



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
 + **ITA 959/2009**

Reserved on: 21st October, 2009

Date of Decision: 30th November, 2009

JAGJIT PAL SINGH ANAND

..... Appellant

Through: Mr. C.S. Aggarwal, Sr. Adv. with
 Mr. Prakash Kumar, Adv.

versus

COMMISSIONER OF INCOME TAX DELHI

..... Respondent

Through: Ms. P.L. Bansal, Adv.

% **CORAM:**

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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 the Digest? YES.

J U D G M E N T

A.K. SIKRI, J.

1. The appellant before us is an individual who has been regularly assessed to the income tax for last number of years. His source of income is the salary, rent and share income from registered firm M/s General Automobiles.

2. In the present appeal we are concerned with the assessment year 1993-94. The appellant had filed his return of income for this year on 13th March, 1995 declaring total income of Rs.27,054/-. This assessment was reopened by issuing notice under Section 148 of the Income Tax Act on 30th May, 2001. The reason given for re-



assessment was the adjudication order passed by the Collector of Customs on 11th January, 1994 and information of the said adjudication having received by the Assessing Officer from the Collector of Customs.

3. It so happened that certain goods namely consignment of Ball Bearings consigned to one M/s V.A. Enterprises were intercepted at cargo on 4th March, 1993 and were placed under seizure under Section 110 of the Customs Act. Said consignment related to the imports made by M/s Om Prakash Khandelwal, 2923, Khurd Sitaram Bazar, Delhi. The total value of the consignment was estimated at Rs.17,48,969/- which was later revised to Rs.10,79,995/-. Show cause notice was issued after that seizure declaring the value at Rs.4,85,892/-. As per the customs authorities the goods were highly undervalued. As mentioned above after the seizure of the goods and issuing show cause notice, Collector of Customs passed adjudication order dated 11th January, 1994 valuing the goods at Rs.10,79,995/-. While doing so, in the adjudication order the Commissioner of Customs observed that M/s V.A. Enterprises, 2921 Khurd Sitaram Bazar, Delhi as proprietary concern of Sh. Om Prakash Khandelwal c/o 2923, Khurd Sitaram Bazar, Delhi had imported ball bearing vide AWB No.098-6505-0635 dated 21.12.1992 for which bill of entry No. 210189 dated 26.2.1993 was filed. This consignment consist of 1,40,000 pieces of ball bearing No. 608 of Bore DIA8MM and 38,000 pieces of Ball Bearing No. 627 of Bore DIA7MM. CIF value of the said consignment was declared US \$ 15130, equivalent to Rs.4,85,891.99. Sh. J.S. Anand (appellant herein) was pursuing the clearance of the said consignment. In this order the Commissioner of Customs further



observed that Sh. J.S. Anand was the main architect of this fraud. He was the real importer in this case and not M/s V.A. Enterprises, who was only a name lender. Therefore, appellant was the only person who was operating this deal and he was the only person investing in his business which was not disclosed to the Department of Income Tax. On this basis notice under Section 148 of the Act was issued for the assessment year 1993-94 stating that appellant had invested in purchasing of goods which had escaped assessment.

4. After reopening the assessment fresh assessment order was passed on 28th February, 2003 under Section 143(3) read with Section 147 of the Act computing the total income of the appellant at Rs.19,07,790/-.

5. In the appeal preferred by the appellant herein, CIT(A) sustained the addition of Rs.10,79,995/- (which was the value estimated by the Collector of Customs in the adjudication order) out of the total addition of Rs.17,48,969/- made by the Assessing Officer. The CIT(A) also deleted the addition of Rs.84,445/- made by the Assessing Officer on account of alleged commission by hawala @ 5% of the value of imports.

6. Not satisfied the appellant preferred appeal before the Tribunal. The Tribunal has, however, dismissed his appeal vide orders dated 29th February, 2008 upholding the initiation of re-assessment proceedings under Section 147 of the Act as well as quantum assessment order as made by the CIT(A).

7. Still aggrieved present appeal is preferred by the appellant under Section 260A of the Income Tax Act in this Court.



8. Mr. C. S. Aggarwal, learned senior counsel appearing for the appellant has challenged the validity of notice under Section 147 of the Income Tax Act as well as the orders on merits whereby addition regarding unexplained investment made by the AO under Section 69 of the Act have been upheld by the Tribunal. On both these orders appeal was admitted framing following substantial questions of law:

1. Whether, the Income Tax Appellate Tribunal was justified in law in upholding the action of the Assessing Officer in assuming jurisdiction by initiating proceeding u/s 147 of the Income Tax Act, 1961, despite the fact that in the absence of independent application of mind of the assessing officer could not be held to have reason to believe that the income of the assessee has escaped assessment?
2. Whether on true and correct interpretation of Section 69 of the Income Tax Act, 1961, the Income Tax Appellate Tribunal was justified in law in upholding the action of the Commissioner of Income Tax (Appeals) in sustaining the addition of Rs.10,79,995/- u/s 69 of the Act, on account of unexplained investment for alleged imports of goods?

