IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 174 OF 2013

Commissioner of Income Tax-III ..Appellant

Vs.

M/s United Phosphorous Ltd. ..Respondent

....

Mr. Charanjeet Chanderpal, Advocates for Appellant.
Mr. Percy Pardiwalla, Sr. Advocate i/b Vasanti Patel for Respondent.

....

CORAM : M.S. SANKLECHA &
G.S. KULKARNI, JJ.
DATED : 27th JANUARY 2015

P.C.:

1. This appeal under Section 260A of the Income Tax Act, 1961 (the 'Act') by the Revenue is directed against the order dated 20th September 2011 passed by the Income Tax Appellate Tribunal (the 'Tribunal').

2. The period involved is block period 1st April 1995 to 14th February 2002.

3. Although numerous questions have been raised in the memo of appeal, at the hearing, only the following question is pressed for our consideration:-

> *"Whether on the facts and in the circumstances of the case and in law, Tribunal is justified in holding that export commission payable of Rs.5,12,99,210/- cannot be taken as part of the undisclosed income for the block period especially when at the time of search evidences gathered and statement of MD of the assessee shows that claim of the assessee for deduction for these expenses is false claim and hence it can be taken as undisclosed income of the block period in view of provisions of section 158B(b) of the Income Tax Act?"*

4. The Office premises of the respondent-assessee was searched under Section 132 of the Act. During the course of the search, the director of respondent-assessee declared undisclosed income of Rs.7.50 crores in respect of the respondent-assessee. However in the return of income filed for the block period, the respondent-assessee declared undisclosed income of Rs.2 crores. In its return of income, the respondent-assessee had challenged the applicability of Section 132 of the Act and also pointed out that though undisclosed income was declared in the preliminary statement of the director, on verification of entries in its account, it is found that the amount of Rs.2 crores at the highest could be offered as taxable for the block period. The Assessing Officer did not accept the petitioner's submission and interelia disallowed expenses on account of of clearing and forwarding expenses, sales promotion expenses, export commission and unmoved balances and added the same to the income in the Assessment Order dated 27th

February 2004.

5. On appeal, the Commissioner of Income Tax (Appeals) (the 'CIT(A)') by order dated 28th March 2006 interelia partly allowed the disallowance of expenses on account of clearing and forwarding expenses and deleted the complete additions of Rs.5.12 crores on commission payable on exports done by the Assessing Officer. The revenue carried the matter in further appeal to the Tribunal. The Tribunal by the impugned order upheld the order of CIT(A).

6. Before us, the only ground urged by the revenue is that the impugned order was not justified in holding that the export commission of Rs.5.12 crores cannot be taken as a part of undisclosed income. The grievance of the revenue is that in view of the statement made by the Director of the petitioner accepting undisclosed income on the above account, there is no occasion for CIT (A) and the Tribunal to hold that the same cannot be considered to be undisclosed income for the block period.

7. We find that the CIT (Appeals) as well as the Tribunal have elaborately discussed the facts which were before them. In fact so far as the commission on exports is concerned, the CIT (Appeals) as well as the Tribunal have rendered a finding on facts that there were no incriminating material found at all to support the stand of the revenue

that no commission on exports was payable. It was also noted that even though commission on exports was payable to over 50 commission agents worldwide, commission has been disallowed only in respect of top 10 parties and not others, though similarly situated. Besides the Assessing Officer did not make any enquiry with RBI, Bank, customers or agents to collect material to show that the commission provided for was false. We find that there is no finding that the expenditure claimed is false. The disallowance cannot be made merely on the statement made by the assessee as the same is subsequently retracted and the retraction has not been found to be incorrect. Thus on facts, both the authorities have consequently arrived at a finding that commission on exports of Rs.5.12 crores is payable. This has not been shown to be perverse.

8. Besides in law, the authorities have reiterated the well settled principles of assessment in block assessment. Additions in block assessment must be founded on evidence recovered during the search. In support, reliance placed upon the decision of this Court in ***CIT Vs. Dr.M.K.E. Memon (2001) 248 ITR 310***, wherein the Court has held that what has to be assessed in the assessment for block period is the undisclosed income of block period and not income or loss of previous year which can be assessed in the regular assessment under Section 143(3) of the Act. Both the authorities have categorically held that there

is no material found in the course of the search which could be the basis of making disallowance of commission paid for the block assessment period. In the aforesaid circumstances, the deletion of addition done by the Assessing Officer on the above account in the block assessment made by CIT(A) and upheld by the Tribunal cannot be faulted.

9. In view of the above, we find that the authorities have concurrently came to the finding of fact that commission on exports was payable and the same is not shown to be perverse. Similarly in law also the impugned order merely follows the binding decision of this Court in Dr. M.K.E. Memon (supra) that the jurisdiction to make a block assessment is only in respect of undisclosed income of block period and not on income which could be the subject matter of assessment in regular assessment proceedings under Section 143(3) of the Act.

10. Accordingly we see no substantial question of law arising in the present appeal. Hence the **appeal** is **dismissed**. No order as to costs.

[G.S. KULKARNI, J] **[M.S. SANKLECHA, J.]**

S.S.DESHPANDE