

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.2.2015

CORAM

THE HON'BLE MR.JUSTICE R.SUDHAKAR
AND
THE HON'BLE MR.JUSTICE R.KARUPPIAH

T.C.(A).No.1117 of 2006

Family of SP.S.S.SP Subramanian Chettiar
Karaikudi.

.. Appellant

Vs.

The Income Tax Officer
Ward 1(3), Karaikudi.

.. Respondent

PRAYER: Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal 'C' Bench, Chennai, dated 30.9.2005 made in I.T.A.No.905/Mds/2003 for the the assessment year 1996-1997 against the order of the Commissioner of Income tax (Appeals) I Madurai dated 17.2.2003 made in ITA.No.82/2000-01 86 & 87/2001-02.

against the order dated 14.3.2001 made in GIR.No.2209-S/I (2) 1996-97 on he file of the Income Tax Officer, ward I (2) Karaikudi.

For Appellant : Mrs.Lakshmi Sriram

For Respondent : Mr.M.Swaminathan
Standing Counsel

सत्यमेव जयते
J U D G M E N T

(Delivered by R.SUDHAKAR, J.)

The assessee has filed this appeal assailing the order of the Income Tax Appellate Tribunal 'C' Bench, Chennai, dated 30.9.2005 made in I.T.A.No.905/Mds/2003 for the the assessment year 1996-1997 and the same was admitted on the following questions of law:

- (i) Whether the order of the Tribunal, in the light of the finding that the appellant had accounted for the entire amount of cost construction to the contractor and that the Assessing Officer did not find any defect in respect of cost account for in

- the books of account, is valid in law insofar as it has agreed with the order of the CIT (Appeals) in arriving at the estimated cost of construction for the purpose of addition assessment u/s.69B of the Act as deemed income?
- (ii) Whether the Tribunal is right in law in sustaining the estimated cost of construction as arrived at by the CIT (Appeals) when the Tribunal has found the appellant had accounted for the entire cost of construction in the account books and that no flaw was found?
- (iii) Whether the Tribunal is right in law in holding that the estimate made by the CIT (Appeals) is reasonable when the Tribunal itself has accepted the fact that appellant has recorded the correct and true cost of construction in its flawless account books?
- (iv) When the Tribunal found as a fact that actual cost of construction is recorded in the books and when such recording is found to be actual expenditure, whether the Tribunal is right in law in upholding the estimated cost of construction as arrived by the CIT (Appeals)?
- (v) Whether the Tribunal is right in law when it has rendered a finding that the actual cost of construction paid to the contractor was accounted and when the accounts were found flawless by the Assessing Officer, in upholding the estimated cost, as unexplained investment under Section 69B?
- (vi) Whether the provisions of Section 69B are invocable in the light of the factual finding of the Tribunal that Assessing Officer could not find out any payment made over and above the payment made to the contractor as cost of construction as per the bills raised by them that the appellant had accounted for the entire amount paid to the contractor and that the Assessing Officer could not find out any defect in respect of cost accounted for in the books of account?

2.1. The facts in a nutshell are as under: The appellant/assessee constructed a multi-storeyed residential-cum-commercial complex at Karaikudi during the assessment years 1994-1995, 1995-1996 and 1996-1997 and admitted the total cost of construction as Rs.41,49,070/-. The Assessing Officer referred the matter to the Valuation Cell, Income Tax Department, Madurai and the Department's Valuer estimated the cost of construction of the complex at Rs.58,09,000/-. The assessee's objections to the

valuation report were considered by the Assessing Officer and thereafter, the assessment order was passed treating the difference in valuation to the tune of Rs.16,61,000/- as income for three assessment years, namely, 1994-1995, 1995-1996 and 1996-1997. Accordingly, a sum of Rs.4,84,610/- was added to the total income of the assessee in the assessment year 1996-1997 and assessment was completed.

2.2. The assessee appealed to the Commissioner of Income Tax (Appeals), who partly allowed the appeals and arrived at the cost of construction at Rs.46,04,145/-, as against estimate made by the Departmental Valuation Officer at Rs.58,09,000/-. The Commissioner of Income Tax (Appeals) directed the Assessing Officer to adopt the above said figure as the cost of construction and recompute the unexplained investment. It was also observed that the unexplained investment should be assessed in one assessment year 1996-1997 and not in other assessment years, as it is not possible to bifurcate the unexplained investment. Accordingly, the Commissioner of Income Tax (Appeals) deleted the additions made for the assessment years 1994-1995 and 1995-1996, and directed the entire unexplained investment to be assessed as income for the assessment year 1996-1997.

