

**HON'BLE SRI JUSTICE L. NARASIMHA REDDY
AND
HON'BLE SRI JUSTICE CHALLA KODANDA RAM**

I.T.T.A No.247 OF 2003

29-10-2014

BETWEEN

Commissioner of Income Tax (Central), Hyderabad

...Appellant

And

Balaji Steel Profiles, D.O.No.43-18-26, Venkataraju Nagar, Visakhapatnam –
530 016

.....Respondent

**HON'BLE SRI JUSTICE L. NARASIMHA REDDY
AND
HON'BLE SRI JUSTICE CHALLA KODANDA RAM**

I.T.T.A No.247 OF 2003

JUDGMENT: (per the Hon'ble Sri Justice L. Narasimha Reddy)

The respondent is a manufacturer of steel and is an assessee under the Income Tax Act, 1961 (for short, 'the Act'). A search was conducted in the premises of the factory on 25-03-1999. On the basis of the discoveries said to have been made therein, the assessing officer initiated steps under Chapter XIV-B of the Act and issued notice under Section 158BC of the Act. It was mentioned that a comparison of the figures mentioned in RG-1 register on the one hand and Daily Rough Production Register (DRPR) on the other hand revealed discrepancy of about 250 metric tonnes of steel and in that view of the matter, the income tax on the corresponding amount is payable at the penal rate. Reference was also made to the statement said to have been made by the managing partner of the respondent.

A reply was submitted by the respondent to the effect that the purport of the DRPR is totally different from that of the RG-1 register. According to them, it is only after the steel that is produced on a particular day and recorded in the

DRPR is cooled for three days, and weighed on approval of quality, that it can be entered in the RG-1 register. Other grounds such as that though search was made on

25-03-1999, statement was recorded on 11-05-1999 through the process of questioning and prolonged interrogation were also pleaded. Ultimately, the respondent filed return for the block period on 17-04-2000 declaring nil income. The assessing officer passed an order on 27-03-2002 treating a sum of Rs.17,64,780/- representing the cost of 134 metric tonnes of steel as the taxable income.

Aggrieved by the order passed by the assessing officer, the respondent filed an appeal before the Commissioner of Income Tax (Appeals)-I, Hyderabad. The same was dismissed on 27-08-2002. Thereafter, it filed IT (SS) No.120/VIZ/97 before the Visakhapatnam Bench of the Income Tax Appellate Tribunal (for short, 'the Tribunal'). The appeal was allowed through order dated 11-03-2003. Hence, this further appeal under Section 260A of the Act, by the Revenue.

Sri S.R. Ashok, learned Senior Counsel for the appellant submits that during the course of search, the RG-1 register and the DRPR were compared, apart from verifying the material on the ground; and when the particulars thereof were put to the managing partner, he agreed for addition of a sum of Rs.35,00,000/- towards undisclosed income. He contends that once the assessment was made on the basis of the material found during the course of search and the statement recorded from the managing partner of the respondent under Section 132(4) of the Act, there was no basis for the Tribunal to interfere with the order of assessment.

Sri Y. Ratnakar, learned counsel for the respondent, on the other hand, submits that except that the assessing officer made comparison of the facts and figures mentioned in RG-1 register and DRPR, no independent material was discovered and the assessment was made on the basis of assumptions. He contends that the entries in the DRPR are in relation to the activities that take place on a particular day and the quantity of steel produced on that day would be entered in the RG-1 register three days thereafter on completion of cooling, quality verification and weighing, and that the same was mentioned in

the course of search as well as subsequent enquiry. Learned counsel further submits that the emphasis by the assessing officer all through, was only on the discrepancy between the entries in the two registers which is genuinely in the realm of Central Excise Department and without even alleging that the quantity of steel representing the discrepancy was sold, attempt was made to levy penal tax. He submits that the Tribunal corrected the patent error committed by the assessing officer, and that no interference is warranted.

