

Court No. - 27

Case :- INCOME TAX APPEAL No. - 161 of 2005

Petitioner :- The Commissioner Of Income Tax-Ii, Lucknow

Respondent :- Dr.(Mrs.) Kiran Garg, Lucknow

Petitioner Counsel :- D.D. Chopra

Hon'ble Devi Prasad Singh,J.

Hon'ble S.C. Chaurasia,J.

Heard Sri D. D. Chopra, learned counsel for the appellant.

None appeared for respondent.

The appeal under Section 260-A of the Income Tax Act was admitted vide order dated 28.10.2005 on the substantial question of law framed by appellant, which is reproduced as under:

'Whether on the facts and in the circumstances of the case, the learned Income Tax Appellate Tribunal was justified in quashing the order of the learned CIT (Appeals) saying that notice u/s 148 being illegal any assessment order passed in consequence to such notice is also illegal while ignoring the order passed by Hon'ble Supreme Court in the case of ITO Vs. Purshottam Das Bongur and another, 224 ITR 362 wherein the learned Court has held that the information contained in the Deputy Director, Directorate of Inspector (Investigation) report can be basis for reopening of the assessment proceedings.'

In brief the assessee who belongs to Provincial Medical Services of Government of U.P., running her livelihood on the basis of salary earned during the course of employment and also showing certain income by way of long term capital gain. The assessee filed

the return for assessment year 2001-02 with ACIT, Range III, Lucknow. The original return was filed for the year under consideration with the ITO, Salary Circle, Lucknow, in which long term capital gain on the sale of shares was declared. However, the capital gain was claimed as exempt under Section 54 of the Act. Subsequently, the assessee received notice under Section 148 from the ITO, IV(2), Lucknow and another notice under Section 142(1) of the Act was issued by the same ITO on 01.09.93. In response to notice under Section 142 (1) of the Act, the assessee stated that she had already filed return to ITO, Salary Circle and the ITO IV(2) had no jurisdiction over her. On receiving the assessee's objection, the ITO IV(2) transferred the case to ACIT, Range III, Lucknow, who had jurisdiction over the assessee. The ACIT, Range III, Lucknow had issued notice under Section 142(1) along with questionnaire on 14.01.2004.

The Revenue has filed a written submission in response to grounds raised by the assessee. In reply the Authorised Representative stated that ground no.1 made by the assessee was not in nature of additional ground. The case of the Revenue convassed before the subordinate authority or Tribunal is that the assessee had purchased 3000 shares of KRS Financials Limited through its share broker, Shri S. S. Mehta, residing at GD-163, Pritampura New Delhi. The delivery of these shares were taken. The assessee's name was already entered in the share certificates. These shares were subsequently sold by the assessee through the same share broker for consideration of Rs.

5,19,480/-, which includes the broker's commission. After deducting the commission, the share broker Sri S. S. Mehta issued a draft of Rs. 5,18,440/-. While filing the return, the assessee computed long term capital gain of Rs. 4,50,393/- for assessment year 1998-99, which was accepted by Assessing Officer under Section 143(1) of the Act.

It appears that Additional Director of Investigation (in short 'ADI') has conducted certain enquiries in respect of Bank Accounts of the State Bank of Bikaner at Jaipur maintained in the name of one Shri S. S. Mehta & Company. From the enquiry, the ADI found that there were deposits of more than Rs. 50 lakhs in this account and Shri Mehta had issued cheques/bank drafts to various parties giving them short term capital gain as well as long term capital gain. ADI informed the Assessing Officer that the assessee has also issued a draft of Rs. 5,18,400/- from that account. Therefore, in consequence thereof, a notice under Section 148 was issued to the assessee on 26.03.2003 assigning reasons. The assessee vide its letter informed the Assessing Officer that original return filed by her may be treated as return filed in response to the notice under Section 148. The assessee furnished the photo copies of shares purchased indicating the distinctive numbers which was transferred in her name. Assessing Officer on enquiry from KRS Financials Limited, confirmed that shares have been transferred and registered in the name of the assessee. These shares subsequently sold to the same broker. However, Assessing Officer does not thought it to be genuine on the basis of ADI's report. The assessee, therefore, requested the Assessing

Officer to cross-examine share broker Sri S. S. Mehtra. In spite of the fact that various letters were sent by Assessing Officer to ADI, Gurgaon for allowing cross-examination of Sri S. S. Mehta, there was no response from ADI, Gurgaon. Ultimately, Assessing Officer held that shares sold was in consequence to by way of long term capital gain declared by by the assessee was not genuine.

Assessing Officer held that the capital gain was purchased by making equivalent payment of amount in cash. Since the Assessing Officer has held that sale of shares was not genuine, it was challenged before the CIT (A). The CITA (A) affirmed the order passed by the Assessing Officer, hence the respondent approached the Tribunal.

The Tribunal recorded a finding that in spite of repeated requests made by Assessing Officer, the ADI had not responded with regard to cross-examination of Sri S. S. Mehta, then it was not justified on the part of the Assessing Officer to draw inference against the assessee. It has been observed by the Tribunal that the only material for formation of belief that the income has escaped assessment was the statement of Sri S. S. Mehta, who has confirmed before the ADI made, during investigating of his bank account that transaction of sale of shares from a particular bank account was not genuine. He has given the name only of interested persons to show the short term and long term capital gain. Admittedly, the assessee was not indicted by him. The assessee who purchased the shares before also delivered by share broker Sri S. S. Mehta. It is undisputed that bank account from which sale consideration was paid was opened

and operated by Sri Mehta, but, in the case of the assessee, where the purchases of the very distinctive number of shares one year before could not be doubted, then there appears no justification to doubt the statement of Sri Mehta.

It is not a case where the report of Additional Director of Intelligence (ADI) was not considered by the Assessing Officer of the Tribunal. In spite of request made by the Assessing Officer, the ADI had not turn-up. Keeping the inaction on the part of the ADI, the Tribunal allowed the appeal and notice under Section 148 was discharged.

Reliance has been placed by learned counsel for appellant on the judgment of Hon. Supreme Court reported in ITR (Volume 224) 1997 page 362 – Income Tax Officer Vs. Purushottam Das Bangur And Another. In the case of Purushottam Das Bangur, the report of Deputy Director, Investigation was not considered as sufficient material by the High Court which was over-ruled by the Supreme Court. The Supreme Court held that the report of Deputy Director, Investigation would have been considered while adjudicating the controversy in question.

In the present case, facts and circumstances seems to be different. Here, in this case the Assessing Officer has sent letters and requested the A.D.I. to cooperate in cross-examination of the witness, which seems to not responded in spite of repeated requests made. In the absence of any response from A.D.I. the Tribunal has drawn adverse inference and observed that report could not have been basis

to form adverse opinion against the assessee. The finding recorded by Tribunal does not seem suffer from any impropriety or substantial illegality. Accordingly, the question is answered against the appellant. The appeal is dismissed accordingly.

Order Date :- 31.3.2010
psd