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Court : Mumbai

Decided On : Jan-17-2000

Reported in : [2005]144TAXMAN674(Bom)

Appeal No. : IT Appeal No. 1311 Of 2000 17 January 2000

Appellant : Babulal C. Borana

Respondent : Third Ito

Advocate for Pet/Ap. : Arun P. Sathe *for the Appellant* R.V. Desai & R. Asokan *for the Respondent*.

Judgement :

J.P. Devadhar, J.

This appeal is filed by the appellant ('the assessee') under section 260A of the Income Tax Act against the decision of the Income Tax Appellate Tribunal dated 3-8-2000.

2. The assessment order relevant for the purpose herein is assessment year 1988-89.

3. Short point of law required to be considered in this appeal is:

'Whether on the facts and in the circumstances of the case the ITAT was right in law in directing the assessing officer to make additions of the value of 400 bags of HDPE powder as unexplained investment under section 69 of the Income Tax Act, 1961 when the same is a part of the purchases and part of the closing stock recorded in the books of account maintained by the assessee and the nature and source of the investment has been duly explained by the assessee?'

4. The assessee is a dealer in HDPE plastic powder.

5. On 29-1-1987 search action under section 132 of the Income Tax Act was carried out at the godown belonging to Wak Bros. situated at Andheri (E), Mumbai. During the course of search 540 bags of HDPE plastic powder weighing 25 kgs. each were found at the said godown. Prohibitory orders were issued by the Income-tax authorities under section 132(3) of the Income Tax Act in respect of the said 540 bags of plastic powder on the prima jacie belief that the same were unaccounted. The assessee by its letter dated 2-12-1987 claimed ownership of 400 bags out of 540 bags of plastic powder lying at the godown of M/s. Wak Bros.

6. In the return filed for assessment year 1988-89, the assessee claimed to have purchased in the relevant financial year 50 M.T.s of HDPE powder valued at Rs. 11,55,000 from M/s. Gautam Trading Co. The assessee relied on a bill bearing No. GIC-28 dated 7-1-1987 issued by M/s. Gautam Trading Co. in support of its contention and stated that on purchase the said goods were stored by the assessee in the godown of M/s. Wak Bros. situated at Andheri (E) Mumbai. The assessee claimed that out of 50 M.T.s, the assessee Q cleared from the said godown 40 M.T.s of HDPE from time to time and sold the same to third parties and the balance 10 M.T.s of HDPE powder (400 bags of 25 Kgs. each) belonging to the assessee was lying in the godown of M/s. Wak Bros. on 29-1-1987. It was claimed that the entire transaction regarding purchase of 50 M.Ts. of HDPE powder from M/s. Gautam Trading Co., sale of 40 M.Ts. to various parties and the closing balance of 10 M.Ts. of HDPE valued at Rs. 2,30,000 have been duly recorded in the books of account maintained by the assessee.

7. During the course of the assessment proceedings, the assessing officer confronted the assessee with the statement of Mr. Bipinkumar B. Shah, proprietor

of M/s. Gautam Trading Co. recorded under section 131 of the Income Tax Act and also the unattested declaration made by the said Bipinkumar B. Shah on a five rupee stamp paper. In his declaration, the said Bipinkumar Shah, had stated that he was dealing in iron & steel, hardware materials and ferrous and non-ferrous metal and that his proprietary concern never dealt in plastic material. The said Bipinkumar Shah denied to have issued any sale bill showing sale of 50 M.Ts. of HDPE powder and further stated that his proprietary concern had no bank account with the Syndicate Bank and that he had never operated any account with the Syndicate bank in the name of M/s. Gautam Trading Co.

