

ito Vs. Chandra Kant N. Seth

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Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Apr-30-2004

Reported in : (2004)89TTJ(Kol.)417

Appellant : ito

Respondent : Chandra Kant N. Seth

Judgement :

This appeal has been filed by the revenue against the order dated 28th April, 2003, passed by the Commissioner (Appeals) in the matter of an assessment made under section 143(3) for the assessment year 1985-86.

All the grounds of appeal raised by the revenue revolve round the issue relating to the addition of Rs. 1, 11,46,448 as income from undisclosed sources.

Material facts, in brief, related to the issue in question, as borne out from the orders of the authorities below, may be summarised as under: A search was conducted in the business premises of the assessee, one Shri D. Sengupta, in the godowns of M/s Orn Development Ltd. and PTR Siding, Shalimar, Howrah on 16-5-1985. It was also found that Shri D.Sengupta was importing steel and steel materials. In the original first assessment the name of Shri D. Sengupta as that of the present assessee and had made the addition on that count.

The first assessment order completed under section 144 on 28-3-1988 and making the addition of Rs. 1,13,53,285 (stock Rs. 90 lakhs plus Rs. 23,53,825 of

Shri D. Sengupta considered to be that of the present assessee), was set aside by the Commissioner (Appeals) vide order dated 16-3-1990, with the following direction : "Before making any inclusion in the total income of the assessee as income from undisclosed sources on account of the materials found on the date of search, i.e., 16-5-1985 mentioned in the impugned assessment order, the assessing officer must prove by cogent piece of material or evidence on record that the assessee Shri Chandrakant N.Seth was actually the owner of the materials in question at the relevant time. In case Sri D. Sengupta is considered to be a benamidar of Shri Chandrakant N. Seth in the instant case, then such benami transaction shall be established by bringing materials and/or evidences on record by the assessing officer to the effect that Shri D. Sengupta imported such materials out of funds provided by Shri Chandrakant N.Seth, the appellant in the instant case.

The assessing officer shall determine afresh the value of the materials in question with reference to the actual cost incurred by Sri D.Sengupta for importing such materials. The assessee shall be given opportunity to produce all necessary documents and evidences to establish the actual cost of materials as mentioned above. The assessing officer while making such fresh assessment shall give reasonable opportunity of hearing to the assessee in consonance with the rules of natural justice. " A fresh second assessment order was than completed by the assessing officer under sections 143(3)/251 on 26-3-1992 making an addition of Rs. 23,53,825 by holding the assessee as benamidar of Sri D. Sengupta.

This assessment was also set aside by the Commissioner (Appeals) vide order dated 14-2-1997 by observing as under "Much time has been consumed but nothing tangible was done. Yet it would be a bit premature to say that there did not exist any case against the assessee. If the assessment against the assessee is weak it is because of the omission on the part of the assessing officer to collect and deal with the documentary evidence about which adequate mention was made in the investigation report. We are, therefore, duty bound to set aside the assessment, even though for the second time, directing the assessing officer to frame a fresh assessment predominantly on the basis of documentary evidence. If the oral testimony would become necessary it should preferably be by way of

