

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.06.2019

CORAM

**THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN**

T.C.A.No.1451 of 2008

Shri Babu Manoharan

...Appellant

Vs.

The Deputy Commissioner of Income Tax,
Central Circle I(3), 121,
Nungambakkam High Road,
Chennai – 600 034.

...Respondent

Tax Case Appeal under Section 260-A of the Income Tax Act, 1961, is directed against the order passed by the Income Tax Appellate Tribunal "A" Bench, Chennai in IT(SS) A. No.107/Mds/2003, dated 19.10.2006 for the assessment block period from 01.04.1989 to 31.03.2000.

For appellant : Mrs.Shree Lakshmi Valli, for
N.Muthukumar

For respondent : Mr.T.R.Senthil Kumar,
Senior Standing Counsel, assisted by
Mrs.K.G.Usha Rani

JUDGEMENT

[Judgment of this Court was made by Mr.T.S.Sivagnanam.,J]

This Tax Case Appeal filed by the assessee under Section 260-A of the Income Tax Act, 1961 (for brevity 'the Act') is directed against the order passed by the Income Tax Appellate Tribunal "A" Bench, Chennai in IT(SS) A. No.107/Mds/2003, dated 19.10.2006 for the assessment block period from 01.04.1989 to 31.03.2000.

2. The appeal has been admitted on the following substantial questions of law:

"1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in confirming the addition sustained by the Commissioner of Income-tax (Appeals) in respect of the cost of construction of the residential building?

2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in coming to the conclusion that the investment in the house property represents undisclosed income and is liable to be included in the block assessment?"

3. We have heard Mrs.Shree Lakshmi Valli, for Mr.Muthukumar, learned counsel for the appellant/assessee and Mr.T.R.Senthil Kumar, learned Senior Standing Counsel, assisted by Mrs.K.G.Usha Rani, for

the respondent/Revenue.

4. The assessee is an individual and his premises were searched on 13.01.2000 pursuant to which, a notice under Section 158BC of the Act was issued on 20.06.2000. The assessee filed his return on income on 10.07.2000 admitting undisclosed income of Rs.8,30,000/-. The Assessing Officer completed assessment vide order dated 28.02.2002 determining the total undisclosed income of Rs.1,93,31,713/-. While doing so, the Assessing Officer made various additions to the income declared. In this appeal, we are concerned about the valuation of a house property 50% of which is owned by the assessee and the remaining 50% was owned by his spouse.

5. The first issue to be decided is whether the assessee can be charged with an allegation of not disclosing the expenditure incurred for construction of the house property and holding that there is an unexplained investment in the construction of the house, when there was nothing found with regard to the investment in the house during the search in the premises of the assessee. If this question is answered in favour of the assessee, nothing more is required to be done in this appeal and the substantial questions of law have to be

answered in favour of the assessee.

6. Mr.T.R.Senthil Kumar, learned Senior Standing Counsel appearing for the Revenue objected to the arguments advanced by learned counsel for the assessee contending that there was no incriminating material found during the search with reference to the valuation of the property, such contention was never raised before the Commissioner of Income Tax (Appeals) or before the Tribunal and the assessee should not be permitted to canvas the said contention. It is the further submission of Mr.T.R.Senthil Kumar, learned Senior Standing Counsel that before the CIT(A), the assessee had produced the cash flow statements and certain reconciliation was done and partial relief was granted to the assessee by the CIT(A). Therefore, it would be too late for the assessee now to contend that there was no incriminating material found during the search with regard to valuation of the property and this point cannot be canvassed for the first time in this appeal.

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7. We have heard learned counsel for the assessee on the above submissions.

8. On a perusal of the grounds of appeal filed before the CIT(A), we find that apart from raising various grounds on each of the issues, which was the subject matter of assessment, in ground 3(f), the assessee has specifically stated that without prejudice to the grounds, namely, the factual issues, the assessee contended that the property in question has already been disclosed in the regular assessment and the difference in the cost of construction, if any, cannot form part of undisclosed income.

9. In support of such contention, the assessee referred to the decision of the High Court of Bombay in the case of **Commissioner of Income Tax Vs. Vinod Danchand Ghodawat reported in (2000) 163 CTR (Bom) 432**. Though such contention was raised, we find that CIT(A) has not dealt with it and has directed the cash flow statements to be produced which obviously the assessee could not refuse to produce and whatever payments made by the assessee by cheques have been given due credit and CIT(A) granted partial relief. The assessee filed appeal before the Tribunal and specifically have raised a contention that the CIT(A) ought to have seen that in the absence of any material found at the time of search, no addition is warranted under Chapter XIV(B) of the Act.

