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Court : Allahabad

Decided On : Sep-16-2003

Reported in : (2004)88TTJ(All)594

Appeal No. : ITA No. 173/All/2003 16 September 2003 A.Y. 1993-94

Appellant : Sushila Singh

Respondent : ito

Judgement :

ORDER

Bhavnesh Saini, J.M.

This appeal by the assessee is directed against the order of the Commissioner (Appeals)-III, Lucknow, dated 5-12-2002 for the assessment year 1993-94 on the following grounds :

'1. Because the proceedings under section 147 have neither been validly initiated nor concluded and the assessment order dated 30-3-2002 (passed in pursuance thereof) is liable to be declared as null and void.

1.2 Because the learned Commissioner (Appeals)-II, Lucknow, on a due consideration of the attendant facts and circumstances of the case, particularly that;

(a) no proceedings were pending in the case of the appellant on 15-3-1999 when commission was issued in favour of DVO to estimate the cost of construction of the property.

(b) for the reason mentioned at Serial No. (a) above, the commission issued in favour of the DVO was invalid and;

(c) the report obtained as a result of such an invalid reference could not have constituted material for initiating proceedings under section 147; should have held that the entire proceedings right from commencement thereof to the conclusion in terms of the assessment order dated 30-3-2002, were without jurisdiction.

1.3 Because, otherwise also, the DVO's report by itself, dated 25-11-1999, could not have constituted the 'material' so as to lead to the formation of 'reason to believe' that any income had escaped assessment, and consequently the very initiation of proceedings under section 147 was illegal.

1.4 Because, in any case the 'reasons recorded' by the learned assessing officer vide ordersheet entry dated 25-1-2001, could not have been held to have met the requirement of law and issuance of notice under section 148, on that basis, is wholly illegal.

2. Because the notice served on Shri Lal Sahab Singh cannot be treated to be the service of notice in accordance with the provisions of law and the assessment order dated 30-3-2002 based on such a notice is wholly without jurisdiction.

Without prejudice to the aforesaid.

3. Because the authorities below have erred in law and on facts in holding that investment in construction of house property to the extent of Rs. 3,82,500 remained unexplained and in adding/sustaining by way of addition, to the income of the appellant is erroneous on facts as well as in law.

4. Because the appellant had sufficient documentary evidence to prove that;

(a) construction on plot of land that had been purchased as early as in the year 1984, was in full swing during the financial year 1991-92; and

(b) on such construction, investment to the extent of Rs. 1,86,800 had duly been met in that year itself; and whole of the investments could not have been considered in the year under appeal.

5. Because the investment in house property was spread over in two financial years, relevant to the assessment years 1992-93 and 1993-94, as per the breakup given hereunder :

(a)

Rs. 1,86,800

:

Asst. yr. 1992-93

(b)

Rs. 5,27,800

:

Asst. yr. 1993-94

(year under appeal)

which stood fully proved by the 'resources' available with the appellant and findings to the contrary are wholly erroneous, illegal and unjustified.

6. Because as far as the investment made during the year under appeal, to the extent of Rs. 5,31,700 is concerned, the said stood fully proved from:

(a) the sum of Rs. 3,20,000 as had been taken as loan from the Bank;

(b) other sources in the form of own savings and loans, etc., as were available with the appellant;

and no addition on this score could have been validly made/sustained.

7. Because the order appealed against is vitiated by non-consideration of attendant facts and circumstances of the case and the same is not tenable, either on facts or in law;

8. Because in any case and wholly without prejudice to the various contentions as have been taken in the foregoing grounds, the quantum of estimate of cost of construction, as made by the DVO, is erroneous, much too high and excessive and addition made/sustained on the basis of such an estimate deserve to be substantially reduced.

9.1 Because the authorities below have erred in law and on facts in holding that the source of deposits of sums aggregating Rs. 50,000 in the Bank account remained unexplained and in making/upholding the addition for the same, to the income of the appellant.

9.2 Because wholly without prejudice to the contention raised in ground No. 9.1 above, the withdrawals out of Bank account (inclusive of withdrawals out of said sum) should have been held to be the sources available with the appellant for meeting the investment in house property.

10. Because the appellant disputes levy of interest under various sections, even on the ground independent of quantum of assessment.

