

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH : KOLKATA

[Before Hon’ble Shri J.Sudhakar Reddy, AM]

I.T.A No. 2121/Kol/2017

Assessment Year : 2008-09

Shri Jagdish Prasad Goel
[PAN: AFFPG 1693 B]
(Appellant)

-vs-

DCIT, Circle-43, Kolkata
(Respondent)

For the Appellant : Shri Miraj D Shah, AR

For the Revenue : Shri Pinaki Mukherjee, Addl. CIT

Date of Hearing : 16.04.2018

Date of Pronouncement : .06.2018

ORDER

This appeal by the Assessee directed against the order of the Learned Commissioner of Income Tax (Appeals)-13, Kolkata [in short the Id CITA] dated 18.07.2017 passed under section 250 of the Income Tax Act, 1961 (in short “the Act”) for the Assessment Year 2008-09 on the following grounds :

- 1. For that the Ld. CIT(A) erred in sustaining addition of Labour Charges to the tune of Rs. 3,60,000/- out of estimated addition on account of Cutting charges made by the Assessing Officer in assessment stage.*
- 2. For that in the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) was not justified in upholding the disallowance development Cost of Rs. 10,81,200/- in the computation of short term capital gains on sales of land and in that way, in computing the said short term capital gains at Rs. 19,06,360/- instead of at Rs. 10,81,200/- in the computation of short term capital gains on sales of land and in that way, in computing the said short term capital gains at Rs. 19,06,360/- instead of at Rs. 8,25,160/- as declared by the appellant.*

3. *For that further grounds of appeal may be submitted or before the date of hearing.*

2. The assessee filed an application for admission of the following additional grounds:

a) For that in the facts and circumstances of the case that the two plots of lands were agricultural lands and therefore were not capital assets for the purpose of Income Tax Act, 1961.

b) For that in the facts and circumstances of the case no capital gain arose from the sales of lands chargeable to tax under the Income Tax Act, 1961.

3. After hearing rival contentions I hold that the additional grounds have to be admitted, as they are legal grounds and as all the facts are on record by following the judgment of Hon'ble Supreme Court in the case of Jute Corporation of India Ltd. vs. CIT 187 ITR 688 and in the case of NTPC vs. CIT 222 ITR 383.

4. The brief facts are that the assessee is an individual and is engaged in the business of iron and steel under the name of M/s J.P. Udyog. He also earned income on sale of agricultural land. A survey was conducted u/s 133A of the Act on 17.02.2008. The assessing officer records that the assessee has suppressed income earned on cutting charges. He estimated the income from cutting charges of Rs. 7,20,000/- further the AO disallowed development cost of land claimed by the assessee of Rs. 10,81,218/-. Aggrieved the assessee carrying the matter in appeal. The Id. First appellate authority, on the issue of suppression of cutting charges, reduced the estimated income to Rs. 2,60,000/-. On the issue of profit of sale of land he dismissed the claim of the assessee. Further aggrieved the assessee in appeal before us.

5. After hearing the rival contentions, perusing the papers on record and orders of the authorities below as well as case law cited I hold as follows.

6. The first issue of cutting charges, the Ld. CIT(A) at page 6 and 7 of his order states that as follows:

“I have gone through the submissions of the appellant. It is seen that the AO has added Rs. 7,20,000/- on presumption basis in respect of cutting charges. The AO has presumed that cutting charges are not mentioned against the 2400 MT of CR/GR Coil. It is pertinent to mention here that the aforesaid documents, the AO has found that cutting charges have been charges on aforesaid quantity. The appellant submitted that few customer purchases coils without any cutting. In this regard, the appellant has furnished confirmation received from M/s PSPL Steel Processors Pvt. Ltd. who has confirmed that the quantity mentioned in the bill dated 05.01.2008, 01.02.2008 and 18.12.2017 has been returned back to the party without any cutting bill done on the sale. The appellant says that no cutting was done therefore, no cutting charges mentioned to be received. The AO did not make any enquiry from the customers or the labour contractors and simply assumed that payments must have been received whereas nothing was found in the impounded material. It was further argued alternatively by the appellant that the AO has taken highest value for cutting charges whereas the mean (average) rate should have been applied. Perusal of assessment order shows that the cutting charges varies from 100 to 300 for estimation of cutting charges and the applied Rs. 300/-. In this case, it is also seen that the appellant could not submit confirmation and break-up of the details of coil which were without cutting in order to prove that cutting charges were not received by him, though he contended during the course of appellate proceedings that he will file so. In absence of any such detail submitted by the appellant in respect of ‘no cutting charges received’, the mean rate of cutting charges is hereby directed to applying on 2400 MT CR/G R coils and accordingly Rs. 3,60,000/- is to be added in the hands of the appellant and remaining Rs. 3,60,000/- is hereby deleted. This ground of appeal is partly allowed.” (Emphasis ours)

