

B.D.A. Ltd. Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Sep-29-1997

Reported in : (1998)65ITD501(Mum.)

Appellant : B.D.A. Ltd.

Respondent : Assistant Commissioner of

Judgement :

1. This first appeal arises out of an assessment made under section 158BC of the Income-tax Act falling under Chapter XIV-B thereof, on the assessee, which is a company engaged in liquor trade, pursuant to a search made under section 132 of the Act on 2-8-1995.

2. Various grounds have been taken in the memorandum of appeal, but the first ground, which goes to the root of the matter, is that the "undisclosed income for the block period could only be computed by setting off the loss incurred in any of the years falling in the block period against the profit for the other years". Arguments were addressed elaborately on this point and it was agreed by both sides that if the ground is to be accepted then there would be no need to decide the merits of the various additions made in the block assessment at this stage. Since we also felt so, we heard arguments only in respect of this ground.

3. The block period consists of the assessment years 1986-87 to 1995-96 (10 years) and the period from 1-4-95 to 2-8-95, the date of search.

The details of the income returned, profit or loss assessed for the different previous years, etc., are as below :-

year	returned	assessed	(Rs.)
(Rs.)			
1986-87	N.A.	N.A.	1987-88
N.A.	N.A.	N.A.	1988-89
N.A.	N.A.	N.A.	1989-90
Loss 11,62,679	Loss 11,62,679	1990-91	85,360
85,360	85,360	1991-92	39,01,035
52,93,894	1992-93	Loss 5,36,62,350	6,18,60,079
1993-94	Loss 3,35,15,530	Loss 2,74,19,057	1994-95
Loss 1,81,42,420	Loss 1,39,09,732	1995-96	Loss 2,74,20,857
Loss 3,77,27,460	Loss 2,74,20,857		

The Assessing Officer has raised a demand on the assessee on the basis of the income assessed in respect of the assessment years 1990-91, 1991-92 and 1992-93. The contention of the assessee is that the losses assessed in respect of the assessment years 1989-90, 1993-94, 1994-95 and 1995-96 are to be adjusted against the aforesaid income and if they are so adjusted, there would be a net loss of Rs. 26,72,992 for the block period and therefore there can be no tax demand. This, in short, is the first ground taken by the assessee and which calls for examination.

4. The learned counsel for the assessee took us through the provisions of Chapter XIV-B and the Circular No. 717, dated 14-8-1995 issued by the CBDT (215 ITR St. (70) explaining the special procedure for assessment in search cases. He highlighted the fact that in respect of search cases, the block period has been treated as one unit though it consists of ten previous years and the period up to the date of search, and contended that it is not permissible to tax only the income earned by the assessee during the block period without setting off the losses suffered during the same period. He drew attention to the provisions of section 158BB and pointed out that it provides for aggregation of the income or loss of each previous year comprised in the block period.

Relying on the provisions of the Explanation (a) to section 158BB(1), he submitted that they made it clear that only brought forward losses of the past years under Chapter VI and unabsorbed depreciation under section 32(2) were to be excluded while aggregating the total income or loss of each previous year comprised in the

block period but set-off of the loss suffered in any of the previous years comprised in the block period against the income assessed in the other previous years comprised in the same block period was not prohibited, either expressly or by implication. He relied on sub-section (4) of section 158BB in support of this submission, which according to him, made the position beyond doubt. He further contended that as per section 158BA(2), the tax is to be charged on the undisclosed income of the entire block period taking the same as one unit of assessment and it is not as if the losses in respect of any of the assessment years included in the block period have to be ignored.

5. Mr. Sudhir Chandra, the learned senior departmental representative, raised two main points. He first asked the question whether it is at all possible to imagine that the object of the search and the provisions relating to the assessment of search cases could be to arrive at a net loss for the block period. He submitted that the whole exercise is to unearth the undisclosed income of the assessee and it would be paradoxical to make a search and then arrive at a net loss in the assessment. His second point was that in any event the losses cannot be set off in the manner claimed by the assessee because of the clear prohibition contained in clause (c) of sub-section (1) of section 158BB. He relied on the observations at page 2 of the assessment order in this regard.