11. Because the order appealed against is contrary to the facts, law and principles of natural justice.'

2. This appeal was taken up for early hearing vide our order dated 6-6-2003 passed in stay petition No. 8 of 2003.

3. We have heard the learned counsel for the assessee. The learned counsel for the assessee on earlier dates filed detailed paper book, copy was also given to the learned Departmental Representative. The paper book contained mainly copy of notice under section 148, reasons recorded by the assessing officer, order-sheet entries, copy of Inspector's report, balance sheet and capital account for the assessment year in question of the preceding three years, copy of the confirmatory letters, pass book of the depositors, copy of the notice issued by the

City Magistrate, copy of the report of the DVO and the case law relied upon by the learned counsel for the assessee. However, none appeared on behalf of the revenue, therefore, revenue is proceeded ex parte.

4. The brief facts taken from the record are that the Inspector of Income Tax submitted his report dated 27-3-1998 to the assessing officer intimating that the assessee was deriving rental income from UBI and construction of the property during the financial year relevant to the assessment year in question. It was also reported that the assessee is not assessed to tax and has not filed return of income. The assessing officer vide his letter dated 15-3-1999 made a reference to the DVO with regard to the valuation of the cost of construction of the property of the assessee. The DVO submitted his report to the assessing officer vide his report dated 25-11-1999. The assessing officer recorded the reasons for reopening of the assessment for the purpose of assessment/reassessment under section 147/148 of the Income Tax Act on dated 26-1-2001. The same is reproduced as below:

'There is a construction of building. The DVO, Income Tax department, Allahabad vide his letter F.No. AVOA/IT/(1) 7/99-2000/314, dated 25-11-1999 has reported the valuation of the above building at Rs. 7,18,500 as against Rs. 3,50,000 shown by the assessee. The assessee has not furnished return on total income for the year. It appears that she has concealed the particulars of her income and therefore, I have reason to believe that the income chargeable to tax to the extent of Rs. 7,18,500 has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961. Approval may kindly be accorded to issue notice under section 148 of the Income Tax Act, 1961.

5. The assessing officer after obtaining the approval of the Assistant Commissioner issued notice under section 148 of the Income Tax Act, dated 22-2-2001 to the assessee. No return was filed within the stipulated time, therefore, notice under section 142(1) was issued with query and the assessee was asked to furnish bill/vouchers of the material purchased and utilised in the construction of the building and was also required to furnish the complete names and addresses of the persons with whom the loans or gifts were taken or given. Return was,

however, filed on 14-12-2001. No capital account or balance sheet was filed with the return. Notice under section 143(2) was issued and during the assessment proceedings, the assessee filed capital account of balance sheet from the assessment year 1990-91 onwards. The building under construction was shown as on 31-3-1992 showing the investment in a sum of Rs. 1,86,800. Similarly, in the assessment year, i.e., 1993-94, the assessee has shown total value of the construction of the building as on 31-3-1993 in a sum of Rs. 7,14,600. The housing loan from UBI was shown in a sum of Rs. 3,43,404. Unsecured loans from relatives and friends were also shown in a sum of Rs. 1,95,100. It was stated by the assessee that the construction was started in the assessment year 1992-93 in which investment of Rs. 1,86,800 was made and construction completed in the assessment year 1993-94 i.e., under appeal and investment in a sum of Rs. 5,27,800 was made. Thus, the total value of the construction was shown in a sum of Rs. 7,14,600. The assessee was directed to produce the cash creditors, who had advanced loans of Rs. 1,95,100, Certain queries were made from the assessee in which the assessee has also filed the detailed of replies. However, the assessing officer did not believe the construction in the two assessment years i.e., 1992-93 and 1993-94. The assessing officer also disbelieved the loan amount of Rs. 1,95,100. The assessing officer found that the assessee was having Bank account No. 978. In this account, maturity of FDR and savings of the assessee as well as subsequent withdrawals were noted. This account was opened on 7-8-1986. The said Bank account shows the deposit of Rs. 50,000 on 26-6-1992, of which the nature and source has not been furnished by the assessee. Accordingly, the amount of Rs. 50,000 was treated as unexplained deposit and was added to the income of the assessee.

6. The assessing officer considered unexplained investment in the construction of house and noted that the assessee took loan of Rs. 3,20,000 from the Bank. There was opening cash balance in the Bank at Rs. 2,10,712. Maturity of the FDR was made at Rs. 36,622. After considering all these credits as well as unexplained deposit of Rs. 50,000 made in the Bank, the unexplained investment was considered as under:

1. Investment determined by the valuer as per report

7,18,500

Less : Withdrawal from Bank account, account No. 978

3,36,000

Balance :

3,82,500

The above amount of Rs. 3,82,500 was considered as unexplained investment in the assessment year in question, i.e., the assessment year 1993-94.