7. From the above it can be seen that the Ld. CIT(A) clearly held that the addition is made on presumption basis and without enquiry. Even then, the alternative plea of the assessee was considered and 50% of the income was reduced. To my mind, when a factual finding is given by the Ld. CIT(A) that the addition is made on presumption and that no evidence was found in the impounded material that cutting charges have been levied on the quantity of 2400 MT and when the assessee has furnished confirmations from three parties to that effect., the question of making of addition on this issue does

not arise. Hence the entire addition should have been deleted . Hence the addition is deleted and the ground is allowed.

8. Ground no. 2 and additional grounds are on the issue of computation of profit of sale of land. The assessing officer at page 3 has given following factual findings.

i) The nature of land at the time of purchase on 25.04.2007 was agricultural land which is also clearly evident from the copy of purchase deed filed.

ii) The nature of land at the time of sale on 15.10.2007 was as same as on the date of purchase on 25.04.2007. It is clearly evident from the sale deed that the land was agricultural.

iii) From para 1 & 2 as above, it is clearly understood that there has been no development/change in the land. At the time of purchase the land was agricultural and also at the time of sale the land was agricultural land. It is worthy to note that if somebody incurs an expenditure around Rs. 10.81 lakh on a land costing Rs. around 12.47 lakh on account of development, there must be the change in the natures of the land. In the instant case, no change in nature of land is seen. (Emphasis ours)

These findings of the fact are not disturbed by the Ld. CIT(A). Hence it is not in dispute that what is purchased and sold is agricultural land. The Hon'ble Bombay High Court in the case of Manubhai A.Sheth v. Nirgudkar (2nd ITO [1981] 128 ITR 87) (supra) held as follows :-

“the capital gains arising from the sale of land situated in India, which land is used for agricultural purposes, would be revenue derived from such land and, therefore, agricultural income within the meaning of section 2(1) of the Income-tax Act, 1961. The Andhra Pradesh High Court in the case of S. Mutyam Reddy v. ITO [1988] 169 ITR 174 has also held that the capital gains arising from sale of land used for agricultural purposes constituted revenue derived from agricultural land and therefore agricultural income under section 2(1A) of the Act and therefore not chargeable to Central income-tax.”

Applying the proposition of law I hold that the profit on sale of agricultural land cannot be treated as income and brought to tax under the Income Tax Act.

9. Even if the assessee has filed a return disclosing the profit as short term capital gain, the same cannot be upheld for the reason that there is no estoppel against law.

a) In the case of CIT vs. DKB & Co. Reported in 243 ITR 618, the Hon'ble Kerala High Court held that "It is the settled position in law that there cannot be estoppels against a statute. There is no provision in the statute which permits a compromise assessment. The above position was indicated by the Apex Court in UOI vs. Banwari Lal Agarwal (1999) 238 ITR 461. It cannot be laid down as a principle of universal application that whenever an assessment has been completed by accepting the offer of an assessee, no penalty can be imposed. It has not been so observed by the Apex ITA No.6076/Del/2012 AY 2009-10 Sh. Haripal Singh Court in Sir Shadilal Sugar and General Mills Ljtd. Vs. CIT (1987) reported in 168 ITR 705, as the Tribunal held. Its conclusion has been arrived at by a clear misappreciation of the ratio laid down in the said case."

