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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

R.138

\+ ITA 224/2003

THE COMMISSIONER OF INCOME TAX ..... Appellant

Through: Mr. Raghvendra K Singh, Advocate

versus

SUNIL AGGARWAL ..... Respondents

Through: None

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

O R D E R

% **02.11.2015**

S. Muralidhar,J.

1. This is an appeal by the Revenue against the order dated 8th August 2002 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 157/Del/97 for the block period 1st April 1986 to 20th June 1996.

2. In the present appeal, the Respondent, despite service did not enter appearance and the case has proceeded *ex parte*. By order dated 7th February 2005, the following two questions were framed by the Court for

consideration:

> "(A) Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was correct in law, in deleting the addition of Rs. 1,38,41,971?
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> (B) Whether in the facts and circumstances of the case, the Income Tax Appellate Tribunal, was correct in deleting the addition of Rs.86 lakhs on account of cash seized from one of the employees of the assessee, namely, Shri Gopal Singh?

3. The background to the present appeal is that the Respondent Assessee is engaged in the business of plastic raw material and is carrying on the business in the names of two proprietorship concerns, M/s Polychem Traders and M/s Petrochem Overseas (India). In addition, the Assessee was a Director in Petro Impex (India) P. Ltd and Par Petrochem Ltd.

4. A search and seizure operation was conducted on 20th June 1996 at the residential and business premises of the Assessee as well as his associate concerns and it continued till 30th July 1996. The case of the Revenue is that despite notice issued on 30th September 1996 to the Assessee under Section 158BC of the Act, requiring him to file a return of total income including the undisclosed income for the block period, the Assessee failed to do so. Ultimately, after a gap of eight months, he filed a return on 9th June 1997. In this return, the Assessee declared an income of Rs.24,50,310 for the various assessment years of the block period. The assessment was completed under Section 158 BC (1) at an undisclosed income of Rs. 3,71,79,576.

5. In the assessment order, it was recorded by the Assessing Officer ('AO')

that during the course of search cash amounting to Rs.86 lakhs was seized from the premises of Canara Bank, Arya Samaj Road, Karol Bagh from an employee of the Assessee, one Mr. Gopal Singh. It was further recorded by the AO that a statement of the Assessee was recorded during the course of search under Section 132(4) of the Act. In response to question No.11, the Assessee is stated to have made a categorical admission that the said sum of Rs.86 lakhs belonged to him; that it was being deposited by Mr. Gopal Singh in the Canara Bank account which was not the account of the Assessee; that routinely surplus cash was given to Mr. Gopal Singh to be deposited for which he was paid 5% of the cash money; that the seized cash amount of Rs.86 lakhs represented "my undisclosed income not recorded in the Books of Accounts".

6. The Assessee retracted the above admission during the course of the assessment proceedings, but not immediately after making the said statement. He started providing information to the AO from 14th July 1997 onwards, i.e., around two weeks before the deadline for finalization of the assessment, i.e., 31st July 1997. In his retraction, the Assessee stated that the surrender was made under a mistaken belief and "without looking into books of account and without understanding law". He further stated that he had been "compelled perturbed by events of search and wherein I had no opportunity either to consult my advocates, my staff or my books of accounts etc. The pressure of search was built so much that I had to make this surrender without having actual possession of the assets or unexplained investments or expenses incurred and hence there being no such income as undisclosed". He claimed that the money seized already stood declared as

out of known sources and the said surrender was meaningless. He did not admit that the surrender was voluntary. The Assessee also offered an explanation regarding the said cash amount that these were from the undisclosed sales of disclosed purchases which were verified from the records and the books of accounts.

7. In the assessment order, the AO, however, declined to accept the above explanation offered by the Assessee. He was of the view that the statement given by the Assessee voluntarily during the course of search under Section 132(4) of the Act had evidentiary value and could be relied upon. It was held that the Assessee had introduced fictitious debtors in his books of accounts and had deposited the cash realized on sale of the raw material into the bank accounts of those fictitious debtors. However, the explanation of the Assessee for certain other cash deposits found in the books of accounts in other accounts was accepted by the AO and no additions were made in that regard.

