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

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Judgment delivered on: 03 July 2024

+ ITA 118/2020

PR. COMMISSIONER OF INCOME TAXAppellant
Through: Mr. Indruj Singh Rai, SSC with
Mr. Sanjeev Menon & Mr. Rahul
Singh, JSCs.
versus

ARUN MALHOTRARespondent
Through: Dr. Rakesh Gupta, Mr. Somil
Agarwal & Mr. Dushyant
Agrawal, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. The instant appeal represents the third round of litigation instituted inter partes and pertains to a block assessment undertaken for the period 01 April 1989 to 14 July 1999. The Income Tax Appellate Tribunal [“**Tribunal**”] while considering cross-appeals filed by the Commissioner as well as the assessee had disposed of those matters by way of a common order dated 05 September 2008. That decision of the Tribunal formed subject matter of ITA No. 923/2009 and ITA No. 1157/2009.

2. The appeals stood admitted on two principal questions as set out in paragraphs 2 and 3 of the judgment dated 25 November 2013 passed in the aforementioned ITAs and which read thus:

“Whether the Income Tax Appellate Tribunal was right in deleting



the addition of Rs.5,23,78,058/- in the block assessment proceedings on account of transactions in question?

Whether the order of the Tribunal is erroneous and contrary to law as it has no adjudicated and decided the grounds of appeal placed by the Revenue and on this ground the entire order should be set aside?

3. The Court ultimately and while disposing of the appeals, rendered the following findings on the various contentions which were addressed:

“14. Initiation of block assessment proceedings under Section 158BC depends upon the facts at the initial stage and not upon the final outcome pursuant to appellate order or even the assessment order. At the beginning or initiation stage, the final outcome was not known and not relevant. In view of what has been stated above, we have to hold that the findings recorded by the tribunal on the first aspect is entirely unjustified, devoid of merits besides being cryptic as it does not refer to the findings and facts found and held by the Assessing Officer and Commissioner (Appeals). The findings recorded by the tribunal are incorrect and legally unacceptable as the tribunal has not disturbed the clear factual matrix/position recorded by the Assessing Officer and Commissioner (Appeals). Incorrect assertion, without material/basis has been made in paragraph 5 to the effect that it was an admitted fact that no evidence was found as a result of search to find that the transactions by the respondent assessee were bogus and no such material revealed any undisclosed income. In view of the aforesaid position, the tribunal has erred in holding that proceedings under Section 158BC were invalid.

15. The said finding of the tribunal is contrary to the findings recorded in paragraph 6, with reference to the statement made by Chander Prakash Sachdeva and the observation that respondent-assessee was not granted opportunity to cross examine the said person. Cross examination was matter relating to block assessment proceedings and not initiation or issue of notice under Section 158 BC of the Act. Tribunal has observed that statement of Chander Prakash Sachdeva has to be ignored and cannot be relied upon for adverse findings. Reference was made to the decision of Supreme Court in *Kishindchand Chellarama vs. CIT*, (1980) 125 ITR 713 (SC) and decision of Delhi High Court in *CIT vs. SMC Share Brokers Ltd.* (2007) 288 ITR 345 (Del). It has been observed that as the entire addition had been deleted, findings of the Commissioner (Appeals) regarding Section 40A(3) no longer survived.



16. It is a fact that Chander Prakash Sachdeva refused cross-examination by the respondent-assessee. The Tribunal was required to examine the reason and effect thereof. Factual matrix of each case has to be examined to ascertain the cause/ reason and decide why the witness did not appear or refused and did not agree be subjected to cross-examination. Evidence Act is not directly and specifically made applicable to income tax assessment proceedings. However, principles of natural justice and fair play apply. Principles of natural justice require and mandate, a fair, equitable and just procedure and what could be fair and just in a given case is premised on the factual matrix and cannot be put in a strait jacket formula. The Delhi High Court in *J & K Cigarettes Ltd. vs. Collector of Central Excise*, 2009 (242) ELT 189 (Del.) examined the constitutional validity of Section 9D of the Central Excise Act, 1944 which confers power or discretion upon the Central Excise Officer to rely upon statement of witnesses who have not been subjected to cross-examination, if any of the following conditions are satisfied:

