SUPREME COURT OF INDIA

Commnr. of Income Tax, Jalandhar-I

Vs.

Shri Rajiv Bhatara

C.A.No.1121 of 2009

(Dr. Arijit Pasayat and Dr. Mukundakam Sharma JJ.)

19.02.2009

JUDGMENT

Dr.Arijit Pasayat, J

1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Punjab and Haryana High Court dismissing the appeal filed under Section 260(A) of *Income Tax Act, 1961* (in short the `Act'). In the said appeal, challenge was to the order dated 01.7.2006 passed by the Income Tax Appellate Tribunal Amritsar Bench, Amritsar (in short the `Tribunal'). The dispute related to the block period 1.4.1990 to 3.7.2000. The question which arose for consideration is as follows: "Whether, on the facts and in the circumstances of the case, the ITAT was right in law in confirming the CIT (A)'s order directing not to levy surcharge on the tax worked out on the undisclosed income as the case pertains to a search conducted period to 1.6.2002?".

3. Factual position in a nutshell reads as follows: Search was conducted on 6.4.2000. The Assessing Officer in his order dated 22.5.2002 imposed surcharge and an application under Section 154 of the Act filed by the assessee for rectification was dismissed vide order dated 17.9.2003 with the observation that the surcharge was levied as per the provisions of Part I of the Ist Schedule appended to Finance Act, 2000. On the ground that there was no mistake apparent on the record, the application under Section 154 of the Act was rejected. However, the Commissioner of Income Tax (Appeals), Ludhiana, (for brevity the CIT (A)') reversed the order passed by the Assessing Officer and took the view that surcharge was not leviable in cases where the search has taken place prior to 1.6.2002. In that regard, reliance was placed on a Division Bench judgment of this Court in the case of *CIT v. Ram Lal Bahu Lal*[1]. On further appeal by the Revenue the Tribunal upheld the order dated 12.9.2005 passed by the CIT (A) holding that the search in the present case took place on 6.4.2000 which was much prior to the date of amendment made in Section 113. The amendment was incorporated on 1.6.2002 by inserting proviso to Section 113 by Finance Act, 2002. It was by the amendment that levy of surcharge on the disclosed income was specifically provided w.e.f.

1.6.2002. The provision has not been given retrospective effect, and therefore, the Tribunal held that it applied only to cases where searches were carried out after 1.6.2002. The High Court dismissed the appeal relying on its decision in the case of *CIT v. Roshan Singh Makkar*[2] and also referred to two other decisions of the *Madras High Court in CIT v. Neotech Company*[3] *and CIT v. S. Palanivel*[4].

4. Learned counsel for the appellant submitted that the case at hand is squarely covered by a decision of this court in *Commissioner of Income Tax, Central II v. Suresh N. Gupta*[5].

5. The power to levy a surcharge on income tax is traceable to Article 271 read with Entry 82 of List I of Schedule VII to the *Constitution of India, 1950* (in short the `Constitution'). That power is not traceable to Section 4 of the Act. Every year the Finance Act is enacted by Parliament to give effect to the financial proposals of the Central Government. The rate at which a charge on the total income of the previous year is imposed under Section 4(1) of the Act is not laid down in the Income Tax Act and, therefore, the said Section provides that the charge has to be fixed by the Central Act. It is because of this, that income tax is levied at different rates under the Finance Act.

6. In order that the charge should be a legal charge under Section 4, it must be a tax on the income of the assessee. If the charge is the tax on anything else, then it would not be a valid charge. That is the only limitation upon the power or authority of Parliament to fix any rate it pleases. So long as the charge is on `total income' of the previous year, there is no limitation upon the power or authority of Parliament to fix any rate if pleases. The Income Tax Act, therefore, contains an elaborate machinery for ascertaining "total income" of an assessee. Section 4(1) prescribes the subject matter of the tax and the rate of that tax is prescribed by the legislature, either under the Act as in the case of Section 113 or vide the Finance Act.