6. Chapter XIV-B, consisting of section 158B to 158BH, was inserted by the Finance Act, 1995 with effect from 1-7-1995. It provided for a "special procedure for assessment of search cases", where search action has been initiated after 30-6-1995. Section 158BA(1) provides that notwithstanding anything contained in any other provisions of the Income-tax Act, in the case of an assessee in whose case action for search has been taken after 30-6-1995, then the Assessing Officer "shall proceed to assess the undisclosed income in accordance with the provisions of this Chapter". Sub-section (2) provides for charging of tax in respect of the undisclosed income of the block period at the rate prescribed by section 113, uniformly irrespective of the year or years to which the income is referable and irrespective of the fact whether the regular assessment for that year or those year was pending or not. Under sub-section (3), an assessee could prove that the income in question relates to a previous year which has not ended or to a previous

year in respect of which the time to file a return under section 139(1) has not expired, and such income would be excluded from the block period. Section 158BB provides for the "computation of the undisclosed income of the block period". The words "undisclosed income" and "block period" are defined in section 158B. Section 158BB, which provides for the computation of the undisclosed income of the block period, is reproduced below : "158BB. (1) The undisclosed income of the block period shall be the aggregate of the total income of the previous year falling within the block period computed, in accordance with the provisions of Chapter IV, on the basis of evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with Assessing Officer, as reduced by the aggregate of the total income, or as the case may be, as increased by the aggregate of the losses of such previous years, determined, - (a) where assessments under section 143 or section 144 or section 147 have been concluded, on the basis of such assessments; (b) where returns of income have been filed under section 139 or section 147 but assessments have not been made till the date of search or requisition, on the basis of the income disclosed in such returns; (c) where the due date for filing a return of income has expired but no return of income has been filed, as nil; (d) where the previous year has not ended or the date of filing the return of income under sub-section (1) of section 139 has not expired, on the basis of entries relating to such income or transactions as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition relating to such previous years; (e) where any order of settlement has been made under sub-section (4) of section 245D, on the basis of such order; (f) where an assessment of undisclosed income had been made earlier under clause (c) of section 158BC, on the basis of such assessment.

Explanation. - For the purposes of determination of undisclosed income, - (a) the total income or loss of each previous year shall, for the purpose of aggregation, be taken as the total income or loss computed in accordance with the provisions of Chapter IV without giving effect to set off of brought forward losses under Chapter IV or unabsorbed depreciation under sub-section (2) of section 32; (b) of a firm, returned income and total income assessed for each of the previous years falling within the block period shall be the income determined before allowing deduction

of salary, interest, commission, bonus or remuneration by whatever name called : Provided that undisclosed income of the firm so determined shall not be chargeable to tax in the hands of the partners, whether on allocation or on account of enhancement; (c) assessment under section 143 includes determination of income under sub-section (1) or sub-section (1B) of section 143.

(2) In computing the undisclosed income of the block period, the provisions of sections 68, 69, 69A, 69B and 69C shall, so far as may be, apply and references to 'financial year' in those sections shall be construed as references to the relevant previous year falling in the block period including the previous year ending with the date of search or of the requisition.

(3) The burden of proving to the satisfaction of the Assessing Officer that any undisclosed income had already been disclosed in any return of income filed by the assessee before the commencement of search or of the requisition, as the case may be, shall be on the assessee.

(4) For the purpose of assessment under this Chapter, losses brought forward from the previous year under Chapter VI or unabsorbed depreciation under sub-section (2) of section 32 shall not be set off against the undisclosed income determined in the block assessment under this Chapter, but may be carried forward for being set off in the regular assessments." The procedure for block assessment is prescribed in section 158BC. It states that the Assessing Officer shall determine the undisclosed income in the manner provided by section 158BB and in doing so, the provisions of section 142, sub-sections (2) and (3) of section 143 and section 144 shall, so far as may be, apply. It further states that on determination of the undisclosed income of the block period accordance with this Chapter, the Assessing Officer shall pass an order of assessment and determine the tax payable by the assessee on the basis of such assessment. Section 158BG, as it stood at the material time, states that an assessment under this Chapter shall be made by an officer of the rank of Deputy Commissioner of Income-tax and that the same shall be approved by the Commissioner of Income-tax. Section 158BH clarifies that save as otherwise provided in this Chapter, all other provisions of the Income-tax Act shall apply to an assessment made under

the Chapter.

7. In our opinion, there is no prohibition against the losses of some of the previous years comprised in the block period being set off against the income of the other years comprised in the block period.