The search in the premises of the respondent was conducted on 25-03-1999 and the only material on the basis of which the block assessment was sought to be made is that there is discrepancy in the facts and figures mentioned in

RG-1 register on the one hand and the DRPR on the other hand, to the extent of about 135 metric tonnes. An attempt is made to rest the order of assessment on the sworn statement, said to have been made by the managing partner of the respondent.

The first aspect that needs to be dealt with is as to whether the statement said to have been recorded from the managing partner of the respondent would fit into the one referable to Section 132(4) of the Act. The provision reads:

“The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income Tax Act, 1922 (11 of 1922), or under this Act.”

On a perusal of this it becomes clear that firstly the statement must be recorded during the course of search and seizure. Secondly it can be recorded only as a sequel to the discovery of books of account, cash, bullion or similar items. In the instant case, the search has taken place on 25-03-1999, but the statement was recorded on 11-05-1999. It was not even alleged that the search was carried out for the entire period, in between. A statement recorded one and half months after the search, can by no means be brought under the purview of Section 132(4) of the Act.

Further, it becomes doubtful as to whether RG-1 register and DRPR which are referable to the Central Excise Act and the rules made thereunder, can be treated as 'books of account' mentioned in Section 132(4) of the Act. Assuming them to be so, the statement fails to qualify the test under the provision on the first count itself. Added to that, the statement was almost in the form of an answer to a question. The answer was not in the form of any voluntary disclosure. It was to the effect that since the facts suggested in the question cannot be explained instantly, the assessee had agreed to offer the value of the material at Rs.35,00,000/- as undisclosed income. It is relevant to mention that four days after the statement was recorded, the respondent submitted a letter/representation on 19-12-2000. At the end of it, it was mentioned that ".....such admission was made only due to confusing state of mind on account of the prolonged, hectic interrogation search proceedings". For all practical purposes, the statement was retracted. In ***Commissioner of Income Tax vs. Naresh Kumar Agarwal***, this Court dealt with the evidentiary value of such statements and the facts of the present case fit into the said judgment.

Coming to the merits of the matter, the block assessment in the instant case is not on the basis of any discovery of wealth, bullion or books of account. The sole basis is the alleged discrepancy between the two registers. When the maintenance of registers was under the Central Excise Act and the rules framed thereunder, the assessing officer could have formed opinion only after ascertaining the relevant facts or the method of arriving at conclusions, from the concerned officials of the Central Excise Department. The respondent made a specific plea that the entries in the DRPR are only tentative in nature and it is only after the steel produced on a particular day is cooled for three days, tested for quality and weighed, that the corresponding entry can be made in the RG-1 register. This however did not weigh with the assessing officer. Straightaway conclusions were drawn as to the discrepancy.

Even if necessary latitude is shown regarding the power of the assessing officer to make the block assessment, what would have constituted the basis, is the suppression of sale proceeds of a product. The mere production of a material, even if not reflected in a register, does not constitute the basis to levy

the central excise duty, leave alone income tax. While excise duty becomes payable when the manufactured material is removed from the factory, the income tax becomes payable when the product is sold and sale proceeds accrue to the assessee. When it was not even alleged that the steel, representing the differential quantity, was sold, there was no basis to infer or imagine the accrual of income or the corresponding obligation to pay the income tax. It does not need any emphasis that the proceedings under Chapter XIV-B are penal in nature and they can be sustained if only they are founded and grounded on undisputed or established facts. An assessee cannot be subjected to the proceedings under that chapter, just on the basis of imaginations or surmises.

Being the last authority on facts the Tribunal analysed every aspect and recorded a finding to the effect that neither the assessing officer nor the appellate Commissioner have recorded any finding to the effect that the respondent has suppressed the sale of any steel, referable to the discrepancy in the registers. We do not find any basis to interfere with the order under appeal.

The appeal is accordingly dismissed. There shall be no order as to costs.

L. NARASIMHA REDDY, J

CHALLA KODANDA RAM, J

29-10-2014

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