ORDER SHEET

IN THE HIGH COURT AT CALCUTTA

Special Jurisdiction
[Income Tax]

ORIGINAL SIDE

GA No. 3801 of 2014
ITAT No. 197 of 2014

PIYUSH PODDAR

Versus

THE COMMISSIONER OF INCOME TAX - XVII

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ARINDAM SINHA

Date : 14th January, 2015.

For Appellant : Mr. N. K. Poddar, Senior Advocate with
Mr. V. Tibrewal, Advocate

For Respondent : Mr. S. B. Saraf, Advocate

The Court : The subject matter of challenge in this appeal is a judgment and order dated 7th August, 2014 by which the learned Tribunal allowed an appeal preferred by the revenue against an order of the CIT(A). By the order, the CIT (A) had reduced the tax liability of the assessee to a sum of Rs.16,36,060/- from the original sum of Rs.6,30,89,413/-. Thus, the relief granted to the assessee was for a sum of Rs.6,14,53,353/-. Aggrieved by the order of the Tribunal, the assessee has come up in appeal.

Mr. Poddar, learned Senior Advocate appearing on behalf of the assessee, submitted that the Tribunal erred in not applying the peak credit theory to the case of the assessee. He submitted that in this case the opening balance as per the bank statement was a sum of Rs.12 lakhs. If the aforesaid sum of Rs.12 lakhs is to be treated as an unexplained entry, then the sum of Rs.12 lakhs may be taxed but that becomes the real income of the assessee on the basis whereof the further transactions can be explained and that is how all further transactions can be taken care of by applying the peak credit theory to the extent of Rs.12 lakhs and in case it is found that the peak credit is exceeding a sum of Rs.12 lakhs, then further addition to the sum of Rs.12 lakhs can be made. He, in support of his submission, relied on a judgment of the Madras High Court in the case of S. Kuppuswami Mudaliar vs. Commissioner of Income-Tax, Madras, reported in [1964] 51 ITR 757, wherein the following view was expressed:

"*Where the income-tax authorities make an addition to the income of the assessee over and above the income as disclosed by the assessee, on an estimate basis, the amount so added must be treated as the real income of the assessee. It is not open to the authorities to take the view that the addition was only for purposes of taxation and that it should not be regarded as the true income of the assessee.*"

The aforesaid view of the Madras High Court was affirmed by the Apex Court in the case of Anantharam Veerasinsghaiah & Co. vs. Commissioner of Income Tax, A.P., reported in [1980] 1213 ITR 457 (SC), wherein the following views were expressed:

> *In the present case, the Appellate Tribunal has relied entirely on the basis that an intangible addition of Rs.2,00,000 had been made to the book profits of the assessee for the assessment year 1957-58 and it inferred that an amount of Rs.90,000 was available for being put to use in the year with which we are*

concerned. Now it can hardly be denied that when an "intangible" addition is made to the book profits during an assessment proceedings, it is on the basis that the amount represented by that addition constitutes the undisclosed income of the assessee. That income, although commonly described as "intangible", is as much a part of his real income as that disclosed by his account books. It has the same concrete existence. It could be available to the assessee as the book profits could be. In Lagadapati Subba Ramaiah v. CIT [1956] 30 ITR 593, the Andhra Pradesh High Court adverted to this aspect of secret profits and their actual availability for application by the assessee. That view was affirmed by the Madras High Court in S. Kuppuswami Mudaliar v. CIT [1964] 51 ITR 757.

There can be no escape from the proposition that the secret profits or undisclosed income of an assessee earned in an earlier assessment year may constitute a fund, even though concealed, from which the assessee may draw subsequently for meeting expenditure or introducing amounts in his account books. But it is quite another thing to say that any part of that fund must necessarily be regarded as the source of unexplained expenditure incurred or of cash credits recorded during a subsequent assessment year. The mere availability of such a fund cannot, in all cases, imply that the assessee has not earned further secret profits during the relevant assessment year. Neither law nor human experience guarantees that an assessee who has been dishonest in one assessment year is bound to be honest in a subsequent assessment year. It is a matter for consideration by the taxing authority in each case whether the unexplained cash deficits and the cash credits can be reasonably attributed to a pre-existing fund of concealed profits or they are reasonably explained by reference to concealed income earned in that very year. In each case, the true nature of the cash deficit and the cash credit must be ascertained from an overall consideration of the particular facts

