

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

SPECIAL JURISDICTION (INCOME TAX)

ORIGINAL SIDE

RESERVED ON: 03.04.2023
DELIVERED ON: 13.04.2023

CORAM:

THE HON'BLE MR. ACTING CHIEF JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

ITAT/157/2022

(IA NO: GA/02/2022)

PRINCIPAL COMMISSIONER OF INCOME TAX-2, KOLKATA

VERSUS

RAM RATAN MODI

Appearance:-

Mr. Om Narain Rai, Senior Advocate.

Mr. Amit Sharma, Advocate.

.....For the Appellant.

Mr. J.P. Khaitan, Senior Advocate.

Mr. Asim Chowdhury, Advocate.

Mr. Soham Sen, Advocate.

.....For the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, ACJ.)

1. This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 27.08.2021 passed by the Income Tax Appellate Tribunal "C" Bench, Kolkata (tribunal) in I.T.(SS).A No. 10/Kol/2002 for the block period 01.04.1986 to 27.08.1996. The revenue has raised the following substantial questions of law for consideration:

- 1) Whether the Hon'ble Tribunal while setting aside the Second assessment order, was justified in negating and/or countering the findings of the Second Assessing Officer with that of the First Assessing Officer.*
- 2) Whether the Hon'ble Tribunal was justified in replacing the opinion of the second assessing officer regarding withdrawal of cash from the bank accounts of M/s. Kalo Engineering Works and M/s. Pragati Engineering Company with its own opinion without mentioning the facts leading to such conclusion.*

2. We have heard Mr. Om Narain Rai, learned senior standing counsel assisted by Mr. Amit Sharma, learned standing counsel for the appellants and Mr. J.P. Khaitan, learned senior advocate assisted by Mr. Asim Chowdhury and Mr. Soham Sen, learned advocates appearing for the respondent assessee.

3. The facts which are necessary for considering the substantial questions of law suggested by the revenue are set out as hereunder:

4. A search was conducted during 1996 on the group of M/s. Shaw Wallace and Company Limited (Shaw Wallace) and also on the respondent assessee as well. Pursuant to the search, the original block assessment

under Section 158BC of the Act was completed on 27.02.1998 making an addition of Rs. 11.86 crores on protective basis. The addition was made on the ground that the assessee had withdrawn cash from two bank accounts of M/s. Pragati Engineering Limited (PEL) and M/s. Kalo Engineering Works Limited (KEW) and the same was treated as undisclosed income of the assessee and accordingly, addition was made on protective basis. The assessee challenged the said assessment order before the tribunal and by order dated 08.10.1999, the tribunal set aside the block assessment order and directed the assessing officers to examine the facts of the case once more after allowing the assessee an opportunity of being heard and also to take it into consideration further developments in the block assessment, of Shaw Wallace and thereafter to come up with a fresh assessment order in the case of the assessee. Pursuant to the order passed by the tribunal, reassessment was completed and second block assessment order dated 27.03.2002 was passed making substantive addition of Rs. 12.41 crores as undisclosed income on the ground of credit entries/cheques deposited in two bank accounts of the PEL and KEW. The assessee assailed the correctness of the order by filing an appeal before the tribunal contending that the assessing officer committed an error in making substantive addition in the reassessment on a new issue which was not subject to the assessment which was set aside by the tribunal by order dated 08.10.1999 and such new addition in the reassessment is void in law and not permissible. It was further contended that the assessing officer committed an error in changing the findings given by his predecessor in the original block assessment especially in the absence of any fresh material or evidence

and it is a case of change of opinion. Further the assessing officer committed a serious error in making the addition by ignoring findings of the assessing officer in the original assessment with regard to the source of deposit in two bank accounts were from Shaw Wallace and also erred in ignoring the findings of the ADIT(Investigation). Further it was contended that the assessing officer on one side made addition and on the other has rendered the finding that Shaw Wallace had siphoned off in cash through dubious methods in league with several persons. This will clearly show that the money does not belong to the assessee and belongs to Shaw Wallace and source of deposit in two bank accounts stands well explained. The tribunal by order dated 31.03.2005 dismissed the appeal. The assessee challenged the order before this Court in ITA No. 170 of 2005. The said appeal was disposed of by the judgment dated 11.03.2020 holding that the tribunal in its order dated 31.03.2005 has not addressed the issues which have been pointed out by the assessee and they should have been dealt with in accordance with the earlier order of the tribunal dated 08.10.1999 for such reasons, the order passed by the tribunal dated 31.03.2005 was set aside and the tribunal was directed to re-determined the appeal as expeditiously as possible. Pursuant to which the tribunal took up the matter and by the impugned order allowed the appeal. Aggrieved by the same, the revenue has preferred the present appeal.

5. On behalf of the revenue, it is argued that the tribunal failed to appreciate that the failure of the assessee to explain the purpose, reason and basis of the withdrawal of Rs. 11.86 crores satisfactory clearly establishes that it was the assessee's income and the assessee had not

disclosed the same and was rightly added by the assessing officer; the tribunal failed to appreciate that the assessee's version that the sale proceeds of undisclosed shares had been deposited in the two bank accounts standing in the name of PEL and KEW were not established in as much as the records reveal that the money in the accounts of the said two entities had come from the account of N.C Jain and P.L. Mittal which in turn had gone it to the accounts of the said two persons from Shaw Wallace; the tribunal failed to consider that the assessee has not been able to prove that the credits in the two bank accounts of PEL and KEW had come from Shaw Wallace and its subsidiaries through bank accounts of the two persons and thus cheques deposited in the two bank accounts of the two entities aggregating to Rs. 12,41,00,000/-being unexplained deserves to be treated as undisclosed income of the assessee; the tribunal failed to appreciate that the observation of the tribunal in the first round of litigation to the effect that the assessing officer would examine the facts of the case once more after allowing the assessee an opportunity of being heard and also to take into consideration the further developments in the block assessment and thereafter to come up with a fresh assessment order, had attained finality and in the instant case the assessing officer has indeed done that which was required of it to be done; the tribunal failed to appreciate that when by the first order dated 08.10.1999 passed by the tribunal, direction was given to the assessing officer to make a fresh assessment by examining the facts of the case once more after taking into consideration further developments in the block assessment of Shaw Wallace and to pass a fresh assessment order which tantamount to directing

the assessing officer to form an opinion without being influenced by the opinion of the first assessing officer, therefore it could not be held that the second assessing officer did not enjoy the jurisdiction to make an addition substantially. It was further submitted that the tribunal was not justified in deleting the addition made by the second assessing officer without considering the additional facts brought on record by him; that the tribunal has not dealt with the issues indicated in the order dated 11.03.2020 passed by this Court in ITA No. 170 of 2005 in the manner they ought to have been dealt with and therefore the order passed by the tribunal is liable to be set aside.

6. The learned senior counsel appearing on behalf of the respondent assessee referred to the certain portion of the assessment order dated 27.02.1998 wherein there is a reference with regard to the findings pursuant to the investigation done by ADIT (Investigation) wherein it has been stated that the money coming through N.C. Jain and P.L. Mittal has come from Shaw Wallace or its subsidiaries and after mentioning the same, the assessee was asked to substantiate their claim with evidence that the credit entries in the two bank accounts are sale proceeds of undisclosed shares as claimed by the assessee in their letters dated 28.12.1996 and 18.02.1998. Further the assessing officer has referred to the contents of the letter of the assessee dated 28.12.1996 wherein he had stated that the assessee had invested out of his undisclosed income in the share applications made in the financial year 1989-1990 and 1990-1991. Further there is reference to the assessee's statement dated 18.02.1998 stating that he had retained the amount of Rs. 186 lakhs out of net cash withdrawals of

Rs. 1180 lakhs and the balance Rs. 1000 lakhs was returned back in cash to the nominees of Shaw Wallace. Therefore, the facts clearly establishes that there is no linkage of the assessee's undisclosed income as disclosed in the block return and the transactions in the bank account of PEL and KEW and the transactions in these two bank accounts are independent of the disclosure made by the assessee in the block return. Further it was stated that as discussed in the block assessment order dated 28.11.1997 in the case of Shaw Wallace, the two bank accounts having utilized siphoned of funds by Shaw Wallace in league with the assessee and that Shaw Wallace has disputed the said findings and has preferred appeal before the tribunal. With these observations, the assessment in respect of the assessee was completed on protective basis. Further by referring to the second assessment order dated 27.03.2002, it is pointed out that setting aside the block assessment in the case of Shaw Wallace has already been completed on 30.03.2000 and the findings in the original block assessment in respect of the said matter remains unaltered and the appeal filed by the Shaw Wallace against the said order is pending before the tribunal.