2.3. Calling in question the said order, the assessee as well as the Revenue filed appeals before the Tribunal. The Tribunal dismissed the appeals filed by the assessee as well as the Revenue and confirmed the order passed by the Commissioner of Income Tax (Appeals). The operative portion of the said order reads as under:

"3. We have heard both sides and considered the issue. It is an admitted fact the Assessing Officer could not find out anything over and above the payments made to the contractor as cost of construction as per the bills raised by them. The Assessee has accounted for the entire amount paid to the Contractor, M/s.Shri Construction, Chennai. Further, the Assessing Officer could not find out any defect in respect of cost accounted for in the books of account and the Department Valuation Officer has valued the property at plinth area rates. The Department Valuation Officer has taken into account excess plinth area compared to the actual and the rate adopted by the Department was also excessive as he has applied the C.P.W.D. Rates. Since the construction was carried out in a moffusil area and the quality was ordinary, the State P.W.D. Rates should have been applied. It is observed that the CIT (Appeals) has reasonably reduced the cost of construction by 15% taking into consideration the

local area rates, quality of materials in construction etc."

2.4. Impugning the said order, the assessee has preferred this appeal on the questions of law, referred supra.

3. We have heard Mrs.Lakshmi Sriram, learned counsel appearing for the assessee and Mr.M.Swaminathan, learned Standing Counsel appearing for the Revenue and perused the orders passed by the Tribunal and the authorities below.

4. Even though this appeal was admitted on the questions of law referred supra, the learned counsel on either side fairly concede that the core issue to be determined in this appeal is "Whether the Assessing Officer is entitled to resort to Section 69B of the Act and consequently, refer the matter to the Departmental Valuation Officer, when books of account were not rejected?"

5. The main plea taken by the learned counsel for the assessee is that the onus probandi lies on the Assessing Officer to establish that the assessee has understated or concealed the actual cost of construction and without discharging the onus, the Assessing Officer is not empowered to rely upon the valuation given by the Departmental Valuation Officer, when the books of account were never rejected.

6. The learned Standing Counsel for the Revenue is not disputing the fact that the books of account furnished by the assessee were never rejected by the Department.

7. In the case on hand, it is beyond any cavil that the books of account furnished by the assessee were never rejected. No explanation was called for from the assessee stating that there was concealment or understatement of amount in the books of account. The initial burden cast on the department to prove that there was understatement or concealment of income has not been discharged and, therefore, the Assessing Officer is not empowered to refer the matter to the Departmental Valuation Officer or rely on such report.

8. The above said view of this Court is fortified by the following decisions:

(i) In *Sargam Cinemas v. Commissioner of Income Tax* (2010) 328 ITR 513 (SC), the Supreme Court has held as under:

"In the present case, we find that the Tribunal decided the matter rightly in favour of the assessee inasmuch as the Tribunal came to the conclusion that the assessing authority could not have referred the matter to the Departmental Valuation Officer (DVO)

without the books of account being rejected. In the present case, a categorical finding is recorded by the Tribunal that the books were never rejected. This aspect has not been considered by the High Court. In the circumstances, reliance placed on the report of the DVO was misconceived."

(emphasis supplied)

(ii) Following the above decision of the Supreme Court, a Division Bench of the Delhi High Court in Commissioner of Income Tax v. Bajrang Lal Bansal, (2011) 335 ITR 572 (Delhi) has held as under:

"The primary burden to prove understatement or concealment of income was on the Revenue and it was only when such burden was discharged that it would be permissible to rely upon the valuation given by the District Valuation Officer. The opinion of the District Valuation Officer, per se, was not an information and could not be relied upon without the books of account being rejected which had not been done in the assessee's case. Moreover, there was no evidence found as a result of the search to suggest that the assessee had made any payment over and above the consideration mentioned in the return of the assessee."

(emphasis supplied)

(iii) In K.K.Seshaiyer v. Commissioner of Income Tax, (2000) 246 ITR 351, a Division Bench of this Court held as under:

"When the actual cost of construction was duly recorded by the assessee and that cost also was set out in the agreement with the contractor, specifying the rates, and which rates had been accepted by the Tribunal, and there was no finding that the building was larger than the assessee had claimed or had better quality of construction or fixtures than the assessee had recorded in his books, the opinion of the valuer could not be straightaway substituted for the actual cost that was recorded in the assessee's books. The Tribunal had not found that the books maintained by the assessee were not credible. Therefore, the Tribunal was not right in not accepting the valuation of house property submitted by the assessee."

9. In view of the findings recorded above and law enunciated in the decisions referred supra, this appeal deserves to be allowed.

Ex consequenti, this appeal is allowed by answering the question of law formulated by this Court in favour of the assessee and against the Revenue. No costs.

Sd/-

Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

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To:

1. The Assistant Registrar,
Income Tax Appellate Tribunal
Chennai Bench "C", Chennai.
2. The Secretary, Central Board
of Direct Taxes, New Delhi.
3. The Commissioner of Income Tax (Appeals) - I
Madurai
4. The Income Tax Officer
Ward I(2), Concurrent Jurisdiction
Karaikudi.

1 cc to M/s. Lakshmi Sriram, Advocate, sr. 7126

1 cc to M/s. M. Swaminathan, Advocate, sr. 7109

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