7. Both the above additions were challenged before the Commissioner (Appeals). The same submissions were reiterated. However, the learned Commissioner (Appeals) dismissed the appeal of the assessee vide impugned order dated 5-12-2002. The assessee is in appeal before us on the grounds of appeal mentioned above challenging both the additions.

8. We have heard the learned counsel for the assessee. He has taken us minutely to the details submitted in the paper book, which were filed before the authorities below as referred to above. The learned counsel for the assessee mainly argued that the construction of the building in question spread in two years, i.e., the assessment years 1992-93 and 1993-94 (under appeal). He has argued that the Competent Authority/City Magistrate issued show-cause notice dated 8-2-1992, to the assessee requesting him to stop illegal construction in the property in question, which shows that the construction was carried in the assessment year 1992-93. Copy of the same show-cause notice is filed at page 74 of the paper book. He has further argued that property in question was purchased in the year 1984 and the assessee has filed details of construction in its P&L; a/c and capital account/balance sheet filed with the assessing officer, in which in the assessment year 1992-93, the assessee has invested Rs. 1,86,800 in the construction of building and in the assessment year 1993-94, the assessee has invested the amount of Rs. 5,27,800. The learned counsel for the assessee further argued that the assessing officer has accepted the housing loan in a sum of Rs. 3,20,000 and the opening cash balance in the Bank in a sum of Rs. 2,10,712. Therefore, the

assessing officer has virtually accepted the investment amount in a sum of Rs. 5,30,712 in the assessment year 1993-94, therefore, nothing remained unexplained. The learned counsel for the assessee further argued that no proceedings were pending before the assessing officer at the time of referring the matter to the DVO for ascertaining the cost of construction of the building, therefore, reference was invalid and the DVO was not authorised to submit the report under the Income Tax Act. The learned counsel for the assessee relied upon the decision of Hon'ble Supreme Court in the matter of Smt. Amiya Bala Paul v. CIT : [2003]262ITR407(SC) . He has further argued that the assessing officer has not given any reasonable and sufficient opportunity to the assessee to produce the creditors before him. Therefore, no adverse presumption could be drawn against the assessee. The learned counsel for the assessee further argued that the assessing officer has issued invalid notice under section 147 of the Income Tax Act, therefore, the entire proceedings are illegal. He has also relied upon the decision of Punjab & Haryana High Court reported as Vipin Khanna v. CIT and argued that no notice under section 148 was given to the assessee with regard to the deposit in a sum of Rs. 50,000, therefore, no addition could be made on the second issue with regard to unexplained deposit of Rs. 50,000.

9. We have considered the submissions of the learned counsel for the assessee, the details furnished in the paper book and the observations of the authorities below and the case laws referred to above.

10. It is admitted fact that the assessee was not assessed to income-tax before initiation of the proceedings under section 147 of the Income Tax Act. The assessee was not filing any return of income. It is also admitted fact that the Income Tax Inspector vide his report dated 27-3-1998 reported the matter of construction of the building in question to the assessing officer. The assessing officer vide his reference dated 15-3-1999 in pursuance of the report of the ITI referred the matter to the DVO for valuation of the construction of the building. The DVO submitted his report about the cost of construction of the building vide his report dated 25-11-1999. The assessing officer recorded reasons for initiating the proceedings under section 147 of the Income Tax Act on dated 25-1-2001 and after getting approval issued notice under section 148 dated 22-2- 2001 to the

assessee and the assessee filed the return of income thereafter. These dates and facts clearly made out that the assessing officer referred the matter to the DVO when no proceedings under the Income Tax Act were pending against the assessee before him. Therefore, the question arises whether the assessing officer was competent to refer the matter to the DVO when no proceedings were pending before him against the assessee.

10A. The Hon'ble Supreme Court in the matter of Smt. Amiya Bala Paul (supra) held :

'That the power of enquiry granted to an assessing officer under sections 133(6) and 142(2) does not include a power to refer the matter to the Valuation Officer for any enquiry by him.'

The Hon'ble Supreme Court further held that

'It is not open to a Valuation Officer to act in his capacity as Valuation Officer otherwise than in discharge of his statutory functions. He cannot be called upon nor would he have jurisdiction to give a report to the assessing officer under the Income Tax Act, except when a reference is made under and in terms of section 55A or the Competent authority under section 269L.'

11. The Mumbai Bench of the Tribunal in the matter of Smt. Saranga Agarwal (SOT-307) Mumbai held :

'Section 147 of the Income Tax Act, 1961-Income escaping assessment-position prior to 1-4-1989-Assessment year 1986-87 Assessing officer made reference to DVO subsequent to completion of assessment and reopened assessment on basis of DVO's report-Whether valuation report is only an opinion of valuer and neither it amounts to 'information' nor can form a ground for reason to believe that assessee had failed to disclose his income fully and truly-Held, yes-whether reopening of assessment was invalid and hence liable to be cancelled-Held, yes.