seeking comments/clarification on the documents and not for a kind of ecclesiastical confession. Incidentally we may mention that the present assessing officer, Assistant Commissioner, Investigation Circle 2(1) made only one appearance on 19-8-1996 and did not appear thereafter in spite of the requisition placed upon him. The order sheet entry dated 19-8-1996, based upon the information given by him is reproduced below : "Assistant Commissioner, Investigation 12(1) is present. The case discussed. It appears there were two raids one on 6-5-1985 as stated in the order of assessment and again on 9-8-1988. We are here concerned with 1985 search. So all the relevant evidence of 1985 search to be produced. Assistant Commissioner, however, was informed, on the basis of 1988 ADI's report that the departmental enquiry report by the Federal bank Ltd. may be crucial evidence. Assistant Commissioner to appear in the 4th week of August, say on 27th A.N. " For the reasons discussed above, the assessment is set aside for being done de novo on grant of opportunity to the appellant." Thereafter, for a third time, an assessment under sections 143(3)/251 was made on 30th March, 1999, making an addition of Rs. 23,53,824 being value of import materials/goods, by reiterating the same reasons as were given in the first two assessment orders. This assessment was given set aside by the Commissioner (Appeals) vide his order dated 17th Nov., 2000, by making the observations as under: "I am satisfied that the directives of CIT(SA)-Central-II, in order dated 14-2-1997, in establishing benami had not been observed by the assessing officer and obviously further investigation was called for in this regard. In view of the foregoing, the order is set aside on this point with a direction to do it afresh in accordance with law." A fresh assessment order for the fourth time was, therefore, made on 27-3-2002 making an addition of Rs. 1,11,46,448. The assessing officer addressed the issue in the following words : "The major issue involved in this proceedings is whether Sri D.Sengupta is a benamidar of the assessee, Shri Chandrakant Seth. Perusal of the assessment orders as well as details filed by the assessee reveal the following : (1) Statements, of Shri D. Sengupta were recorded under section 132(4) on 24-4-1985 by the Rev. Int. Authority, and again under section 132(4) by the Addl. Director of IT (Inv.),,Calcutta. On 16-5-1985, and again by the assessing officer of Shri Sengupta on 18-3-1988, under section 131 and again by the Commissioner (Appeals)-VIII, Calcutta under section 131 while

hearing the appeal in the case of the assessee Shri C.K. Seth.

(2) In all the above statements Shri D. Sengupta repeatedly asserted that (f) Shri Sengupta used to get 1 per cent of CIF value of imports for such lending of name; (3) Statement of Shri Chandrakant Seth was recorded under section 131 on 17th March, 1988 by the assessing officer of Shri D. Sengupta and under section 131 on 4th March, 1992 by the then assessing officer of Shri Seth.

(b) Import licence-holders contacted him to arrange importation and he did the same in consultation with Shri D. Sengupta as Shri Sengupta was enjoying facilities (banking facilities) to operate the licences; (e) Shri Seth had been charged under Customs Act, 1962, for violation of the said Act.

In view of the above it is conclusively proved that Shri D. Sengupta was a benamidar of Shri Chandrakant Seth. As Shri Seth had several cases pending against him being charged by the customs authority and revenue intelligence authority, it was safer for him to carry on the business in the name of a person like Shri D. Sengupta. It is also clear from the above that the control and possession of the imported materials in the name of Shri D. Sengupta as well as operation of bank accounts solely rested in the control of Shri Seth and he was the actual beneficiary of the transactions in respect of the materials store and inventorised during search on 16-5-1985.

However, Shri D. Sengupta on being cross-examined by the Authorised Representative of Shri Seth before the Commissioner (Appeals)-VIII, Calcutta, during deposition under section 131 confirmed that he could not be called a benamidar of Shri Seth as per section 2(a) of the Benami Transactions (Prohibition) Act. This was against a specific query by the said Authorised Representative as to whether Shri Sengupta could be called a benamidar of Shri Seth as per section 2(a) of the Benami Transactions (Prohibition) Act. Shri Sengupta had nowhere and never again or before retracted his statement that he does not know abc of the business; he used to sign blank cheques and hand them over to Shri C.K. Seth; Shri C.K. Seth obtained letter of authority in his name; the control of the business was with Shri C.K. Seth. Moreover, Shri Sengupta was confronted with Benami Transactions (Prohibition) Act, 1988, whereas the period

under consideration relates to assessment year 1985-86, hence the provisions of the said Act of 1988 do not lie (apply) in the instant case. Further, statement given by a person before any civil authority on oath bears a strong evidentiary value as laid down under section 164 of the Cr.PC and simply retracting it does not reduce the worth of the statement made on oath as a piece of evidence.

