IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

ITA No. 129 of 2005
Date of decision: 4.8.2010

Commissioner of Income Tax (Central) Ludhiana

-----Appellant

Vs.

Sh.Girdhari Lal Bassi

----Respondent

CORAM:- HON'BLE MR JUSTICE ADARSH KUMAR GOEL
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present:- Mr. Krishan Kumar Mehta, Advocate for the revenue.
Mr. Pankaj Jain, Advocate for the respondent-assessee.

Adarsh Kumar Goel,J.

1. This appeal has been preferred by the revenue under section 260A of the Income Tax Act, 1961 (for short, 'the Act') against order dated 5.10.2004 passed by the Income Tax Appellate Tribunal, Chandigarh Bench 'B', Chandigarh in ITA No.1064/Chandi/96 for the block period 1.4.1985 to 11.8.1995, proposing to raise following substantial questions of law:-

i) Whether on the facts and in the circumstances of the case, the ITAT was correct in law to decide the issue of unexplained cash of Rs.45 lacs in a block assessment order, by following the order of CIT(A) dated 18.3.1999, which was on the issue of allowability of interest in a regular assessment order?

ii) Whether on the facts and in the circumstances of the case, the ITAT was correct in law in ignoring the primary evidence detailed in the block assessment order and which had also not been

considered by the CIT(A) in his order dated 18.3.1999?

iii) Whether on the facts and in the circumstances of the case, the ITAT was correct in law in discharging its function as the first appellate authority by just following the decision of the CIT (A) dated 18.3.1999 given in a different context?

iv) Whether on the facts and in the circumstances of the case, the ITAT was correct in law in holding that the stated NRI gifts totaling Rs.7,50,000/- and investment of Rs.8,21,175/- in vehicles were explained even when these had been voluntarily surrendered by the assessee during block assessment proceedings?

v) Whether on the facts and in the circumstances of the case, the ITAT was correct in law in deleting the addition of Rs.4,22,973/- representing income declared in belated return for assessment year 1995-96, disregarding express provisions of section 158BB(1)(c) of the IT Act?

2. The assessee is an individual and is engaged in property dealing. Search and seizure operation was carried out at the premises of the assessee on 11.8.1995 leading to seizure of number of documents and account books in addition to cash amount of Rs.47.27 lacs. Sum of Rs.46 lacs was seized in absence of explanation about the source of amount. Notice under Section 158BC of the Act was issued to the assessee in response to which return of the block year 1.4.1985 to 11.8.1995 was filed by the assessee declaring Nil income. During assessment, the assessee explained the cash recovered as being the amount withdrawn from the bank and a certificate dated 5.2.1996 was

also produced. This explanation was not found to be acceptable. The Assessing Officer ascertained facts by conducting a survey on Union Bank of India under section 133A of the Act on 20.3.1996. From the survey, it was found that the bank records had been manipulated. The plea that over-draft limit was extended to the assessee which had a credit balance on 8.8.1995 out of which a sum of Rs.45 lacs was withdrawn was negatived by the over draft balance book showing balance as on 8.8.1995 to be only less than Rs.3 lacs. The cheque dated 8.8.1995 for withdrawal of Rs.45 lacs was issued from a cheque book which itself was issued to him on 6.9.1995. The scroll register and overdraft balance book showing actual cash receipt was dated 15.9.1995 and not 8.8.1995. The Bank Manager Shri J.N.Arora admitted that entry of withdrawal of Rs.45 lacs was cooked up at the instance of the assessee. The certificate issued to the assessee dated 5.2.1996 filed before the Assessing officer on 2.3.1996 was accordingly withdrawn. After this survey was conducted and these facts were found, the assessee filed revised return on 30.4.1996 appending note to the return to the following effect:-

> "In the original return filed due to some misunderstanding and ill advise, no amount was surrendered. Later on, after going through the records, a sum of Rs.55 lacs has been surrendered. Any correspondence relating to the seizure amount may be treated as withdrawn. The earlier action of not disclosing the amount is regretted.
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> In addition to the amount found at the time of search, some more amount has been disclosed on estimated basis as it has been found later on that

some of the pages of the seized diary were missing and as such exact calculation of the amount to be disclosed, could not be made."