8. On further enquiries the assessing officer found out that the bank account No. 2668 in Syndicate Bank, Homji Street Branch was in fact opened and operated by the said Bipinkumar B. Shah in the name of M/s. Gautam Trading Co. and that the cheques issued by the assessee in the name of M/s. Gautam Trading Co. were deposited in that bank account. However, as the said Bipinkumar Shah had denied to have any dealings with the assessee and taking into account other factors such as inordinate delay on the part of the assessee in claiming the goods, the fact that bank account in the name of M/s. Gautam Trading Co. was opened in February, 1987 Le., after the search action on 29-1-1987, the fact that the assessee issued cheques towards the price of the goods in February, 1987 i.e., after the date of search, the fact that the bank account in which the cheques issued by the assessee were deposited have been disowned by Bipinkumar B. Shah, proprietor of M/s. Gautam Trading Co., the fact that the sales tax challan for Rs. 1,05,000 being the sales tax payable by M/s. Gautam Trading Co. on sale of 50 M.Ts. of HDPE was also lying with the assessee and that the sales tax amount of Rs. 1,05,000 has not been credited to the account of the State Government, the assessing officer concluded that there was no genuine sale and the entire transaction of purchasing 50 M.Ts. of VIDPE powder by the assessee from M/s. Gautam Trading Co. was a Havala transaction. Accordingly, the assessing officer made addition of Rs. 11,55,000 being the value of the said 50 M.Ts. of HDPE powder as investment from undisclosed income.

9. On appeal filed by the assessee, the Commissioner (Appeals) deleted the entire addition of Rs. 11,55,000. The Commissioner (Appeals) held that out of 50 M.Ts.

of HDPE plastic powder, the assessee had sold 40 M.Ts. to various parties and the amounts received by the assessee from those third parties have been found to be genuine and if sales are genuine, then the purchase must be genuine and, therefore, 40 M.Ts. of HDPE cannot be said to be Havala transaction and accordingly deleted the addition of the value of 40 M.Ts. of HDPE powder. As regards the balance 10 M.Ts. of HDPE, the Commissioner (Appeals) held that the same has to be accepted as genuine because the assessee himself has come forward to claim its ownership and the value of 10 M.Ts. (Rs. 2,30,000) is shown as closing stock in the books maintained by the assessee. Accordingly, the Commissioner (Appeals) held that the value of 10 M.Ts. of HDPE plastic powder lying in the godown of M/s. Wak Bros. could not be added to the income of the assessee as unexplained investment.

10. Being aggrieved by the aforesaid order, the revenue filed an appeal before the Income Tax Appellate Tribunal (ITAT) and by the impugned order dated 3rd August, 2000 the Tribunal after considering the totality of facts came to the conclusion that the purchase of 50 M.Ts. of HDPE powder claimed to have been made by the assessee from M/s. Gautam Trading Co. has not been proved by the assessee. The Tribunal held that when the purchase itself was not genuine, there was no question of making any investment and consequently, the question of making additions on account of unexplained investment in a non-genuine purchase does not arise. However, as the assessee had claimed that 400 bags of HDPE plastic powder weighing 25 kgs. each (10 M.Ts.) lying at the godown of M/s. Wak Bros. was purchased by the assessee from M/s. Gautam Trading Co. and the purchase from M/s. Gautam Trading Co. is found to be not genuine, the Tribunal held that the source of acquisition of 400bags of HDPE plastic powder by the assessee remained unexplained and, therefore, the value of 400 bags of HDPE plastic powder has to be added to the income of the assessee. Challenging the said order of the ITAT the present appeal is filed by the assessee.

11. Mr. Arun Sathe, learned advocate appearing on behalf of the appellant submitted that the entire transaction relating to the purchase of 50 M.Ts. of HDPE powder from M/s. Gautam Trading Co. and sale of 40 M.Ts. (out of the said 50 M.Ts.) to third parties and the value of the balance stock of 10 M.Ts. of HDPE

powder is duly recorded in the books of account maintained by the assessee. He submitted that after purchasing 50 M.Ts. of HDPE valued at Rs. 11,55,000, the assessee had paid to M/s. Gautam Trading Co. Rs. 9,27,500 from time to time (Rs. 3,00- 000 on 9-2-1987, Rs. 2,00,000 on 16-2-1987, Rs. 2,00,000 on 18-2-1987 and Rs. 2,27,500 on 18-3-19871 by cheque and the balance amount of Rs. 2,27,500 was due and payable by the assessee to M/s. Gautam Trading Co. at the relevant time. All the above payments were made from the regular bank account of the assessee. The rent paid by the assessee to M/s. Wak Bros. for storing the goods in their godown are also recorded in the books maintained by the assessee. The books of account maintained by the assessee have not been rejected by the assessing officer and, therefore, the purchase of 50 M.Ts. of HDPE powder valued at Rs. 11,55,000 from M/s. Gautam Trading Co. could not be treated as investment from undisclosed income of the assessee. In this connection, he relied upon the decision of the Delhi High Court in the case of CIT v. La Medica (2001) 250 ITR 575 and the decision of the Madras High Court in the case of K.K. Seshaiyer v. CIT : [2000]246ITR351(Mad) .

