

CASE NO.:
Appeal (civil) 924 of 2007

PETITIONER:
Manish Maheshwari

RESPONDENT:
Asstt. Commissioner of Income Tax & Anr

DATE OF JUDGMENT: 23/02/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T
WITH
CIVIL APPEAL NO. 925 OF 2007
[Arising out of SLP (Civil) No.9751 of 2005]
M/s Indore Construction (Pvt.) Ltd. \005Appellant
Versus
Commissioner of Income Tax \005Respondent

S.B. SINHA, J :

Leave granted.

Interpretation of the provision Section 158BC of the Income Tax Act, 1961 (for short, 'the Act') is in question in these appeals which arise out of judgments and orders dated 28.09.2004 and 14.03.2005 passed by a Division Bench of the Indore Bench of the Madhya Pradesh High Court in I.T.A. Nos. 60 and 105 of 1999.

Before embarking on legal issues, we may notice the fact of matter from Civil Appeal arising out of Special Leave Petition (Civil) No.9751 of 2005.

The assessee 'M/s Indore Construction Company (Pvt.) Ltd.' (for short, 'the Company') is a company registered and incorporated under the Companies Act, 1956 (for short, 'the Act'). One Shri Rameshwar Maheshwari is of one of its Directors. Shri Maheshwari, apart from being a Director of the said Company, is also a tax consultant. A search was conducted, as contemplated under Section 132 of the Act, in the premises of the said Maheshwari and his wife Smt. Lalita Devi on 21.11.1995. Several incriminating documents relating to the business of the Company were seized. A proceeding was initiated against the Company purported to be under Section 158BC of the Act. The order of assessment was passed on 29.11.1996. The Tribunal in an appeal preferred by the assessee thereagainst opined that the Assessing Officer had no jurisdiction to proceed against the assessee for making the block assessments in terms of Chapter XIV-B of the Act, as no search was conducted in terms of Section 132 of the Act, stating :

"28. Perusal of the assessment order would go to reveal that the A.O. did not do so. Instead of determining the undisclosed income on the basis of the materials seized from the residence of the Co's Director, he embarked upon a roving enquiry in respect of completed assessments by referring three apartments to the Valuation Cell 'to ascertain the correct investment made by the assessee' and on receipt of the reports of the

Valuation Cell proceeded to compute the income u/s 69 as unexplained investment, adding thereto further undisclosed profit earned on sale of flats. To our mind, what the A.O. did is beyond the scope of sec. 158BD. No addition can be made in any of the assessment year of the block period regarding which no material or information is available with the A.O. In a case, where any material or information is found during search, the A.O. has to co-relate such material/information with regard to the regular assessment which have already been completed. At the cost of repetition we may state that Chapter XIV-B does not authorize the A.O. to review the assessment completed unless and until there is any direct or indirect or clinching evidence to indicate that the assessee has withheld or had not disclosed any income. No additions can be made merely on the basis of presumption or hypothesis. This is what the A.O. had actual done."

An appeal preferred by the respondent herein before the High Court, as noticed hereinbefore, thereagainst under Section 260-A of the Act, has been allowed, holding that the Assessing Officer had the requisite jurisdiction in terms of Section 158BD of the Act read with Section 2(31) thereof. The Block Assessment Period is 1987-88 to 1995-96. The search was conducted on 21.11.1995, wherefor a warrant of authorization was issued on 15.10.1995 in the following terms :

"If a summons under sub-section (1) of section 131 of the Income Tax Act, 1961 or under sub section (1) of section 142 of the Income Tax Act, 1961 is issued to Shri Rameshwar R. Maheshwari, Smt. Lalita Devi.

To produce, or cause to be produced, books of accounts or other documents of the institution or relevant proceedings under the Income Tax Act, 1961 he would not produce or cause to be produced, such books of accounts or other documents as required.

Shri Rameshwar H. Maheswari, Smt. Lalita Devi.

any person is in possession of any money, bullion, jewellery or other valuable article or things and such money, bullion, jewellery or other valuable article or things represents either wholly or partly income or property which has not been, or would not be disclosed for the purposes of the Indian Income Tax Act, 1922 or the Income Tax Act, 1961."

We may also notice that purported compliance of Section 158BD was sought to be made by issuing a notice to the Company on 06.02.1996, which is as under :

"To

Indore Construction Co. Pvt. Ltd.
380, Jawahar Marg,
Indore

In pursuance of provisions of the section 158BC of the Income Tax Act, 1961, you are requested to prepare a true and correct return of your total income including the undisclosed income in respect of which you as individual / HUF / Firm / Company / AOP / Body of individual/local authority are assessable for the block

period mentioned in Section 158B(a) of the Income Tax Act, 1961.

The return should be in the prescribed form 2B and be delivered in this office within 16 days of service of this notice duly verified and signed in accordance with the provisions of Section 140 of the Income Tax Act, 1961.