7. Now we are required to see as to whether the tribunal was justified in allowing the appeal filed by the assessee and setting aside the order passed by the assessing officer dated 27.03.2005 for the block period from 01.04.1986 to 27.08.1996. The learned tribunal has elaborately set out the facts and we find that there are repetitions at various places and it became a little difficult for us to cull out the reasons assigned by the tribunal for allowing the appeal. After hearing the elaborate submissions made by the learned advocates on either side and on careful consideration of the order

passed by the tribunal, we are of the view that the learned tribunal was right in allowing the assessee's appeal. We support such conclusion with the following reasons:-

8. In the first order of the tribunal dated 18.10.1999, the original block assessment order was set aside by rendering the following findings:

“3. It has been learnt that the tribunal has set aside the block assessment order in the case of SWC and has directed the AO to reassess the same in the light of an order passed by the Calcutta High Court in the writ petition filed by SWC in W.P No. 11982/7/1999 relating to the block assessment and also regular assessments for the relevant period. Since the assessment in which the addition of Rs. 1186 lakhs has been made in a substantive manner itself stands set aside for reframing purpose, in fitness of things the addition of the amount in the hands of the present assessee also on a protective basis should required a fresh examination. We therefore, set aside the impugned block assessment and direct the AO to examine the facts of the case once more after allowing the assessee an opportunity of being heard and also to take into consideration the further developments in the block assessment and thereafter to come up with a fresh assessment order in the case of the assessee” (emphasis given by us)

9. The reasons for the tribunal to issue the abovementioned direction was because the assessing officer in the original block assessment made in the year 1998 has made substantive addition of Rs. 11.86 crores in the hands of Shaw Wallace and since the case of Shaw Wallace has been remanded back to the assessing officer for reframing the block assessment and other assessments, the addition made on the assessee was on protective basis. The tribunal took note of the fact that this court had set aside the block assessment/regular assessment in the case of Shaw Wallace and directed

fresh assessment to be made. Therefore, the tribunal thought fit to set aside the assessment made on the assessee and remand back the matter to the assessing officer for fresh assessment with a direction to take into consideration further developments in the block assessment of Shaw Wallace. Thus, the substantive addition of Rs. 11.86 crores made on Shaw Wallace had already been set aside and the assessing officer while reassessing the case of the respondent assessee has to look for further developments in the reassessment of Shaw Wallace and then has to consider while making fresh assessment on the assessee. Thus, the tribunal rightly posed a question to itself that it is required to examine whether there was any further developments in the case of Shaw Wallace and noted that this question has been answered by the second assessment order passed in the year 2002 wherein it has been observed that the set aside block assessment in the case of Shaw Wallace has already been completed on 30.03.2000 and findings in the original block assessment in respect of the above matter remains unaltered meaning thereby no addition or deduction/deletion has been made in the addition made in the hands of Shaw Wallace and the original assessment order in the case of Shaw Wallace has been followed and reiterated in the second block assessment order dated 30.03.2000. Thus, it became clear that no addition has been made by the assessing officer in the reassessment of the block period in the case of Shaw Wallace. Therefore, the tribunal noted that this fact has to be considered by the assessing officer as per the direction issued by the tribunal and thereafter to come up with a fresh assessment order in the case of the respondent assessee. The second assessing officer had admitted that there is no

alteration in the hands of the Shaw Wallace meaning thereby that there is no addition or deduction and therefore the tribunal, in our view rightly came to the conclusion that when there was no change in the reassessment order in the case of Shaw Wallace taking note of the direction issued by the tribunal in the order passed in the year 1999, the assessing officer in the second reassessment proceedings could not have disturbed the findings rendered in the original block assessment order passed in the year 1998 in the assessee's case as it would tantamount to second assessing officer reviewing his own order which power is not vested with him. At this stage, the tribunal rightly took note of the observation passed by this court in ITA No. 170 of 2005 dated 11.03.2020 which is to the following effect:

The Court: By an order of the tribunal dated 8th October, 1999, the appeal of the assessee was partly allowed by setting aside the impugned block assessment directing the assessing officer to examine the facts of the case once more after hearing the assessee, taking into account "further developments in the block assessment" and made a fresh assessment order.

Rs. 11.86 lakhs were added to the account to the assessee on a "protective basis". This protective addition was made in connection with a block assessment order made in the case of Shaw Wallace and Co. Ltd. (SWC) where these additions were made in a "substantive manner". According to the tribunal, since this substantive addition had been set aside and remanded, the case of the assessee required a re-look.

The remand was thus very limited.