12. Jodhpur Bench of the Tribunal in the matter of Vijay Kurnar (supra) held :

'Reassessment under section 147(b)-Information-Valuation report of DVO Reference under section 131(1)(d) can be made to DVO only while trying a suit and not in a completed suit-assessing officer was, therefore, not authorised to make such reference when the assessments were already completed-Further, report of DVO was just an opinion and could not be used by the assessing officer as information for reopening the assessment-Commissioner (Appeals) rightly cancelled the reassessments.'

13. Nagpur Bench of the Tribunal in the matter of Dr. Arjun D. Bharat v. Income Tax Officer held :

'Power to issue commission- condition precedent for exercise of power under section 131(1)-Assessment proceedings must be pending.'

14. We had no an occasion to deal with the same issue in the matter of Income Tax Officer v. East West Trading Corporation ITA Nos. 750 to 753/1999, which we have decided vide our order dated 27-8-2003, and held :

'Considering the above judgment and facts of the case involved in all these appeals, would prove specifically that the assessing officer made the reference to DVO after the completion of the assessment. No proceedings were pending before the assessing officer in all the assessment years and as such the assessing officer was not legally justified to send the reference to the DVO calling for the estimate of the cost of construction and as such the assessing officer was not justified in reopening the assessment under section 147/148 on such material.'

We accordingly dismiss the appeal of the revenue.

15. Now coming to the facts of this case, it is specifically established that no proceeding was pending before the assessing officer at the time of making reference to the DVO. Even otherwise, after the decision of the Hon'ble Supreme Court no reference could be made to the DVO except what is provided under section 55A or section 269L of the Income Tax Act. Therefore, the assessing officer was not justified in making a reference to the DVO.

16. Section 147 of the Income Tax Act. provides

'If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may subject to provisions of sections 148 to 153 assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section or re-compute the loss or the depreciation allowance or any other allowance as the case may be, for the assessment year concerned.'

At the most, the report of the DVO was merely his opinion to the assessing officer, but after the decision of the Hon'ble Supreme Court in the matter of Smt. Amiya Bala Paul (supra), even no reference could be made to the DVO to assess the cost of construction as is done by the Assessing officer in this case. Even proceedings were pending before the assessing officer under the Income Tax Act at that time, therefore, the reference to the DVO itself was bad in law. What the AID could not do under the Income Tax Act, cannot by any stretch of imagination be termed as 'the assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year.' The assessing officer in the reasons given for the reopening of the assessee/reassessment has only mentioned the report of the DVO, dated 25-11-1999. The assessing officer was thus, influenced by the report of the DVO, dated 25-11-1999 and was not having any other material to justify the reasons for reopening of the assessment or for reassessment. The only material available for initiating the proceedings under section 147 had been the report dated 25-11-1999 of the DVO. The very basis for initiating proceedings under section 147 of the Income Tax Act for assessment/reassessment was, therefore, invalid and unfounded opinion of the DVO, which he was not authorised to do so. Therefore, the very basis of initiating proceedings under section 147 was not in accordance with law. Thus, the report of the DVO cannot form a valid ground for reason to believe that the assessee has failed to disclose her income fully and truly. The assessment order, therefore, suffers from inherent illegalities and is liable to be quashed on these reasons. However, we have considered more facts in this case and found that the Competent Authority/City Magistrate issued notice dated 8-2-1992 to the assessee to stop construction in respect of the property in question as the assessee was found to have been constructing illegal construction. The

