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

Reserved on: 06.02.2018
Pronounced on: 12.03.2018

\+ **ITA 1003/2017, C.M. APPL.41767-41768/2017 & 3505/2018**

VINOD KUMAR GUPTA …. Appellant

Through: Sh. Arvind Kumar with Sh. Harshvardhan Sharma, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX CENTRAL CIRCLE-17 .... Respondents

Through: Sh. Zoheb Hossain, Sr. Standing Counsel with Sh. Deepak Anand, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The question of law framed in this appeal is as follows:

> *"Was the addition – upheld by the impugned order, on the basis of statements made by Sh. Suresh Kumar Gupta and the materials seized from his premises justified in the facts and circumstances of the case given that the premises were separate, though a common warrant under Section 132 of the Income Tax Act, 1961 was issued in respect of both?"*

2. A search and seizure operation under Section 132 of the Income Tax Act, 1961 [hereafter "the Act"] was conducted at the premises of the appellant-assessee on 30.07.2009. The search included the assessee's brother – Mr. Suresh Kumar Gupta ("S.K. Gupta" hereafter) who lived in the first and second floor of the same premises, namely, S-511, Greater Kailash Part-II. The assessee and that brother lived separately, but in the same

building. Two *panchnamas* were drawn in the course of the searched premises listing out the material seized separately from both the premises. On 21.04.2010, a notice under Section 153A of the Act was issued and the assessee filed his return declaring a total income of ₹3,80,610/-. The Assessing Officer (AO) completed the assessment, at ₹1,94,62,172/- by adding amounts that were based upon documents seized from the premises of S.K. Gupta, from his residential and office premises at Daryaganj. The AO was of the opinion that in the overall facts and circumstances of the case, percentage of the income based on the statements made, were attributable to the income of the assessee. This amount included ₹1,97,30,929/- on account of undisclosed interest income made in the case of S.K. Gupta. A portion of the income was added to the assessee's income. An additional amount of ₹92,16,098/- on account of unaccounted expenditure on the marriage of the son and daughter of the assessee was made.

3. The assessee appealed to the Commissioner [hereafter "the Appellate Commissioner"]. The Appellate Commissioner had earlier made a detailed appellate order rejecting S.K. Gupta's appeal on 28.10.2013. That appellate order was for the Assessment Year (A.Y.) 2006-07 and had found that the undisclosed income derived from the notings in the seized documents belonged to both the brothers. In the appeal preferred by the assessee, the Appellate Commissioner apportioned the undisclosed interest income in the ratio of 40%:60% respectively in the hands of the assessee and the brother - S.K. Gupta. The Appellate Commissioner rested his reasoning, based upon a settlement award made by the Company Law Board in the course of *inter se* disputes and differences that were the subject matter of litigation before the

Board. The Appellate Commissioner also allowed credit for the opening capital. The assessee appealed to the Tribunal.

4. The Tribunal by the impugned order rejected the assessee's contention with respect to the validity of the assessment made in the block period. The assessee had contended that in the absence of any satisfaction recorded in terms of Section 153C(1) of the Act, since the seizures relied upon in the final assessment pertained to him but were made in the course of the proceedings and search of his brother's premises (to which he was a third party), the materials so seized became third party material for which notice was mandatorily required. It was argued, in other words, that in the absence of a notice under Section 153C, the assessment was illegal. This contention was rejected by the Tribunal. The assessee had challenged the substantive addition with respect to the apportioning of interest income in the hands of the other brother. He had contended that the ratio of 40%:60%, i.e. 40% attributable to him on account of the appellate order of the Commissioner made in his brother's case which was followed in his case as well was not legal. The Tribunal rejected this contention.

5. The Tribunal, by its impugned order, rejected the assessee's arguments, and held, *inter alia*, as follows:

> *"On careful consideration of the above rival submissions and vigilant and careful perusal of the material available on record and on respectful consideration of the case laws cited at bar before us, we observe that the documents and consolidated balance sheet, as available in the assessee's paper book- I from pages 196 to 221, it is vivid that these consolidated balance sheets reflect the assets in the shape of bank balance, investment in properties in the names of various group*

members and companies relating to the present assessees i.e. Shri S.K. Gupta and Shri V.K. Gupta. We further observe that the debtors, stock, loans, advances and creditors of various group companies belonging to the present assessees and ' bank borrowings show that the loans have been taken in the names and Smt. Madhu Gupta wife of Shri S.K. Gupta and Smt. Veena Gupta wife of Shri V.K. Gupta. Therefore, the income arising on account of these assets cannot be exclusively attributed or held as belonging to late Shri Suraj Bhan Gupta only.