12. Mr. Sathe further submitted that when the identity of the person from whom the goods have been purchased by the assessee has been established and the payment made by the assessee to that person is also established, the Income Tax Authorities were not justified in holding that the purchase of 50 M.Ts. of HDPE powder by the assessee was not a genuine one. He submitted that it is not the case of the revenue that the Syndicate bank account No. 2668 in the name of M/s. Gautam Trading Co. is the account belonging to the assessee. It is not even the case of the revenue that the amounts withdrawn from the aforesaid bank account was received by the assessee. In these circumstances, when the assessee has paid for 50 M.Ts. of HDPE powder from his bank account, it could not be said that the above transaction is not genuine.

13. Mr. Sathe further submitted that neither the delay on the part of the assessee in approaching the Income Tax Authorities to claim the goods nor the statement of Bipinkumar Shah, proprietor of Gautam Trading Co. recorded under section 131 of the Income Tax Act render the transaction to be not genuine. He submitted that the statement of Bipinkumar Shah that he is not having any bank account with the

Syndicate bank is found to be false by the assessing officer and, therefore, on the basis of the statement made by Bipinkumar Shah which is disbelieved, it could not be said that the claim of the assessee in purchasing 50 M.Ts. from M/s. Gautam Trading Co. is not genuine. He submitted that having held that the addition of the value of 40 M.Ts. of HDPE powder was not justified the Tribunal ought not to have directed the assessing officer to make additions of the value of 10 M.Ts. of HDPE. He submitted that the fact that the assessee has produced the sales tax challan of M/s. Gautam Trading Co. cannot be held against the assessee. He submitted that failure on the part of M/s. Gautam Trading Co. to pay sales tax does not render the transaction not genuine. Mr. Sathe submitted that none of the conditions set out in section 69 of the Income Tax Act are satisfied and, therefore, the Tribunal was totally in error in holding that the transaction was not genuine and directing the assessing officer to make addition in respect of the value of 10 M.Ts. of HDPE powder.

14. Mr. R.V. Desai, learned senior advocate appearing on behalf of the respondents, on the other hand submitted, that the order passed by the Tribunal is based on finding of fact and the appeal does not raise any substantial question of law and, therefore, no interference is called for in exercise of jurisdiction under section 260A of the Income Tax Act. He submitted that on the basis of material on record, the Tribunal has rightly come to the conclusion that there was no genuine sale of 50 M.Ts. of HDPE powder and it was only a Havala transactions.

15. Mr. Desai further submitted that if the purchase of 50 M.Ts. was genuine, then the assessee would not have taken 11 months to claim 10 M.Ts. of HDPE powder lying at the godown of M/s. Wak Bros. He submitted that if the purchase was genuine, then, in the ordinary course payment for the goods would have been made at the time of purchase. However, in the present case, the payment has been made by the assessee much after the date of search and that too in a fictitious bank account opened in the name of M/s. Gautam Trading Co. in February, 1987. He submitted that the above assertion is further corroborated by the statement of Bipinkumar Shah proprietor of M/s. Gautam Trading Co., who, has not only denied to have issued the sale bill produced by the assessee but also denied having any bank account in Syndicate bank in which the cheques issued

by the assessee were allegedly deposited. He submitted that the sales tax challan in respect of 50 M.Ts. of HDPE was recovered from the assessee and in fact sales tax payable in respect of 50 M.Ts. of HDPE has not been actually credited to the account of the State Government. All these factors clearly shows that there was no sale transaction. He submitted that once it is held that there was no sale transaction with M/s. Gautam Trading Co., then the claim of the assessee that the 10 M.Ts. of HDPE lying at the godown of M/s. Wak Bros. was purchased by the assessee from M/s. Gautam Trading Co. had to be rejected. Therefore, no fault can be found with the directions given by the Tribunal to the assessing officer to add the value of 10 M.Ts. of HDPE powder as the deemed income of the assessee. In these circumstances, the counsel submitted that the findings given by the Tribunal is only a finding of fact and no substantial question of law is involved in the present appeal and the same is liable to be dismissed.

