THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 01.02.2013

\+ ITA 1462/2010
\+ ITA 1463/2010
\+ ITA 751/2011

COMMISSIONER OF INCOME TAX ..... Appellant

versus

BHUSHAN CAPITAL AND CREDITS SERVICES LTD
..... Respondent

Advocates who appeared in these cases:
For the Appellant : Mr. Abhishek Maratha, Advocate
For the Respondent : Mr. Ajay Vohra, Advocate

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

R.V.EASWAR, J

These are appeals filed by the revenue under section 260A of the Income Tax Act, 1961. They relate to the assessment year 1999-2000.

2. The assessee is a company. It filed a return of income which was processed under section 143(1) on 21.3.2000. The assessment was reopened under section 147 of the Act and the reopened assessment was completed under section 147 read with section 143(3). This assessment

was quashed by the CIT(Appeals) on the ground of lack of jurisdiction of the AO to reopen the assessment. His order was confirmed by the Tribunal. Thereafter the assessment was reopened again under section 147 of the Act on the basis of information given by the Director of Income Tax (Investigation) to the effect that the assessee has received accommodation entries from another company - My Money Security (P) Ltd. - for Rs.5 lacs by cheque No.421180 dated 23.3.2009. The assessee was asked to provide details of the shares purchased from the above company between the period 9.5.1998 and 22.3.1999. After examining the details the AO took the view that the capital gains of Rs.5,10,130/- which was declared in the return of income arose on account of a transaction which was sham, that no shares were sold by the assessee and only an accommodation entry was taken from My Money Security (P) Ltd and that the amount of Rs.5,10,130/- declared as capital gains (short term) should be assessed as the undisclosed income of the assessee. On this basis the reassessment was completed by order dated 29.12.2006 in the following manner:-

Income as per order u/s 250/147/143(3) dt.18.07.05	NIL
Add : Loss on sale of share M/s Décor Steel Ltd. disallowed {as discussed above (₹57,46,463 –	52,36,333

5,10,130 = 52,36,333)}	
Add : Undisclosed income introduced under guise of short term	5,10,130
TOTAL INCOME	57,46,463

3. In the appeal filed before the CIT(Appeals), the assessee challenged the jurisdiction of the AO to reopen the assessment and also challenged the addition on merits. The CIT(Appeals) rejected the challenge to the jurisdiction of the AO to reopen the assessment. On merits, he decided the appeal in favour of the assessee by deleting the addition of Rs.5,10,130/-.

4. Both the assessee as well as the revenue filed appeals before the Tribunal. The appeal of the assessee was against the decision of the CIT(Appeals) upholding the jurisdiction of the AO to reopen the assessment, whereas the appeal of the revenue was against the decision of the CIT(Appeals) deleting the addition of Rs.5,10,130/-. The Tribunal passed a common order on 15.10.2009. In ITA No.2476/Del/2007, which was the appeal filed by the assessee, the Tribunal held, agreeing with the assessee, that the AO did not have jurisdiction to reopen the assessment. After referring to the precedents on the point, the Tribunal held that there was no material before the AO to show that the short term capital gains

shown by the assessee were his undisclosed income and that the assessment having been reopened after a period of almost 8 years cannot be upheld since it was a case of a change of opinion on the basis of material which was not relevant to the formation of the belief that income chargeable to tax had escaped assessment. On this reasoning the Tribunal held that the AO had not properly assumed the jurisdiction to reopen the reassessment. It accordingly allowed the assessee's appeal. The appeal filed by the revenue in ITA No.2703/Del/2007, in which the decision of the CIT(Appeals) was questioned on merits, thus became academic in nature and was not decided by the Tribunal.

5. The effective appeal of the revenue before us is in ITA No.1463 which is against the order of the Tribunal in the assessee's appeal in ITA No.2476/Del/2007. The other appeal filed by the revenue in ITA No.1462 of 2010 is directed against the Tribunal's decision in ITA No.2703/Del/2007 which seems to have been filed by way of abundant caution, since the Tribunal has not dealt with the merits of the addition.