10. From the above judgment and order, it is clear that the remand was for a very limited purpose and therefore, the second assessing officer in the reassessment proceedings could not have altered the protective assessment made to the tune of Rs. 11.86 crores on the respondent assessee as there is

no change or development in the findings recorded in the second block assessment order of Shaw Wallace. Therefore, the tribunal was right in holding that the second reassessment order was vitiated as it exceeded the specific direction given by the tribunal. We find that the following finding on facts rendered by the tribunal was fully justified:

Firstly, this finding is contrary to the AO's original assessment order because in the first round, the protective assessment was made in the hands of the assessee because substantive assessment was made in the hands of M/s. SWC and, secondly, the Tribunal in its First Order of 1999 (dated 08.10.1999) has categorically made a finding of fact in its own words "It has been learnt that the Tribunal has set aside the block assessment order in the case of SWC and has directed the AO to reassess the same in the light of an order passed by the Calcutta High Court in the writ petition filed by SWC in WP No. 11982/7/1999 relating to the block assessment and also regular assessments for the relevant period. Since the assessment in which the addition of Rs. 11.86 lakhs has been made in a substantive manner itself stands set aside for re-framing purpose, in fitness of things the addition of the amount in the hands of the present assessee also on protective basis should require a fresh examination. We therefore, set aside the impugned block assessment and direct the AO to examine the facts of the case once fore after allowing the assessee an opportunity of being heard, and also to take into consideration the further developments in the block assessment and thereafter to come up with a fresh assessment order in the case of the assessee". This finding of fact as found by the First Tribunal order of 1999 that substantive assessment of Rs. 11.86 cr has been made in the hands of M/s. SWC and protective assessment of it is made in the hand of assessee has not been challenged by the Revenue/AO before the Hon'ble High Court or any application/Miscellaneous application was filed by the Revenue/AO before this Tribunal to rectify if any mistake of fact/law existed, so it becomes final. Thirdly, even the second AO on one hand says that in the set aside

proceeding of M/s. SWC reassessment was framed without any alteration. So the question is that if there was no substantive assessment/addition of Rs. 11.86 crores in the hands of M/s. SWC in the second block assessment of M/s. SWC then the same amount would have been reduced to that extent, from the second/block reassessment order of 30.03.2000 in the case of M/s. SWC which is not the case of the Second AO and so the finding of AO is per se contradictory and in this context the Ld. A.R. explained that in the case of M/s. SWC in the first round the AO noted that M/s. SWC has deposited Rs. 89.2 crores to take over six (6) Gauhati companies and had deposited money in the accounts of Shri N.C. Jain and Shri P.K. Mittal and intermediaries: meaning thereby that money transferred by M/s. SWC to Shri N.C. Jain and Shri P.K. Mittal and then transferred to M/s. Kalo and M/s. Pragati which were benamidars,/entities have been taxed substantively in the hands of M/s. SWC and according to him this fact is evident from a perusal of the impugned order at page 11/77 of the paper book the second AO has noted that "Besides in the case of SWCL.....In that case on the basis of investigations it was revealed that the fund of SWCL to the tune of Rs. 89.02 crores out of ICDSs of Rs. 219.77 crores utilized for acquisition of six Gauhati based companies was held to be for non-business purpose as the money was siphoned off in cash through dubious methods in league with several persons including the assessee and accordingly interest on ICDS totaling Rs. 67.65 crores was disallowed." From the aforesaid finding of second SO, we note that while he perused the block assessment order of M/s. SWC he found that Rs. 89.02 crores was given by it (M/s. SWC) to acquire six (6) Gauhati companies which was from ICDS of Rs. 219.77 crores and since the money (Rs. 89.02 crores) was utilized for non-business purpose, the AO disallowed interest expenditures to the tune of Rs. 67.65 crores in the case of M/s. SWC. From this discussion we note that in the block assessment order of M/s SWC it was found that M/s. SWC had transferred through several persons/entities including the assessee Rs. 89.02 crores for acquiring six (6) Gauhati based companies and this amount (Rs. 89.02 crores) was from ICDS of Rs. 219.77 crores and therefore the AO in the case of M/s. SWC disallowed the interest expenditure to the tune of Rs. 67.65 crores on the

reason that amount of Rs. 89.02 crores was utilized for non-business purpose and we note that for these precise reasons that no substantial addition was made in the hands of the assessee because the entire money which has come to the kitty of assessee either as credit entry or withdrawal are from/for M/s. SWC. For this reason only the First AO made addition on the assessee only on protective basis.

