

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 17.2.2016.

CORAM

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN
AND

THE HON'BLE MR.JUSTICE N.KIRUBAKARAN

T.C.(A) No.1189 of 2007

Commissioner of Income Tax,
Chennai.

Appellant

vs.

Shri.T.Rangroopchand Chordia

Respondent

Tax Case (Appeal) against the Order of the Income Tax Appellate
Tribunal, Madras 'B' Bench dated 8.12.2006 in
I.T.(SS)A.No.68/Mds/2005.

For appellant : Mr.M.Swaminathan
Assisted by Mr.K.Sureshkumar

For Respondent : Mr.R.Sivaraman

JUDGMENT

(Judgment of the Court was delivered by V.RAMASUBRAMANIAN, J.)

This appeal is filed by the Revenue under section 260A of the
Income Tax Act, 1961. The appeal was admitted on 4.9.2007, on the
following two questions of law:-

*"i) Whether, on the facts and circumstances of the case,
the Tribunal was right in holding that addition of*

undisclosed income cannot be made on the basis of loose sheets found at the time of search on the ground that the sheets did not contain the dates of the transactions and as such do not have any evidentiary value?

ii) Whether, on the facts and circumstances of the case, the Tribunal was right in deleting the additions made on the basis of the loose sheets found at the time of search, when the assessee had accepted in his sworn statement that the information in the loose sheets pertained to his undisclosed income, and did not retract the statement until about a year later?"

2. The facts leading to the present appeal that may be necessary for an adjudication of the substantial questions of law raised are narrated as under:-

(1) The respondent/assessee is an individual carrying on business of Hire Purchase Finance for Automobiles. He is also having an interest as a Partner or Director or Shareholder in certain Concerns/Firms/Companies, about which, we are not now concerned.

(2) A search and seizure operation under section 132 was conducted in the premises of the assessee on 7.6.2000, based on a warrant of authorisation issued in the name of the assessee. The search was actually commenced on 7.6.2000 and it concluded on 8.9.2000.

(3) During the course of the search, the officers seized certain material and came to the conclusion that the assessee had undisclosed income which he had also invested.

(4) Therefore, a notice under section 158BC was served on the assessee on 6.2.2001, calling upon him to file a return of income within a specified time.

(5) The assessee filed a return of income for the block period on 27.9.2002 after about one year and 7 months. In the return of income, which he filed, the assessee declared an undisclosed income of Rs.5,00,000/- for the block period.

(6) The officers found that the income of the assessee that was not disclosed included, business income from a property development venture, business income from a Proprietary Concern engaged in finance business, long term capital gains on the sale of property at Poes Garden and bogus creditors appearing in the books of accounts of various family Concerns apart from investments outside the books of accounts.

(7) During the search and seizure operation, the statement of the assessee as well as one of his brothers was also recorded wherein both of them admitted to have had undisclosed income and to

have made investment. A statement on oath was also taken before the Deputy Director of Income Tax. These statements were obviously recorded under section 132(4) of the Act.

(8) Thereafter, the assessing officer completed the block assessment for the period on 7.6.2000 by the order dated 30.9.2002 under section 158BC read with section 143(3) of the Act. Subsequently, an order of rectification was also passed under section 154 about which we are not now concerned.

3. The assessee filed an appeal in I.T.A.No.46/2003-04 before the Commissioner of Income Tax (Appeals). The appellate Commissioner concurred with the findings of the assessing officer and dismissed the appeal holding that the addition of Rs.58,53,000/- towards undisclosed income was correct and proper.

4. As against the said order of the Appellate Commissioner, the assessee filed a further appeal in I.T.A.No.68/MDS/2005 before the Tribunal. Before the Tribunal, several issues were raised, one of which revolved around the non-service of the notice under section 143(2), before making an assessment under section 143(3). Though the Tribunal recorded a finding that no notice was served under section 143(2), the Tribunal did not set aside the assessment on that ground.

But, it went into other questions and held that the loose sheets, on the basis of which, additions were made, were not of any evidentiary value and that therefore, the addition of the amount of Rs.58,53,000/- was not proper and correct. Therefore, the Tribunal allowed the appeal of the assessee. Hence, the Department is on appeal before us.