(Search was conducted in the month of Nov. 95)."

A Company registered and incorporated under the Act is indisputably a 'person' within the meaning of Section 2(31) of the Act. Block period is defined in Section 158B(a) contained in Chapter XIV-B, to mean :

"(a) "block period" means the previous years relevant to ten assessment years preceding the previous year in which the search was conducted under section 132 or any requisition was made under section 132A, and includes, in the previous year in which such search was conducted or requisition made, the period up to the date of the commencement of such search or, as the case may be, the date of such requisition;"

Chapter XIV-B provides for 'Special Procedure for Assessment of Search Cases'. How a search would be conducted is provided for in Section 132 of the Act; Clause (a) of sub-section (1) whereof reads as under :

"132. Search and seizure

(1) Where the Director General or Director or the Chief Commissioner or Commissioner or any such Joint Director or Joint Commissioner as may be empowered in this behalf by the Board, in consequence of information in his possession, has reason to believe that -

(a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income Tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922, or under sub-section (1) of Section 142 of this Act was issued to produce, or cause to be produce , any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or";

the officer specified therein so authorized would be entitled to exercise its powers stated therein.

Sub-section 1A of Section 132 of the Act empowers the Chief Commissioner or Commissioner to authorize an officer to take action under any of the clauses referred thereto. A presumption is raised under sub-section 4A of Section 132 of the Act in the following terms :

"(4A). Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search, it may be presumed \026

(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;

(ii) that the contents of such books of account and other documents are true; and

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested."

Search and seizure is to be made in terms of Rule 112 of the Income Tax Rules, 1962. For the purpose of invoking the said provision, special procedure for assessment is laid down in Chapter XIV-B, the conditions precedent wherefor as laid down must be satisfied. Sections 158BC and 158BD read as under :

"158BC. Procedure for block assessment :

Where any search has been conducted under section 132 or books of account, other documents or assets are requisitioned under section 132A, in the case of any person, then :-

(a) the Assessing Officer shall

(i) in respect of search initiated or books of accounts or other documents or any assets requisitioned after the 30th day of June, 1995 but before the 1st day of January, 1997, serve a notice to such person requiring him to furnish within such time not being less than fifteen days;

(ii) in respect of search initiated or books of accounts or other documents or any assets requisitioned on or after the 1st day of January, 1997 serve a notice to such person requiring him to furnish within such time not being less than fifteen days but not more than forty-five days;

as may be specified in the notice a return in the prescribed form and verified in the same manner as a return under clause (1) of sub-section (1) of section 142, setting forth his total income including the undisclosed income for the block period :

Provided that no notice under section 148 is required to be issued for the purpose of proceeding under this Chapter :

Provided further that a person who has furnished a return under this clause shall not be entitled to file a revised return;

(b) the Assessing Officer shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and the provisions of section 142, sub-sections (2) and (3) of section 143 and section 144 shall, so far as may be, apply;

(c) the Assessing Officer, on determination of the undisclosed income of the block period in accordance with this Chapter, shall pass an order of assessment and determine the tax payable by him on the basis of such assessment;

(d) the assets seized under section 132 or requisitioned under section 132A shall be retained to the extent necessary and the provisions of section 132B shall apply subject to such modifications as may be necessary and the references to "regular assessment" or "reassessment" in section 132B shall be construed as references to "block assessment".

"158BD. Undisclosed income of any other person \026

Where the 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 account or other documents or any assets were requisitioned under section 132A, then, the books of account, other documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against such other person and the provisions of this Chapter shall apply accordingly."

Condition precedent for invoking a block assessment is that a search has been conducted under Section 132, or documents or assets have been requisitioned under Section 132A. The said provision would apply in the case of any person in respect of whom search has been carried out under Section 132A or documents or assets have been requisitioned under Section 132A. Section 158BD, however, provides for taking recourse to a block assessment in terms of Section 158BC in respect of any other person, the conditions precedents wherefor are : (i) Satisfaction must be recorded by the Assessing Officer that any undisclosed income belongs to any person, other than the person with respect to whom search was made under Section 132 of the Act; (ii) The books of account or other documents or assets seized or requisitioned had been handed over to the Assessing Officer having jurisdiction over such other person; and (iii) The Assessing Officer has proceeded under Section 158BC against such other person.

The conditions precedent for invoking the provisions of Section 158BD, thus, are required to be satisfied before the provisions of the said chapter are applied in relation to any person other than the person whose premises had been searched or whose documents and other assets had been requisitioned under Section 132A of the Act.

A taxing statute, as is well-known, must be construed strictly. In *Sneh Enterprises v. Commissioner of Customs, New Delhi* [(2006) 7 SCC 714], it was held :

"While dealing with a taxing provision, the principle of 'Strict Interpretation' should be applied. The Court shall not interpret the statutory provision in such a manner which would create an additional fiscal burden on a person. It would never be done by invoking the provisions of another Act, which are not attracted. It is also trite that while two interpretations are possible, the Court ordinarily would interpret the provisions in favour of a tax-payer and against the Revenue."

