IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.13 of 2009

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Mahesh Kumar Agarwal @ Mahesh Agarwal, son of Sri Jagdish Prasad Agarwal, resident of Nai Sarak Chowk, Police Station-Chowk, Patna City, District-Patna.

.... Appellant/s

Versus

Assistant Commissioner of Income Tax, ACIT, Central Circle-4, Patna.

.... Respondent/s

with

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Miscellaneous Appeal No. 14 of 2009

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Mahesh Kumar Agarwal @ Mahesh Agarwal, son of Sri Jagdish Prasad Agarwal, resident of Nai Sarak Chowk, Police Station-Chowk, Patna City, District-Patna

.... Appellant/s

Versus

Assistant Commissioner of Income Tax, ACIT, Central Circle-4, Patna.

.... Respondent/s

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Appearance :

(In MA No.13 of 2009)

For the Appellant/s : Dr. Krishna Nandan Singh, Sr.Adv.
Dr.Kamal Deo Sharma, Adv.
Mr. Sriram Krishna, Adv.

For the Respondent/s : Smt. Archana Sinha, Sr. S.C., I.T. Deptt.
Mr. Alok Kumar, Adv.
Mr. Sanjeev Kumar, Adv.
Mrs. Shalini Bihari, Adv.

(In MA No.14 of 2009)

For the Appellant/s : Dr. Krishna Nandan Singh, Sr.Adv.
Dr.Kamal Deo Sharma, Adv.
Mr. Sriram Krishna, Adv.

For the Respondent/s : Smt. Archana Sinha, Sr. S.C., I.T. Deptt.
Mr. Alok Kumar, Adv.
Mr. Sanjeev Kumar, Adv.
Mrs. Shalini Bihari, Adv.

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date: 16-04-2018

These two Misc. Appeals have been preferred under

Section 260A of the Income Tax Act, 1961 for setting aside the order dated 12.09.2008 passed by the Income Tax Appellate Tribunal, Patna Bench, Patna (hereinafter referred to as the 'Tribunal') in I.T.A. No.545/Pat/06 and I.T.A. No.546/Pat/06 dismissing the appeal, upholding and sustaining the addition of Rs.98,01,294/- and Rs.49,38,985/- respectively as income from other sources.

While admitting these appeals by order dated 23.01.2015 the following substantial questions of law have been framed for the purpose of these appeals:-

> *"(i) Whether or not on the facts and in the circumstances of the case M/s Pawan Carrier being a separate taxable entity and old assessee of Ward No.18(12), Kolkata and admittedly having executed the carriage contract in question and received payment for the same through Bank can be held to be a smoke screen or front for the Appellant-Assessee?*
>
> *(ii) Whether the Assessing Authority under the Income Tax Act, 1961 was at all justified and acted legally in holding the Appellant-Assessee responsible, on the facts and in the circumstances of this case, for the alleged shortfall in quantity of Bitumen allegedly short delivered by M/s Pawan Carrier to the various consignees of the RCD, Government of Bihar despite the signed receipt for full quantity of Bitumen received by the J.E.s/ E.E.s, and making addition of cost of the said shortfall as income in the hands of the Appellant-Assessee and the Income Tax Appellate Tribunal was justified in sustaining such addition?*

(iii) Whether or not the Assessing Officer and the Appellate Authorities below have acted legally and judicially in ignoring the fact and drawing adverse inference against the Appellant, despite the admitted fact supported by materials on record, that payments for the carriage contract in question were received by M/s Pawan Carrier through Bank by cheque directly from the oil Companies against receipted delivery Challans, tax at source deducted from such payment by the Oil Company and Form No. 16A issued by the Oil Companies in favour of M/s Pawan Carrier?

(iv) Whether or not the Assessing Officer committed grave error leading to miscarriage of justice in not making full and proper enquiries as to the status of M/s. Pawan Carrier from the Income Tax Department Ward No. 18(12), Kolkata and considering judiciously the result of such enquiry?

(v) Whether or not on the facts and in the circumstances of the case the order of assessment and Appellate Orders sustaining it are vitiated as the authorities below failed to exercise powers vested in them of enforcing compliance by M/s Pawan Carrier and the concerned J.E.s /E.E.s to comply with the directions contained in the set aside the order dated 30.05.2001 and to ensure the end of justice?"