- "(a) when the person who had given the statement is dead;
- (b) when he cannot be found;
- (c) when he is incapable of giving evidence;
- (d) when he is kept out of the way by the adverse party;
- and
- (e) when his presence cannot be obtained without an amount of delay or expense, which the Officer considers unreasonable."

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20. The Assessing Officer has referred to several statements of Chander Prakash Sachdeva recorded on different dates. Copies of these statements were made available to the respondent for his comments. Chander Prakash Sachdeva was also summoned for cross-examination by the respondent-assessee. However, Chander Prakash Sachdeva refused cross-examination on the ground that he feared for his life. The said fact is specifically mentioned in the assessment order, though at another place it is also mentioned that for reasons best known to him, Chander Prakash Sachdeva refused cross-examination. The fact that Chander Prakash Sachdeva had feared for his life, stands recorded in the order passed by the Commissioner (Appeals). It is recorded that during the course of statement on 9th November, 1998, Chander Prakash Sachdeva had asserted that he had been threatened and warned that he would be killed. The Commissioner (Appeal), however, disbelieved him as Chander Prakash Sachdeva had made complaint to Custom authorities etc. but had claimed that he did not file a police complaint for fear to his life. The said fact and the assertion that



Chander Prakash Sachdeva feared for his life has not been adverted to and mentioned in the order passed by the tribunal. Witness protection to those threatened and terrorized has engaged attention of the courts. Right to cross-examine though an important and valuable right, is not absolute and inalienable. It should not become a cause or a ground to intimidate witnesses and non-appearance or reluctance to stand for cross-examination, an alibi or excuse to escape legal liability. The perpetrator or the culprit, should not be permitted and allowed to take advantage or benefit of execrable situation which is his own creation. Of course, the authorities and tribunal should be satisfied that the witness was being prevented, intimidated or threatened and the said finding must have some basis or foundation. Failure to answer questions or appear as witness is violation of law and an offence. Considered answer after examination of all facts is required and should form basis of an opinion, whether the statement should be relied on. Further surrounding and corroborated evidence and material is required to be examined, for deciding whether there is truth in the statement. Even if the statement is not relied upon, there should be reference and examination of corroborative and surrounding facts and material. This aspect and examination is clearly absent in the order of the tribunal.

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22. We would now like to refer to the written submissions filed by the respondent and notice the contentions. The respondent-assessee has incorrectly submitted that the Commissioner (Appeals) had held that the purchases from Sachdeva Trading Co. and Rave Scans were genuine. There is no such finding by the Commissioner (Appeals). Findings of Commissioner (Appeals) as noticed above is vague, contradictory and not coherent. Commissioner (Appeals) had not agreed that the purchases of the exported goods were made from Sachdeva Trading Co. or Rave Scans and has observed that purchases were made in cash from third parties and, therefore, the Assessing Officer should examine the applicability of Section 40A of the Act. Our attention was also drawn to the fact that the goods were rejected and returned by the Hong Kong party and this had made Chander Prakash Sachdeva unhappy and he backed out. The said finding has been recorded by the Commissioner (Appeals) but without recording on what basis. Tribunal has not given any finding on the said aspect and their order is silent. Submission by the respondent before the Assessing Officer was that three bills totaling to Rs.95,37,920/- were returned and not paid as the material supplied was rejected and returned. The assessment order does not refer to re-import, and rejection of material by the Hong Kong party after export. At this stage, we may notice that the decision of the Delhi High Court in the case of **CIT vs. SMC Share Brokers Ltd. (2007)** 288 ITR 345 was overruled by the Supreme



Court with an order of remand in the decision reported as ***Income Tax Officer vs. M. Pirari Chrodi*** (2011) 334 ITR 262 (SC) with a direction that the High court was not correct in taking the view and an order of remand was passed for cross examination. Even if we ignore the statement of Chander Prakash Sachdeva, the appellant's contention is that there was sufficient evidence or material to show that transactions were not genuine. Further in case statements of Chander Prakash Sachdeva were debatable, it has to be analyzed as to what weight was to be given to the said statements and whether the corroborative/surrounding circumstances, justify clean purgation of the respondent assessee.