Yet again in J. Srinivasa Rao v. Govt. of A.P. & Another [2006 (13) SCALE 27], it was held :

"In a case of doubt or dispute, it is well-settled, construction has to be made in favour of the taxpayer and against the Revenue."

In M/s. Ispat Industries Ltd. v. Commissioner of Customs, Mumbai [JT 2006 (12) SC 379 : 2006 (9) SCALE 652], this Court opined:

"In our opinion if there are two possible interpretations of a rule, one which subserves the object of a provision in the parent statute and the other which does not, we have to adopt the former, because adopting the latter will make the rule ultra vires the Act."

Law in this regard is clear and explicit. The only question which arises for our consideration is as to whether the notice dated 06.02.1996 satisfies the requirements of Section 158BD of the Act. The said notice does not record any satisfaction on the part of the Assessing Officer. Documents and other assets recovered during search had not been handed over to the Assessing Officer having jurisdiction in the matter.

No proceeding under Section 158BC had been initiated. There is, thus, a patent non-application of mind. A prescribed form had been utilized. Even the status of the assessee had not been specified. It had only been mentioned that the search was conducted in the month of November 1995. No other information had been furnished. The provisions contained in Chapter XIVB are drastic in nature. It has draconian consequences. Such a proceeding can be initiated, it would bear repetition to state, only if a raid is conducted. When the provisions are attracted, legal presumptions are raised against the assessee. The burden shifts on the assessee. Audited accounts for a period of ten years may have to be reopened.

A large number of decisions of various High Courts have been cited at the bar. We would, at the outset, refer to a decision of the Gujarat High Court in Khandubhai Vasanji Desai and Others v. Deputy Commissioner of Income-Tax and Another [(1999) 236 ITR 73]. Therein, it was clearly held :

"This provision indicates that where the Assessing Officer who is seized of the matter and has jurisdiction over the person other than the person with respect to whom search was made under s. 132 or whose books of account or other documents or any assets were requisitioned under s. 132A, he shall proceed against such other person as per the provisions of Chapter XIV-B which would mean that on such satisfaction being reached that any undisclosed income belongs to such other person, he must proceed to serve a notice to such other person as per the provisions of s. 158BC of the Act. If the Assessing Officer who is seized of the matter against the raided person reaches such satisfaction that any undisclosed income belongs to such other person over whom he has no jurisdiction, then, in that event, he has to transmit the material to the Assessing Officer having jurisdiction over such other person and in such cases the Assessing Officer who has jurisdiction will proceed against such other person by issuing the requisite notice contemplated by s. 158BC of the Act. "

Similar view has been taken by the Gujarat High Court in Rushil

Industries Ltd. v. Harsh Prakash [(2001) 251 ITR 608], Priya Blue Industries P. Ltd. v. Joint Commissioner of Income-Tax [(2001) 251 ITR 615], Premjibhai and Sons v. Joint Commissioner of Income-Tax [(2001) 251 ITR 625], and by Kerala High Court in Commissioner of Income-Tax v. Deep Arts [(2005) 274 ITR 571], Commissioner of Income-Tax v. Don Bosco Card Centre [(2006) 205 CTR 500] and by Madhya Pradesh High Court in Commissioner of Income-Tax v. Smt. Maya Chotrani [(2007) 288 ITR 175].

We may, however, notice that Mr. A.K. Chitale, relied upon a decision of the Delhi High Court in Commissioner of Income Tax v. Pushpa Rani [(2005) 193 CIR (Del) 256] wherein a Division Bench of the said Court held :

"\005The Tribunal on the material placed before it, arrived at a conclusion that there were no search warrants in the name of the assesseees and hence it accepted the contention of the learned counsel that the proceedings initiated under s. 158BC in the cases of the assesseees were ab initio void and without jurisdiction. The learned counsel for the Department was unable to furnish any clarification and stated before the Tribunal that the facts stated by the assesseees regarding non-issuance of the search warrant in the case of the two ladies were correct. It is in view of this that the Tribunal has held that unless a search warrant is issued, the Assessing Officer cannot invoke the provisions of s. 158BC for initiation of block assessment proceedings under Chapter XIV-B. However, so far as the bank locker is concerned, it is submitted that the officer was armed with the search warrant and, therefore, whatever the property was found, namely, jewellery, money and bonds, etc., the assesseees ought to have assessed and the Tribunal ought not to have interfered with the order made by the CIT (A)."

We are of the opinion that the said decision has no application in the instant case.

As the Assessing Officer has not recorded its satisfaction, which is mandatory; nor has it transferred the case to the Assessing Officer having jurisdiction over the matter, we are of the opinion that the impugned judgments of the High Court cannot be sustained, which are set aside accordingly. The appeals are allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.