Hence, Shri D. Sengupta is considered benamidar of the assessee, Shri Chandrakant Seth.

On the date of search, i.e., on 16-5-1985, the following stocks were found in the godown mentioned below in the name of Shri D. Sengupta and Shri C.K. Seth as under: Goods kept in the godown of M/s Orn Development Ltd. in the name of Shri D. Sengupta as stated by Sri Devendra Jhunjhunwalla, an executive of the said Ltd. Co. to belong to Shri C.K. Seth, stocks found was valued at Rs. 78,15,133 as on 16.5.1985 Goods kept in 4/5, Chasadhoppa lane, Howrah, in the name of Shri D.Sengupta valued at In godown No. 9 & 13 belonging to Shri C.K. Seth goods found valued Rs. 8,32,550 + 2,64,881 respectively Out of the above stocks, in the absence of any evidence regarding the stock position as on 31-3-1985, his stock on that date has to be estimated which is done at Rs. 90 lakhs. Besides, it is gathered that the following goods were imported by Shri D. Sengupta and customs duty paid thereon as under All these investments are held to have come from undisclosed income of the assessee Shri C.K. Seth and, therefore, will be added to the total income under the head "other sources." The assessee again preferred an appeal before the Commissioner (Appeals), who by his impugned order dated 28-4-2003, deleted the addition.

The learned departmental Representative has submitted that the Commissioner (Appeals) has erred in deleting the addition made by the assessing officer. It was further submitted that the assessee was given reasonable opportunity to meet the case set up against him by the assessing officer. He further submitted that, in the light of the deposition made by Sri D. Sengupta and other circumstantial evidences, the assessing officer had rightly treated the assessee as the owner of the goods found in the course of search conducted on 16th May, 1985. He further submitted that the statement of Shri D. Sengupta to the effect that he was a

benamidar of Shri C.K. Seth, he did not know about the business, he used to sign blank cheques and hand them over to Shri C.K. Seth, Shri C.K. Seth obtained letter of authority in his name, the control of the business was with Shri C.K. Seth and Shri D. Sengupta used to get only 1 per cent of CIF value of imports for lending his name were sufficient enough to hold that Shri C.K. Seth was a benamidar of Shri D. Sengupta and as such the assessing officer was justified in including the income relating to the business standing in the name of Shri D. Sengupta in the hands of the present assessee and the Commissioner (Appeals) has wrongly deleted the addition. The learned departmental Representative has, in fact, virtually supported the reasons given by the assessing officer in his orders made from time to time.

The learned authorised representative has submitted that the assessing officer has not been able to discharge the burden that lay upon him to establish that the assessee was the real owner of the business standing in the name of Shri D. Sengupta by bringing cogent and sufficient evidences in support thereof. He further contended that the assessing officer has not discharged his burden through legal evidences of definite character. The assessee has been treated as a real owner of the business standing in the name of Shri D. Sengupta on mere suspicion and conjectures. The statement of Shri D. Sengupta given from time to time has not been considered in its entirety and totality. The assessing officer has further failed to take into account the documentary evidences filed before him in support of the sources of acquisition of goods found at the time of search. It was further contended that the assessing officer has failed to comply with the directions given by the Commissioner (Appeals) in his order dated 16th March, 1990 and also thereafter. He further contended that the income arising out of the business in question carried by Shri D. Sengupta has already been finally assessed in his hands and as such there is no reason to include the same amount in the total income of the present assessee. The ownership of the goods imported by Shri D. Sengupta rested with the licence-holders and neither the assessee nor Shri D. Sengupta could be held as owner of those goods in the light of the provisions contained in that behalf. The value of the goods estimated by the assessing officer was also not correct and justified and the same cannot be treated as income of the assessee from undisclosed source. There is no evidence on record to show and