A perusal of the impugned order, which is a common order in both the cases, would show that the appellant happened to be an individual assessee who derived income from transportation business running in the name of M/S Bhartiya Trading Company and salary income from M/s J.G. Founding Ltd. For the assessment years 1995-96 and 1996-97 assessment was completed on total income of Rs.49,38,985/- and Rs. 98,01,294/- respectively. The case relates to the infamous "Bitumen Scam" which was going on in the Road Construction Department, State of Bihar and was widely reported in the Indian media.

M/s Bhartiya Trading Company was one of the panel transporters out of 14 panel transporters of Road Construction Department, Government of Bihar and was a contractor authorized to lift the Bitumen from oil companies by way of entering into a contract with them. The impugned order contains the quantity of Bitumen lifted and delivered as per report of the Engineer-in-Chief of the Department. Information with regard to delivery were collected from all over Bihar and it was found that the contracted quantity of Bitumen was not delivered to consignees, whereas all the oil companies confirmed lifting of Bitumen. It is in these circumstances notice was issued to the assessee to explain as to why the cost of short supply of Bitumen should not be added in his total income under Section 69A.

It was the stand of the assessee in his reply that he had not lifted any Bitumen and produced the photocopy of delivery challan showing that consignment was lifted by M/s Pawan Carrier.

The appellant submitted that he had not received any payment for carriage charges.

The oil companies were called upon to explain as to why M/s Pawan Carrier was allowed to lift consignment when the contract was given to M/s Bhartiya Trading Company for the purpose. It was then reported that M/s Bhartiya Trading Company had authorized M/s Pawan Carrier to lift the Bitumen in its behalf. The contents of the latter which was produced by the oil companies has been quoted by the learned Tribunal in the impugned order and we take note of that as under:-

> *"I hereby authorize our sister concern M/s Pawan Carrier, 40/1, Stand Road, Kolkata to execute the above order on my behalf."*

According to impugned order, the assessee failed to produce anyone from M/s Pawan Carrier. The Assessing Officer arrived at a conclusion that the assessee was involved in this case. The contract was not fully executed and part quantity of 1981.60 M.T. Bitumen was not delivered to various consignees and the same was misappropriated in collusion with M/s Pawan Carrier for its own benefit. The estimated cost of the Bitumen were added to the total income of the assessee. The Tribunal having gone through the materials available on record disbelieved the case of the assessee that

M/s Pawan Carrier was a different entity. The Tribunal concluded that M/s Pawan Carrier was introduced by Sri Mahesh Agrawal, proprietor of M/s Bhartiya Trading Company and whole contract was executed by M/s Pawan Carrier according to the direction of the assessee Shri Mahesh Agrawal. The assessee failed to produce proprietor of M/s Pawan Carrier. M/s Pawan Carrier was served with a notice which was replied stating that M/s Pawan Carrier had lifted Bitumen on behalf of Sri Mahesh Agrawal and executed contract according to his directions.

The Tribunal found that M/s Pawan Carrier is sister concern of M/s Bhartiya Trading Company and it was the assessee who introduced M/s Pawan Carrier to oil companies and oil companies trusted the assessee and allowed M/s Pawan Carrier to lift the Bitumen. Relying upon the judgment of the Hon'ble Calcutta High Court in **N.L. Dalmiya's case (1994) 207 I.T.R. 89** and the judgment of the Hon'ble Supreme Court in **Sunil Siddharth's case (1995) 156 I.T.R. 509**, **C.I.T. Vs. Durga Prasad More, 82 I.T.R. 540** and **Arvind Narottam's case** reported in **173 I.T.R. 479** decided by Hon'ble Kerala High Court, learned Tribunal rejected the grounds taken by the assessee in appeal and confirmed the order of C.I.T. (A).