7. The purpose of Chapter XIV is to lay down a special procedure for assessment of surcharge cases with a view to combat tax evasion and also to expedite and simplify assessments in search cases. Undisclosed incomes have to be related in different years in which income was earned under block assessment. This is because in such cases, the "block period" is for previous years relevant to 10/6 assessment years and also the period of the current previous year up to the date of the search. The essence of this new procedure, therefore, is a separate single assessment of the "undisclosed income", detected as a result of search and this separate assessment has to be in addition to the normal assessment covering the same period. Therefore, a separate return covering the years of the block period is a prerequisite for making block assessment. Under the said procedure, Explanation is inserted in Section 158-BB, which is computation Section, explaining the method of computation of "undisclosed income" of the block period.

8. If the "block period", as defined in Section 158-B(a), comprises previous years relevant to 10/6 assessment years is treated by Parliament as one unit of time for assessment purposes, one has to correlate "undisclosed income" to each of the years in which income was earned by the assessee.

9. Section 158-BB is required to be read with Section 4 of the Act, then the relevant Finance Act of the year concerned would automatically stand attracted to the computation under Chapter XIV-B. Section 158-BB looks at Section 113. That Section fixes the rate of tax.

10. In the present case undisputedly Para A was applicable at the given point of time. As a general concept, income tax includes surcharge. Reading Section 2(1) of the Finance Act, 2001, it is clear that the term `income tax' as used in Section 2(1) and proviso to Section 2(3) of the said Act did not include the amount of surcharge. Surcharge was a separate item of taxation, different from income tax. This was made clear vide Section 2 (1)(a), proviso to Section 2(3) and Para A of Part I to Schedule I.

11. Section 158-BA(2) read with Section 4 of the Act looks at Section 113 for the imposition rate at which tax has to be imposed in the case of block assessment. That rate is 60%. That rate is fixed by the Act itself. That rate has been stipulated by Parliament not with a view to oust the levy of surcharge but to make the levy cost effective and easy. Therefore, a flat rate is prescribed. The difficulty in block assessment is that one has to correlate the undisclosed income to different years in which income is earned, hence, Parliament has fixed a flat rate of tax in Section 113.

12. Though Parliament was aware of rate of tax prescribed by Section 113 and yet in the various Finance Acts, Parliament has sought to levy surcharge on the tax in the case of block assessment. In the present case, the assessing officer has applied the rate of surcharge at 17% which rate finds place in Para A of Part I of Schedule I to the said *Finance Act of 2001*, therefore, surcharge leviable under Finance Act was a distinct charge, not dependent for its leviability on the assessee's liability to pay income tax but on assessed tax.

13. Therefore, even without the proviso to Section 113 (inserted vide Finance Act, 2002 w.e.f. 1.6.2002), Finance Act, 2001 was applicable to block assessment under Chapter XIV-B in relation to the search initiated on 6.4.2000 and accordingly surcharge was leviable on the tax.

14. According to the assessee, prior to 1.6.2002, the position was ambiguous as it was not clear even to the Department as to whether surcharge was leviable with reference to the rates provided for in Finance Act of the year in which the search was initiated or the year in which the search was concluded or the year in which the block assessment proceedings under Section 158 BC were initiated or the year in which block assessment order was passed. To clear that doubt precisely, the proviso has been inserted in Section 113 by which it is indicated that Finance Act of the year in which the search was initiated would apply. Therefore, it has to be held that the proviso to Section 113 was clarificatory in nature. It only clarifies that out of the four dates, Parliament was opted for the date, namely the year in which the search was initiated, which date would be relevant for applicability of a particular Finance Act. Therefore, the proviso has to be read as it stands.

15. The above position was highlighted in Suresh N. Gupta's Case (supra).

16. There is no appearance on behalf of the Assessee-respondent in spite of service of notice.

17. In view of what has been stated in the aforesaid case the inevitable result is that the appeal deserves to be allowed, which we direct. The impugned order of the High Court in Tax Appeal No.587 of 2006 is set aside and the departmental Civil appeal is allowed with no order as to costs.

[1]*(148 CTR 643)*
[2]*(2006) 287 ITR 160*
[3]*(2007) 291 ITR 27*
[4]*(2007) 291 ITR 33*
[5]*2008(4) SCC 362*