



+* **THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on : 27.08.2008
 % Judgment delivered on : 08.09.2008

+ **ITA 596/2006**

THE COMMISSIONER OF INCOME TAX Revenue
DELHI-X

versus

SHRI ANAND SWARUP KHANDELWAL Respondent

Advocates who appeared in this case:

For the Appellant : Ms.Prem Lata Bansal
 For the Respondent : Mr Prakul Khurana

CORAM :-

HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

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

RAJIV SHAKDHER, J

1. This is an Appeal by the Revenue under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') preferred against the judgment of the Income Tax Appellate Tribunal (hereinafter referred to as the Tribunal) passed in



IT(SS) No. 331/Del/2002 for the block period 1.4.88 to 15.10.98.

2. The only issue raised by the Revenue in the present Appeal is with regard to the deletion by the Tribunal of a sum of Rs.21,61,67,368/- which had been added by the Assessing Officer under Section 40A(3) of the Act on account of purported cash transaction in the sum of Rs.108,08,36,839/-.

3. In order to dispose of the Appeal, the following facts relevant to the issue require to be noted. These are as follows:-

3.1 A search and seizure operation was carried out in the premises of the Assessee i.e, Shri A.S.Khandelwal, on 15.10.1998. Consequently, a notice dated 11.11.99 under Section 158BC of the Act was issued, which was served on the Assessee on 22.11.99. By virtue of this notice the Assessee was required to furnish a return for the block period 1.4.88 to 15.10.98 within a period of 16 days from the receipt of notice. On 7.7.2000 a return of income was filed by the Assessee declaring total undisclosed income for the block period in the sum of Rs.3,47,000/-.



3.2 The Assessing Officer after taking into account the documents (i.e Annexures A-2 to A-8) seized from the premises of the Assessee, framed an assessment vide order dated 29.12.2000 including therein undisclosed income of the Assessee, to the tune of Rs.22,86,89,132/-. The said assessment included several additions including the addition under consideration in the present appeal in the sum of Rs.21,61,67,368/- with respect to assessment year 1999-2000 by taking resort to the provisions of Section 40A(3), in respect of, cash purchases amounting to Rs.108,08,36,839/-.

3.3 Aggrieved by the aforesaid order dated 29.12.2000 passed by the Assessing Officer, the Assessee preferred an appeal with the Commissioner of Income Tax (Appeals) (hereinafter referred to as the CIT). By an order dated 19.2.2002 the CIT upheld the addition of a sum of Rs.21,61,67,368/- made by the Assessing Officer under Section 40A(3) of the Act.

3.4 Being aggrieved by the order of the CIT, the Assessee preferred an appeal to the Tribunal. In the appeal before the



Tribunal, the Assessee had raised several grounds. However, the grounds pertaining to the issue under consideration were

Ground Nos.2 and 8 which are extracted hereinbelow:-

“2. Under the facts and circumstances of the case, the Ld CIT(A) has erred in confirming action of the AO in holding that the various loose papers found from the assessee belongs to him. He has further erred in confirming the action of the AO by holding that various transactions/jottings on these papers represent trading of the assessee.”

“8. Under the facts and circumstances of the case, the Ld. CIT(A) has erred in confirming action of the AO in invoking the provisions of section 40A(3) in respect of alleged purchases of Rs.1,08,08,36,839/- on the basis of seized papers and thereby confirming the addition of Rs.21,61,67,368/- for Asstt. Year 1999-2000 u/s 40A(3).”

