

HIGH COURT OF JUDICATURE AT ALLAHABAD

Judgment reserved on 10.10.2011

Judgment delivered on 25.11.2011

Income Tax Appeal No.241 of 2008

Commissioner of Income-tax (Central), Kanpur

v.

Smt. Shaila Agarwal

Hon. Sunil Ambwani, J.

Hon. K.N. Pandey, J.

1. We have heard Shri Bharat Ji Agarwal assisted by Shri A.N. Mahajan, learned counsel for the department. Shri Ashish Bansal appears for the assessere.

2. The Commissioner of Income Tax (Central), Kanpur has preferred this appeal under Section 260A of the Income Tax Act, 1961 (the Act) against the order of the Income Tax Appellate Tribunal "B" Bench, Lucknow dated 31.10.2007 in ITA No.801/Luc/2006 (Assessment Year 2002-03) by which it had allowing the appeal for statistical purposes and has held that irrespective of any material discovered in search under Section 132 of the Income Tax Act, 1961 (the Act), relating to any period, an assessment is required to be made for block period of six assessment years, and consequently, the assessments, which have been completed, are also liable to be restored to the file of the Assessing Officer to consider the additions in the assessments under Section 153 A, as well. The Tribunal further observed that in the event the search is declared illegal by any Court, or assessment under Section 153A is held invalid, the appeal in relation to regular assessment will revive at the instance of the department, on an application to the Tribunal.

3. The appeal was admitted on the questions of law as follows:-
"Whether on the facts and in the circumstances of the case, the Hon'ble Income tax Appellate Tribunal was justified in law in setting aside the case and restore to the file of A.O. without appreciating that as per provisions of section 153 A, "only assessment pending" as on the date of search are abated and not the "assessment completed" or 'appeal pending'?"

4. Brief facts given to this income tax appeal are as follows:-

5. The assessee filed a return for the assessment year 2002-03 on 31.12.2002 declaring income of Rs.3,66,438/-. The case was selected for scrutiny, on which a notice under Section 143 (2) of the Act was issued. On 10.11.2004 the assessee was required to produce the donors along with evidence, the source of gifts and the relationship between the donors and the donee in respect of gifts of Rs.99,00,000/-. On 30.3.2005 an assessment of Rs.1,16,65,376/- was made under Section 143 (3) of the Act. The CIT (A)

dismissed the appeal on 22.5.2006, and confirmed the addition of Rs.99,99,000/-, as unexplained credit on account of bogus gifts. A relief of Rs.1,20,000/- was given on account of low withdrawals out of Rs.2,40,000/-, which was added by the Assessing Officer.

6. After the decision of the appeal by CIT (A) on 22.5.2006 proceedings a search under Section 132 of the Income Tax Act was carried out on 17.10.2006. The search and seizure operation was challenged by the assessee in a writ petition filed before the Lucknow Bench of the High Court in July, 2007. The writ petition is still pending

7. A notice under Section 153 (A) was issued to the assessee on 26.9.2007, as a result of search and seizure, calling the assessee to file return for six assessment years including assessment year 2002-03.

8. The Tribunal, hearing the appeal against the order of CIT (A) dated 22.5.2006 allowed the appeals accepting the arguments made on behalf of appellant-assessee that once a notice under Section 153A has been issued after search and seizure operations, as per the provisions of Section 153A, all the assessments of the six preceding assessment years prior to the date of search have to abate and that even the completed and concluded assessments should stand merged in the fresh assessment to be made by the Assessing Officer under Section 153A in pursuance of the search. The Tribunal observed in para 7 to 9 of its order:-

"The present appeal arises out of the assessment made prior to the date of the search. The intention of the legislature is to make a combined assessment of all the income disclosed or assessed in regular assessment and discovered in search. We accordingly restore the assessment to the file of the Assessing Officer to consider these additions in the assessment u/s 153A as well. However, in an event where search is declared illegal by any court or assessment u/s 153A is held invalid, then this appeal in relation to regular assessment will revive at the instance of the department if an application is moved to the Tribunal in this behalf. Accordingly, the appeal of the assessee is allowed but for statistical purposes and subject to the observations made above. In the result, the appeal of the assessee is allowed for statistical purposes. Order is pronounced in the open court on 31.10.2007."

