

F. Ramesh and ors. Vs. Assistant Commissioner of Income

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Court : Income Tax Appellate Tribunal ITAT Chennai

Decided On : Sep-21-2004

Reported in : (2005)92TTJ(Chennai)760

Judge : S Mehrotra, M Singh

Appellant : F. Ramesh and ors.

Respondent : Assistant Commissioner of Income

Judgement :

1. These appeals by four different assesseees are directed against the different orders of the Asstt. CIT, Circle I(2), Salem, made under Section 143(3) r/w Section 158BC of the IT Act in the case of F.Ramesla, dt. 30th June, 1997, and under Section 143(3) r/w Section 158BD of the Act in the cases of Sri R. Kailash, Smt. Nisha R. and Smt.

R. Sangeetha, dt. 30th Sept., 1997, for the block period 1st April, 1986 to 20th June, 1996. Since common issues are involved in all these appeals, they are heard together and are being disposed of by this consolidated order, for the sake of convenience.

2. The first common issue in all the appeals is as regards to the admitted income of the assesseees assessed as undisclosed income by the AO. The briefly stated facts in these cases are that the assesseees have paid advance taxes in all the assessment years assessed by the AO and treated the income which falls under

the advance tax as undisclosed income while framing the block assessment. The assessees have filed the paper books which contain the challans of advance taxes for the relevant assessment years. A search was conducted on 20th June, 1996, in the premises of Mr. F. Ramesh (one of the assessees) and the returns of income for the respective assessment years by all the assessees were filed after the date of search, i.e., 20th June, 1997. The AO while framing the block assessments in all these cases, treated the income declared by the respective assessees as undisclosed income while framing the block assessments.

3. This being the first appeal, the learned counsel for the assessee argued the matter before us. On this basis he argued that the income covered by the advance tax cannot be treated as undisclosed income for the purposes of block assessment. For this, he relied on various case law which are as under: On the other hand, the learned Departmental Representative relied on the block assessment order.

4. We have heard the submissions of both the sides and gone through the case records including the paper books filed by all the assessees. We have seen that this issue is squarely covered by the Hon'ble Gauhati High Court cited supra as referred by the learned counsel for the assessee and the Hon'ble High Court dealt with this issue in para 7 of its order which is being reproduced as it is : "7. From the aforesaid judgment of the apex Court, it is clear that the Act itself provides for payment of the advance tax and the Act enjoins upon the assessee a duty to file the return of the income disclosing his true income and on the basis of the income so disclosed, the assessee is required to make a self-assessment and pay the tax on such income. There cannot be any manner of doubt that when the assessee pays advance tax, the advance tax payment is assessed by the assessee on the basis of self-assessed income. The advance tax reflects the income admitted by the assessee. When the assessee pays the advance tax he discloses his income at the particular point of time, which may or may not be taxable on a subsequent date, on the return submitted by him under Section 139 or under Sub-section (1) of Section 142 because of the assessee's tax planning or he may claim exemption and refund of the tax paid, but for doing so he will have to show the income on which the advance tax is paid and then claim refund or complete exemption, as

the case may be, as permissible under the relevant statute. Claim of refund of the tax paid as advance tax or complete exemption from the tax can be asked for by the assessee only after indicating his income which was assumed to be assessable income by the assessee at the time when the advance tax was paid. Disclosure of the self-assessed income by the assessee would only entitle the assessee to claim refund or exemption from tax as the assessee is required to show the income on the basis of which the advance tax is paid or ultimate claim is made. The moment the advance tax is paid the taxable income at that point of time is disclosed to the Revenue by the assessee.

It cannot be said by the Revenue that the advance tax paid would or may not be the tax payable on the basis of ultimate assessment made and, therefore, it cannot be taken to be a representation of the income on which the advance tax was paid. The question is whether the income, which represents the payment of advance tax, would be said to be an undisclosed income when the payment of advance tax itself necessarily implies disclosure of the income on which the advance tax is paid by the assessee to the Revenue." In view of the above case law of the Hon'ble Gauhati High Court as well as the case law of the Hon'ble Patna High Court and the Hon'ble Rajasthan High Court cited (supra), we are of the opinion that the income which is covered by the advance tax and the income which is below taxable limit, i.e., below the basic exemption cannot be included in the undisclosed income while framing block assessment. In view of the above, we direct the AO to recalculate the undisclosed income of the respective assessee after going through the advance tax payments and basic exemption as provided in the Act.

