

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

INCOME TAX APPEAL No. 67 of 2004

C I T JODHPUR

V/S

M/S MANGILAL RAMESHWAR LAL

Mr. KK BISSA, for the appellant / petitioner

Mr. ANJAY KOTHARI, for the respondent

Date of Order : 18.1.2008

HON'BLE SHRI N P GUPTA, J.

HON'BLE SHRI DEO NARAYAN THANVI, J.

ORDER

REPORTABLE

This appeal and the cross objections have been filed by the Revenue and the assessee, respectively, against the order of the learned Tribunal dt. 19.3.2004. Before the Tribunal cross appeals were filed; one by the assessee, and the other by the Revenue. The matter relates to block assessment, for the block period 1987-88 to 1997-98.

The appeal has been admitted, vide order dt. 17.12.2004, by framing following substantial questions of law.

"1. Whether the jurisdiction of Assessing Officer for assessment of undisclosed income in a block assessment under Section 158-BB of the Income Tax Act, 1961 is limited to the material found during the search or on the basis of information available the Assessing Officer could estimate the income to the best of his

judgment de hors the material on record, appreciating the factual circumstances of the case?

2. Whether in the facts and circumstances of the case the learned tribunal was justified in deleting the entire trading additions so also the addition of Rs.550559/- on account of unexplained opening capital made by the A.O.?"

Thereafter the assessee filed cross objections, exercising his right under Section 260A (7) read with O. 41 Rule 22 C.P.C., and this Court, vide order dt. 7.7.2005, admitted the cross objections, by framing following substantial question of law:-

"Whether the ITAT has misconstrued the provisions of Section 158 BE providing for limitation for completion of block assessment and has grossly erred in rejecting the ground of limitation raised by the respondent- assessee before the ITAT."

It is contended by the learned counsel for the assessee, that the learned Tribunal has grossly erred in proceeding on a basis that in the present case books of account were seized on 3.1.97, and the words appearing in Section 158BE (2) (b) are "books of account required" and, therefore, limitation would be two years. According to the learned counsel the present case is not a case covered by the eventuality of "books of account required" but is covered by the eventuality of notice being served under this chapter on such other person in respect of search

initiated, and therefore, the relevant question to be considered was as to when the search was initiated in respect of that other person. If it is found, that that was initiated on or after 1.1.97, then obviously the limitation would be two years, and if it is found that the search was initiated after 30.6.95 but before 1.1.97 then the limitation would be one year. Learned counsel invited pointed attention of the Court to the provisions of Section 158BE, 132, and 132A of the Income Tax Act in this regard, so also to the provisions of 158BC and 158 BD.

On the other hand learned counsel for the Revenue supported the impugned judgment on the question of limitation by contending that the notice was given to the assessee on the basis of books of account or other documents seized, and since the seizure took place on 3.1.97, therefore, the period of two years was available for making final assessment, and therefore, the assessment cannot be said to be time barred.

We have considered the rival submissions, and have gone through the various provisions of the Income Tax Act, and the relevant case law.

Since the question involved in the cross objection goes to the root of the matter, inasmuch as if that question is answered in favour of the assessee, the appeal

of the Department will be rendered only academic.

Therefore, we proceed to examine this question, as framed in the cross objection.

We may immediately gainfully quote the provisions of Section 158BE sub-sections (1) and (2), which read as under:-

158BE. (1) The order under section 158BC shall be passed

(a) within one year from the end of the month in which the last of the authorisations for search under section 132 or for requisition under section 132A, as the case may be, was executed in cases where a search is initiated or books of account or other documents or any assets are requisitioned after the 30th day of June, 1995, but before the 1st day of January, 1997;

(b) within two years from the end of the month in which the last of the authorisations for search under section 132 or for requisition under section 132A, as the case may be, was executed in cases where a search is initiated or books of account or other documents or any assets are requisitioned on or after the 1st day of January, 1997.

(2) The period of limitation for completion of block assessment in the case of the other person referred to in section 158BD shall be

(a) one year from the end of the month in which the notice under this Chapter was served on such other person in respect of search initiated or books of account or other documents or any assets requisitioned after the 30th day of June, 1995, but before the 1st day of January, 1997; and

(b) two years from the end of the month in which the notice under this Chapter was served on such other person in respect of search initiated or books of account or other documents or any assets are requisitioned on or after the 1st day of January, 1997.]

Explanation 1. In computing the period of limitation for the purposes of this section,

(i) the period during which the assessment proceeding is stayed by an order or injunction of any court; or

(ii) the period commencing from the day on which the Assessing Officer directs the assessee to get his accounts audited under sub-section (2A) of section 142 and ending on the day on which the assessee is required to furnish a report of such audit under that sub-section; or

(iii) the time taken in reopening the whole or any part of the proceeding or giving an opportunity to the assessee to be re-heard under the proviso to section 129; or

(iv) in a case where an application made before the Settlement Commission under section 245C is rejected by it or is not allowed to be proceeded with by it, the period commencing on the date on which such application is made and ending with the date on which the order under sub-section (1) of section 245D is received by the Commissioner under sub-section (2) of that section,

shall be excluded:

Provided that where immediately after the exclusion of the aforesaid period, the period of limitation referred to in sub-section (1) or sub-section (2) available to the Assessing Officer for making an order under clause (c) of section 158BC is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to be extended accordingly.]

Explanation 2. For the removal of doubts, it is hereby declared that the authorisation referred to in sub-section (1) shall be deemed to have been executed,

(a) in the case of search, on the conclusion of search as recorded in the last panchnama drawn in relation to any person in whose case the warrant of authorisation has been issued;

(b) in the case of requisition under section 132A, on the actual receipt of the books of account or other documents or assets by the Authorised Officer.]”