3.5 The Tribunal while dealing with Ground No.2 noted that even while the Assessing Officer made observations on the basis of the seized documents that the Assessee was carrying on trading activity which could not be associated with his activity as a broker, it had accepted the commission income with reference to transactions declared as undisclosed income of the block period of the Assessee. The Tribunal also noted that the stock of bullion to which reference has been made by the Assessing Officer based on the seized documents was not



physically found with the Assessee. The Tribunal also observed that the Assessing Officer had not brought on record any positive material to show that the transactions on which he had accepted the Assessee as having earned commission were bilateral transactions where both buyers and sellers could be termed as two different persons. It observed that the Assessing Officer was not able to show that the Assessee had entered into the said transactions as an agent or that the commission received by the Assessee represented profits from activity of sale or purchase of goods undertaken by the Assessee himself. The Tribunal, thus concluded, that it appeared to it that, the Assessee acted as a bailee of goods and, at no point of time, the property in the bullion passed to the Assessee. This conclusion, the Tribunal arrived at based on the fact that the Assessing Officer had not been able to bring any material on record to establish that the Assessee had received possession of the bullion as an actual buyer or that the property in the bullion had passed to the Assessee. The Tribunal noted that after the Assessing Officer had accepted the agency commission it was not permissible for the Assessing Officer to presume that such



transactions were from purchase or sale made by the Assessee in his own right. In view of the above, the Tribunal concluded that the appellant herein could not bring on record any material to prove that the transactions referred to in the documents seized represented the purchase and sale of goods in which the Assessee had proprietary rights.

3.6 In these circumstances, the Tribunal allowed Ground No.2 raised in the appeal filed by the Assessee before it.

3.7 With reference to Ground No.8 the Tribunal noted the contention of the Revenue that the transactions reflected in the seized documents (Annexures A-2 to A-8) were trading transactions made in cash by the Assessee and hence, in terms of Section 40A(3) a disallowance @ 20% of the amount of total transactions amounting to Rs.108,08,36,839/- had been made, which were, as stated above, quantified as Rs.21,61,67,368. Briefly, the Tribunal also recorded amongst others, the following submissions of the Assessee:-



- (i) the provisions of Section 40A(3) could not be taken resort to in a block assessment proceedings conducted under Chapter XIV-B of the Act;
- (ii) no claim in respect of cash purchases amounting to Rs.108,08,36,839/- had either been made or allowed in the block assessment and, therefore, the question of disallowance did not arise;
- (iii) the resort to the provisions of Section 40A(3) could only be taken in the course of regular assessment;
- (iv) there were no purchases made as alleged or at all. Being a broker the assessee only received a commission, therefore, the provisions of Section 40A(3) did not apply.

3.8 The Tribunal, after noting the submissions of both the Revenue and the Appellant, held that in view of the findings returned in respect of Ground No.2 of the appeal that the seized documents, being Annexures A-2 to A-8, did not reflect purchases in which Assessee had proprietary rights and it being undisputed that, in respect of, such



transactions Assessee had declared commission from agency business, which had been accepted as undisclosed income of the block period without any adverse comments thereon, there was no factual or legal justification in making disallowance under Section 40A(3) of the Act. The Tribunal categorically stated that it was unable to accept that the seized documents Annexures A-2 to A-8 represented purchases made by the Assessee in cash.

4. Having heard the learned counsel for the Revenue as well as the Assessee and perused the record of the case below, we are of the view that the addition made by the Assessing Officer by taking resort to Section 40A(3) of the Act on the ground that the Assessee had made cash purchases to the tune of Rs. 108,08,36,839/- is untenable. It is quite evident that the said section is set into motion only if an Assessee incurs an 'expenditure' in cash of a sum exceeding Rs.20,000/-. In other words, the section prohibits making payments towards expenditure in cash for a sum exceeding Rs.20,000/-. In the event of an Assessee undertaking a payment of an expenditure for a sum exceeding Rs.20,000/- in cash, 20% of such



expenditure can be disallowed. In view of the finding returned by the Tribunal that the Assessing Officer could not place any material on record to show that the documents so seized represented purchases made by the Assessee in cash, the provisions of Section 40A(3) will not come into play. If that be so, then there was no question of the Assessing Officer making an addition of 20% of the alleged expenditure involved i.e., a sum of Rs.21,61,67,368/-.

5. In view of the findings returned by the authorities below which involved appreciation of the evidence placed before them, we do not find that the appeal involves any substantial question of law which would require our consideration.

6. In view of the discussion above, the appeal is dismissed.

RAJIV SHAKDHER, J

BADAR DURREZ AHMED, J

September 08, 2008

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