<u>Court No. - 35</u>
Case :- INCOME TAX APPEAL No. - 484 of 2008
Appellant :- Commissioner Income Tax Kanpur
Respondent :- Dr.Shiv Kant Mishra Kanpur
Counsel for Appellant :- A.N.Mahajan,C.S.C.
Counsel for Respondent :- S.D. Singh

<u>Hon'ble Bharati Sapru,J.</u>
<u>Hon'ble Vinod Kumar Misra,J.</u>

Heard Shri Krishna Agrawal, learned counsel for the department and Shri Tanmay Sadh, learned counsel for the respondent.

This appeal has been filed by the department under Section 260A of the Income Tax Act, 1961 against the order passed by the tribunal dated 23.05.2008 relating to block period ending on 14.09.2002. The questions of law sought to be answered are as under:-

" Whether on the facts and in the circumstances of the case and on a correct and true interpretation of the provisions of Section 158BB and Section 158B (b) of the Income Tax Act, 1961, the Tribunal was justified in law in upholding the deletion made by the Commissioner of Income Tax (Appeals) in respect of Rs.36,60,072/- which was found to be undisclosed income by the Assessing Officer?"

A search and seizure operation was conducted by the department on 14.09.2002 at the residential and business premises of the assessee. During the course of search operations books of account, documents and loose papers were found and seized.

While verifying the investment made in construction of the house property, it was gathered from enquiries, that the investment in the construction of the house property was made largely out of profits earned by the assessee from sale of shares. Post search enquiries were conducted and the A.O. came to the conclusion that the transaction in shares was a sham transaction. The A.O., therefore, concluded that the whole transaction was done to re-oute the undisclosed money of the assessee by introducing the same in his regular books as capital gain receipts from sale of shares and had been claimed exempt u/s 54F. The transaction was held to be covered u/s 158B(B) and the amount on account of sale proceeds of the shares, were added by the A.O. resulting in total addition of Rs.36,60,072/-

Ld. CIT (A) knocked off the addition holding that the post search enquiries and additions were not on the basis of evidence found as a result as is the mandate of section 158BB. In the preliminary and concluding statement of the assessee recorded during the course of search, only general question regarding the immovable properties were asked. Also, that the contradiction found in the statements of the assessee and his brother led the AO to suspect the share transactions being bogus which led to further enquiries. However, these statements were not recorded during the course of search. Neither there was any material found during the search leading to the discovery of the bogus nature of the share transaction nor were the suspicion raising statements recorded during the course of search. The assessee had disclosed the share transaction in regular return of income tax filed by him before the date of search.

The Hon'ble ITAT has confirmed the order of the ld. CIT (A) on similar reasoning holding that the 'proceedings were initiated against the assessee and addition of Rs.36,60,072/- was made u/s 158(b) of the I.T. Act based on the copy of computation of income filed along with return for assessment year 2002-03 and not on the basis of material/documents seized during the course of search."

The Tribunal has recorded a clear findings of fact that the additions were sought to be made not on the basis of any new material or documents seized during the course of the day rather full disclosure has already been made with regard to the additions made by the assessee itself. In view of this, the Tribunal has rightly come to the conclusion that such an addition could not have been made under the provisions of Section 158 BB of the Act.

The assessee has rightly relied on a decision of this Court in the case of *Commissioner of Income Tax Vs. N.K. Laminates*

P. Ltd. reported in (2014) 365 ITR 211 (AII) wherein the Court has examined at length the provisions of Section 158B, 158BB and 158 BC of the Act which relate to undisclosed income and has come to the conclusion that the material which is not found at the time of search or as a result of requisition of books of account or other document, cannot be made the basis for determination of undisclosed income under Section 158(B)(B).

It is necessary mandate of Section 158(B)(B) of the Act that any material which is found during the search itself should form the basis of any additions which may be made. The facts in this case are otherwise. The matter is therefore, concluded by the facts and even otherwise on merits the question is answered in favour of the assessee and against the department.

The appeal is thus dismissed. No costs.

Order Date :- 1.12.2016
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(Vinod Kumar Misra, J.) (Bharati Sapru,J.)