3. Return was duly verified by the assessee and was accompanied by Vakalatnama signed by him in favour of his counsel Shri Subhash Aggarwal. In these circumstances, the Assessing Officer completed assessment vide order dated 30.8.1996 under section 158BA of the Act holding that sum of Rs.45 lacs so seized from the assessee during search represented his undisclosed income. Apart from the said amount, other additions were also made which included amount representing foreign gifts received by the assessee and unexplained investment in purchase of cars. In the bank account seized during the search, there were entries showing amount received from NRIs as gifts. The assessee was duly confronted with the said entry and statement of the assessee was recorded. Unable to give any valid explanation, he surrendered the amount of the gifts as income. The assessee also in response to a questionnaire about the source of investment in car owned by him, offered the investment in the car as undisclosed income for the block year. Similarly, he also surrendered the amount of investment in purchase of another car which was not in his name but in the name of his nephew.

4. Aggrieved by the order of assessment, the assessee approached the Income Tax Appellate Tribunal and challenged the additions. The Tribunal upheld the plea of the assessee and deleted the additions. The findings recorded by the Tribunal are as under:-

i) **With regard to addition of Rs.45 lacs**:

"…We find that the dispute is the addition of Rs.45 lacs out of Rs.55 lacs, as the assessee has not disputed such addition of Rs.10 lacs before us. So far as dispute relating to Rs.45 lacs is concerned, the assessee claims that the same was out of withdrawals from the bank, whereas the revenue has treated the same as income from undisclosed sources. We find that the AO has made the impugned addition in respect of Rs.45 lacs basically relating to the finding of the ADIT vide survey of the bank on 20.3.1996 and considering the statement of the assessee vide revised return (though not accepted as no such provision under law existed) and observing that such transaction with the bank by the assessee on 8.8.1995 was not true as the assessee had connived with the Bank officials by manipulating bank record. However, we find that the CIT(A) while adjudicating appeal of the assessee for assessment year 1996-97, to which period 8.8.1995 and 15.9.1995 relates has discussed the issue at length from pages 6-10 of his order, wherein the CIT(A) has gone through the following documents:-

i) Cheque dated 8.8.1995
ii) Photocopy of the bank account No.17129
iii) Photocopy of the certificate dated 29.12.1995
iv) Photocopy of the certificate dated 5.2.1996
v) Letter dated 3.4.1996 withdrawing the certificate issued earlier.
vi) Letter dated 8.4.1996 issued by the appellant to the bank.
vii) Letter dated 9.4.1996 issued by the branch manager to his General Manager seeking instructions.
viii) Letter dated 29.8.1996 indicating total amount of interest charged on the overdraft.
ix) Letter dated 9.11.1998 showing bifurcation of interest charged from 1.4.1995 to 7.8.1995 and 8.8.1995 to 31.3.1996.

After perusal of the above documents, the CIT(A) held that such cash was withdrawn by the assessee on 8.8.1995 and the certificate earlier issued by the Bank was subsequently withdrawn under pressure of the ADI. The CIT(A) has further observed that the Bank has charged interest on such overdraft from 8.8.1995 and not from 15.9.1995, which itself suggested that cash was available with the assessee out of withdrawals made on 8.8.1995. We also find that such finding of the CIT(A) has not been challenged by the revenue by filing appeal which suggest that the department has nothing to say against such order, we therefore, observing the totality of facts and circumstances of the case, are of the opinion that the revenue in this case could not bring sufficient material on record which could suggest that the cash found was on account of undisclosed sources. Whereas the CIT(A) while disposing of the appeal for a.y.96-97 has categorically held that such cash available with the assessee was out of withdrawals made from bank on 8.8.1995, we find that such finding of the CIT(A) is based on after evaluating all the events and documents in this regard and more important the revenue has not preferred any appeal against such finding of the CIT(A), which signifies as to the acceptance of the order of the CIT (A) by the revenue. We, therefore, based on above discussion, are of the considered view that so far as the addition of Rs.45 lacs is concerned, the same is not justified as the assessee has duly explained as to the genuineness of availability of such cash and also confirmed by the CIT(A) while disposing of appeal for a.y.96-97. We, therefore, delete the addition of Rs.45 lacs out of Rs.55 lacs made by the AO. However, since the assessee has not disputed the balance of Rs.10 lacs in his appeal, the same is confirmed. Grounds stand partly accepted.

ii) **Addition of Rs.7.5 lacs towards NRI gifts**:

"We after hearing both the parties and perusing the case law cited find that if any income or asset is duly disclosed in the books of account and same is filed alongwith regular return the same is outside the scope of undisclosed income. While arriving at such conclusion, we find support from the judgment cited supra, including decisions of this Bench, wherein it has been held that NRI gifts disclosed in regular return of income, the same cannot be added in block assessment. We, therefore, based on our above discussion and following the various decisions hereinabove, delete the addition made by the AO and accept the ground raised by the assessee in this regard."

iii) **Additions on account of unexplained investment in car**:

"We after hearing both the parties and perusing the record find that such purchase of car was made out of withdrawals from NRI bank account of Shri Vinod Kumar, duly confirmed by the Bank while issuing certificate and also confirmed by Shri Vinod Kumar. Since the source has duly been confirmed by the bank and also by the lender, in our considered view, the AO was not justified in treating the same as income from undisclosed sources. We, therefore, delete the impugned addition and accept the ground.