23. We have also noticed and record that tribunal has not decided the ground of appeal that the respondent had not filed certificate as postulated under Section 80HHC(4) and, therefore, was not eligible for deduction in the said Section. The contention of the Revenue is that there is contradiction in the order of the Commissioner (Appeals) because on one hand he has recorded that material was not purchased from Sachdeva Trading Co./Rave Scans but at the same time she had directed benefit of Section 80HHC. The said aspect has not been looked into and examined by the tribunal.”

4. The appeals in terms of the aforementioned judgment dated 25 November 2013 ultimately came to be allowed with the questions of law being answered in favour of the Revenue and the matter being remanded to the Tribunal for examination afresh.

5. Pursuant to the aforesaid judgment, the Tribunal rendered final judgment on 28 October 2016. The aforesaid decision of the Tribunal was subjected to challenge by the assessee by way of ITA 303/2017. The Court framed the following question for determination in that appeal:

“Did the Income Tax Appellate Tribunal (“ITAT”) fail to adhere to the specific mandate issued to it by this Court in the previous order dated 25th November, 2013 in ***CIT v. Arun Malhotra (2014) 363 ITR 195 (Del)***?”

6. On due consideration of the issues which arose, the Court ultimately came to conclude that the Tribunal had failed to undertake the adjudication in accordance with the directions framed in the earlier set of appeals which had been disposed of by way of the judgment



dated 25 November 2013. This becomes evident from a reading of the following observations as appearing in the decision of this Court dated 17 May 2017:

“11. The Court is unable to agree with the above submission. There was a specific mandate before the ITAT that had been spelt out in para 24 of this Court’s previous order. The ITAT was to consider afresh all the issues and contentions that arose before it. That the ITAT simply failed to do. It has chosen to adopt a shortcut by verbatim reproducing the portions of the order of the assessment order or the order of this Court whether for the purposes of setting out the facts or even the reasoning and conclusion. It is one thing the ITAT to quote from an order of the AO or the CIT (A) and then explain whether the ITAT agreed with or differed from the said portion. It is another to simply incorporate into the order those very words and passages without any attribution to the source leaving the reader wondering if that could be the actual reasoning of the ITAT. The present impugned order of the ITAT falls in the latter category.

12. Looking at it from any point of view, the Court is unable to accept the impugned order of the ITAT as having satisfied the mandate of this Court, as spelt out in para 24 of its earlier order extracted hereinbefore.

13. Consequently, the question framed is answered in the affirmative i.e. in favour of the Assessee and against the Revenue. The Court hereby sets aside the impugned order dated 28th October 2016 passed by the ITAT and restores to its file IT(SS)A No. 77/Del/2012 and IT(SS) A No. 85/Del/2012. The above appeals shall be listed in the ITAT on 17th July, 2017 for directions before a Bench of which the author of the impugned order is not a member.”

It is pursuant to the aforesaid order of remit that the Tribunal came to render the judgment which stands impugned at the instance of the Revenue by way of the present appeal.