6. The reasons recorded under section 148(2) for reopening the assessment are as follows:-

"M/S BHUSHAN CAPITAL CREDIT SERVICES LTD, AY : 1999-2000

The Directorate of Investigation-I, New Delhi, vide its office letter No.1320 dated 2.3.2006 had sent a report in case of beneficiaries and operators of accommodation entries in Delhi. The letter was accompanied with a detail report. A perusal of the report shows that, M/s Bhushan capital Credit Services Ltd, whose jurisdiction lies with the undersigned, has been a beneficiary of an entry provided by M/s MY MONEY SECURITIES LTD. which has provided accommodation entries to the tune of several crores to various beneficiaries. The assessee M/s Bhushan capital Credit Services Ltd, has also been a beneficiary of accommodation entries, provided by M/s MY MONEY SECURITIES LTD. at ₹5 lacs vide chq no.421180 dt.23/03/99.

In view of the above credible information received from the DIT (Inv), I have reasons to believe that the said income chargeable to tax has escaped assessment, as per the provisions of section 147 (a), (b) & (c) of the Income Tax Act 1961.

3. I am, therefore, satisfied that the said income has escaped assessment, and accordingly after recording the above said reasons as laid down under the provisions of Section 148(2) of the Income Tax Act, propose to issue a notice to the above mentioned assessee u/s 148(1) of the IT Act 1961."

We find from a perusal of the assessment order that the assessee had declared the amount of Rs.5,10,130/- in its return of income as short term capital gains on sale of shares. In the reopened assessment, the AO has

taken the view that the amount in fact did not represent any capital gains on sale of shares, but represented the undisclosed income of the assessee brought in by means of an accommodation entry given by My Money Security Pvt. Ltd. Accordingly he brought the amount to tax with the narration "undisclosed income introduced under guise of short term capital gains". The fact however remains that the amount had been declared in the return of income as capital gains and what the AO did was only to change the nomenclature from "capital gains" to "undisclosed income". The assessment has been reopened after a lapse of about 8 years from the end of the relevant assessment year as noted by the Tribunal in paragraph 10 of the impugned order. If the assessment is sought to be reopened after a period of four years from the end of the relevant assessment year, it is incumbent upon the AO, under the first proviso to section 147, to show that the escapement of income was on account of failure of the assessee to file the return of income or to furnish fully and truly all material facts relating to the assessment. As we have already noted, according to the revenue the assessee had declared the amount of Rs.5,10,130/- as capital gains in the return of income. There was thus no failure to disclose the income. Consequently, there is no

escapement of income. The change of the nomenclature from "capital gains" to "undisclosed income" does not result in any escapement of income since the rate of tax is the same under both heads. In the relevant assessment year, there was no difference in the rate of tax applicable to capital gains. Therefore, neither is there any escapement of income nor is there any under assessment. It is not a case covered by special sub-clause (ii) of clause (c) of Explanation (2) below section 147 which speaks of the income being assessed at too low a rate. The primary condition for invoking section 147 is that there should be escapement of income. It appears to us from the facts of the case that there was no escapement of income chargeable to tax. In this view of the matter, we find no infirmity in the ultimate decision of the Tribunal that the reassessment was without jurisdiction. No substantial question of law arises from the order of the Tribunal. Both the appeals of the revenue in ITA Nos. 1462 and 1463 of 2010 are accordingly dismissed with no order as to costs.

7. ITA No.751/2011 is consequential. It is directed against the order of the Tribunal in ITA No.465/Del/2010 dated 28.9.2010 by which the Tribunal agreed with the CIT(Appeals) who had cancelled the penalty of Rs.20,54,140/- imposed on the assessee under section 271(1)(c) of the

Act. Since we have held in ITA No.1463/10 that the Tribunal was right in quashing the reassessment on the ground of lack of jurisdiction, the quashing of the penalty is consequential. No substantial question of law arises out of the order of the Tribunal.

8. In the result, all the three appeals filed by the revenue are dismissed with no order as to costs.

R.V.EASWAR, J

BADAR DURREZ AHMED, J

February 01, 2013
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