5. Before going into the two questions of law raised for our consideration, we must address ourselves to the preliminary issue raised by Mr.R.Sivaraman, learned counsel appearing for the respondent/assessee about the very maintainability of the appeal. According to the learned counsel for the respondent/assessee the appeal filed by the Revenue is not maintainable since the entire order of assessment passed under section 143(3) has no legs to stand in view of the admitted position that no notice under section 143(2) was issued or served.

6. There is no dispute about the fact that a notice under section 143(2) was not issued and that the order of assessment dated 30.9.2002 was one passed under section 143(3). Therefore, heavy reliance is placed by Mr.R.Sivaraman, the learned counsel appearing for the respondent/assessee, upon the decision of the Delhi High Court in COMMISSIONER OF INCOME TAX v. PAWAN GUPTA (318 ITR 322)

and ASSISTANT COMMISSIONER OF INCOME TAX v. HOTEL BLUE MOON (321 ITR 362).

7. We have carefully considered the above submissions.

8. For finding an answer to the above contention, it may be necessary to take note of a few dates and some of the provisions of the Act.

9. Admittedly, the search under section 132 commenced on 7.6.2000 and it concluded on 8.9.2000. Though the learned counsel for the respondent/assessee as well as the Income Tax Appellate Tribunal has taken it to be a case of survey, it is really a case of search as seen from the order of assessment.

10. Upon conclusion of the search, a notice, as contemplated under section 158BC(a)(ii) of the Act was, admittedly, issued. As per this notice, the assessee was supposed to file a return of income.

11. Though clauses (b), (c) and (d) of Section 158BC indicate the procedure to be followed by the assessing officer after serving notice under clause (a) of Section 158BC, there is no indication in those clauses as to what the assessing officer should do in case the assessee fails to respond to the notice or responds to the notice beyond the period stipulated therein. Clause (b) of section 158BC, on

which reliance is placed upon merely enables the assessing officer to proceed to determine the undisclosed income of the block period in the manner laid down under section 158BB and it further says that in such an event, the provisions of section 142, sub-sections (2) and (3) of section 143, sections 144 and 145 shall, so far as may be, applied. In other words, what will happen to a case where the assessee does not respond to a notice under section 158BC(a) is not to be found in the same section, but, to be traced from the other provisions.

12. Since clause (b) of section 158BC makes a reference to section 158BB, sections 142, 143(2), 143(3), 144 and 145, let us now take a detour to those sections.

13. Section 158BB merely indicates the manner in which the undisclosed income of the block period has to be computed. Therefore, we may skip the same. Section 142 deals with the procedure for making an enquiry before assessment. The procedure prescribed under section 142(1) deals with two types of situations viz., where a person has made a return under section 115WD or section 139 and a case where the time allowed for filing a return under section 139(1) has already expired, but, no return was filed.

14. The next provision that is referred to in clause (b) of section

158BC is section 143, with particular reference to sub-sections (2) and (3) alone. Sub-section (2) of section 143 contemplates the procedure to be followed by the assessing officer, where a return has been furnished under section 139 or where a return has been furnished in response to a notice under section 142(1). The proviso to clause (i) of sub-section (2) of section 143, inserted by the Finance Act, 2003, with effect from 1.6.2003, states that no notice under this clause shall be served on the assessee on or after the 1st day of June, 2003. Sub-section (2) of section 143 reads as follows:-

"(2) Where a return has been furnished under section 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer shall,--

(i) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim:

Provided that no notice under this clause shall be served on the assessee on or after the 1st day of June, 2003;"

15. A reading of sub-section (2) of section 143 would reveal that

it also applies to a case where a return has been furnished either under section 139(1) or in response to a notice under section 142(1). Thus, section 143(2) also does not cover a situation where no return has been filed. Therefore, a reference under clause (b) of section 158BC to sub-section (2) of section 143 may have to be understood in the context of the fact that both of them do not deal with a situation where a return of income has not been filed. Therefore, let us now proceed to sections 144 and 145.

