Neutral Citation No.2023:PHHC:078162-DB

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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CWP No.25693 of 2016 (O&M)
Date of Decision: 25.5.2023

Sh. Amarjit Singh Sekhon ... Petitioner

Versus

Tax Recovery Officer and another ... Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Mr. Kushagra Mahajan, Advocate,
for the petitioner.

Mr. Vaibhav Gupta, Junior Standing Counsel,
for the Income Tax Department-respondent.

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MANISHA BATRA, J.

1. The instant petition seeking issuance of writs of certiorari and mandamus has been filed by the petitioner who is admittedly an assessee under the Income Tax Act, 1961 (for short “the Act”) on the grounds that he regularly files income tax returns. He was a partner holding 5% share in a partnership firm namely, M/s Deep Cinema (hereinafter referred to as “the firm”). The firm had acquired a plot at Delhi and the building known as Deep Cinema was constructed over the said plot (hereinafter to be referred as “the property”). The property was burnt in the riots which took place in Delhi in the year 1984. A dispute had, however, been arisen amongst the partners of the firm even prior to that and in the year 1983, a receiver was got appointed by the High Court of Delhi to take over the property and management of the firm in a

litigation initiated by its partners. It was submitted that subsequently, the partners of the firm entered into an agreement in pursuance of which they sold their respective shares in the property during the assessment year (A.Y.) 1994-95 by executing different sale deeds. The share of the petitioner in the sale proceeds of the property of the firm had worked out to be Rs.14,11,000/- and after claiming cost of acquisition @25% of the sale proceeds and index cost @2.44%, the total cost for acquisition of the property had been worked out @Rs.8,60,710/-. The petitioner in the income tax return for the relevant year as filed by him, declared long term capital gains of Rs.5,50,290/- in respect of his share in the property. The respondent No.2 assessing officer passed an order on 25.09.1998 observing that since the building belonged to the firm who was claiming depreciation, therefore, the excess amount received by the assessee was to be deemed as capital gain. Addition of amount of Rs.5,50,290/- was made as capital gain against the petitioner on protective basis.

2. It was further submitted by the petitioner that the Commissioner of Income Tax (for short "CIT") by invoking his revisional jurisdiction under Section 263 of the Act, set aside the order dated 25.09.1998 passed by respondent No.2 under Section 143 (3) of the Act by passing an order dated 19.03.2001 (Annexure P-2) and remanded the case with direction to pass a fresh order. The petitioner challenged the said order by filing an appeal before the Appellate Tribunal (hereinafter to be referred as "the Tribunal") who vide order dated 24.03.2006 (Annexure P-3) had upheld the order of the CIT by holding that the CIT was justified in revising the assessment. However, simultaneously it was reiterated by the Tribunal that the nature of the addition as per revised order was to be continued only on protective basis

and not on substantive basis as the capital gain was liable to be taxed in the hands of the firm on substantive basis under Section 45 (4) of the Act and also observed that the CIT had not held that addition was required to be made on substantive basis.

3. It was further submitted by the petitioner that the respondent No.2 framed a fresh assessment vide order dated 15.02.2002 (Anneuxre P-4) in consonance of the directions issued by the revisional authority. The said order had also been challenged by him by filing an appeal before Commissioner of Income Tax (Appeal) (for short "CIT (A)"). Vide order dated 27.03.2003, the CIT (A) had upheld the order of the assessing authority which was challenged by the petitioner by filing an appeal before the Tribunal. This appeal was also dismissed vide order dated 08.09.2006 (Annexure P-5) reiterating that assessment in the hands of the petitioner was made on protective basis and upholding the order of the assessing officer in assessing the short term capital gain at Rs.13,33,215/- after giving deduction of Rs.77,786/-.

4. The petitioner further submitted that a notice of demand dated 06.09.2005 was issued by the respondent No.1 thereby demanding an amount of Rs.7,28,178/- as arrears of income tax and a certificate of recovery was also issued. The respondent No.1 had also passed an order on 31.03.2016 under Section 220 (2) of the Act thereby charging interest amounting to Rs.16,84,740/- on amount of Rs.7,01,800/- and an amount of Rs.15,27,302/- was recovered by the respondent No.1 from the bank account of the petitioner by issuing a letter dated 22.03.2016 to its banker on 31.03.2016. The petitioner made prayer for issuing a writ of certiorari for quashing notice of demand and certificate of recovery both dated 06.09.2005

and letter dated 22.03.2016 and order dated 31.03.2016 on the ground that since the additional amount of Rs.7,01,800/- had been assessed against him on protective basis, therefore, no tax, interest or penalty could be recovered from him. He also prayed for issuing a writ of mandamus for directing the respondent No.1 to refund the amount of Rs.15,27,302/- along with interest.