(b) In the case of Mayank Poddar (HUF) vs. WTO reported in 262 ITR 633 the Hon'ble Calcutta High Court has held as under.

"Even if the assessee had included the same in his return, that would not preclude the assessee from claiming the benefit of law. There cannot be any estoppel against the statute. A property, which is not otherwise taxable, cannot become taxable because of misunderstanding or wrong understanding of law by the assessee or because of his admission or on his misapprehension. If in law an item is not taxable, no amount of admission or misapprehension can make it taxable. The taxability or the authority to impose tax is independent of admission. either there can be any waiver of the right by the assessee. The Department cannot rely upon any such admission or misapprehension if it is not otherwise taxable. (Emphasis ours) This question was dealt with by this court in Bhaskar Mitter's case [1994] 73 Taxman 437, at paragraph 8 at page 442. In this decision, this court observed:

"An assessee is liable to pay tax only upon such income as can be in law included in his total income and which can be lawfully assessed under the Act. The law empowers the Income-tax Officer to assess the income of an assessee according to law and determine the tax payable thereon. In doing so, he cannot assess an assessee on an amount, which is not taxable in law, even if the same is shown by an assessee. There is no estoppel by conduct against law nor is there any waiver of the legal right as much as the legal liability to be assessed otherwise than according to the mandate of the law (sic). It is always open to an assessee to take the plea that the figure, though shown in his return of total income, is not taxable in law."

c). In the case of Nirmala L Mehta vs. A Balasubramaniam, CIT and others reported in 269 ITR p.185, the Hon'ble Bombay High Court has held as under.

"The problem arose because the petitioner in her return for the assessment year 1988-89 filed on June 30, 1988, offered the prize money of the lottery to tax rather a fundamental error of law on the part of the assessee, but that error of law once detected by the petitioner, it was urged before the Commissioner of Income Tax that the prize money earned by the Petitioner could not be taxed under the Income Tax Act, 1961. It is

true that it was at a later stage that such contention was raised by the Petitioner, but the said contention was a pure question of law and the CIT ought to have entertained it on the ground of delay. There cannot be any estoppel against the statute, [article 265](#) of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law.

The Constitution Bench of the Supreme Court in Amalgamated Coalfields Ltd. Vs. Janapada Sabha, AIR 1961 SC 964, held thus (page 965): "It may be stated at the outset that the tax now impugned has been imposed by the local authority from March 12, 1935, and that the first occasion when its validity was attached was in only 1957, though if the petitioners are right in their submissions their acquiescence might not itself be a ground for denying them relief. Before however we set out the points urged by the Ld. Attorney General in support of the petition, it would be convenience if we narrate briefly the history of the levy of this tax." The Supreme Court thus, held that acquiescence to an illegal tax for a long time is not a ground for denying the party the relief that he is entitled to." 14.1. Vide Circular No.5/2001-02(F.No.142/13/2010-SO-PPL) dt. 3.6.2010, the Board explained the rationalisation of the provision by insertion of S.56(2)(viii). Income shall be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. There is no gainsaying that the department circulars are binding on the assessee. Admittedly the assessee followed mercantile system of accounting. Under these circumstances, the interest income in question cannot be brought to tax during the year."

Applying the proposition of law laid down in this case law to the facts of this case, I hold that, merely because the assessee offered income of the purchase and sale of agricultural land, the income cannot be taxed under the Income Tax Act, 1961. Hence, I allow the additional grounds filed by the assessee.

9. In the result, the appeal of the assessee is allowed.

Order pronounced in the Court on 27.06.2018

Sd/-
[J.Sudhakar Reddy]
Accountant Member

Dated : 27.06.2018

SB, Sr. PS

ITA No.2121/Kol/2017
Shri Jagdish Prasad Goel
A.Yr.2008-09

Copy of the order forwarded to:

1. Shri Jagdish Prasad Goel, Prop. of M/s J.P. Udyog, 4, India Exchange Place, Kolkata-700001
2. DCIT, Circle-43, Kolkata, 3, Govt. Place (West), Kolkata-711101.
- 3..C.I.T.(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches