



THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 24.07.2008

+ **ITA 68/2008**

**THE COMMISSIONER OF INCOME TAX
DELHI (CENTRAL)-I** ... Appellant

- versus -

M/S ANSAL PROPERTIES & IND. (PVT) Ltd. ... Respondent

Advocates who appeared in this case:

For the Appellant : Mr R. D Jolly, Advocate

For the Respondent : Mr Satyan Sethi with Mr Johnson Bara, Advocates.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in Digest ? Yes

BADAR DURREZ AHMED, J (ORAL)

1. Admit.
2. The following substantial questions of law arise for our consideration:-

- (1) Whether the Income Tax Appellate Tribunal had not erred in holding that no surcharge could be levied with reference to the search conducted before 01.06.2006, the effective date of insertion of the proviso in Section 113 of the Income Tax Act, 1961 ?



- (2) Whether in the facts and circumstances of the present case, the Income Tax Appellate Tribunal had not erred in law in holding that the Commissioner of Income Tax had no power to initiate proceedings u/s 263 of the Income Tax Act, 1961 ?
3. The counsel for the parties agree that the appeal may be taken up for disposal straight away and nothing further needs to be filed.
4. The facts are that a search and seizure operation u/s 132 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') was conducted in the case of the assessee on 10.02.2000. The block assessment in this case was completed by the Assessing Officer u/s 158 BC on 28.2.2002 at a total undisclosed income of Rs.73,48,58,971/-. The assessee being aggrieved by the block assessment order preferred an appeal which was partly allowed by the Commissioner of Income Tax (Appeals). Thereafter by an order dated 28.3.2003, the Assessing Officer revised the undisclosed income to Rs 42,11,32,524/-, giving effect to the order passed by the Commissioner of Income Tax (Appeals). It is pertinent to note that in the block assessment order as well as in the order dated 28.3.2003, no surcharge was levied on the undisclosed income.



5. Thereafter, the Assessing Officer sought to invoke the provisions of Section 154 in an attempt to levy surcharge on the undisclosed income. Those proceedings culminated in the order dated 30.6.2003 whereby the Assessing Officer levied surcharge on the undisclosed income. The assessee took the matter in appeal before the Commissioner Income Tax (Appeals). The said appeal was disposed of by an order dated 11.12.2003 on the ground that levy of surcharge was a contentious and debatable issue which could not be rectified u/s 154 of the said Act.

6. It is at this stage that the Commissioner Income Tax issued a notice u/s 263, on 1.3.2004. The contents of the said notice clearly indicate that the Commissioner Income Tax was aware of the fact that the Section 154 order of the Assessing Officer had been set aside by the Commissioner Income Tax (Appeals) by his order dated 11.12.2003 on the ground that the issue of surcharge was a contentious and debatable issue. This is noted in paragraph 2 of the said notice dated 01.03.2004. Despite this fact, the Commissioner took the view that the block assessment order dated 28.3.2003 giving effect to the order of the Commissioner Income Tax (Appeals) was erroneous and prejudicial to the interest of the revenue since surcharge, which was leviable, had not



been charged in this case. The proceedings arising out of the said notice dated 01.03.2004 culminated in the order dated 23.3.2004 u/s 263 whereby the Commissioner directed the levy of surcharge @ 10 % on the amount of income tax computed by the Assessing Officer and directed that a revised notice of demand and challan be issued.

7. Being aggrieved by this order, the assessee preferred an appeal before the Income Tax Appellate Tribunal which has been decided in favour of the assessee on 18.12.2006. It is this order of the Tribunal which is the subject matter of the present appeal.

8. Before going into any further details with regard to the impugned order, it would be relevant to point out that in the meanwhile the revenue had preferred an appeal before the Tribunal against the order dated 11.12.2003 passed by the Commissioner Income Tax (Appeals). That appeal was numbered as IT(SS) No.88/Del./2004. It was dismissed by the Tribunal holding that “[t]he issue of levy of surcharge as per proviso to section 113 in cases of search conducted prior to 1.6.2002 from which date the said proviso was effective, is a debatable issue.” On the basis of this finding, the Tribunal concluded that the “[o]mission to levy surcharge in the assessment cannot be said



Consequently, the Tribunal dismissed the revenue's appeal. The matter did not rest here.

9. The revenue filed an appeal before this Court against the Tribunal's order dated 23.6.2006. That appeal (ITA No. 270/2007) was dismissed by this Court following its decision in the case of **Commissioner of Income Tax v. Devi Dass Malhan: ITA No.155/2007** (decided on 23.2.2007). While dismissing the said appeal, this Court by its order 14.3.2007 held that “[w]e are of the opinion that the amendment to Section 113 of the Income Tax Act, 1961 is not retrospective in nature”. It is also pertinent to note that in **Commissioner of Income Tax v. Devi Dass Malhan** (*supra*), this court had observed:-

“The Tribunal held, and in our view rightly, that apart from the fact that the issue is debatable and no such order could have been passed in rectification u/s 154 of the Act, even on merits, the proviso to Section 113 of the Act did not have any retroactive effect. The proviso was inserted with effect from 1.6.2002 by virtue of the Finance Act, 1999 and there is nothing to indicate that it would operate from retroactively.”

10. The impugned order of the Tribunal which has been passed in respect of proceedings initiated by the Commissioner, Income Tax u/s 263 has returned two findings. The first finding is that no



1.6.2002 i.e. before the insertion of the proviso to Section 113 of the said Act. The other point that has been decided by the Tribunal is that the Commissioner, Income Tax did not have any power u/s 263 for taking action against the order of the Assessing Officer once the Commissioner Income Tax (Appeals) had set aside the order of the Assessing Officer levying surcharge. It is in this context that the two questions referred to above have been framed.

