

ITA/26/2010

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (Income Tax)
ORIGINAL SIDE

SRI CHITTA RANJAN BERA

-Versus-

INCOME TAX OFFICER, WARD-3,
HALDIA

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 17th February, 2023

Appearance :
Mr. Ananda Sen, Adv.
...for the appellant.

Mr. Smarajit Roychowdhury, Adv.
...for the respondent.

The Court : This appeal filed by the assessee under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity) is directed against the order dated 11th September, 2009 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata (the Tribunal) in M.A. No.173/Kol/2008 for the assessment year 2004-05.

The appeal was admitted on 11th February, 2010 on the following substantial questions of law:

- (i) *Whether on the facts and in the circumstances of the case, the order of the Learned Tribunal*

was erroneous in so far as it was perverse having been passed without considering the ground that the remand report furnished by the respondent before the C.I.T. (Appeals), was ignored by the CIT (Appeals)?

- (ii) Whether on the facts and circumstances of the case the order of the Learned Tribunal was erroneous in so far as it fail to consider that the order of the C.I.T. (Appeals) upheld the addition on account of discrepancy in stock even after mentioning that the remand report did not mention any discrepancy in respect of transaction with Annapurna Fertilizers ?"*

We have heard Mr. Ananda Sen, learned Counsel for the appellant/assessee and Mr. Smarajit Roychowdhury, learned standing counsel for the respondent/revenue.

The short issue which falls for consideration is whether the Commissioner of Income Tax (Appeals) was right in ignoring the remand report furnished by the Assessing Officer. The issue related to the closing stock of the assessee is whether the same was duly established during the assessment proceedings. Admittedly, during the assessment the original books of accounts were not produced as it is the assessee's case that they were not traceable and a complaint was lodged with the police and FIR was also registered. When this was pointed out before the First Appellate Authority, the CIT(A) by

proceedings dated 27th February, 2007 directing the Assessing Officer to clarify the following issues:

As regarding addition of Rs. 3,86,055/- on a/c. of undisclosed investment in stock, you are requested to clarify:

- (i) Basis on which the stock was shown in the accounts? Whether the assessee was maintaining a stock register and if so, the said stock register was verified?*
- (ii) Whether the bank had ever physically inspected the stock of the assessee? If yes, a copy of the inspection report of the bank should be forwarded.*
- (iii) A copy of the stock statement filed by the appellant with the bank during the F.Y. 03-04 should also be forwarded.*

The Assessing Officer in his remand report dated 20th March, 2007 clarified the issues in the following terms:

As directed I am to report as under for your kind perusal -

- 1. (i) Sri Ghosh, during the course of hearing stated that the assessee maintained stock register during the relevant period and stock shown in the account was as per stock register and stock summary enclosed with the audit report reflects closing stock as on 31.3.2004.*
- (ii) During the course of assessment proceedings the bank was asked to furnish details in respect of CC A/c maintained by the assessee. The bank inter-alia sent copy*

of inspection report which is enclosed herewith for your ready reference.

(iii) 9 (nine) copies of stock statement filed by the assessee and as forwarded by the bank are enclosed herewith.

- 2. Out of total cash payment of Rs. 3,07,650/- made in violation of Sec. 40A(3) of the I.T. Act, on two occasions payments were made on days the bank was closed. Rs. 92,000/- was paid on 18.1.2004, which was Sunday and Rs. 33,950/- was paid on 26.1.2004 i.e. on Republic Day. These payments are covered under exception laid down in Rule 6DD(k) of I.T. Rule.*

As could be seen from the remand report nine copies of stock statement filed by the assessee as forwarded by the bank were enclosed. Copy of the said internal inspection report of the bank has been annexed in the paper book from which it is seen that the stock statement as on 31st October, 2004 valued at Rs.23.37 lacs was also noted in the said report. However, when we perused the order passed by the CIT(A) dated 15th October, 2007 we find that there is absolutely no reference to the remand report. The assessee at the earliest point of time i.e., during the course of the assessment, was confronted with the question that on comparison of stock statement enclosed with the report, vis-à-vis statement submitted before the bank as on 31st March, 2004 the stock declared in the bank was higher than in the account. Assessee's explanation was that to

enjoy cash credit limit, submission of stock statement before the bank is a routine affair and the same should not be taken seriously. It was further stated that the stock declared to the bank purely on estimate basis and the bank relied upon the stock statement, granted cash credit facility and never physically verified whether physical stock tallies with the stock statement. The CIT(A) did not take into consideration this aspect of the matter. The legal issue is as to whether the assessee could be taxed based upon the inflated stock shown in the stock statement submitted to the bank. This issue is no longer res integra and has been decided in the *Commissioner of Income Tax vs. N. Swami* reported in (2000) 241 ITR 363 (Mad.). In the said decision it was held that the assessee's income is to be assessed by the income tax officer on the basis of the material which was required to be considered for the purpose of assessment and ordinarily not on the basis of the statement which the assessee may have given to a third party unless there is material to corroborate that statement of the assessee given to a third party, even if it be a bank. It was further held that mere fact that the assessee had made such a statement by itself cannot be treated as having resulted in an irrebuttable presumption against the assessee. The burden of showing that the assessee had undisclosed income is on the revenue. That burden cannot be said to be discharged by merely

referring to the statement given by the assessee to a third party in connection with the transaction which was not directly related to the assessment and making that the sole foundation for a finding that the assessee had deliberately suppressed his income. Further, it was held that the burden is on the revenue to prove that income sought to be taxed is within the taxing provision and there was, in fact, income. The decision in N. Swami was followed in *Commissioner of Income Tax vs. Acrow India Ltd.* reported in (2008) 298 ITR 447 (Bom.). Thus, the law on the subject having been well-settled, it is the burden upon the Assessing Officer to show that the assessee had undisclosed income and merely by referring to a bank statement the assessment could not have been completed. However, on facts, the assessee's case, is better placed. We say so because that the CIT(A) had called for a remand report and the remand report clearly brings out all the facts and also encloses the inspection report submitted by the bank which reflects the correct details.

Thus, the CIT(A) and the learned Tribunal had committed an error in not accepting the case of the assessee.

For the above reasons, the appeal filed by the assessee is allowed and the substantial questions of law are answered in favour of the assessee. Consequently, the order

of assessment passed by the CIT(A) as well as the order passed by the Tribunal are set aside.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

A/s./S.pal/s.chandra/s.das