9. Shri Bharat Ji Agrawal appearing for the department submits that the assessment was completed, the assessment order was passed on 31.3.2005. The appeal was also decided by CIT (A) on 22.5.2006 much before the initiation of search under Section 132 on 17.10.2006. The proceedings for assessment or reassessment were not pending on 17.10.2006 and thus according to the second proviso of Section 153A, only the pending assessment or reassessment is to abate. The assessments, which had become final are not liable to abate. The second appeal filed before the ITAT is not continuation of the proceedings of assessment. He submits that in pursuance to the assessment order under Section 143 (3) a penalty of Rs.97,85,925/- was imposed under Section 271 (1) (c) of the Act. If the interpretation given by the ITAT is to be accepted, the entire proceedings of

penalty will also abate giving an unreasonable advantage to the assessee, inspite of adverse findings inviting penalty.

10. Shri Bharat Ji Agarwal submits that the order of the Income Tax Appellate Tribunal is not acceptable as it is not in accordance with the provisions of the Act. A plain reading of the second proviso of Section 153A of the Act would show that only the assessment pending on the date of initiation of the search shall abate.

11. The second proviso of Section 153A reads as under:-

"Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate."

12. A plain reading of Section 153A would show that where notice under this Section is issued as result of any search under Section 132, assessment or reassessment if any relating to any assessment year falling within the period of six assessment years referred to under Section 153, pending on the date of initiation of search under Section 132 or requisition under Section 132A shall abate. The words, pending on the date of initiation of search under Section 132, or making of requisition under Section 132A, as the case may be, has to be assigned simple and plain meaning. Where the assessment or re-assessment is finalised, there are no pending proceedings to be abated, and restored to the file of the assessing officer. To abate means to diminish or to take away. The word 'abatement' has been defined in the Concise Law Dictionary (P. Ramanatha Aiyer) as follows:-

"Abatement. "Abatement" means, in respect of any chargeable accounting period, ending on or before the 31st day of March, 1947 a sum which bears to a sum equal to-

(a) in the case of a company, not being a company deemed for the purposes of Section 9 to be a firm, six per cent of the capital of the company on the first day of the said period computed in accordance with Schedule II, or one lakh of rupees, whichever is greater, or

(b) in the case of a firm having-

- (i) nor more than two working partners, one lakh of rupees, or
- (ii) three working partners, one and a half of rupees, or
- (iii) four or more working partners, two lakh of rupees, or

(c) in the case of a Hindu undivided family, two lakhs of rupees, or

(d) in any other case, one lakh of rupees,-

The same proportion as the said period bears to the period of one year and, in

respect of any chargeable accounting period beginning after the 31st day of March, 1947, such sum as may be fixed by the annual Finance Act. [Business Profits Tax Act (21 of 1947), S.2 (1)]

Removal or destruction, (as) of a nuisance; failure; premature end, suspension or diminution, (as) of an action or of a legacy.

The action of abating; being abated. {O.XXII, R.1, CPC (5 of 1908)}; decrease [S.12 (3) (b) (i), Specific Relief Act (47 of 1963)].

Of An Action Or Suit: In civil law an abatement of a suit is a complete termination of it. Abatement of a matter or cause is caused by the same becoming defective on account of the death of the parties materially interested. (Ency. of the Laws of England)

A suspension or termination of proceedings for want of proper parties or due to some technical defect.

The abatement of the main action abates proceedings ancillary or collateral to it.

In Criminal Law: Abatement of proceedings connotes their termination without any decision on merits and without the assent of the prosecutor. (Ency. of the Laws of England)

In Revenue Law: Abatement is a deduction from or refunding of duties on goods damaged during importation or in store."

13. The word 'abatement' is referable to something, which is pending alive, or is subject to deduction. The abatement refers to suspension or termination of the proceedings either of the main action, or the proceedings ancillary or collateral to it. The word is commonly used in the legislations, which provide for abatement of action/ suit; abatement of legacies; abatement of nuisance; and all actions for such nature, which have the pendency or continuance. The proceedings, which have already terminated are not liable for abatement unless statute expressly provides for such consequence thereof.