10. In this regard, reliance was placed on the decision of the Delhi High Court in **Commissioner of Income Tax Vs. Ravi Kant Jain reported in 250 ITR 141**. The above ground was canvassed before the Tribunal as could be seen in paragraph 8 of the impugned order, where the Tribunal noted the submission of the learned counsel for the assessee. Nevertheless, the Tribunal proceeds solely on the basis that the cost of construction has been correctly arrived at by the CIT(Appeals). While doing so, the Tribunal in paragraph 11 of the impugned order points out that, when a person is dealing with his personal affairs, it is not expected of him to record all transactions in mercantile system of accounting and there was no need to record the expenditure towards construction of house and reflect the liability separately. The Tribunal did not examine the issue canvassed by the assessee before it, in the absence of any material found at the time of search no addition is warranted.

11. In our considered view, the contention advanced before us by Mrs.Sri Laxmi Valli was canvassed before CIT as well as before the Tribunal. Therefore, it is incorrect to state that the assessee, for the first time, has canvassed such a point. Furthermore, we have noted that the said point is a question of law and even assuming that the

said point was not raised by the assessee at an earlier point of time, the assessee cannot be foreclosed from doing so when the assessee is able to convince the Court that it is a pure question of law.

12. Therefore, we reject the preliminary objection raised by the Revenue. Thus, we first proceed to consider as to whether the assessee could be charged of undisclosed expenditure in the absence of any incriminating material recovered during search.

13. The Revenue does not and cannot dispute the fact that there was no incriminating material recovered from the assessee during the course of search conducted on 13.01.2000. The first search was done in the premises of the father-in-law of the assessee on 12.08.1999 and in the course of the search, the said property was also noticed and after the search, valuation report was called for from the assessee. After they had submitted the same, the Department appointed a valuer who had submitted his report in December, 1999, pursuant to the inspection conducted on 12.08.1999. This valuation report was prepared after the search was conducted in the premises of the father-in-law of the assessee. Thus, when the assessee's premises was searched on 13.01.2000, the valuation report of the said property was

very much available with the department. Thus, the assessee has not been confronted with any incriminating material recovered during the search. But the present exercise done by the Assessing Officer is based on the valuation report furnished by the Departmental Valuer, pursuant to the search conducted in the premises of the assessee's father-in-law on 12.08.1999. This fact would clearly establish that there was no incriminating material was recovered from the assessee from the property in question, when the assessee's premises was searched on 13.01.2000. If this is the factual position, could the assessee be charged of undisclosed expenditure.

14. We take note of the following decisions, which dealt with more or less a similar fact situation.

15. In the case of **Commissioner of Income Tax Vs. Khushlal Chand Nirmal Kumar reported in (2003) 263 ITR 0077** the High Court of Madhya Pradesh held that addition made by the Assessing Officer in the block assessment, on account of alleged unexplained investment in construction of house, which was based merely on the report of the DVO and not on any material found in the course of search, was not justified.

16. In the case of **Commissioner of Income Tax Vs. Manoj Jain reported in (2006) 287 ITR 0285** the High Court of Delhi held that search at the assessee's premises did not lead to seizure of any incriminating evidence to suggest that any income has not been disclosed or would not have been disclosed and the Assessing Officer was not justified in making additions on account of undisclosed investment in two property on the basis of the report of the DVO.

17. In the case of **Commissioner of Income Tax Vs. Ashok Khetrpal reported in (2207) 294 ITR 0143**, the High Court of Delhi held that under the provisions of Chapter XIV-B only such of the categories of income, which has been found as a result of search can alone be the subject-matter of an assessment under this Chapter. Under Chapter XIV-B, before an addition of an "undisclosed income" can be made, the Assessing Officer has to bring on record the material to show that on evidence found as a result of search there is an undisclosed income representation by credits appearing in the books of accounts.

18. In the case of **Bimla Singh Vs. Commissioner of Income Tax reported in (2009) 308 ITR 0071**, the High Court of Patna

considered the case pertaining to a difference in the valuation of the property i.e., as stated by the assessee and that of the DVO. In the said decision, the Court had pointed out the determination of value of the house property by a valuer is generally a matter of estimate based to some extent on guess and despite utmost bonafide and the estimate of the value of the house is bound to vary. In the said case, the difference in value was less than 15% and the Court found the same to be meagre and stated that it can be assumed to be a bonafide difference.

19. In the case of **Commissioner of Income Tax Vs. Puneet Sabharwal, reported in (2011) 338 ITR 0485**, the High Court of Delhi found that there was no material with the Assessing Officer to come to the conclusion that the assessee has paid extra consideration for purchase of properties over and above what has been stated in the sale deed and addition under Section 69B, solely on the basis of the valuation report, cannot be sustained.

20. In the case of **Commissioner of Income Tax Vs. S.V.Sreenivasan reported in (2018) 404 ITR 0459 (Mad)**, the Division Bench of this Court held that the provisions of Section 158BB

require that undisclosed income is to be computed solely on the basis of evidence found as a result of search or requisition of books of accounts or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence.