8. The other major addition made by the AO was on account of a purported loan of Rs.45,00,000 received from M/s Nice International, the proprietor of which was Mr. Sant Kumar Sharma of Bombay. Mr. Sant Kumar Sharma, during the course of enquiry, stated on oath that he arranged export orders in the sum of Rs.1.36 crores and the alleged purchase of garments were received from M/s Ambica Agency of Delhi and M/s H.T. Avia of Delhi. The payments received from Russia were credited to the accounts of M/s Nice International and from the said account the said amount was deposited in the account of the Assessee and three other persons showing the amount

as loan advanced to the said persons. The AO after setting out the entire statement of Mr. Sant Kumar Sharma concluded that the Assessee was the main person who arranged the said transactions and used Sant Kumar Sharma as a front man. The money channelized through the bank belonged to the Assessee who was the ultimate beneficiary. Despite being asked to furnish the addresses of the alleged purchase parties, i.e., Ambica Agency and H.T. Avia of Delhi, the Assessee failed to furnish any information and the origin of the fund invested in the form of purchases of export garments remained unexplained. Though no payment had in fact been made to either of the above agencies and no interest was paid to Mr. Sant Kumar Sharma, it was found that the total export realisation i.e.Rs.1,36,41,971 belonged to the Assessee was further disbursed in the form of loans in the name of the Assessee, his wife and a person known to him. The said sum was accordingly added to the income of the Assessee as unexplained cash credit under Section 68 of the Act.

9. In appeal filed before the ITAT, there was a concurrent view of the two Members comprising the Bench i.e. Mr. R.K. Gupta and Mr. R.S. Syal that the additions made in the sum of Rs.86 lakhs to the income of the Assessee should be deleted. It was noted that pursuant to the search and seizure, the Assessee had surrendered a sum of Rs.2.26 crores which included a sum of Rs.86 lakhs, viz., the cash seized from Canara Bank. It was noted that the explanation offered by the Assessee for the sum constituting Rs.2.26 crores minus 86 lakhs had been accepted by the AO. It was held that the explanation given by the Assessee in respect of the said sum of Rs.86 lakhs also ought to have been accepted by the AO. The AO had not doubted the

sales and purchase figures or the fact of cash sales having been made. It was accordingly held that the addition of Rs.86 lakhs was not justified.

10. However, on the question of the addition of Rs.1,36,41,971, there was a slight difference of opinion between the two Members comprising the Bench. In his opinion dated 21st July 2000, Mr. R.K. Gupta was of the view that the Assessee had not been afforded an opportunity to cross-examine Mr. Sant Kumar Sharma and therefore, the statement of Mr. Sant Kumar Sharma could not be considered for making the addition. While Mr. R. S. Syal did not disagree with this finding, he observed view that the AO should be "given liberty to consider the taxability of the said sum in accordance with law."

11. The above difference of opinion necessitated reference of the matter to the third member who by an order dated 31st May 2002 concluded that the observation made by Mr. Syal was superfluous and that once the two members had agreed that addition of Rs. 1.36 crores could not have been made, then "there was no need to make any further observation". The resultant order was passed by the ITAT on 8th August 2002 allowing the appeal of the Assessee.

12. It was submitted by Mr. Raghvendra Singh, learned counsel for the Revenue, that the ITAT failed to appreciate that the evidentiary value of the statement on oath recorded by the Assessee under Section 132(4) of the Act carries more weight than a statement made during a survey under Section 133A. He accordingly submitted that the reliance by the ITAT on the

decision of its co-ordinate Bench in ***Pushpa Vihar v. ACIT, 48 TTJ 389(Bom.)*** was misplaced, since that decision dealt with a statement recorded during a survey under Section 133A of the Act. In this context, he also placed reliance on the decision of this Court in ***CIT v. Dhingra Metal Works (2010) 328 ITR 384 (Del.)*** which in turn relied upon the decision of the Kerala High Court in ***Paul Mathews & Sons Vs. Commissioner of Income Tax (2003) 263 ITR 101 (Kerala)***. He further submitted that the Assessee had not chosen to retract his statement till ten months after the date of the search and therefore the retraction itself was not genuine. According to him, the said retraction did not dilute the evidentiary value of the categorical admission made by the Assessee in his statement under Section 132(4) of the Act. He submitted that the addition of Rs.86 lakhs solely on the basis of the said retracted statement as, therefore, permissible. He also placed reliance on the decision of Punjab & Haryana High Court in ***CIT v. Lekh Raj Dhunna 344 ITR 352*** to urge that an unsatisfactory explanation regarding the late retraction of a statement made during the course of the search proceedings would not be accepted, and would not impinge upon the authenticity of the statement made in the first place during the search proceedings.