Even on first principles, it is not possible to countenance the argument of the revenue that the result of the computation of a particular period comprised in the block period has to be ignored, if such computation shows a loss. It would be the same thing as saying that in respect of a normal previous year consisting of a period of twelve months, the result of computation for the first period of six months would be ignored, if it shows a loss, and the income computed in respect of the rest of the six months only would be taken. Such an argument, if advanced in respect of an assessment of an assessee whose case is not covered by Chapter XIV-B, cannot be accepted, as it is a well-accepted and recognised position that the computation must be made with reference to the whole period of twelve months comprised in the previous year and the tax is payable only if such computation shows a positive income. Losses incurred during the previous year cannot be ignored and this principle is in-built in the concept of an assessment under the Income-tax Act. The principle is that for the purpose of charging income-tax the various sources of income of an assessee have got to be aggregated and the results of each source for the entire previous year have to be reckoned and merely because the first few months of the previous year show a positive income and the rest of the period shows a negative income, the result of the later period cannot be ignored. The income-tax law does not permit this. In *CIT v. National Syndicate* (1961) 41 ITR 225, the Supreme Court held that "if the profits or gains of a business for a particular year are to be taxed they must be computed for the whole year taking into account losses incurred during the same year" (at page 234). What is true of the assessment of an assessee who has not been brought under section 132 and in whose case Chapter XIV-B does not apply is also true in respect of an assessee who has been searched and whose assessment is to be made under Chapter XIV-B. There is no difference between the two types of cases so far as the application of the principle is concerned. In the former, the previous year is the period with reference to which the income is to be ascertained, as

defined in section 3 of the Act; in the latter, it is the "block period" with reference to which the income is to be ascertained, and the block period consists of previous years relevant to ten assessment years preceding the previous year in which the search took place and includes the further period up to the date of commencement of the search. But the undisclosed income is to be computed with reference to the entire block period and it is the total undisclosed income relating to the block period that is charged to income-tax under sub-section (2) of section 158BA. It follows that the results of the different previous years comprised in the block period will have to be aggregated in order to find out the "total undisclosed income relating to the block period". In other words, the block period is to be treated as the previous year and so it follows that the losses suffered during certain parts or periods of the block period have to be set off or adjusted against the income earned during the remaining parts or periods thereof.

8. We now proceed to examine whether the principle of aggregation has been given effect to in Chapter XIV-B and if so, to what extent.

Section 158BB, which we have extracted earlier, gives effect to the principle of aggregation. To paraphrase sub-section (1), it says that the undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period.

The undisclosed income is to be computed in accordance with Chapter IV of the Act (sections 14 to 59). Explanation (a) says further that for the purposes of determination of the undisclosed income the total income or loss of each previous year shall, for the purpose of aggregation, be taken as the total income or loss computed in accordance with the provisions of Chapter IV without giving effect to set off of brought forward losses under Chapter VI or unabsorbed depreciation under section 32(2). Reading sub-section (1) in conjunction with clause (a) of the Explanation, it is clear that while aggregating the results of the different previous years falling within the block period, the losses have also to be taken into account. It may very well happen that while determining the result of a particular previous year falling within the block period on the basis of the evidence found as a result of the search or the documents or such other materials as are available with the

Assessing Officer, he may find that the computation of the income as per Chapter IV (sections 14 to 59) yields a negative result, i.e., a loss. The possibility of this position has been taken into account by clause (a) of the Explanation.

It is significant that having done so, the Explanation does not further say that if the computation results in a loss it should be ignored. On the contrary, it proceeds to say that the loss for that previous year shall be considered for aggregation. It further clarifies that only the brought forward losses under Chapter VI and the unabsorbed depreciation under section 32(2) cannot be adjusted against the income of a previous year while resorting to aggregation. Mr. Sudhir Chandra says that clause (a) of the Explanation prohibits set off of brought forward losses under Chapter VI or unabsorbed depreciation, and therefore the assessee's claim is untenable. We do not think so. Sub-section (1) mandates the computation of the undisclosed income of the block period to be the aggregate of the total income of the previous years falling within the block period computed in accordance with the provisions of Chapter IV on the basis of the evidence materials found at the time of the search. As already seen, such computation may yield in a negative income (i.e., loss) for a particular previous year. That is why Explanation (a) says that such losses are also to be aggregated while determining the aggregate undisclosed income. One reason for excluding the brought forward losses and unabsorbed depreciation from being set off against the undisclosed income computed in accordance with the provisions of Chapter IV may be to get over the decision of the Supreme Court in *Cambay Electric Supply Industrial Ltd. v. CIT* (1978) 113 ITR 84 wherein it has been held that section 72, which deals with the carry forward and set off of business loss, has a direct impact upon the computation of the income under the head "profits and gains of business or profession". It has been clearly held that it is not possible to accept the view that section 72 has no bearing on, or is unconnected with, the computation of the total income of an assessee under the above head. Relying on this decision, an assessee whose case is covered by the provisions of Chapter XIV-B may attempt to reduce the undisclosed income by seeking to set off the past business losses, which have been determined in the regular assessments made earlier for the years falling within the block period and which have been permitted to be carried forward to the future years. The Legislature might have thought that such an attempt cannot be