21. If we apply the ratio laid down in the above decisions, the only conclusion that can be arrived is to hold that the assessee could not have been charged of undisclosed expenditure. The valuation report submitted in December, 1999 states that, it is only to determine the probable cost of construction and the valuer in paragraph 3.5 of the report, stated that the construction was in progress even at the time of inspection i.e., on 12.08.1999. Therefore, the assessee cannot be found fault that he has not filed his returns, which he had time to file till September, 2001.

22. Mr.T.R.Senthil Kumar, learned Senior Standing Counsel, would strenuously contend that the cash flow statement should have disclosed the expenditure incurred by the assessee and if the same has not been disclosed in the cash flow statements, then the Assessing Officer is fully justified in holding that there was undisclosed

expenditure incurred by the assessee.

23. We would have appreciated such contention, had it been a case of regular assessment. However, we are dealing with a case where it is a block assessment pursuant to a search and we are guided by the legal principles set out in the above mentioned decisions which clearly and consistently held that in the absence of any material found during the course of search regarding the undisclosed investment, the assessee cannot be penalized solely based on the valuation report provided by the Department.

24. As pointed out by us earlier, the valuation report was prepared much earlier to the search conducted in the assessee's premises and therefore, this valuation report obviously is a material which is very much available with the Department and the same could not have been the basis for holding that there has been an undisclosed investment.

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25. In the case of **Bimla Singh (Supra)** the Court found that if the difference between the value given by the assessee and that of the DVO was less than 15%, it can be assumed to be a bonafide

difference. In the case before us, the difference is less than 4%. The construction of the house commenced in October, 1997 and even on the day of the inspection by the Department valuer i.e., on 12.08.1999, the construction was in progress. Therefore, we would be well justified in holding that this difference of less than 4% has to be held as a bonafide difference.

26. Thus, for the above reasons, the assessee is entitled to succeed and the substantial question of law is required to be answered in favour of the assessee.

27. In the result, this Tax Case Appeal is allowed and the order passed by the Tribunal is set aside and the substantial questions of law are answered in favour of the assessee.

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(T.S.S.,J)

(V.B.S.,J)

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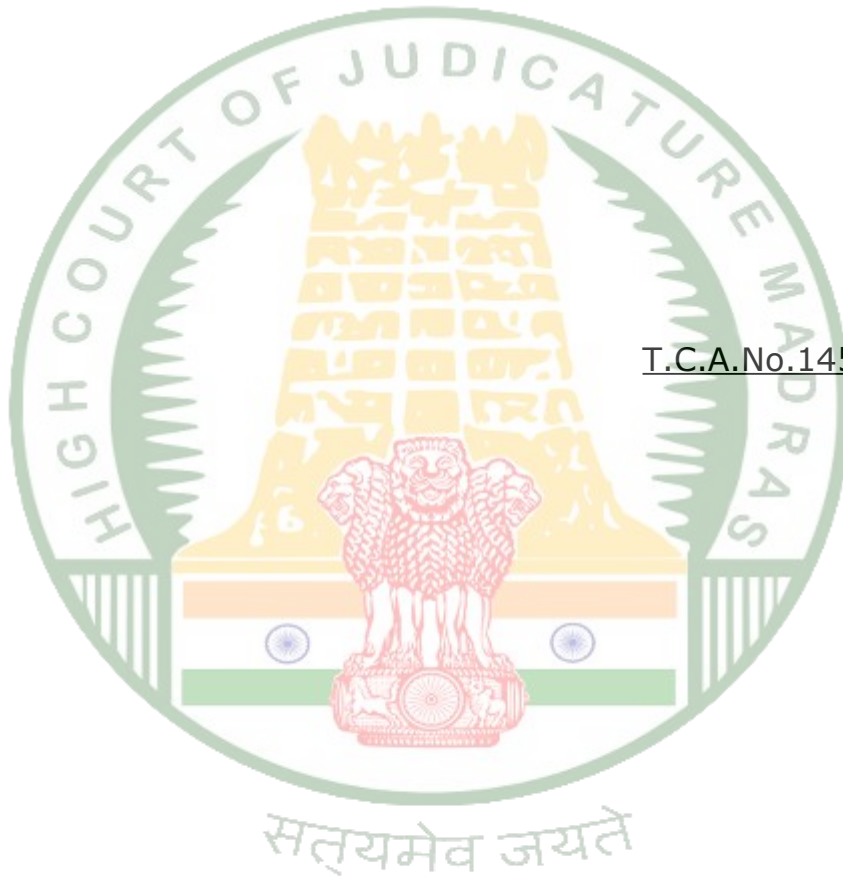
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1. The Deputy Commissioner of Income Tax,
Central Circle I(3), 121,
Nungambakkam High Road,
Chennai – 600 034.

2. Income Tax Appellate Tribunal "A" Bench, Chennai

**T.S.Sivagnanam., J.
&
V.Bhavani Subbaroyan.,J.**

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