establish that the assessee had made investment in acquisition of the goods found at the time of search, out of his undisclosed source. He further pointed out that the goods seized were ultimately unconditionally released on the basis of statement of Shri D. Sengupta in favour of the actual owner of the goods, and as such the goods found could not be treated as unexplained goods in the hands of the present assessee. It was also submitted that the addition of Rs. 90 lakhs had not arisen out of the Commissioner (Appeals)'s order directing the assessing officer to frame a fresh assessment order. Therefore, considering the said amount of Rs. 90 lakhs as undisclosed income in the hands of the assessee in the impugned assessment order was beyond the assessing officer's jurisdiction. He further contended that all the relevant documents and the papers collected by the assessing officer and used against this assessee has not been provided and supplied to the present assessee to rebut and explain the same. The statement of Shri D. Sengupta under section 132(4) on 24th April, 1985 was never supplied to the assessee.

In support of the contention that there was no material to hold the assessee as benamidar of Shri D. Sengupta, the learned counsel for the assessee has referred various decisions of the Apex Court of the land and other High Courts wherein it has been held that the onus to establish the benami transaction is on the person who asserts so. In short, the learned counsel for the assessee has reiterated all those submissions and contentions that were made before the Commissioner (Appeals) and are elaborately discussed in the order of the Commissioner (Appeals) to which he has drawn our attention.

We have heard both the parties and have gone through the orders of the authorities below. We have carefully perused the voluminous papers filed by the assessee. We have deliberated upon the judicial decisions cited at the Bar.

The whole controversy in the present case rests upon the issue as to whether the present assessee can be held as the real owner of the business carried on in the name of Shri D. Sengupta. In other words, the question arises for our consideration is as to whether Shri D. Sengupta can be held as benamidar of the present assessee and all benefits or interest arising from the business carried on

in the name of Shri D. Sengupta belonged to the present assessee. In this connection, we have to refer to the well settled principle laid down by the Courts time and again with regard to the benami transaction. In recent decision delivered on 29-11-2002 by the Hon'ble jurisdictional Calcutta High Court in Smt. Usha Bhar v. Sanat Kumar Bhar (2004) 135 Taxman 526 (Cal), after reviewing and relying on the propositions laid down by the Hon'ble Apex Court, it has been held as under : In a suit claiming a property as benami, there must be cogent and sufficient evidence to conclude that the apparent is not the real. In order to ascertain whether a particular sale is benami and the apparent purchaser is not the real owner, the burden lies on the person asserting to prove so. Such burden has to be strictly discharged through legal evidence of definite character. Such evidences either directly prove the fact of benami or establish circumstances unerringly and reasonably raising and inference of that fact. It is the intention of the parties, which is to be discovered. Very often such intention is shrouded in a thick veil. It is not possible to pierce the veil easily.

But such difficulties would not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him. The difficulty would not justify the acceptance of mere conjecture or surmise as a substitute for proof. The proof has to be weighed against a document prepared and executed showing the person expressly as purchaser or transferee. This follows the initial presumption in favour of the apparent state of affairs being the real state of affairs. However, the question is largely one of facts. For determining this question, no absolute formula could be evolved nor can a formula so evolved be uniformly applied in all situations. But in such circumstances, it is the probabilities and inferences, which are to be gathered in order to discover the relevant indicia. It is not sufficient to show circumstances, which might create suspicion. The court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. There have been various decisions by different High Courts, and the Supreme Court on these questions. By now, these propositions are well settled through those decisions. In order to determine whether a transaction was or is a benami one, the following guidelines may be followed : (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (6) the conduct of the parties concerned in dealing with the property after the

sale. Jayadayaal Poddar v. Mst. Bibi Hazra AIR, 1974 SC 171, Amit Mukherjee v. Smt. Bibhabati Dasi AIR 1979 Cal 344 and Krishnanand Agnihotri v. State of Madhya Pradesh AIR 1975 SC 796 for the above proposition.