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We after hearing the parties and perusing the record find that purchase/sale of the car was made through bank account of Shri Vinod Kumar as confirmed by him as well as the bank certificate, the fact which could not be converted by learned DR and the AO could not bring anything material on record in support of his finding that such car was purchased by the assessee out of his undisclosed income. We, are therefore, of the opinion that the AO was not justified in ignoring such transaction in the name of Shri Vinod Kumar and treating the same as income

of the assessee. We, therefore, delete the impugned addition and accept the ground."

iv) **Deletion on account of income not being undisclosed in view of return filed for the assessment year 1995-96**

"We have also considered the various case law, wherein it has been held that income already shown and determined earlier cannot be a part of undisclosed income and only income given under section 158B(b) can be assessed under Chapter XIVB. We, therefore, based on the totality of facts and circumstances of the case and also following the decisions of various courts including that of the Chandigarh Bench of the ITAT, are of the view that interest and rental income regularly shown by the assessee cannot be a part of undisclosed income. We, therefore find that the AO was not justified in treating such income as undisclosed and charging tax @ 60%. We accordingly set aside the findings of the AO and accept the ground raised by the assessee in this regard."

5. We have heard learned counsel for the parties and perused the record.

6. Learned counsel for the revenue submitted that unexplained cash of Rs.45 lacs was rightly added as income from undisclosed sources on account of there being no explanation at the time of seizure of the cash, the plea of amount being available in overdraft and having been withdrawn from the bank having been found to be false during survey conducted on the bank premises with reference to the record of the bank leading to withdrawal of certificate issued in favour of assessee by the Bank and further stand of the assessee in the revised return on 30.4.1996 accepting the amount as

undisclosed income. He submits that finding recorded by the Tribunal is perverse in ignoring the said material merely on the ground that the CIT(A) accepted the plea of the assessee for subsequent assessment year 1996-97 relating to assessment of interest income of the said amount, which finding was not challenged by the revenue. He submits that each assessment year is independent and mere fact that the revenue did not challenge the finding recorded in a subsequent year could not deviate from the startling facts clinching the issue of undisclosed income on the statement of the assessee himself which was not shown, in any manner, to be involuntary. He has relied upon judgment of this Court in ***Kanshi Ram Wadhwa v. CIT***, (1982) 138 ITR 830 to the effect that a statement surrendering the undisclosed income cannot be ignored.

7. Learned counsel for the assessee supported the findings recorded by the Tribunal. He relied upon following judgments to submit that only material found during search can be the basis of block assessment:-

i) ***CIT v. Aggarwal Developers P Limited***, (2007) 163 Taxman 699 (Del.);

ii) ***CIT v. Vikram A.Doshi,*** (2002) 256 ITR 129 (Bom.);

iii) ***CIT v. Vishal Aggarwal***, (2005) 147 Taxman 597 (Del.);

8. We are of the view that the questions have to be decided in favour of the revenue and finding recorded by the Tribunal are perverse and cannot be sustained in law.

9. We proceed to deal with the questions in seriatim.

Re: (i) to (iii)

10. It is undisputed that the assessee initially did not give any explanation regarding cash recovered and though explanation was sought to be furnished by relying on certificate from Bank, on being confronted with the fact that record relied upon was not genuine, the assessee filed a revised return declaring the amount to be undisclosed income. In such circumstances, the stand of the assessee in withdrawing from his earlier statement was not shown to be genuine. The assessee did not disclose what was the purpose of withdrawal of such a huge cash amount and whether any further cheque was issued from that cheque book during the period in question. Learned counsel for the assessee submitted that in statement recorded on 21.9.1995, the assessee had taken a stand that the amount found represented withdrawal from the bank. Assuming such a statement was made after more than one month of the search, the fact remains that the assessee himself gave a statement in the revised return filed on 30.4.1996 on being confronted with the facts found during survey on the bank premises, falsifying the stand of the assessee. The Tribunal had no justification whatsoever to disregard the same. Infact, no reason for disregarding the said statement has been given by the Tribunal. This being an important material required to be taken into account and having been taken into account by the Assessing Officer, the Tribunal could not have disregarded the same. If any important piece of evidence is disregarded by a fact finding authority, the finding would stand vitiated and will give rise to question of law, which in the