14. The word 'pending' occurring in the second proviso to Section 153A of the Act, is also significant. It is qualified by the words 'on the date of initiation of the search', and makes it abundantly clear that only such assessment or reassessment proceedings are liable to abate.

15. The pendency of an appeal in the Tribunal against the order of assessment against which an appeal has been decided by CIT (A) is not a continuation of the proceedings of assessment. An appeal under the Income Tax Act lies to the Appellate Tribunal on a question of law. Even if it is pending on the date of search, no such intention has indicated by the Tribunal arises out of the provisions of second proviso to Section 153A,

to abate the proceedings, which have been completed, or concluded, and to restore assessment to the file of the Assessing Officer.

16. We do not find force in the submission of Shri Ashish Bansal that where a notice under Section 153A has been given after the search operations under Section 132, for filing assessment for the block period of 6 years, and if such period includes any of the assessment year, the abatement of assessment and re-assessment proceedings, to give way to reassessment considering the additions in the assessment under Section 153A, will also include the assessment or re-assessment, which has been completed. If as a result of search, some undisclosed income is found to have escaped assessment, the Assessing Officer, may initiate steps for reassessment after sanction of competent authority, within the prescribed period of limitation.

17. A Circular No.7 of 2003 dated 5.9.2003 issued by the Commissioner of Income Tax has clarified the position in para 65.5 as follows:-

"The Assessing Officer shall assess or reassess the total income of each of these six assessment years. Assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under section 132 or requisition under section 132A, as the case may be, shall abate. It is clarified that the appeal, revision or rectification proceedings pending on the date of initiation of search under section 132 or requisition shall not abate. Save as otherwise provided in the proposed section 153A, section 153B and section 153C, all other provisions of this Act shall apply to the assessment or reassessment made under section 153A. It is also clarified that assessment or reassessment made under section 153A shall be subject to interest, penalty and prosecution, if applicable. In the assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year."

18. In *State of Rajasthan & Ors. v. Khandaka Jain Jewellers*, (2007) 14 SCC 339 the Supreme Court reiterating the principles of interpretation of taxing statutes held in para 24 as follows:-

"A taxing statute has to be construed as it is all these contingencies that the matter was under litigation and the value of the property by that time shot up cannot be taken into account for interpreting the provisions of a taxing statute. As already mentioned above a taxing statute has to be construed strictly and if it is construed strictly then the plea that the incumbent took a long time to get a decree for execution against the vendor that consideration cannot weigh with the Court for interpreting the provisions of the taxing statutes."

19. The second proviso to Section 153A of the Act, refers to abatement of the pending assessment or re-assessment proceedings. The word 'pending' does not operate any such interpretation, that wherever the appeal against such assessment or reassessment is pending, the same alongwith assessment or reassessment proceedings is liable to be

abated. The principles of interpretation of taxing statutes do not permit the Court to interpret the Second Proviso to Section 153A in a manner that where the assessment or reassessment proceedings are complete, and the matter is pending in appeal in the Tribunal, the entire proceedings will abate.

20. There is another aspect to the matter, namely that the abatement of any proceedings has serious causes and effect in as much as the abatement of the proceedings, takes away all the consequences that arise thereafter. In the present case after deducting bogus gifts in the regular assessment proceedings, the proceedings for penalty were drawn under Section 271 (1) (c) of the Act. The material found in the search may be a ground for notice and assessment under Section 153A of the Act but that would not efface or terminate all the consequence, which has arisen out of the regular assessment or reassessment resulting into the demand or proceedings of penalty.

21. For the aforesaid reasons, we are of the opinion that the Income Tax Appellate Tribunal erred in law in abating the regular assessment proceedings, which had become final, and restoring them as a consequence of search under Section 132, and notice under Section 153A of the Act to the file of the Assessing Officer.

22. The appeal is allowed. The order of the Income Tax Appellate Tribunal dated 31st October, 2007 is set aside. The question of law is decided in favour of the revenue and against the assessee. The Tribunal will decide the appeal on merits in accordance with law.

Dt.25.11.2011