5. The next issue in the cases of Sri F. Ramesh, Sri R. Kailash and Smt. R. Sangeetha is as regards to the addition on account of commission payment on NRI gifts. During the course of hearing, the learned counsel as well as the Departmental Representative conceded that there is an element of commission on NRI gifts. The AO has estimated the NRI commission at 5 per cent. When it was pointed out it is excessive, then both the parties agreed that the reasonable commission will be at 2 per cent. In view of this, we restrict the commission on NRI gifts to 2 per cent and accordingly, direct the AO to recalculate the undisclosed income by restricting the commission to 2 per cent for all the assessee under

consideration.

6. The next issue in the case of Sri R. Kailash is as regards to cost of construction of 'Kailash Apartments'. The briefly stated facts are that the assessee, Sri R. Kailash, constructed apartments upto the period 31st March, 1997, and incurred a total expenditure of Rs. 21,93,890. The expenditure relevant for the period of block assessment was Rs. 19,00,000. The assessee filed an estimate from an approved valuation engineer in support of his claim. However, the AO referred it to the valuation cell who valued the said property at Rs. 34,58,400.

However, the assessee filed objection against the valuation estimated by the DVO for adopting a huge sum of Rs. 26,80,720 as cost of construction. However, the AO rejected the admitted value and adopted the Departmental valuation without giving any reasons. It was the plea of the assessee that the entire construction was made under his personal supervision and, therefore, proportionate reduction should be given in the cost of apartments.

7. Before us, the learned counsel for the assessee relied on the decision of the Hon'ble Supreme Court in the case of Smt. Amiya Bala Paul v. CYT (2003) 262 ITR 407 (SC) and the decision of the Hon'ble Bombay High Court in the case of CIT v. Vinod Danchand Ghodawat (2001) 247 ITR 448 (Bom). On the other hand, the learned Departmental Representative relied on the order of the AO.8. We have heard both the sides and gone through the case law relied on by the assessee's counsel. It is seen that this issue is squarely covered by the Hon'ble apex Court in the case of Amiya Bala Paul cited supra, wherein it has been held that the AO has no power to refer the matter to the DVO under any of the provisions of the Act to estimate the cost of construction. Another aspect in this case is that the assessment is based on the DVO's report which is obtained after the search, and the Courts are in unanimity that block assessment cannot be framed on the basis of material gathered subsequently, i.e., subsequent to search. In view of this, the assessee succeeds on this issue.

9. The next issue in the case of Smt. R. Sangeetha is as regards to the addition of Rs. 1,75,000 made for purchase of flat at Silver Palace Road, Bangalore. The assessee in her statement admitted that she has paid a sum of Rs. 6 lakhs to M/s

Royal Builders & Developers, Bangalore, for the purchase of flat. Subsequently on enquiry, M/s Royal Builders stated vide their letter that they have received a sum of Rs. 7,75,000 for the sale of flat from the assessee. In view of this, the AO made an addition of Rs. 1,75,000 being the difference between the admitted payment and actual payment as stated by the builder.

10. Before us, the assessee stated that a sum of Rs. 6,88,000 was paid to M/s Royal Builders & Developers as per the account copy furnished.

The assessee stated before us that she is not aware of other charges amounting to Rs. 87,000. The learned Departmental Representative relied on the block assessment.

11. We have gone through copy of accounts of Royal Builders & Developers and seen that the assessee has paid a sum of Rs. 6,88,000, hence, the difference is actually Rs. 87,000 only. In view of this, we feel that the assessee has explained the difference to the extent of Rs. 88,000 and the remaining difference of Rs. 87,000 is to be treated as undisclosed income. Hence, we direct the AO to recalculate the undisclosed income and restrict to Rs. 87,000 on this issue.

12. In the result, the appeals in ITA No. 257/M/1997 is allowed and ITA Nos. 148, 256 and 258/M/1997 are partly allowed.

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