16. Under section 144, the assessing officer is entitled to make a best of judgment assessment, under three different contingencies. The first contingency is where the assessee fails to make a return required under section 139(1) or has not made a return or a revised return under other sub-sections of section 139. The second contingency is where the assessee failed to comply with all the terms of the notice under section 142(1). The third contingency is one where the assessee, having made a return, failed to comply with all the terms of the notice under section 143(2).

17. Thus, section 144 is the only provision where the assessing officer could have proceeded to have a best judgment assessment upon the failure of the assessee to file a return in response to a notice

issued under clause (a)(ii) of section 158BC of the Act.

18. But, if we have a look at the sequence of events that has happened in this case, it is seen that the search commenced on 7.6.2000 and concluded on 8.9.2000. Therefore, the assessment was required to be completed within two years viz., on or before 30.9.2002 under section 158BC.

19. The assessee who did not choose to file a return within the time stipulated in the notice under section 158BC dated 6.2.2001 for nearly one year and seven months, filed a return actually on 27.9.2002. Therefore, there was actually a period of three days left for the Department to complete the assessment. It is in such circumstances, that the Department did not choose to pass a best of judgment assessment under section 144. The notice under section 143(2) could not also be issued since it contemplates the adherence of the principles of natural justice, if notice is issued. In other words, a situation has been created by the assessee for the assessing officer, whereby the default on the part of the assessee was to be taken advantage of by him.

20. Keeping the peculiar circumstances of the case in mind, if we have a look at the judgment of the Supreme Court in Hotel Blue Moon,

it will be clear that the said decision did not deal with a case where the assessee waited for more than a period of 19 months and then chose to file a return at a time when it was impossible to comply with section 143(2). If we have a look at sub section (3) section 143 read with section 158BC, notice under section 143(2) should be issued within one year from the date of filing of the block return. In other words, if literal meaning to the dictum of the Supreme Court is applied, the notice under section 143(2) could have been issued on or before 27.9.2003. But, that would go against the prescription contained in section 158BC. Therefore, the decision in Hotel Blue Moon has to be read in the context of a person, who filed the return within the time and the Department had slept over the same. The same would apply to the decision of the Delhi High Court in Pawan Gupta. Hence, the preliminary objection with regard to non-issuance of notice under section 143(2) is rejected.

21. Coming to the two questions of law now before us, it is seen that they revolve around the loose sheets picked up during search. These loose sheets are documents within the meaning of section 2 of the Indian Evidence Act. It reads as follows:-

"Document means any matter expressed or described upon any substance by means of letters, figures or marks,

or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter."

22. It is relevant to note that this definition is a re-production of the definition of the same expression contained in Section 3(18) of the General Clauses Act. Therefore, it is clear that loose sheets recovered from the premises of the assessee constitute documents within the meaning of the Explanation under sub-section (4) of section 132. Sub-section (4) of Section 132 speaks about the admissibility of evidence of those documents. Sub-section (4) together with the Explanation thereunder to section 132 reads as follows:-

"(4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.

Explanation -- For the removal of doubts, it is hereby declared that the examination of any person under this sub-section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for

the purposes of any investigation connected with any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act."

23. Therefore, in the light of the definition of the expression 'document' and in the light of admissibility of the said document based upon the statements made by the assessee, the additions made by the assessing officer cannot be found fault with. Though there was a retraction of those statements by the assessee, those retractions were rightly rejected on the appreciation of the return filed on 27.9.2002 where admittedly, a particular amount was shown as undisclosed income. Therefore, the retraction is of no avail in the light of section 132(4) and its Explanation. In view of the above, the question of laws are answered in favour of the appellant/Department and the appeal is allowed. No costs.

(V.R.S.,J.) (N.K.K.,J.)
17.2.2016.

Index: Yes/No.
Internet: Yes/No.
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To

Income Tax Appellate Tribunal,
Madras 'B' Bench

V.RAMASUBRAMANIAN, J.
AND
N.KIRUBAKARAN, J.

Ssk.

T.C.(A) No.1189 of 2007

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