We have gone through the questions framed in the appeal. The Assessing Officer, C.I.T. (A) and the Tribunal which are ultimate fact finding body and all have concluded on facts holding that M/s Pawan Carrier was acting on the basis of authorization given by this appellant- assessee to execute the contract on his behalf. The assessee was called upon to produce the proprietor of said M/s Pawan Carrier but he failed to produce him and pleaded that M/s Pawan Carrier is a rival business entity and therefore does not produce him for examination. The Tribunal has taken note of the facts appearing from the record that M/s Pawan Carrier had lifted the Bitumen while executing the contract according to direction of assessee.

Law of agency in this regard is well settled. If the appellant introduced M/S Pawan Carrier as its agent and by virtue of his authorization given in favour of M/S Pawan Carrier if the oil companies allowed M/s Pawan Carrier to lift the Bitumen and then M/s Pawan Carrier being an agent of this assessee did some unauthorized act, the appellant-assessee cannot escape the liability arising out of such unauthorized act of his agent.

In course of argument, learned senior counsel representing the appellant has tried to impress upon us by placing a copy of the partnership deed by way of supplementary affidavit to show that M/s Pawan Carrier was a partnership firm established on 1^{st} of April, 1995.

Learned counsel representing the respondents has strongly objected to the kind of document which has been sought to be introduced at this stage and submits that it does not inspire confidence. Learned counsel has relied upon a Division Bench judgment of this Court passed in the case of **D.N. Singh Vs. Commissioner of Income Tax & Anr**. in **Misc. Appeal No.214 of 2002 on 5th March, 2009** wherein the Hon'ble Division Bench took note of the judgment of Hon'ble Supreme Court in the case of **R.B. Jodha mal Kuthiala Vs. CIT (1971) 82 ITR 570 (SC)** wherein the Hon'ble Supreme Court observed that for determining the person liable to pay tax, the test laid down by the Court was to find out the person entitled to that income. In the present case, the Tribunal has found that the Bitumen was lifted but not supplied to the Road Construction Department and, in that view of the matter, the ratio of the judgment of the Hon'ble Division Bench in the case of D.N. Singh (supra) would equally apply in the concluded facts of this case.

Keeping in mind the aforementioned facts and circumstances we answer the substantial questions of law as framed in the following para in its chronological order:-

(i) In the facts of the present case, it is concurrent finding of all the authorities that M/s Pawan Carrier was acting on the basis of an authorization granted in their favour to execute the contract on behalf of the assessee and therefore all the act done by

M/s Pawan Carrier will be binding upon the assessee and merely because payments have been received in the name of M/s Pawan Carrier the assessee cannot derive any benefit out of that and the assessee cannot be allowed to avoid the liability arising out of non-supply of Bitumen to the consignees.

(ii) M/s Pawan Carrier has been held to be an agent of the assessee, the assessee would be liable for the shortfall in the quantity of Bitumen delivered by M/s Pawan Carrier. Since the assessee has been found to be the person, who ultimately held to be responsible for the act of its agent, the assessing authority, for the reasons recorded in the impugned order, would be justified in making addition of cost of the said shortfall as income in the hands of appellant assessee and the Tribunal has committed no error in sustaining such addition.

(iii) Payment of the carriage contract amount in question to M/s Pawan Carrier cannot be a conclusive proof of fact that the appellant-assessee had no interest in the work in question and/or the contract awarded to the appellant-assessee stood terminated only because M/s Pawan Carrier was authorized to execute the contract on behalf of the assessee. The amount received by M/s Pawan Carrier was on the basis of the authorization of the assessee as an agent of the assessee, therefore the assessing officer and the appellate authority as also the learned Tribunal has rightly taken a view based on the materials available on the record.

(iv) The assessee was given opportunity to bring the proprietor of M/s Pawan Carrier and when he failed to bring the proprietor of M/s Pawan Carrier before the assessing officer, a notice was sent to M/s Pawan Carrier on which a reply was received that they had executed the work on behalf of the appellant-assessee, therefore no grave error leading to miscarriage of justice has been committed by the assessing officer.

(v) In our considered opinion in the facts and circumstances of the case no fault may be found with the order of assessment and the appellate orders sustaining it.

In result, both the appeals have to fail and are, accordingly, dismissed.

(Rajendra Menon, CJ)

(Rajeev Ranjan Prasad, J)

Arvind/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	20.04.2018
Transmission Date	N/A