8. On perusal of the said proposition laid down, it is clear that, to hold Sri D. Sengupta as benamidar of the assessee, there must be cogent and sufficient evidence to conclude that the apparent state of affairs being the business carried on in the name of Sri D. Sengupta is not real. The assessing officer has treated Sri D. Sengupta as benamidar of the present assessee on the basis of his deposition recorded on 24-4-1985, 16-5-1985, 18-3-1988 and 4-3-1992. No other documentary evidences were brought on record to establish the benamidar as alleged to by the assessing officer. We have gone through the statement of Shri D. Sengupta recorded on 16-5-1985, 18-3-1988, 19-7-1989 and 4-3-1992 and find the following results : Though in his deposition made on 16-5-1985 Shri D. Sengupta stated that he was a benamidar of the present assessee but in his statement given on 18-3-1988 he categorically stated that his deposition to the effect that the entire stock was owned by the present assessee was erroneous inasmuch as all the imported materials were imported in his name by the holders of the import licences and they were the real owners of the goods. He further stated in his deposition made on 18-3-1988 that he realised that his idea of treating the transaction as of benami was really erroneous in law and he prayed that it may be ignored. In his deposition recorded on 19-7-1989, he further reiterated that the present assessee had helped him to do his business. In his cross-examination on 19-7-1989, he further stated that he had done import business during the relevant period and no benarni transaction was involved in the present case. He further stated that the parties who gave letters of authority in his name had provided the funds for importing goods and after importing those goods, the goods were delivered to them who were the import licence holders. He further confirmed that retainership fee was given to the present assessee for looking after and managing his import business and for rendering the services in connection therewith. He further stated that whatever money was received from the import licence holders were deposited in his bank account and the payments for purchase of the goods were also made from that account. Looking to the statement of Shri D. Sengupta given from time to time in their entirety and totality,

the result of his statement is that the business of import of goods was being carried on by Sri D. Sengupta with the help of the licence given by the import business holders and that the funds provided by the licence holders who had given letter of authority in favour of Shri D. Sengupta and the goods after importing were delivered to the licence holders after charging certain commission and charges. The oral statement of Sri D. Sengupta from time to time no doubt raises doubt as to the ownership of the business being carried on by him but coupled with documentary evidence produced by the assessee it has not been conclusively established and proved by cogent and legal material that Sri D. Sengupta is the benamidar of the assessee. Various documents such as confirmation given by the licence holders, bank account maintained by Shri D. Sengupta, release of the goods by the authority in favour of actual owners goes to destroy the departmental case that the assessee is a benamidar of Sri D. Sengupta. The assessing officer has not been able to discharge the burden that lay upon him through legal evidence of definite character. The only evidence relied on by the assessing officer is the initial statement of Sri D. Sengupta. The statement of Sri D. Sengupta given initially that he was benamidar of the present assessee is not backed by or supported by documentary evidences or the surrounding circumstances. There is no evidence available on record which can directly prove the fact of benamidar as alleged by the assessing officer. The evidences available on record do not also establish the circumstances which can unerringly and reasonably raise an inference that Shri D. Sengupta is benamidar of the assessee. The necessary ingredients such as source, possession, motive, relationship between the parties, custody of the title and the conduct of the parties, to hold Shri D. Sengupta as benamidar of the assessee are not available or present in the present case inasmuch as the assessing officer has not been able to discharge its burden through legal evidence of definite character. The evidences with regard to the import of the goods on the strength of import licence provided by the licence holder and the evidences with regard to the source of money by the licence holder to Shri D. Sengupta are sufficient to hold that the present assessee is not real and the true owner of the goods found at the time of search. No nexus or link has been established by the assessing officer so as to conclusively say that Shri D. Sengupta was carrying on business for and on behalf of the present assessee and

the real owner was the present assessee and nobody else. We further find that there is no such evidence on record to show that the amounts deposited in the bank account controlled and managed by Shri D.Sengupta were, ever diverted to the bank account of the present assessee. After examining all the facts and circumstances of the case and the various documents and papers available on record in the form of a paper book filed by the assessee the following facts can be said to have emerged therefrom: (i) Sri D. Sengupta had actually imported the material in question as an agent of the holders of import licences and necessary funds required for such imports were provided by such holders of import licence's and not by the present assessee. The fact of importing the goods on the basis of import licence provided by import licencees and the fact of providing funds required for such imports were by holders of import licences are fully examined by the assessing officer and there is ample and satisfactory evidences on record to establish the same. The licence holders have also confirmed the same position.