5. The respondents appeared and filed separate replies taking common pleas that the petitioner had shown capital gain in his own hands like other partners of the firm in the return for the relevant A.Y. The firm had neither filed any return nor any assessment had been made in case of the firm. The petitioner had also not been able to show the existence of the firm and to confirm the fact of filing return by the firm. His entire case was built on the basis of existence of the firm but he failed to prove the same and, therefore, there was no question of capital gain being assessed in the hands of the firm which has been claimed by the petitioner. It was submitted that even the protective assessment became substantive if the addition continued to be only on protective basis. While asserting that the respondents had claimed the recovery of the amount in question which rightly so was assessed as protective amount by treating it as substantive amount and the interest accrued thereon and while controverting the remaining pleas and asserting that the notices were legally issued, dismissal of the petition had been prayed for.

6. Learned counsel for the petitioners argued that the assessment against the petitioner had been made on protective basis and at no point of time any substantive assessment had been made by respondent No.1. He argued that since no substantive addition had been made till date, therefore, the protective addition was liable to be quashed. He further argued that in

the absence of any substantive addition being made as against the petitioner, the respondents had no right or authority to effect recovery of the amount in question from the petitioner or to charge and recover interest on the same. It was further argued that though protective assessment was permissible but no protective recovery was allowed. With these broad arguments, it was submitted that the writ petition deserved to be allowed and the petitioner deserved to be issued the writs of certiorari and mandamus as prayed for.

7. Per contra, learned counsel for the revenue argued that since the petitioner had failed to prove the existence of firm or to prove the fact that any return had been filed by the firm and his entire claim of short term gain had been made on the basis of existence of the firm, which could not be proved by him, therefore, the protective assessment as made against him had automatically been converted into substantive assessments and the revenue was well within its rights to recover the same. Accordingly, it was argued that there was no merit in the plea of the petitioner and it was liable to be dismissed.

8. We have heard learned counsel for the petitioner and learned counsel for the revenue at length and have gone through the record. In our opinion, the only substantial question of law which is involved for consideration in this case is that whether the act of the respondents of recovering the amount assessed as protective addition against the petitioner and charging interest thereon and subsequently recovering the same without framing any substantive assessment is illegal and not sustainable in the eyes of law?

9. On going through the record, it emerges that it is not in dispute between the parties that initially the respondent No.2 assessing officer had

made the addition of an amount of Rs.5,50,290/- and had assessed the same on protective basis as against the petitioner qua the A.Y. 1994-95. It is also revealed that the revisional authority had set aside this assessment order and had given directions to the respondent No.2 to frame the assessment afresh who vide order dated 15.02.2022 (Annexure P-4) had re-assessed the income of the assessee for the A.Y. 1994-95 as Rs.13,58,520/- while maintaining its earlier order that the assessment was made on protective basis. It is further revealed that the Tribunal while dismissing the appeals of the petitioner vide order dated 24.03.2006 and 08.09.2006 respectively had reiterated that the assessment was made on protective basis. It is clear from the above that the assessment of the amount of short term capital gain had been made by the assessing authority on protective basis and the same had not been made at substantive basis.

10. Now let us consider the position of law with regard to protective assessments. The concept of protective assessment has not been defined in the Income Tax Act and there are no specific provisions governing the same. However, it is well settled by judicial precedents and it is an established departmental practice which has gained judicial recognition by the Courts over the years that in the interest of revenue, protective assessment can be framed in a situation where the revenue during the proceedings finds that a particular amount of income can be taxed in the hands of different persons/assessee but the assessing officer is not sure enough about such person in whose hands the income is chargeable to tax. A protective assessment is regarded as being protective because it is an assessment which is made 'ex abundanti cautela' where the department has a "doubt as to the person who is or will be deemed to be in receipt of the

income". A decision of Constitution Bench of Hon'ble Supreme Court in case of **Lalji Haridas v. ITO**, (1961) 43 ITR 387, is a foundation laid by way of judicial recognition on the point wherein the Hon'ble Apex Court considered the question where it appeared to the income tax authorities that certain income had been received during the relevant assessment year, but it was not clear as to who had received that income and prima facie it appeared that the income might have been received either by A or by B or by both together. It was held that in such cases, it would be open to the income tax authorities to determine the question by taking appropriate proceedings against both A and B. The Hon'ble Apex Court further observed that in the proceedings taken against both A and B, however, exhaustive inquiry should be made and the question as to who is liable to pay the tax, should be determined after hearing objections and the proceedings against the other person might also continue. It was also observed that a final determination had to be made in one of the proceedings and until proceedings against the one had been fully determined, no assessment order should be passed.

11. The above legal position was discussed by High Court of Mumbai in **DHFL Venture Capital Fund v. ITO**, (2013) 34 Taxmann.com 300, wherein it was observed that when the assessing officer is of the opinion that an assessee before him is returning a particular income but it should be assessed in the hands of a firm or a family and not in the hands of the person who returned it, then to safeguard the interest of the revenue, the assessing officer may assess it in more than one hand. It was further observed that however, this procedure could be permitted only at the stage of assessment as, it was possible for the appellate or revisional authority to give a clear finding as to the assessee who is liable to be assessed leaving the one

who is aggrieved to get redress by appropriate proceedings. In any event, if, at the stage of Tribunal or High Court, it is found that the same income is assessed in both places, the department should provide relief *suo motu* to one of them. Similarly in **ITO v. Bachu Lal Kapoor**, (1966) 60 ITR 74 (SC), Hon'ble Apex Court had observed that when there was a doubt as to which person amongst two was liable to be assessed, parallel proceedings might be started against both. In view of the above discussed position of law, it is clear that an assessing officer can certainly make a protective assessment of income at the hands of one person if it appears to him that such income can be assessed in the hands of firm and not in the hands of the person who returned it. Therefore, the protective assessment as made by the assessing officer in this case on the basis that the firm was in existence and such income could be assessed at the hand of firm cannot be found any fault with nor the same has been disputed by either of the parties.