7. Having heard learned counsels for respective parties, we note that the various contentions which were addressed with respect to the validity of import of articles as well as the aspects relating to the statement of Sh. Chander Prakash Sachdeva clearly pale into insignificance bearing in mind the following findings which have come



to be rendered by the Tribunal:

“12.1 The Ld. CIT(A) further recorded in his findings that the A.O. has not furnished any evidence to show that export sales have not been done. No enquiry is made from party to whom the export sales have been made. On the face of the documentary evidences on record, in the light of finding of fact recorded by the A.O. as well as Ld. CIT(A), it is established on record that assessee made genuine export sales through Custom Authorities and received the export remittance through Banking channel. Therefore, there were no justification for the A.O. to make the addition under section 69A of the IT Act against the assessee. No material evidence have been produced on record to rebut the finding of fact recorded by the Ld. CIT(A). Even in the written synopsis filed by the Ld. D.R, nothing is established against the exports made by the assessee. There is no adverse material available on record relating to the exports made by the assessee. In the absence of any material or evidence on record to disprove the exports made by the assessee, we hold that export was made by assessee in his proprietorship concern and there was absolutely no justification for making the addition of Rs.5,23,78,058/- as undisclosed export proceeds under section 69A of the I.T. Act. The export proceeds are recorded in the books of account of the assessee. Therefore, it could not be treated as undisclosed particularly, when export proceeds have been received through banking channel. No material has been produced by Department to prove if any incriminating material was found in search that export or export sale proceeds received through banking channel were bogus. May be assessee did not file return for A.Y. 1994-1995, but assessee proved that genuine export sales have been made by him. There was no other income detected by Department. Assessee, therefore, explained Section 69A is not applicable in this case. In view of the above, we are of the view that Section 69A of the I.T. Act is not attracted in the case of assessee. The Ld. CIT(A), therefore, correctly accepted the explanation of assessee. We, therefore, decide this issue in favour of the assessee and hold that there was no justification for the A.O. to make addition of Rs. 5,23,78,058/- against the assessee. There is no infirmity in the findings of the Ld. CIT(A) in deleting this addition. Ld. CIT(A) correctly deleted the addition. Issue No. 1 is decided in favour of the Assessee and against the Revenue.”

8. It becomes apparent from a reading of the aforesaid conclusions recorded that the Tribunal has ultimately on facts come to the conclusion that the factum of exports could not be doubted and that the export proceeds stood duly reflected in the books of account. It has



categorically observed that there was no justification for additions being made under Section 69A of the Income Tax Act, 1961 [**“Act”**], since the record had established that the assessee had made genuine export sales and received export remittances through regular banking channels.

9. While dealing with the statement of Sh. Chander Prakash Sachdeva and the denial of a right of cross-examination, the Tribunal has observed as follows:

“**13.4** In our humble opinion, all the above conditions are not satisfied in the case of the assessee as Shri Chander Prakash Sachdeva was available to the A.O. because his statement at various stages have been recorded after the search and at the assessment stage. Therefore, he was available for cross-examination on behalf of the assessee. When assessee asked for cross-examination to his statement, he was capable to give statement. He was not kept out of the way by the assessee and that there was no delay in the proceedings. Therefore, it is clear that without any just cause Shri Chander Prakash Sachdeva refused to cross-examination on behalf of the assessee. A.O. has also not exercised his powers to summon him to produce him for cross-examination on behalf of the assessee. Therefore, when Shri Chander Prakash Sachdeva refused for cross-examination on behalf of the assessee which were recorded at the back of the assessee by the Investigation Wing and the A.O, his statement cannot be relied upon against the assessee to frame the assessment. It may be noted here that according to assessment order, statement of Shri Chander Prakash Sachdeva was also recorded on 09.11.1998 i.e., prior to the search. Therefore, such statement cannot be considered as statement recorded under section 132(4) of the I.T. Act. Therefore, allegation of the alleged threat to Shri Chander Prakash Sachdeva is not substantiated through any evidence or material on record. Ld. D.R. in his synopsis relied upon decisions of Hon’ble Delhi High Court in the cases of CIT vs. Somal Construction (supra), CIT, Naresh Kumar Aggarwala (supra) and decision of Hon’ble Kerala High Court in the case of Bhagheeradha Engineering Ltd., vs. ACIT (supra) and others on the proposition of presumption under section 132(4A) and 292(C) of the I.T. Act, 1961, which are not applicable to the facts and circumstances of the case. It is well settled law that burden to prove that apparent is not real is on the person who alleges it to be so. It is a case of search, therefore, burden is upon A.O. to prove that assessee has earned undisclosed income through evidence and material recovered during the course



