of this Chapter except to the extent provided for in Chapter XIV-B.

There is no fundamental right in an assessee to commit breaches of the law. The right that can be asserted by one who has chosen to violate the law is the right to be treated in a manner similar to that in which other similar offenders are treated. Chapter XIV-B accords similar treatment to all persons belonging to the class for whom that Chapter is to apply. There is no discrimination therein among those who suffer such searches.”

13. We may, however, clarify that in the aforesaid case, the Madras High Court also observed that mere payment of advance tax by dates would not establish and intend to disclose the income and the disclosure is to be made by filing the return. However, with this observation we would not agree, having regard to the judgment of this court in ***Mrs. Kumkum Kohli*** (supra).

14. We thus summarize the position as under:-

- (a) Where the stipulated date of filing the return of income as prescribed under Section 139 (1) of the Act is over and return is not filed, it has to be normally held that the income has not been disclosed for the purpose of this Act.
- (b) If the search takes place under Section 132 of the Act and by that date return is not filed, and the date of filing the normal return has expired, filing of the return thereafter under Section 139 (4) of the Act would be of no consequence for the applicability of Chapter XIV B of the Act.
- (c) Even if the return is not filed but the assessee is able to demonstrate that he had disclosed his income to the department before the date of search in the some manner or the other, it would not be treated undisclosed income for the purpose of assessment in accordance with the Chapter XIV B of the Act.
- (d) Payment of advance tax would be one such step which would warrant inference that the assessee had disclosed his income to the department.

15. Applying the aforesaid principles in these cases, we are of the opinion that it cannot be said that the assessee had made disclosure of the long term capital gain before the date of search and as the time for filing the return had expired by that time, the provisions of Section 158 BB (1 (c) of the Act were rightly applied by the Assessing Officer.

16. Learned counsel for the respondent has sought to argue that during the search provisional balance sheet was found which

contained profit shown on account of sale of the said shares and, therefore, it be treated as disclosure. Such provisional balance sheet which was within the possession of the assessee at the time of search would not meet the test of “disclosure’. As mentioned above the overt act has to be of the nature from which it can be concluded that the assessee had disclosed the income to the department before the date of search in some form like payment of advance tax, etc.

17. We thus do not agree with the approach of the Tribunal and set aside the order of the Tribunal of by answering the question of law in favour of the Revenue and against the assessee.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

NOVEMBER 29, 2010
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