The charging section 4 of the Income Tax Act provides that the tax is to be charged on the income of a person to the extent it belongs to him. In the present case, the income belongs to various individuals and group companies from the assets, investments, etc. which cannot be held as exclusively belonging to late Shri Suraj Bhan Gupta and the same belongs to various family members including the present assessees, their wives and children. We may also point out that as the seized documents are cash book, ledger account, consolidated balance sheets and other documents and these have been maintained just to briefly record the assets and liabilities of the family members and group companies, therefore, various complexity and uncertainties are there in the identification of exact income, which belongs to the individual members of the group companies and thus it is not possible to allocate the income there from person-wise and company-wise. Therefore, we ate inclined to agree with the findings of the Commissioner of Income Tax (Appeals) that the income should be allocated between Shri. S.K Gupta and Shri V.K. Gupta as they are the key players after the death of Late Shri Suraj Bhan Gupta and they also agreed before the Company Law Board vide order dated 13.1.2009 to divide the assets of the family and group companies in the ratio of 60:40 respectively among them. Hence, we decline to agree with the contention of the assessee that the entire income discernible from the consolidated balance sheets should be assessed in the hands of Late Shri Suraj Bhan Gupta.

22. So far as the alternative prayer of the assessee is concerned

that the income should be assessed in the hands of AOP is concerned, we do not find any force in this contention as there was no AOP in existence during the relevant assessment years and it is also not clear as to which AOP the income should be assessed. At this juncture, we again point out that vide Company Law Board order dated I 3.1.2009 both the assessees have agreed to divide the assets of the group which was headed by late Shri Suraj Bhan Gupta between them in the ratio of 60:40 and being a beneficiary of the assets in such ratio, the authorities below were right in taxing the income therefrom in the same ratio in the hands of respective assessee-appellant.

Consequently, ground no. 3 of the assessee is dismissed."

6. Mr. Arvind Kumar, learned counsel argued that the documents seized from the possession and control of S.K. Gupta from his residential office premises cannot be presumed under the law, to belong to the assessee, in terms of Sections 132(4A) and 292C of the Act. It was argued that there has been no investigation, examination or statement taken under oath under the Act, in case of the assessee by the Income Tax Department, from which there could be a reasonable assumption that the incriminating documents seized from the possession and control of S.K. Gupta belonged to the assessee.

7. It is argued that in terms of Section 153C of the Act (as it existed upto 31.05.2015) the AO of S.K. Gupta had to record his "satisfaction" that the documents seized under Section 132 of the Act, from the possession and control of S.K. Gupta, belonged to the assessee, before they could have been handed over to the AO having jurisdiction over him. In terms of Section 153C of the Act the AO of the assessee could not have proceeded against him with respect to the said seized documents from the possession and

control of Sh. S.K. Gupta, without the mandatory recording of the satisfaction and subsequent handing over the same by the AO of the searched person, i.e. Sh. Suresh Kumar Gupta.

8. It was also argued that the Tribunal's conclusion that when there is a search and seizure operation against two persons simultaneously then the material documents, etc. seized therefrom can be used validly against both the searched persons without taking the aid of Section 153C of the Act is contrary to law. Reliance is placed on the decision of the Supreme Court in *Commissioner of Income Tax -III v. Calcutta Knitwears* (362 ITR 673) that for the purpose of Section 158BD of the Act a satisfaction note is *sine qua non* and must be prepared by the AO before he transmits the records to the other AO who has jurisdiction over such other person, which provision is *parimateria* to the provision of Section 153C of the Act. Reliance is also placed on *Pepsico India Holdings Pvt. Ltd. v. ACIT* (370 ITR 295); *Commissioner of Income Tax v. RRJ Securities Ltd.* (380 ITR 612) and *Principal CIT v. Nikki Drugs and Chemicals Pvt. Ltd.* (386 ITR 680).

9. Counsel argued that the Tribunal's decision that the assessee and his brother Suresh Kumar Gupta have agreed before the Company Law Board to divide the assets of the family and the group companies in ratio of 40:60, respectively among them could be the basis of the finding that the undisclosed interest income should also be apportioned in the same ratio between them.