of search. But, nothing has been brought on record if assessee earned any undisclosed income. The entire story is built-up on the statement of Shri Chander Prakash Sachdeva which cannot be read in evidence against the assessee as noted above. Only purchase bills issued by Shri Chander Prakash Sachdeva were found in search. On such bills, statement of Shri Chander Prakash Sachdeva was recorded post-search and at assessment stage. There is no other evidence available against assessee. Therefore, in view of the material available on record and in view of the findings recorded by the Ld. CIT(A) that purchases have been made by the assessee for effecting exports and in view of the fact that there is no other evidence except the statement of Shri Chander Prakash Sachdeva which was not subjected to cross examination, purchases claimed by the assessee to have been made from his two concerns cannot be disbelieved particularly when payments for purchases have been made through banking channel. Merely because amounts have been withdrawn in cash from the Bank Accounts of M/s Sachdeva Trading Co and M/s Rave Scans cannot be used as evidence against the assessee, in the absence of any evidence or material connecting the assessee for withdrawal of such cash. No basis have been explained how the A.O. has given a finding that cash withdrawal is connected to the assessee. There is no evidence available on record as to how Shri Chander Prakash Sachdeva was not having any capacity to sold the goods. He has accepted part goods have been returned by assessee. The findings of the A.O. also shows that bank account was opened by Shri Chander Prakash Sachdeva in the name of two of his proprietorship concerns supported by the documentary evidences on record. Therefore, there is no justification to apply Section 69C of the I.T. Act against the assessee. No evidence was found during the course of search to prove that purchases made by assessee were bogus. No evidence has also been found during the course of search that assessee made purchases in cash from other concerns. It was merely an inference of the Ld. CIT(A) that assessee made purchases in cash from other parties. The Bank Accounts of these two concerns have been operated by Shri Chander Prakash Sachdeva only. Therefore, on the basis of evidence and material on record, we hold that assessee made the purchases for exports from M/ s. Sachdeva Trading Co and M/s. Rave Scans only. We, accordingly hold that purchases were not made in cash as mentioned by the authority below. There is no evidence of such purchases having been made in cash. We, therefore, hold that assessee made purchases from these two concerns belongings to Shri Chander Prakash Sachdeva in a sum of Rs.3,38,65,440/-. The addition on this amount is accordingly deleted. The Order of the Ld. CIT(A) invoking provisions of Section 40A(3) of the I.T. Act, is accordingly set aside. In the absence of any evidence of cash purchases made by assessee, such findings of the Ld. CIT(A) are reversed. We, accordingly, hold that



assessee made genuine purchases from the above two concerns of Shri Chander Prakash Sachdeva. Therefore, no addition could be made against the assessee. The findings of the authorities below is accordingly set aside and entire addition is deleted. Issue No.2 is decided in favour of the Assessee and against the Revenue.”

10. While in the instant appeal the appellants have sought to question the correctness of the conclusions ultimately arrived at and noticed hereinabove, in our considered opinion, the aspects pertaining to import lose all significance bearing in mind the findings returned by the Tribunal in the aforementioned paragraph 12.1 of its judgement.