Immediately thereafter the matter was heard finally as both the counsel were ready to argue the matter. We now proceed to determine these questions of law as framed:

QUESTION NO.1

9. This question relates to the justification in initiating the proceedings under Section 147 of the Income Tax Act. The submission in this behalf was that proceedings were initiated by the Assessing Officer at the instance of Commissioner of Income Tax and there was



no independent application of mind by the Assessing Officer. This submission is predicated on the noting in the nature of draft which reads as:

“CIT wrote to Addl. Commissioner on 28.5.2005. CIT desires that concerned A.O. may pl. be directed to take necessary action as recommended by Investigation Wing agt. OP. Khandelwal & J.S. Anand. The limitation expires on 31.5.2006.”

It was argued, on the strength of the aforesaid noting, that action was taken by the Assessing Officer on the basis of “desire of the commissioner”.

10. We are not inclined to accept this argument of the learned counsel. This noting is to be read in the context of other attendant circumstances as well as the reasons for recording such a noting. As already pointed out above, information was received from the custom authorities based on the adjudication order passed by the Commissioner of Customs (Air Cargo) implicating the appellant of fraud and also recording a finding that he was the real importer and not M/s V.A. Enterprises. When this information was received by the Commissioner, he would naturally forward the same to the Assessing Officer for taking “necessary action”. It is apparent from the reading of the notice issued by the Assessing Officer under Section 148 of the Act that after the entire matter was placed before him he had applied his independent mind namely he had gone through the order of the Commissioner of Customs (Air Cargo) and the aforesaid finding recorded therein on the basis of which he came to the conclusion that income had escaped assessment. Significantly, the Commissioner had nowhere stated as to what kind of action is to be taken. It is the Assessing Officer who dwelled into this aspect and decided to issue



notice under Section 148. Reasons which are given by the Assessing Officer for initiating these proceedings are his own and amply depict his independent application of mind as is clear from the copy of the reasons recorded by the Assessing Officer in the following manner:

“DDI (Inv.) Unit III (2), New Delhi has sent information in the case of Shri Om Parkash Khandelwal, Prop., VA Enterprise, 2923, Sitaram Bazar, Delhi (copy of the order of Commissioner of Customs, Air Cargo, New Customs House, Near IGI Airport, New Delhi dated 11.5.1999 through CIT-V, New Delhi. The CIT-V, New Delhi has directed to take necessary action in case to Shri J.S. Anand, D-14/A-I, Model Town, New Delhi who is connected with this case.

Order of Commissioner of Customs (Air Cargo) dated 11.5.1999 reveal that M/s VA Enterprises, 2921, Khurd Sitaram Bazar, Delhi as proprietary concern of Shri Om Prakash Khandelwal, do 2923, Khurd Sitaram Bazar, Delhi imported Ball Bearing vide AWB No.098-6505-0635 dated 21.12.1992 vide B/E No.210189 dated 26.2.1993. This consignment consist of 1,40,000 pieces of Ball Bearing No.608 of Bore DIA8MM and 38,000 pieces of Ball Bearing No.627 of Bore DIA7MM. CIF value of the said consignment was declared as US\$ 15130 (0.08 US\$ per piece) equivalent to Indian Rs.4,85,891.99. Shri J.S. Anand pursuing the clearance of the said consignment. The consignment was intercepted on 4.3.1993 at Air Cargo, Complex, New Delhi by DRI officers. After investigation the case DRI offices found that the good was grossly undervalued and therefore were placed under seizure U/S section 110 of the Customs Act, 1962. The total value of these consignments estimated at Rs.17,48,969/- by DRI offices which was almost confirm by Commissioner of Custom, Delhi, hence the total consignment was under value by Rs.12,00,000/- (approximate).

Order of Commissioner of Custom (Air Cargo) further held reveal that Shri J.S. Anand is main architect of this fraud. The real importer in this case was Sh. J.S. Anand and not M/s V.A. Enterprises through its Proprietor Shri OM Prakash Khandelwal. Mr. Khandelwal was only a name-lender. Hence, Shri J.S. Anand is the only person who is operating this trade and he is the only person investing in his business which was not disclosed to the Department of Income tax, hence the difference amount of Rs.12,00,000/- (approximate) was invested in purchasing of good was invested in Financial Year 1992-93 has escaped assessment. In order to bring to tax this amount notices u/s 148 is for the A.Y., 1993-94 is required to be issued and necessary approval for the same are solicited at the earlier date.”