11. The learned tribunal not stopping with the above conclusion examined the merits of the addition to the tune of Rs. 12.41 crores on the ground that the credit to the bank account of N.C. Jain and P.L. Mittal has not been proved by the assessee. Though the assessing officer noted that the assessee has filed bank statement, chart, statement recorded under Section 131 of the Act, evidencing transfer of money from Shaw Wallace its subsidiaries to the bank accounts of N.C. Jain and P.L. Mittal, held that the documents produced by the assessee does not show whether the money came from Shaw Wallace and its subsidiaries and the same was given to two concerns namely PEL and KEC. The tribunal after considering the facts as well as the documents which was part of the assessment records held that the assessing officer failed to consider the matter on merits more importantly the bank statement, charts and the statement recorded by the investigation team immediately after search under Section 131 of the Act in the year 1998 to make the addition of Rs. 12.41 crores. The tribunal noted that pursuant to the show cause notice issued by the assessing officer the assessee submitted a further chart to show that money came to the bank accounts of PEL and KEW from Shaw Wallace through bank accounts of N.C. Jain and P.L. Mittal. The tribunal also noted that the assessing officer has not pointed out any infirmity in the flow chart and the statement of the

assessee which was recorded by the investigating wing under Section 131 of the Act as early as on 18.02.1998, and faulted the assessing officer for having outrightly rejected on spacious plea. The tribunal also faulted second assessing officer in not cross verifying the claim that the bank statement from the Syndicate Bank obtaining from those bank accounts which could have been easily be done. Furthermore the tribunal noted that the documents produced by the assessee clearly show that the money came to the account of PEL and KEW from Shaw Wallace through bank account of N.C. Jain and P.L. Mittal through cheques. After rejecting the findings of the second assessing officer to be spacious plea, the tribunal took upon itself an exercise of examining as to the correctness of the claim made by the assessee to prove the source of money coming from Shaw Wallace. It was held by the tribunal that in the original block assessment order of 1998, the assessing officer after noting that in the bank account of PEL and KEW as money deposited are from Shaw Wallace through P.L. Mittal and N.C. Jain and P.L. Mittal subsidiary of Shaw Wallace and the first assessing officer had noted the following facts:-

1) *M/s. Pragati Engineering Company*

<i>N.C. Jain</i>	<i>(A/c No. 4882 Syndicate Bank Brabourne Rd., Branch, Calcutta)</i>	<i>Rs. 345 lakhs</i>
<i>P.L. Mittal</i>	<i>(A/c No. 4915 Syndicate Bank Brabourne Rd., Branch, Calcutta)</i>	<i>Rs. 235 lakhs</i>
<i>M/s. Dunlop India Limited</i>		<i>Rs. 200 lakhs</i>

M/s. Kalo Engineering Works

<i>N.C. Jain</i>	<i>(A/c No. 4882 Syndicate Bank Brabourne Rd., Branch, Calcutta)</i>	<i>Rs. 230 lakhs</i>
<i>P.L. Mittal</i>	<i>(A/c No. 4915 Syndicate Bank Brabourne Rd., Branch, Calcutta)</i>	<i>Rs. 422 lakhs</i>
<i>M/s. Dunlop India Limited</i>		<i>Rs. 275 lakhs</i>

12. After taking note of these facts, the tribunal held that this being the reason that in the first assessment order, the assessment in the case of the respondent assessee was on protective basis. In paragraph 21 of the order passed by the tribunal elaborate exercise has been done by the tribunal to examine the details produced by the assessee to return a finding of fact that the money has been transferred to the two entities are from the bank accounts of the two said persons. Thus, the tribunal rightly concluded that the protective assessment was not warranted in the hands of the assessee because the assessee has been able to discharge the onus for showing the nature and source of credit entries in the bank account of KEW, PEL as well as, in the bank accounts of N.C. Jain and P.L. Mittal which in turn are sourced from Shaw Wallace and its subsidiaries and it is evident that the source of money for Shaw Wallace and subsidiaries was in turn from ICDS which promoted the assessing officer to disallow in the hands of Shaw Wallace interest expenditure to the tune of Rs. 67.65 crores and therefore the addition to the tune of Rs. 12.41 crores made in respect of credit entities in the bank accounts of the two entries are unjustified and rightly directed

the same to be deleted. Thus, we find that the tribunal after verifying and examining the factual position has granted relief to the assessee and the revenue has failed to make out a case to set aside the order passed by the tribunal.

13. For all the above reason, the appeal filed by the revenue is dismissed and the substantial questions of law are answered against the revenue.

(T.S. SIVAGNANAM)
ACTING CHIEF JUSTICE

I Agree.

(HIRANMAY BHATTACHARYYA, J.)

(P.A- SACHIN)