11. Insofar as benefits under Section 80HHC are concerned, the Tribunal has on a consideration of the entire material on record ultimately come to conclude as follows:

“14. This issue relates to deduction under section 80HHC of the I.T. Act. The Ld. CIT(A) has recorded in his findings that Auditor's Certificate was filed in the name of the company. M/s Iram Group International P. Ltd., was incorporated on 28.02.1995 which succeeded the proprietorship concern of the assessee whose object was to takeover export business of proprietorship concern. The Ld. CIT(A) further recorded in his findings that export was made by proprietorship concern and profit in respect of such exports was liable to be assessed in the hands of the proprietorship concern of the assessee. The Ld. CIT(A) further recorded that it was a case of succession and Books of Account and Audit report of the proprietorship concern continued from the concern and since statement of account is available which was filed with the return of income of the company, the Report of such Audit in the prescribed Form should not be rejected simply because the same was filed along with return of Company which succeeded the proprietorship concern. Apart from such factual findings which have not been displaced with the help of any relevant and cogent evidence by the Revenue, it is to be noted that Auditor's Report filed in the name of proprietorship concern before Ld. CIT(A) was admitted by the Ld. CIT(A) on calling the report from the A.O. at the appellate proceedings. We may also note that Shri S.S. Rana, attended the appellate proceedings before Ld. CIT(A). There is no specific ground taken by the Revenue against the action of the Ld. CIT(A) in admitting Auditor's Report filed in the name of proprietorship concern. It may be noted here that assessee filed return of income under section 158BC of the IT. Act and assessment was completed against him in his proprietorship concern. Therefore, assessee



rightly claimed deduction under section 80HHC with respect to export proceeds. Therefore, taking into account the facts and circumstances of the case and also in view of the fact that exports were made, export proceeds were received through Banking channel, Auditor's Report was admitted and examined by the Ld. CIT(A), the report of the A.O. was called or and Revenue was represented by Shri S.S. Rana, the assessee is entitled for deduction under section 80HHC of the I.T. Act. As per the Auditor's Report, assessee claimed deduction of Rs.2,56,54,271/- under section 80HHC for A.Y. 1995-1996. Deduction has been claimed on the basis of sale proceeds received by the assessee in convertible foreign exchange. Therefore, the Ld. CIT(A) noted at page-15 of the appellate order that A.O. admitted that proper Audit Report was filed along with the return of income of the Company. Therefore, the Ld. CIT(A) rightly held that in view of the same, A.O. must accept the report now filed in the name of proprietorship concern before its incorporation. Ld. CIT(A), therefore, correctly directed the A.O. to calculate the deduction under section 80HHC after proper verification and as per law. Learned Counsel for the Assessee relied upon decision of ITAT, Delhi Bench in the case of Mrs. Manju Kapoor Dalmia vs. ITO (2011) 140 TTJ 1 (UO) in which it was held as under:

"Filing of certificate in Form No. 10CCD along with return for claiming deduction under s. 80QQB is a procedural requirement and it should not be construed as mandatory; failure to file the certificate before the AO can be cured by permitting appropriate rectification at a subsequent stage; once the certificate was admitted by CIT(A) by following the procedure of r. 46A, assessee's claim for deduction under s. 80QQB is allowable."

14.1 The learned counsel for the Assessee further relied upon decision of Hon'ble Karnataka High Court in the case of CIT vs. American Data Solutions India (P.) Ltd., (2014) 223 Taxman 143 (Kar.) in which it was held as under:

"Proceedings before first Appellate Authority being continuation of assessment process, since audit report was produced at that stage, Appellate Authority was duty bound to take note of said audit report and grant benefit under section 10A."

14.2. The above decisions supports the findings of the Ld. CIT(A) in granting deduction under section 80HHC of the I.T. Act. We, therefore, do not find any infirmity in the Order of the Ld. CIT(A) in allowing the claim of assessee. Accordingly, deduction under section 80HHC was rightly allowed by the Ld. CIT(A). We, uphold, his order and dismiss this ground of appeal of the Revenue.



Issue No.3 is decided in favour of the Assessee and against the Revenue.”

12. On an overall consideration of the above, we find ourselves unable to discern any substantial question of law that may be said to arise upon the appeal. It shall consequently stand dismissed.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JULY 3, 2024/kk