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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 573/2005

COMMISSIONER OF INCOME TAX DEL..... Appellant

Through : Mr. Zoheb Hossain, Sr.
Standing Counsel with Mr.
Deepak Anand, Jr. Standing
Counsel for Revenue.

versus

KULBHUSHAN AHUJA

..... Respondent

Through :

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

ORDER
30.08.2018

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The question of law framed in this case is as follows :

"Whether the order passed by the learned Income Tax Appellate Tribunal is perverse inasmuch as it failed to appreciate that the additions made were not entirely based on the admission of the testimony alone but also based on the documents seized in the course of the search?"

The facts of the case are that search and seizure proceedings were carried out on 05.09.1995 in the premises of M/s Ahuja Sons

Shawl Wale (P) Ltd. by the empowered officers under the erstwhile Foreign Exchange Regulation Act (FERA). In the course of the search, some loose papers belonging to unknown individuals, the name of the assessee (the director of the searched party) were found. He was one of the 600 persons named in the diary and loose papers. Apparently, the assessee admitted during the course of the search that he had received an amount of Rs.35.54 lakhs as foreign remittance. A few days later i.e. 11.09.1995, the assessee retracted his statement and denied having entered into any transaction. An amount of Rs.9 lakhs which was seized by the FERA authorities, was subsequently claimed by the assessee to be accounted amounts. In these circumstances, a search was carried out on 23.09.1997 on the basis of the FERA authorities search, under Section 132 of the Income Tax Act by the Revenue. This resulted in a notice under Section 158BC; in response, the assessee filed a return declaring Rs.1,70,740/- as undisclosed income for the block period. Based upon the statement made in the course of FERA proceedings as well as analyses of the loose sheets/documents seized by FERA authorities which were handed over to the income tax authorities, the Assessing Officer completed the assessment for the block period and added Rs.35.45 lakhs determining the total undisclosed income to be Rs.37,24,740/-. The assessee appealed to the ITAT, contending that the sole basis of the addition was the retracted statement which could not be

used, and that the loose sheets could not be conclusive either way in the absence of any supporting material. The ITAT accepted these contentions and allowed the assessee's plea. It was also held by the ITAT that barring the FERA proceedings and inquiry, no further investigation or inquiry was conducted by the income tax authorities justifying the addition made in the course of the block assesment.

The Revenue contends that the Assessing Officer was justified in adding and bringing to tax the additional sums based upon the statement made to the FERA authorities. It is submitted that though this statement was retracted, its evidentiary value cannot be undermined. It is further submitted that apart from the retracted statement, there was independent corroborative material in the form of loose sheets that mentioned receipt of substantial foreign exchange by the assessee.

The ITAT's finding, pertinently reads as follows :

“6. We have duly considered the rival contentions and the material on record. In the case of Parimisetti (supra), the Supreme Court observed that the Act does not provide that whatever is received by a person must be regarded as income liable to tax. It further observed that in all cases in which a receipt is sought to be taxed as income, the burden lies on the department to prove that it is within the taxing provision. In the present case, the addition is based merely on the basis of the admission of the assessee before, the FERA authorities. In fact, it is doubtful whether the assessee really received the amount or not, because during the search, either under FERA or

under the Act, except for the cash of Rs. 9 lacs, no further money or asset were found which could corroborate the receipt of Rs.35.54 lacs. Even Rs. 9 lacs found by the FERA authorities belonged to ASSPL which were duly accounted for. Assuming that the assessee did receive the amount, but it does not automatically follow that it was his income. The department has not carried out any enquiry worth its name to show that it was really the income, and that too real income of the assessee. It also cannot be brushed aside that just six days after the FERA search, the assessee retracted his admission, that IS soon after recovering from the shock of search. In K.T.M.S. Mohammed's case (supra), the Supreme Court observed that the ambit; scope and intendment of the two Acts (i.e. FERA and I.T. Act) were entirely different and dissimilar, and, therefore, the significance of a statement recorded under the provisions of FERA during the investigation or proceeding under that Act so as to bring them within the meaning of judicial proceeding must be examined only qua the provisions of that Act and not with reference to the provisions of any other alien Act or Acts, such as the Income Tax Act, 1961. What more we can add for the present case where the addition is made without any effort or enquiry on the part of the department. In fact, in the same judgment, the Supreme Court has made many such observations to drive home the point that the statement cannot be made use of for proceedings under the Act. As a matter of fact, in the present case, not only the statement is used but is made the sole basis to make the addition. Thus, there being really no basis for the addition, we delete the addition of Rs.35.54 lacs.”

It is evident that the ITAT based its conclusion on the three facts : that the statement relied upon was retracted within a week of

it being made by the assessee; the loose papers were merely indicative of some receipt of foreign exchange; no further material or lead was found. Most importantly, after the documents were transmitted to the ITAT with respect to the income tax liability of the assessee, based exclusively on the retracted statement given to the FERA authorities, the same cannot be termed as unreasonable. The outcome of FERA proceedings, may be either way, however, they are not conclusive or determinative or do not by any means diminish a primary responsibility of the income tax authorities to establish that the undisclosed income at the relevant time was in the hands of the assessee.

For the foregoing reasons, this court is of the opinion that there is no merit in this appeal. The question of law is answered against the appellant and in favour of the assessee.

This appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

AUGUST 30, 2018

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