11. In so far as the question No.1 is concerned we find that the same is entirely covered by the decision of the Supreme Court in the case of *CIT v. Suresh N. Gupta* : 297 ITR 322, inasmuch as the Supreme Court has taken the view that the proviso to section 113 is clarificatory in nature and therefore surcharge on undisclosed income would be leviable. In *Suresh N. Gupta (supra)*, the Supreme Court held:-

“25. We find no merit in the above arguments. Both, the Finance Acts of 2000 and 2001, indicated that a substantive charge was created in respect of the income-tax to be levied. Both these Acts prescribed the rates of surcharge. The said surcharge did not depend for its leviability on the assessee’s liability to pay income-tax but on the assessed tax. The assessee has relied upon the above anomalies in support of their contention that such anomalies made the charge ineffective. In our view, such submission amounts to begging the question. According to the assessee, prior to June 1, 2002, the position was ambiguous as it was not clear even to the Department as



clear this doubt precisely, the proviso has been inserted in section 113 by which it is indicated that the Finance Act of the year in which the search was initiated would apply. Therefore, in our view, the said proviso was clarificatory in nature. In taxation, legislation of the type indicated by the proviso has to be read strictly. There is no question of retrospective effect. The proviso only clarifies that out of the four dates, Parliament has opted for the date, namely the year in which the search is initiated, which date would be relevant for applicability of a particular Finance Act. Therefore, we have to read the proviso as it stands.”

Consequently, this question is decided in favour of the revenue and against the assessee.

12. However, the matter does not end here inasmuch as we are concerned with the jurisdiction of the Commissioner to have invoked the provisions of Section 263. It is the contention of the learned counsel for the assessee that on the date on which the Commissioner invoked the provisions of Section 263 and issued a notice thereunder, the question of surcharge being levied on undisclosed income was a debatable one and two views were possible. That being the position, the provisions of Section 263 of the said Act could not be invoked. The learned counsel for the respondent placed reliance on the judgment of the Supreme Court in *Commissioner of IncomeTax v. Max India Ltd:* (2007) 295 ITR 282 (SC). In the said decision, the Supreme Court held that for the purposes of examining as to whether an action



u/s 263 is valid or not the position of law as it stood on the date when the Commissioner exercised such jurisdiction and passed the order would be relevant and not what it was declared subsequently.

13. Considering the facts of the case in this light we find when the Commissioner had issued the notice on 1.3.2004, the Commissioner of Income Tax (Appeals) had already, while construing the rectification order dated 30.6.2006 passed by the Assessing Officer, held that the issue of surcharge was a debatable one. This fact was also subsequently confirmed by the Tribunal, though later to the order passed under Section 263. The impression we get by reading these orders as also the order passed by the Tribunal and subsequently by this Court on 14.3.2007 is that at the time when the Commissioner issued the notice under Section 263 and passed the order dated 23.3.2004, the contemporaneous understanding was that two views were possible and the question of surcharge on undisclosed income was a debatable one. It is a different matter that today the Supreme Court has settled that issue and has held that surcharge is leviable on undisclosed income and that the amendment to Section 113 of the said Act by introduction of the proviso was only clarificatory in nature. The position is very clear that when an issue is debatable, the provisions of Section 263 cannot be



time when the notice and the order u/s 263 were issued and passed. Consequently, the only conclusion that can be arrived at is that the initiation of proceedings under Section 263 were without jurisdiction.

14. The learned counsel for the assessee also supported the impugned order by stating that in view of Explanation (c) to Section 263 (1), it was not open to the Commissioner to have a relook into the matter under Section 263 of the said Act. He submitted that because the issue of levy of surcharge had already been considered by the Commissioner Income Tax (Appeals) in his order dated 11.12.2003, it was not open to the Commissioner to exercise his jurisdiction with regard to such issue under Section 263 in view of the said Explanation. In response, Mr. Jolly who appeared on behalf of the revenue stated that Explanation (c) does not come into play at all. He submitted that the Commissioner sought to revise the order dated 28.3.2003 and not the order dated 30.6.2003 which was passed by the Assessing Officer invoking the provisions of Section 154 of the said Act. We, however, find that the facts indicate a different story, the block assessment order was passed on 28.2.2002, this was taken in appeal by the assessee and after the Commissioner, Income Tax (Appeals) had partially allowed the appeal, the Assessing Officer, giving effect to the Appellate Order,



this order, according to us, did not survive because the Assessing Officer subsequently passed the order dated 30.6.2003 under Section 154. It is clear that there cannot be two assessment orders in respect of the same assessee for the same assessment period. When the Commissioner issued the notice u/s 263 he sought to revise the order dated 28.3.2003 which had already been superseded by the order dated 30.6.2003 passed by the Assessing Officer levying surcharge which order was also set aside in appeal by the Commissioner, Income Tax (Appeals) by the order dated 11.12.2003 as indicated above. It appears that what the revenue authorities could not do adopting the route of Section 154 of the said Act, it sought to do by adopting the other route of Section 263 of the said Act. But once the Commissioner, Income Tax (Appeals) had already shut the issue of levy of surcharge by the order dated 11.12.2003, it was not open to the Commissioner to invoke the provisions of Section 263 and to reopen the issue over again. For this reason also, the order under Section 263 was without jurisdiction. Consequently, question No.2 has to be decided in favour of the assessee and against the revenue.

15. In view of the fact that question No.2 is decided in favour of the assessee and against the revenue, this appeal is liable to be



in favour of the revenue in view of the Supreme Court decision in *CIT v. Suresh N. Gupta* (*Supra*). This is so because question No.2 raises a jurisdictional issue.

The appeal is dismissed.

BADAR DURREZ AHMED, J

RAJIV SHAKDHER, J

July 24, 2008
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