13. The narration of facts hereinabove shows that the Assessee did not simply retract the statement made by him during the course of surrender. He also offered an explanation for the sum of Rs.86 lakhs found in the hands of his employee, Mr. Gopal Singh. One feature that distinguishes the present case from that before the Punjab and Haryana High Court in ***Lekh Raj***

Dhunna (*supra*) is that in the latter case, the Assessee failed to discharge the onus on him through cogent material to rebut the presumption that stood attracted in view of the statement made under Section 132(4) of the Act. In the present case, as noted by the ITAT, the Assessee sought to explain the said amount with reference to the entries in the books of accounts of the sales made during the year and the stock position. In other words, the AO did not find that the cash seized represented amounts not emanating from sales but some other source. The fact that the Assessee may have retracted his statement belatedly did not relieve the AO from examining the explanation offered by the Assessee with reference to the books of accounts produced before him.

14. Therefore, although the counsel for the Revenue may be right in his submission that a statement under Section 132(4) of the Act carries much greater weight than the statement made under Section 133A of the Act, a retracted statement under Section 132(4) of the Act would require some corroborative material for the AO to proceed to make additions on the basis of such statement. Of course, where the retraction is not for any convincing reason, or where it is not shown by the Assessee that he was under some coercion to make the statement in the first place, or where the retraction is not followed by the Assessee producing material to substantiate his defence, the AO might be justified in make additions on the basis of the retracted statement.

15. In the present case, the Assessee had an explanation for not retracting the statement earlier. He also furnished an explanation for the cash that was

found in the hands of his employee and this was verifiable from the books of accounts. In the circumstances, it was unsafe for the AO to proceed to make additions solely on the basis of the statement made under Section 132(4) of the Act, which was subsequently retracted.

16. Consequently, the Court is unable to find any legal infirmity in the conclusion reached by the ITAT that the addition of Rs.86 lakhs to the income of the Assessee was not justified. Question (B) is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue.

17. Turning now to Question (A), the Court finds that indeed no opportunity was given to the Assessee to cross-examine Mr. Sant Kumar Sharma, whose statement was the principal basis for making the addition of Rs. 1,38,41,971.

18. Mr. Singh has placed reliance on the decision of the Supreme Court in ***ITO v. M Pirai Choodi (2011) 334 ITR 262(SC)*** to urge that denial of an opportunity to cross-examine by itself could not vitiate the assessment proceedings particularly when the Assessee had not raised a demand to that effect before the AO. He submitted that in the present case, it was recorded by the AO himself that despite sufficient opportunities, the Assessee did not cooperate. It was also not recorded by the AO that the Assessee had asked for cross-examination of Mr. Sant Kumar Sharma and that such opportunity was being denied by the AO.

19. The Court finds that in the present case the basis for making the addition of Rs. 1,38,41,971 was the statement of Mr. Sant Kumar Sharma. He had

furnished various details which were incriminating as far as the Assessee was concerned. It was incumbent on the AO, in those circumstances, to afford the Assessee an opportunity of cross-examination of Mr. Sant Kumar Sharma. The ITAT also noted that the Assessee could not be said to have not cooperated at all in the assessment proceedings.

20. The Court further notes that in ***M. Pirai Choodi's*** case (*supra*), the Assessee had not availed the statutory remedy of filing an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)] against the order of the AO but had approached the High Court directly by way of a writ petition. In those circumstances, the Supreme Court held that the High Court ought to have required the Assessee to avail the remedy of a statutory appeal instead of quashing the assessment proceedings on the ground of violation of natural justice. The Supreme Court, in fact, permitted the Assessee to approach the CIT (A).

21. It was then urged by Mr. Singh that if in the present case the Court was of the view that there was a violation of natural justice on account of the denial of opportunity to the Assessee to cross-examine Mr. Sant Kumar Sharma, the matter ought to be remanded to the AO for that purpose. While this may have been a possible course to adopt, this Court is not inclined to do so since almost two decades have elapsed since the date of the search. There must be some finality to proceedings that seek to cover a block period beginning 1st April 1986. Consequently, Question (A) is also answered in the affirmative, i.e., in favour of the Assessee and against the Revenue.

22. The appeal is dismissed, but in the circumstances, with no order as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

NOVEMBER 2, 2015
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