Thus a reading of these two sub-sections shows, that sub-section (1) covers the cases under Section 158BC, which is a provision relating to the person, against whom/ on whose premises search was made, while sub-section (2) relates to cases covered by cases, relating to Section 158BD, which covers the cases of the persons, other than the person, with respect to whom search was made, and undisclosed income of such other person is found. In the present case it is not the case of the Revenue that any search was conducted against, or on the premises of the present assessee. Obviously, therefore, the provisions of sub-section (1) are not at all attracted.

So far sub-section (2) is concerned, it comprehends two eventualities; one being notice should have been served on such other person in respect of search initiated, and the other eventuality being that books of accounts or other documents or any assets should have been requisitioned. Obviously, this sub-section applies to cases referred to cases in Section 158BD, and a look at Section 158BD shows that it provides that where assessing officer is satisfied that any undisclosed income belongs to any person, other than the person with respect to whom search was made under Section 132 or whose books of accounts or other documents, or any assets were requisitioned under Section 132A, then such books of accounts etc. are to be handed over to the assessing officer having jurisdiction

over such other person, and the assessing officer is to proceed under Section 158BC, against such other person. Then, a look at Section 132 and 132A shows that for the present purposes Section 132 covers cases of search, while Section 132A confers the power to requisition books of accounts, and obviously a reading of the two provisions shows that the two have their independent field of operation.

In view of the above, since in the present case neither any books of account were requisitioned from the assessee nor any search was conducted against him or in his premises nor is it the case of the Revenue that any books of accounts were requisitioned under Section 132A from the person against whom and on whose place search was conducted, not being the present assessee. Rather the positive case of the Revenue is that the search was conducted against the other person on 3.1.97, and in the course of that search certain books of accounts were found which showed undisclosed income of the present assessee, and therefore, notice under Section 158BD was given to the present assessee. Therefore, the consideration taken into account by the learned Tribunal for deciding the question of limitation to be on the basis of "books of account required" is wholly misplaced. Obviously, the case was, and is required to be examined on the anvil of the initiation of search against such other person.

With this it is not in dispute between the parties that the warrant of search was issued on 30.12.96, and the actual search was conducted on 3.1.97. It is in between these two dates that the date 1.1.97 falls. In that view of the matter the precise question to be gone into is, as to when the search can be said to have been initiated. Obviously Section 132 provides a long process starting from initiation of search proceeding ending with actual search undertaken. According to Section 132(1) the competent authority is required to have reason to believe, then he is to issue authorization to the authorised officer. Then, according to sub-section (2) the assistance of police officer may be obtained, then according to sub-section (3) if it is not practicable to seize any books of accounts or other documents etc. for the reasons other than those mentioned in second proviso to sub-section (1), a prohibition order is to be issued, then under sub-section (4) statements can be recorded, and so on. Obviously, there is a long distance between entertaining reason to believe, issuing authorization, and actual conducting of search. In that view of the matter, the words used in various clauses of Section 158BE are significant. In the two clauses in sub-section (1) the words are "last of such authorization for search under Section 132 or for requisition under Section 132A". As against which the words used in sub-section (2) are "in respect of search initiated or books of account or other document or any assets requisitioned".

Thus, actual conducting of search is not given any relevance in either of these two sub-sections. Since in the present case we are concerned with sub-section (2), we only have to find out as to when the search was initiated. Obviously, since the search warrant was issued admittedly on 30.12.96, the initiation of search, could on no parameters be said to have not commenced, in any case, on this date. We make it clear that we are not examining in this case, the precise point as to when the search can be said to have initiated, since the facts in this case are clear that search warrant was issued on 30.12.96, obviously the search must have been initiated even some times earlier to which date we need not go as even this 30.12.96 is a date prior to 1.1.97. And, therefore, the matter is covered by clause (a) providing one year's limitation.

The starting point of limitation for the purpose of Section 158BE(2) is from the end of the month in which the notice under this chapter was served. In the present case as we find from the orders annexed with this appeal that notice under this chapter i.e. under Section 158BD was issued to the assessee on 8.3.99, and was served on him on 15.3.1999, which month ends on 31.3.1999. Obviously, since as noticed above, the assessment order has been passed on 28.3.2001, which obviously is, much after expiry of one year, and is clearly barred by time.

The learned Tribunal has proceeded on the basis that the words appearing in Section 158BE (2) (b) are "books of account required", and has found that books of account in this case was seized on 3.1.1997, and therefore, the period of limitation would be two years. In our view, this approach of the learned Tribunal is wrong. Even at the cost of repetition, it may be observed, that the expression "books of account required", used in sub-section (2) (a) and (b), refers to the requirement of books of account, as contemplated by Section 132A, whereunder the competent authority, in consequence of information in his possession having reason to believe about the eventuality mentioned in sub-section (1), may require the requisitioning officer to require the officer or authority referred to in Section clauses (a), (b), (c) of that section to deliver the books of accounts, or other assets to the requisitioning officer. In the present case, it is not the case of the Revenue, that any such authorisation was made under Section 132A, rather as appears from the assessment order itself, that the notice was issued under Section 158BD, consequent upon search, and not on account of any books of accounts or documents or papers having been requisitioned under Section 132A. Thus, since the basic assumption of the learned Tribunal is wrong, the finding cannot be sustained.

For the reasons mentioned above, the question framed in the cross objection vide order dt. 7.7.2005, is

answered in favour of the assessee, and against the Revenue, with the further obvious result, that the appeal filed by the Revenue becomes academic.

Accordingly, the cross objection no. 1/2005 is allowed, and the assessment orders, and appellate orders are all quashed. While the appeal no. 67/2004 is dismissed.

(DEO NARAYAN THANVI), J.

(N P GUPTA), J.

/Sushil/