12. However, now the question that arises for consideration is as to whether the revenue was justified in recovering the amount of Rs.15,27,302/- from the petitioner, a part of which was assessed by way of protective assessment by adding interest on the same and by issuing recovery certificate and passing impugned order dated 31.03.2016. The position of law with regard to recovery in such cases is also well settled which is to the effect that while a protective assessment is permissible, a protective recovery is not allowed and such an exercise which is permissible in the case of a regular assessment must necessarily yield to the discipline of statute where recourse is sought to be taken to the provisions of Section 148 of the Act. In this regard, reliance can be placed upon **CIT v. Cochin Company Pvt. Ltd.**, (1976) 104 ITR 655 (Kerala) and **DHFL Venture**

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Capital Fund's (Supra) wherein it was held that there can be precautionary assessment but not protective recovery but where an assessment is intended to be protective, it should be so expressed. It is, therefore, clear that though a protective assessment can be made but no recovery of tax can be effected on the basis of the same and the recovery can be effected only after substantive assessment is done. In the present case, on perusal of record, it is revealed that at no stage prior to effecting recovery of an amount of Rs.15,27,302/- in pursuance of letter dated 22.03.2016 and order dated 31.03.2016, the revenue authorities had made substantive assessment of the income of the assessee which had been protected by way of protective assessment and without passing any order of substantive assessment, and without having made any substantive addition in the hands of the petitioner assessee, thereby converting protective assessment into substantive assessment, demand notice for recovery of tax had been issued against the petitioner. The respondents failed to produce any fresh facts or inquiries conducted by the assessing officer on the basis of which recovery was sought to be effected. On applying the legal proposition to the effect that without substantive assessment, no recovery can be effected to the instant case, it is observed that since at the time of passing of assessment order by respondent No.2 where the protective addition was made in the case of the petitioner, no substantive addition had been made in the hands of the firm, therefore, no substantive additions were infact in existence. Subsequent demand in the absence of substantive addition being specifically made in the hands of the petitioner, recovery could certainly not be effected from him. At this juncture, one argument raised by learned counsel for the revenue is required to be taken into consideration. He brought the attention of this Court to para 12 of the order dated 08.09.2006 passed by the Tribunal (Annexure P-5) wherein it was observed as follows:-

> "In certain cases, where no substantive assessment is made, even the protective assessment made becomes substantive. In the present case, in the return of the income filed, the assessee had himself shown the capital gains in his own hands like other partners of the firm. It appears that firm had neither filed the return within the meaning of Section 45 (4) read with Section 50 (1) of the Act nor any assessment had been made in case of firm because despite repeated opportunities allowed, the assessee had not been able to confirm this fact. In this case, the assessing officer in order to protect the interest of the revenue, completed the protective assessment in the hands of the assessee. But while making the protective assessment, the AO was required to apply her mind with regard to computation of capital gain."

13. On going through the above, it clearly appears that though the Tribunal had made observation that protective assessment may become substantive, however, it had neither declared the impugned assessment as substantive assessment nor gave any direction to the assessing authorities to frame the same qua the petitioner assessee. It is also not the case of the respondents that at any stage thereafter, the authorities had framed substantive assessment in respect of the additions made in the income of the petitioner against him. In such circumstances, when without framing any substantive assessment, the respondents sought to recover the amount

assessed protectively rather recovered the same by issuing the impugned demand notice and recovery certificate, their action cannot be stated to be sustainable in law. Accordingly, the impugned demand notice and recovery certificate have become liable to be set aside and it is ordered accordingly. However, keeping in view the fact that recovery pursuant to the impugned notice and certificate has already been effected from the petitioner by the respondents and further keeping in view the interest of the revenue who might be entitled to recover the amount protected by way of protective assessment as made against the petitioner from him or from the firm or any other person, by making substantive assessment, we consider it proper to remit the case with a direction to the assessing officer to consider the question of making substantive assessment in the matter against the proper assessee and then to pass an order of recovery in this case. It is made clear that if the assessing officer/proper officer fails to make any substantive assessment against the petitioner within a period of three months from the date of passing of this order, then the revenue shall be liable to refund the amount so recovered from the petitioner.

14. Ordered accordingly.

(RITU BAHRI)
JUDGE

(MANISHA BATRA)
JUDGE

25.5.2023
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Whether speaking/reasoned Yes/No
Whether reportable Yes/No