assessee has shown the value of the assessment in a sum of Rs. 1,86,800. Even if the assessee has not given the proof of the investment of this amount in the assessment year 1992-93, but the fact remains that the assessee was found by the Competent authority to have been raising illegal construction in the property in question, therefore, it is established at least that the assessee had been raising construction in the assessment year 1992-93. The assessing officer was not justified to reject the claim of the assessee with regard to part investment in the assessment year 1992-93. The assessing officer was also not justified in treating the entire investment in the property in the assessment year 1993-94. We may also add here that the value shown by the DVO and the assessee is almost the same as the DVO has suggested the value of the construction of the property in a sum of Rs. 7,18,500 and the assessee has shown the value of the investment in a sum of Rs. 7,14,600. The difference is very small and is liable to be ignored. The assessing officer himself accepted that the assessee has obtained Bank loan in a sum of Rs. 3,20,000 and the assessee was having other opening balance, therefore, the assessee had been able to prove her contention that at least Rs. 6 lakhs was invested in the assessment year 1993-94. As far as the creditors are concerned, the counsel for the assessee has filed copy of the order-sheet entries. It shows that the assessing officer first time issued notice under section 131 of the Income Tax Act to the creditors for examination on 13-3-2002 and the assessment order is passed on 30-3-2002. Therefore, it appears that no proper opportunity was given to the assessee to produce the creditors for examination. Considering the above discussion and the authorities referred to above, we are of the considered view that the assessing officer referred the matter to the DVO for valuation of the cost of construction of the building when no proceeding was pending under the Income Tax Act against the assessee and that the assessing officer was not authorised to make any reference to the DVO. The only reference could be made for the purpose of working out the capital gain as is held by the Hon'ble Supreme Court in the case of Smt. Amiya Bala Paul (supra). Therefore, the entire proceedings are vitiated and are liable to be quashed. Accordingly, we set aside the orders of the authorities below on issue No. 1 and quash the assessment order in respect of ground Nos. 1 to 8 of the appeal of the assessee.

17. On the second issue, which is so raised in ground No. 9, the assessing officer has made addition of Rs. 50,000 being unexplained deposit in Bank account No. 978. The learned counsel for the assessee argued that the proceedings under section 147 were initiated mainly on account of reference made to the DVO for valuation of construction of building. Therefore, no other addition could be made. He has referred to the decision of Hon'ble Punjab & Haryana High Court in the matter of Vipin Khanna v. CIT (supra). We do not agree with the submissions of the learned counsel for the assessee. Section 147 of the Income Tax Act, which is reproduced above, clearly authorised the assessing officer to make assessment/reassessment of such escaped income and also any other income chargeable to tax, which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section. The language of section 147 is very specific on this issue. The assessing officer in this case found the unexplained investment in the Bank account No. 978 in a sum of Rs. 50,000 on 26-6-1992, of which the nature and source was not furnished by the assessee before the assessing officer.

This date clearly falls in the financial year relevant to the assessment year 1993-94 (under appeal). Therefore, the assessing officer was justified in making the addition on this issue. The Hon'ble Supreme Court in the matter of V. Jagan Mohan Rao & Ors. v. CIT (1970) 75 ITR 373 (SC) held :

'Therefore, once assessment is reopened by issuing a notice under sub-section (2) of section 22 the previous underassessment is set aside and the whole assessment proceedings start afresh. Once valid proceedings are started under section 34(1)(b) the Income Tax Officer not only had the jurisdiction but it was his duty to levy tax on the entire income that had escaped assessment during that year.'

18. We may again revert back to the decision of the Hon'ble Punjab & Haryana High Court as is referred by the learned counsel for the assessee in the matter of Vipin Khanna (supra). The Hon'ble High Court, while concluding the judgment has specifically made the clarification which we would like to reproduce :

'For the sake of clarification, we may repeat that nothing observed by us in this case would debar the assessing officer to bring to tax any other item of income which may have escaped assessment and which comes to his notice during the course of proceedings under section 147 of the Act.'

The clarification of the Hon'ble High Court in the above judgment is very specific and would negate the claim of the counsel for the assessee. Considering the above discussion we are of the view that the submissions of the learned counsel for the assessee have no force. The same are accordingly rejected. However, considering our order on first issue, in which we have held that the entire assessment order is vitiated and is bad in law, as the assessing officer relied upon such material in the form of report of the DVO which is against the provisions of law. Therefore, the entire assessment proceedings are vitiated. Proceedings under section 147 of the Income Tax Act were initiated mainly on the basis of report of the AVO on reference made by the assessing officer. However, the assessing officer was not legally authorised to make the reference as held above. Therefore, initiation of the proceedings under section 147 of the Income Tax Act on such material itself was bad in law, which vitiated the entire assessment proceedings. When initiation of the proceeding itself was bad in law, we cannot sustain the findings of the or authorities below on such illegally initiated proceedings. Therefore, such initiation of proceedings under section 147 would also vitiate the remaining proceedings on other issues, which were noticed by the assessing officer during the proceedings under section 147 of the Income Tax Act and made the addition. Therefore, the entire assessment order is held to be bad in law and is liable to be set aside and quashed in respect of all the additions made in the assessment order by the assessing officer. Accordingly, the addition made on this issue is also deleted. No other issue is argued or pressed. The remaining grounds are consequential in nature. Since the assessment is cancelled, therefore, those grounds do not require any adjudication.

19. As a result, the orders of, the authorities below are set aside and quashed. The appeal of the assessee is accordingly allowed.