and circumstances of the case. Evidence may exist to show that reliance cannot be placed completely on the availability of a previously earned undisclosed income. A number of circumstances of vital significance may point to the conclusion that the cash deficit or cash credit cannot reasonably be related to the amount covered by the intangible addition but must be regarded as pointing to the receipt of undisclosed income earned during the assessment year under consideration. It is open to the revenue to rely on all the circumstances pointing to that conclusion. What these several circumstances can be is difficult to enumerate and indeed, from the nature of the enquiry, it is almost impossible to do so. In the end, they must be such as can lead to the firm conclusion that the assessee has concealed the particulars of his income or has deliberately furnished inaccurate particulars. It is needless to reiterate that in a penalty proceeding the burden remains on the revenue of proving the existence of material leading to that conclusion."

Mr. Saraf, learned advocate appearing for the revenue, submitted that the theory of peak credit could not be applied to the case in hand for the following reasons:

(a) Going by the case of the assessee, he is an entry operator. Therefore, by his own admission each transaction is a different unit and there cannot be any continuity of transactions which may be possible in the case of an ordinary trader.

(b) The point as regards applicability of peak credit theory was never advanced before the assessing officer nor in the memo of appeal before the CIT(A).

Mr. Poddar disputed this submission of Mr. Saraf. He drew our attention to the grounds of appeal as would appear from the judgment of the CIT(A). He drew our attention to ground nos. (ii) and (iii) which reads as follows:

"ii) That on the facts and circumstances of the case, the Ld.AO is wrong and unjustified in considering the entire deposit made into the bank as undisclosed/unexplained cash credit in the case of the assessee.

iii] That on the facts and circumstances of the case, the Ld. AO has proceeded on erroneous belief in treating the deposits in the bank a/c. as unexplained without considering the regular withdrawals from the same bank."

Mr. Saraf drew our attention to a Division Bench judgment in the case of Bhaiyalal Shyam Behari v. Commissioner of Income-Tax, reported in (2005) 276 ITR 38, wherein the following views were expressed:

"*For adjudicating upon the plea of peak credit the factual foundation has to be laid by the assessee. He has to own all cash credit entries in the books of account and only thereafter the question of peak credit can be raised."*

Mr. Saraf, relied upon the judgment in the case *of Kale Khan Mohammad Hanif, reported in (1963) 50 ITR 1 (SC),* which was also taken into account by the learned Tribunal.

We have considered the rival submissions advanced by the learned advocates appearing before us. We are inclined to think that Mr. Saraf is correct in his submission that the factual foundation for applying the theory of peak credit was not laid by the assesee. The assessee may have impliedly done so, but expressly no such attempt is discernible to us. It is not in dispute that this plea was not raised before the Assessing Officer. Even in the memo of appeal, from the grounds, quoted above, one cannot say that the point was squarely taken but arguments were no doubt advanced before the CIT(A). The learned Tribunal has also not considered the question in the correct perspective. The Tribunal appears to have proceeded solely on the basis of the

judgment of the Apex Court in the case of *Kale Khan* being unmindful of the fact that in the case of *Kale Khan*, the scope of meaning of Section 68 was in issue but the Supreme Court was not concerned with an identical set of facts which are before us. What will be the implication after Section 68 is applied to the opening balance of a little over Rs.12 lakhs in this case vis-à-vis the further transactions is a serious question of fact which has to be considered and for that purpose we are of the opinion that a remand is required. We should not be deemed to have express any opinion as to whether the peak credit theory is applicable to the fact and circumstances of the case or is not applicable to the facts and circumstances of the case. That question is left to be decided by the Tribunal on the basis of evidence, which may be adduced before them and they shall allow letting in of necessary evidence, if the assessee so desires. The limited question to be considered is whether the assessee is entitled to any benefit on the basis of peak credit theory.

In the result, the order under challenge is set aside and the matter is remanded to the learned Tribunal for re-hearing. The learned Tribunal is requested to hear out the matter within a period of six months from the date of communication of this order.

The appeal is, thus, disposed of.

(GIRISH CHANDRA GUPTA, J.)

(ARINDAM SINHA, J.)

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