circumstances, can be held to be a substantial question of law. Judgment of this Court in ***Kanshi Ram Wadhwa*** supports the stand of the revenue. As regards judgments relied upon on behalf of the assessee, the principle laid down therein that block assessment has to be based on material found during search is undisputed but in the present case, there is nothing to show that assessment is not based on such material. Accordingly, we answer questions (i) to (iii) in favour of the revenue and against the assessee and hold that ITAT was not justified in deleting the addition on account of unexplained cash of Rs.45 lacs merely on the basis of order of the CIT(A) for the next assessment year on the issue of allowability of interest in regular assessment.

Re: (iv)

11. We have already noticed the findings of the Tribunal. The Tribunal held that NRI gifts were disclosed in regular return ignoring the fact that on being unable to give valid explanation during the block assessment, the assessee himself surrendered the amount as unexplained income. As observed earlier, this being an important material, the Tribunal could not have disregarded the same and finding recorded without considering the effect of surrender is clearly perverse and unsustainable. The Tribunal also observed that the amounts representing gifts were mentioned in the return for the earlier assessment year and did not form part of the seized material and the same could not be treated as undisclosed income under Chapter XIVB. We are of the view that this reason is not legally tenable. The bank

accounts were part of seized material and mere fact that the assessee had disclosed the same did not deviate from the fact that income was undisclosed in absence of the gifts being proved to be genuine which was further corroborated by the factum of surrender by the assessee himself during the block assessment proceedings. The question is, accordingly answered in favour of the revenue, holding that the Tribunal was not justified in holding the gifts and investments to be duly explained.

Re: (v) :

12. The Tribunal took into account disclosure in belated return for the assessment year 1995-96 for deleting the addition representing undisclosed income of the assessee by relying upon provisions of Section 158BB(i) (c) of the Act. The scheme of the provision clearly is to take into account disclosures in returns filed prior to search or to take into account disclosures independent of the return which are satisfactorily verifiable. Disclosure in a return filed after the search cannot be treated as a disclosed income. This aspect has been examined by this Court recently in ITR No.170 of 1998 (***The Commissioner of Income Tax, Jalandhar v. Shri Ashwani Trehan***) decided on 8.7.2010, wherein it was observed:-

> "Under Section 158BB, undisclosed income is aggregate of income for the previous year falling in the block period, on the basis of evidence found in search, reduced by the income determined on the basis of returns already filed or where date for filing of return had not expired, on the basis of entries made in the books of account. In other words, return filed after search was not at par with disclosed income. The stand of the assessee that he had filed return

under Section 139(4) of the Act on 25.3.1996, which should be taken into account could not be accepted. The return filed could be taken into account only if the same was before the date of search, as provided under Clause (b) of Section 158BB and if the return had not been filed but the date was still available, only entries in books of account could be taken into account. In view of this clear scheme of Section 158BB of the Act, the interpretation placed by the Tribunal in taking into account the return filed after the search, is against the express statutory provision under Clause (b) of Section 158BB. It is well settled that the Section has to be read as a whole and if interpretation taken by the Tribunal is to be accepted, the same will be against the scheme of Clause (b) of Section 158BB. In ***M.R. Singhal*** v. ***Assistant Commissioner of Income Tax,*** [2007] 290 ITR 162 (P&H), same view was taken and it was held that return filed after search even before 'due date' under Section 139(4) of the Act could not be taken into account. The relevant observations are as under:-

> "Though learned counsel for the assessee has relied upon section 139(4) of the Act which permits the return to be filed even after the expiry of due date,for purposes of Section 158BB(1)(c) of the Act, the consequence of the return having not been filed by the due date cannot be nullified by a return filed under section 139(4) of the Act. Even otherwise, section 158BB(1)(c) of the Act clearly provides that even where the date for filing the return has not expired, transactions recorded on the basis of entries relating to income in the books of account have to be taken into account. In the present case, no advance tax or self-assessment tax had been paid at the relevant time. In such a situation, the

return filed under Section 139(4) of the Act could no be taken into account."

13. Applying the above principle to the present case, the income declared in a belated return after the search could not be treated as undisclosed income. The view taken by the Tribunal cannot, thus, be legally sustained.

17. Accordingly, question is answered in favour of the revenue and against the assessee.

18. As a result, we allow this appeal. The impugned order of the Tribunal is set aside and that of the Assessing Officer is restored.

(Adarsh Kumar Goel)
Judge

August 4, 2010
'gs'

(Ajay Kumar Mittal)
Judge