11. Following aspects clearly emerge from the aforesaid discussion:

- (a) CIT had only desired the AO to “take necessary action” i.e. appropriate action in the matter. What action should be taken was not even spelt out.
- (b) It is the AO who examined the matter on the basis of information received from DDI (Inv.) including therewith copy of order of Commissioner of Customs (Air Cargo) and he decided that it was a fit case for initiating proceedings under Section 148 of the Act and acted accordingly.
- (c) The reasons given by the AO and formation of belief that income of the assessee had escaped assessment in the year under consideration are recorded by the AO himself by applying his own mind. This is not influenced by his superior officer.

12. In this backdrop we have no hesitation in holding that Tribunal rightly rejected this contention of the appellant taking note of two judgments of the Supreme Court. In the case of ***Raymonds Woollen Mills-236 ITR 34*** the Hon’ble Supreme Court has held that in determining whether the commencement of the reassessment proceedings was valid, it was only to be seen that there was a prima facie some material on the basis of which the Department could reopen the case. The sufficiency correctness of the material is not a thing to be considered at this stage. We find that there was a material on record on the basis of which the Assessing Officer has formed opinion that there is escapement of income in the case of the assessee for the year under consideration. In the case of ***ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd.- 291 ITR 500 (SC)*** the



Apex Court held the same view.

13. We thus decide this question against the appellant/assessee.

OEUSITON NO.2

14. Finding of fact was recorded by the Commissioner that real importer in this case was the appellant and not M/s V.A. Enterprises. In appeal, the matter was remitted back to the Commissioner regarding valuation and further determination of duty, confiscation, adoption, fine and penalty etc. Fresh orders dated 11th May, 1999 were passed wherein the Commissioner held that it was Sh. J.S. Anand who negotiated the price of consignment and only he placed the order and was to arrange the disposal of the goods. Commissioner of Customs after examining all the facts and circumstances of the case, held that the goods have actually been under invoiced and these are to be assessed to customs duty on the value mentioned in page 3 of the CIT(A)'s order. It was further ordered that the goods were confiscated u/s 111(m) of the Customs Act, 1962 and these were allowed to be redeemed on payment of fine in lieu of confiscation amounting to Rs.5 lac. Penalty of Rs.10 lac was imposed each on Shri O.P.Khandelwal and Shri J.S.Anand u/s 112(a) of the Customs Act, 1962 for various acts of omission and commission committed by them.

15. On this basis the Assessing Officer in the reassessment proceedings confronted the appellant with the fact that although bill of entry for Rs.4,85,892/- in respect of the goods imported was submitted, the actual value of the goods imported was Rs.17,48,969/- and therefore the appellant must have made investment of Rs.12,63,077/- (Rs.17,48,969 – 4,85,892/-) from undisclosed sources



and made addition to the income.

16. CIT (A) modified this order by taking into consideration import value as Rs.10,79,995/- instead of Rs.17,48,969/- which was the value revised by the custom authorities. On the basis of the aforesaid material the Income Tax Appellate Tribunal also upheld the order of the CIT (A).

17. Mr. Aggarwal, learned senior counsel appearing for the appellant made an attempt to dislodge the aforesaid finding by submitting that since the goods have been confiscated and the assessee too had suffered the loss and, therefore, there was no question of escapement of any income. This aspect, according to him, was not dealt with by the Tribunal.

18. We are not impressed by this argument either. The finding recorded by the Commissioner of Customs and upheld by the CEGAT amply depicts that it was the appellant who had imported the aforesaid material and undervalued the same to the extent of Rs.10,79,995/-. This would clearly mean that assessee made an unexplained investment of the aforesaid amount namely the appellant had invested this money in importing the goods which were unexplained. Therefore, addition under Section 69 of the Act could validly be made. If the goods which were provided from the unexplained import have been confiscated, that may be a loss suffered by the appellant and it is for the appellant to claim that loss. The appellant never made any such attempt. Had the appellant made a claim in this behalf on the premise that it represent an expenditure incurred which is allowable under Section 37 of the Income Tax Act, before the Assessing Officer, the Assessing Officer could have gone



into this aspect. However, such a plea was not even taken either before the Assessing Officer or before the CIT(A) and for the first time raised before the ITAT that too in the form of written submissions and we are not sure as to whether it was pleaded at the time of arguments or not. Though, it is a submission of learned senior counsel that this aspect is not dealt with by the Tribunal, no attempt was made by the appellant by filing application under Section 254(2) of the Income Tax Act pointing out that such a plea was taken but not considered. Accordingly we decide this question also against the appellant.

19. As a consequence this appeal is dismissed with costs quantified in the sum of Rs.10,000/-(Rupees ten thousand).

A.K. SIKRI, J.

SIDDHARTH MRIDUL, J.

NOVEMBER 30, 2009

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