allowed to succeed and that the block assessment under Chapter XIV-B would have to be made untrammelled by what happened in the earlier regular assessments. The other reason why the brought forward losses under Chapter VI are excluded is because the block assessment is confined only to the determination of the undisclosed income of the block period, whereas losses to be carried forward to future years may have been determined in the regular assessment made prior to the date of search under the normal provisions of the Act and in the very nature of things such losses, determined and allowed to be carried forward, have no place in the context of a block assessment framed after the search. The two streams of assessment are kept apart and one is not projected into the other. The position is made clear beyond any doubt in sub-section (4) of section 158BB. It says that losses brought forward from the earlier years under Chapter VI or unabsorbed depreciation under section 32(2) will not be set off against the undisclosed income determined in the block assessment under Chapter XIV-B, but will be carried forward for being set off in the regular assessments. Thus, reading clause (a) of the Explanation to sub-section (1) in harmony with the said sub-section and sub-section (4), we are of the opinion that the prohibition against setting off the losses against the undisclosed income of the block period applies only to losses under Chapter VI (section 72) and unabsorbed depreciation determined and permitted to be carried forward in regular assessments and does not apply to adjustment of the loss computed in respect of a particular previous year falling within the block period against the income computed in respect of the other years falling within the block period. Such adjustment or set-off, in fact, cannot be considered to fall under the category of "brought forward losses under Chapter VI" at all. In this respect, we are of the view that both clause (a) of the Explanation to sub-section (1) of section 158BB and sub-section (4) thereof convey the same idea. We are fortified in this by the view expressed by the Board in its circular cited supra at page 98 (of 215 ITR St.) to the effect that "where in the regular assessment proceedings set-off of loss or unabsorbed depreciation has been allowed in the regular assessment proceedings, the same shall be ignored for determining the undisclosed income for the block period". Thus the object of the provisions appears to be to ensure that the assessee does not walk away with double set-off of the brought forward losses

under Chapter VI, once in the regular assessments and again in the block assessment. Nothing more can be read into the provisions.

9. It may be recalled that Mr. Sudhir Chandra had argued that section 158BB(1)(c) proved the assessee's claim untenable. The argument cannot be given effect to. The clause does not speak of a return claiming loss. It only says that in a case where the due date for filing a return of income has expired, but no return of income has been filed, there will be no reduction of any amount for determining the undisclosed income. If the assessee has already filed a return showing positive income in respect of a previous year or years falling within the block period, the income declared in such return or returns will be reduced from the aggregate undisclosed income, where assessments on such return or returns have not been made till the date of search. This is provided in clause (b). Clause (c) says where no such return has been filed before the due date, no reduction will be possible. The provisions are intended to eliminate double-taxation of the same income. Similarly double allowance of the same loss is also avoided by these provisions. Clause (c) does not admit of the argument advanced by Mr. Sudhir Chandra to the effect that the returns for the assessment years 1989-90, 1993-94, 1994-95 and 1995-96, for which losses have been computed in the block assessment, not having been filed till the date of search, the losses computed for those years cannot be set off against the income computed in respect of the other years falling within the block period.

10. The answer to Mr. Sudhir Chandra's poser whether the cumbersome exercise of a search is undertaken merely to compute the assessee's losses for being set-off against the undisclosed income is that section 158BB itself accepts the possibility of such a situation by referring to the computation of a loss in respect of previous year falling within the block period, on the basis of the evidence or materials found during the search and as per the provisions of Chapter IV. That apart, one of objects of a search is to obtain evidence regarding the true income of an assessee and if such evidence points to a loss, the computation being made under the statute itself, there can be no escape from the conclusion that the loss is to be set off, howsoever reluctant one may be to do so.

11. To sum up, we hold that for the reasons stated above, the assessee's claim is accepted and the losses for the assessment years 1989-90, 1993-94, 1994-95 and 1995-96, as computed in the block assessment, are directed to be set off against the undisclosed income computed in respect of the other previous years falling within the block period.

12. As already stated in the beginning of this order, we have not heard arguments on the merits of the other grounds taken by the assessee. The appeal is therefore allowed to the extent indicated above.

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