(ii) The statement given by Sri D. Sengupta from time to time does not conclusively establish that Sri D. Sengupta was a benamidar of the present assessee. Here it may be noted that Sri D. Sengupta in order to avoid or shift his liability arising from the business transaction might have stated at the initial stage that he was a benamidar of Shri C1. Seth but that statement cannot be used against the present assessee unless fully supported and established by cogent, adequate and legal evidences.

(iii) The fact of receiving retainership fees by the assessee from Shri D. Sengupta has been admitted by Sri D. Sengupta in his deposition and the assessing officer has also admitted the same by including the retainership fees as income of the assessee while completing the impugned assessment order.

(iv) The goods imported and found at the time of search were ultimately released to the real owners and not to the present assessee or to Sri D. Sengupta implying thereby that the department has accepted the position that the imported goods were owned by the import licence holders.

(v) As directed by the Commissioner (Appeals) in his order dated 16th March, 1990, the assessing officer has not established the question of benamidar by

bringing cogent material or evidences on record to show that the present assessee was the actual owner of the goods in question at the relevant time and the goods were imported out of the funds provided by the present assessee. Though directed by the Commissioner (Appeals) from time to time, the assessing officer has not been able to discharge his burden that lay upon him by bringing sufficient materials and/or evidences on record in support of the assessing officer's conclusion that the present assessee was the owner of the goods in question and the funds were actually provided by the present assessee.

(vi) The assessing officer has not taken into account the statement of Sri D. Sengupta in his entirety and totality. Various statements given by Shri D. Sengupta from time to time and the statement given in the course of cross-examination by the assessee should have been taken into account and, if that would have been taken into account, it would be clear that Sri D. Sengupta had ultimately admitted that he was not benamidar of the assessee.

Considering the totality of the facts and circumstances of the case-and in the light of the directions and observations given by the first appellate authority from time to time we are of the considered view that there are no cogent and sufficient evidence on record to conclude that Shri D. Sengupta is not the real owner but the benamidar of the present assessee. We further hold that the assessing officer has not been able to discharge the burden that lay on him in ascertaining that Sri D. Sengupta is benamidar of the present assessee by bringing any cogent or sufficient evidences. We further hold that it is a case of mere suspicion but it is to be remembered that the suspicion cannot take a place of proof. We may further observe that the present assessment order has been freshly made in pursuance to the Commissioner (Appeals)'s order dated 17-11-2000 wherein the issue was only with regard to the addition of Rs. 23,53,824 as made by the assessing officer in the assessment made for the third time on 30-3-1999, which was the subject-matter of appeal before the Commissioner (Appeals) disposing the appeal vide his order dated 17-11-2000. On perusal of the assessing officer's order made for the 2nd time and 3rd time on 26-3-1992 and 30-3-1999 it is clear that only an addition of Rs. 23,53,824 was maintained by the assessing officer and the addition of Rs. 90 lakhs made in the first assessment order dated 28-3-1988 was left out. We are,

therefore, of the opinion that this addition of Rs. 90 lakhs is also not tenable to be made on this count also.

In the light of the discussions made above and considering the totality of the facts and circumstances of the case we are inclined to be in agreement with the conclusion arrived at by the Commissioner (Appeals) in deleting the addition of Rs. 1, 11,46,448 made by the assessing officer in the assessment made for the 4th time on 27th March, 2002.

The order of the Commissioner (Appeals) is, therefore, upheld.

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