10. Mr. Zoheb Hossain, learned counsel for the Revenue urged that in this case there is no dispute that firstly the statement of the assessee was recorded on 30.07.2009. In the course of the statement, the books seized from his

premises were confronted to him; he also admitted that a hard disk was seized in the course of the search. The statement of S.K. Gupta too was made available before the final assessment order was framed in the case of the assessee. Based upon the statement as well as the settlement recorded by the Company Law Board on 13.08.2008, it was concluded that the amounts required to be added were to be in the names of the assessee and S.K. Gupta since they were brothers and children of one late Suraj Bhan Gupta. These amounts during the relevant period were attributable to the business that their deceased father had with them. On account of the search, which occurred later, the income could not be assessed in the case of late Suraj Bhan Gupta nor assessed in the status of an Association of Persons (AOP). In this regard, it was pointed out that the assessee was afforded opportunity to deal with the statement made by his brother and also deal with the apportionment of the rights and liabilities of the parties in terms of the compromise/settlement between S.K. Gupta and the assessee, before the final assessment was made. Mr. Zoheb Hossain stated that having regard to all these facts, there was no necessity of issuing notice under Section 153C; the fact of the matter was that the search was a joint one, carried out in one continuous proceeding, even though at site both the assessee and his brother lived in separate apartments.

11. It was argued that the findings of the lower appellate authority are based upon an overall appreciation of the circumstances and cannot be called as findings of law. Whilst the incriminating material that led to the adding of assessee's income were found in the premises of S.K. Gupta, since the documents were recovered in the course of one search proceeding, there was

no impediment to treat it as part of one composite search. That the assessee was issued notice under Section 153A is not in dispute. In the circumstances, the attribution of amount of interest was done correctly. It was stated that as far as the marriage expenditure of assessee's children is concerned, the addition made i.e. ₹92,16,098/-, was derived from the books of account seized from the assessee's premises. In fact, the assessee did not even urge this aspect and rather gave it up.

Reasoning and Conclusions

12. The assessee's principal submission with respect to the invalidity of the search assessment is the absence of notice under Section 153C. What the assessee argues is that being a third party, the materials relatable to him but recovered from S.K. Gupta's premises could be used if at all by following the procedure of prescribing the record to his Assessing Officer (AO). After recording satisfaction, his AO proceeds to apply his mind to such documents and if found credible, issue notice and take the matter further, under Section 153C.

13. The assessee's arguments about the correct procedure are, in fact, a matter of law. However, there are certain singular features to this case. The search and seizure was conducted on the same date; even through one authorization. The premises searched were S-511, Greater Kailash Part-II. The warrant, in fact, was issued in the name of S.K. Gupta, Gaurav Gupta, the assessee, Veena Gupta, Vikas Gupta and Ms. Madhu Gupta. The *panchnama* drawn on 01.08.2009 was signed by both the assessee and S.K. Gupta. The statements of both S.K. Gupta and Vinod Gupta were recorded

on the same date, i.e. 31.07.2009. Furthermore, the documents, cash and other books of accounts seized pointed to such circumstances that the Revenue was justified in arguing that a separate notice under Section 153C was unnecessary. These facts are that both the assessees are brothers. Both were involved in the common business and the assessee used to be in-charge of the accounts. Given these, there was no necessity of issuing notice under Section 153C and following the separate but elaborate procedure prescribed therein.

14. The Court is also cognizant of the fact that so far as the materials seized from S.K. Gupta's premises are concerned, *arguendo* the assessee's submission that he had no control and had to be given a separate opportunity with respect to the documents attributable to his (assessee's) accounts and the affairs would have been justified had he been denied the relevant materials. However, such is not the case. The statements made by S.K. Gupta – like the assessee's own statement, the relevant documents in the form of the compromise/settlement and other details were made available to the assessee to enable him to make submissions before the Assessing Officer (AO). Therefore, the substance of the procedure prescribed under Section 153C was followed. In other words, there was no failure of natural justice nor opportunity denied to the assessee to explain reasonably about the inferences that could be drawn from materials recovered and sought to be attributed to his income.

15. As far as the addition made and the proportion applied goes, this Court notices that the CIT(A) and the Tribunal premised their findings upon the admitted documents in the form of a compromise settlement in the course of

which the relevant share of the parties' rights and liabilities have been settled. In these circumstances, the business, which had yielded such interest, had to be inevitably apportioned between the two brothers who had parted ways later. The income generated was during the period when both of them were together. Essentially, being factual, the findings are based upon a *rationale* which is both convincing and reasonable. In these given circumstances, the Court is of the opinion that there is no error of law with respect to the additions made.

16. As far as the addition with respect to the unaccounted sum of ₹92,16,098/- goes, the Court notices that besides contesting that the assessee's son was nick named "Golu", there cannot be any denial that the documents seized clearly revealed the total expenditure that the assessee incurred in respect of both his children. Those were not traceable to the books of account or the returns that he had disclosed earlier. In these circumstances, the addition made was justified.

17. For the above reasons, it is held that the question of law framed has to be and is answered in favour of the Revenue and against the assessee. The appeal is consequently dismissed but without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

MARCH 12, 2018