16. We have carefully considered the rival submissions. Under section 69 of the Income Tax Act additions on account of unexplained investments can be made as deemed income of the assessee, if the assessee has made investments which are not recorded in the books maintained by the assessee and the assessee offers no explanation about the nature and source of investments or the explanation offered by the assessee is in the opinion of the assessing officer., not satisfactory.

17. In the present case, the assessee has recorded the transact. ion relating to 50 M.Ts. of HDPE in the regularly maintained books of account and the assessee has offered explanation regarding the nature and source of investment but the same has not been accepted. Therefore, the question to be considered in this appeal is, whether the Tribunal was justified in rejecting the explanation offered by the assessee.

18. As per the books of account maintained by the assessee, Rs. 11,55,000 was the price of 50 M.Ts. of HDPE powder purchased by the assessee from M/s. Gautam Trading Co. It is not in dispute that in the relevant assessment year payments in respect of the said goods has been made by the assessee to the extent of Rs, 9,27,500 by cheque from his regular bank account and the same has been duly credited in the Syndicate bank account of M/s. Gautam Trading Co. It is

also not in dispute that out of 50 M.Ts. the assessee has sold 40 M.Ts. of HDPE to third parties and the amounts received from those parties are also reflected in the books of account maintained by the assessee. The value of the remaining 10 M.Ts. of HDPE is also reflected in the books of account maintained by the assessee. Thus, the identity of the person from whom the goods have been purchased and the source of investment in such goods has been explained by the assessee.

19. The assessing officer as well as the Tribunal rejected the explanation of the assessee mainly on the ground that Bipinkumar B. Shah, Proprietor of M/s. Gautam Trading Co. in his statement/declaration had stated that he was not dealing in HDPE powder, that he had not issued the sale bill for 50 M.Ts. of HDPE, that he did not have any bank account in the name of M/s. Gautam Trading Co. with the Syndicate bank and that the only bank account in the name of M/s. Gautam Trading Co. was with the Ahmedabad Co-op. Bank, Narsinath Street Branch, Bombay which is operated by him by signing in Gujarati. However, the assessing officer in the present case, on investigation has found that the above statement /declaration made by Bipinkumar B. Shah is false and has recorded a categorical finding that the Syndicate bank account No. 2668 at Hom,0 Street Branch, was in fact opened by the said Bipinkumar Shah in the name of M/s. Gautam Trading Co. and that the said Bipinkumar Shah was operating the Syndicate bank account No. 2668 by signing in English and he was operating the bank account in the name of M/s. Gautam Trading Co. with Ahmedabad Co-op.

Bank Limited by signing in Gujarati. Thus, it is established that the amounts paid by the assessee by cheque for 50 M.Ts. of HDPE has been received by M/s. Gautam Trading Co. In these circumstances, we are of the opinion that based on the statement of Bipinkumar Shah which is found to be false, it could not be held that the transaction between the assessee and M/s. Gautam Trading Co. was not genuine.

20. Moreover, it is not the case of the revenue that the investments made by the assessee are outside the books maintained by the assessee. It is not the case of the revenue that the Syndicate bank account No. 2668 in the name of M/s.

Gautam Trading Co. belongs to the assessee. It is also not the case of the revenue that the amounts withdrawn from the Syndicate bank account No. 2668 has been received by the assessee. In the present case, the books maintained by the assessee has not been rejected by the assessing officer and in fact the addition is based on the entries made in the books of account maintained by the assessee. The fact that the said Bipinkumar B. Shah has not paid sales tax payable on sale of 50 M.Ts. of HDPE or the fact that the assessee has paid for the goods after the date of search and claimed 10 M.Ts. of HDPE belatedly does not in any way affect the genuineness of the transaction. Having rejected the addition of the value of 40 M.T.s of HDPE powder, the Tribunal could not have sustained addition of the value of 10 M.Ts. of HDPE powder, when the nature and source of investment has been duly explained by the assessee.

21. For all the aforesaid reasons, we hold that the Tribunal was not justified in rejecting the explanation of the assessee and directing the assessing officer to add the value of 10 M.Ts. of HDPE as deemed income of the assessee.