TaxHelpline Case No.141 of 2014

[INLAND REVENUE APPELLATE TRIBUNAL]

I.T.A. No.1069/LB of 2010, decided on 13th December, 2013.

Before Ch. Anwaar ul Haq, Judicial Member and Sohail Afzal, Accountant Member

Shahbaz Butt for Appellant. Muhammad Nazir Rizvi, D.R. for Respondent

FAROOQ ALTAF
Vs
C.I.R., R.T.O., SIALKOT

ORDER

CH. ANWAAR UL HAQ (JUDICIAL MEMBER).---The present appeal is directed against the order dated 30th June, 2009 passed by the Taxation Officer, Income Tax Audit-05, Sialkot and the Order No.369 dated 23rd January, 2010 passed by the learned Commissioner Inland Revenue (Appeal), Gujranwala.

2). The facts in brief giving rise to the present appeal are that the appellant joined hands in partnership with two others namely Ch. Ghulam Nabi Cheema and Ch. Mehmood Cheema (respectively father and son) on 1st July, 1994 under the name and style of Messrs Kisan Cold Storage, Bhopal Wala, Teh: Daska, Dist Sialkot. It was agreed between the parties that the cold storage shall be constructed on the land measuring 8-kanals owned by Ch. Ghulam Nabi Cheema and the market value thereof shall be considered as his capital contribution towards the Association of Persons, while the remaining two partners agreed to provide funds for erection of building and installation of machinery and running capital for the cold storage. In this manner, the appellant had 40% share in the profits and losses of the Association of Persons, while the remaining partners have 30% shares each. The Association of Persons is being regularly assessed since assessment year 1995-96 at NTN 148931-6. The balance sheets submitted in the case of Association of Persons reflect the above land on the assets side. By virtue of the above agreement impliedly the present appellant became owner in each bit of land to the extent of 40% share. However, statedly dispute arose and it was every likelihood that the owners of land may throw the appellant out of the Association of Persons. Therefore, the appellant, so as to safe-guard his interest and secure his rights in the ownership of land, through a registered deed dated 26th February, 2004 get transferred piece of land measuring 3-kanals and 4-marlas land beneath the cold storage, in his name. Since the market value had increased, therefore the consideration was recorded as Rs. 5,500,000. In the

stated background, the Income Tax Department initiated proceedings against the appellant in terms of section 122 of the Income Tax Ordinance, 2001 by issuing investigation letter dated 5th May, 2005 (relevant to Tax Year 2005). The said notice was followed by notices under section 176 issued on different dates as detailed in the assessment order on page-1 thereof. It is, however, important that notice under section 111 was issued on 15th September, 2007 (relevant to Tax Year 2008). Statedly no compliance was made. Therefore, finally a notice under section 111(1) (b) read with section 111(2) was issued on 2nd June, 2009 (relevant to Tax Year 2009). The taxpayer explained his position vide letter dated 27th June, 2009 thereby stating that no money has changed hands for the consideration and the land which belonged to the Association of Persons was got transferred to the name of the taxpayer being a member /partner of Association of Persons so as to safe-guard his rights and interest in the Association of Persons inasmuch as land belonging to Association of Persons. The contention of the taxpayer did not find favour of the assessing officer, which resulted into an addition of Rs. 5,500,000 under section 111(1)(b) read with section 111(2) of the Income Tax Ordinance, 2001 in Tax Year 2004 vide an order passed on 30th June, 2009. The order dated 30th June, 2009 was assailed before the first appellate authority, who rejected the contention of the taxpayer in terms of the said order holding that since the investigation notice was issued in the Tax Year 2005, therefore the addition has rightly been made in Tax Year 2004. Nevertheless all the other contentions raised by the appellant did not find favour of the Commissioner Inland Revenue (Appeal). The above treatment brought the taxpayer before us in the present appeal.

3). The parties have been heard and record perused.

4). The learned counsel appearing on behalf of the appellant submitted that the assessing officer has not rebutted the following facts:--

(i) Existence of AOP as from assessment year 1995-96.

(ii) Investment of land measuring 8 kanals by Ghulam Nabi Cheema as his capital in the AOP and cash investment by other two members of AOP for erection and construction of cold storage.

(iii) The Taxation Officer has not rebutted the fact that the said AOP was an existing taxpayer and the balance sheet as on 30-6-2002 shows the capital of all the constituents of AOP as well as land, building, machinery, furniture, securities and cash.

(iv) The taxation officer has only objected that the above said Ghulam Nabi Cheema is only owner of 2/5 share of land measuring 15 kanals 8 marla in khasra Nos. 1097 and 1098, while working out the share of Mr.Ghulam Nabi, he has ignored the fact of share in land at khasra No.1099. A complete khasra gardawari and shajrah stood submitted, which was sufficient to prove that the said Abdul Ghani has share to the extent of 8 kanals in total land. Therefore, sale/transfer of 40% shares as per registered deed 3 kanals 4 marla to the present appellant was correct.

(v) The reasons given at Serial Nos. (1) and (2) are sufficient to prove that land measuring 8 kanals was retained for the purposes of cold storage. The assessing officer himself states as under:--

"That land area where cold storage is located is measuring 15 kanals 7 marla at khasra Nos.1090, 1097 and 1099 out of which land measuring 8 kanals was retained for cold storage and construction was not made on whole land i.e. 8 kanals whereas the taxpayer purchased 3 kanals 4 marlas land/property on which cold storage was constructed."

5). It is important to point out here that the assessing officer has in fact acknowledged that "land as per balance sheet of AOP was the same, and reflections reproduced from record in para 3 thereof shows that the contention raised by the taxpayer are correct with the exception that the assessing officer has objected that Ghulam Nabi Cheema was owner of 6 kanals 6 marlas. Despite the fact that in earlier paragraphs, he admits that land measuring 8 kanals was retained for construction of cold storage.

6). Firstly when the value of land was taken as capital of one partner and secondly it was admittedly utilized for construction of cold storage and thirdly that the subject land appears to be the property of the AOP. How the same cannot be sold especially when only 40% share was transferred to the taxpayer being his share in AOP.

7). It is also important that the taxpayer took-over his share by fulfilling the legal formalities and thus the recitals of the documents endorse the same. Therefore, the inference that the taxpayer has invested afresh in the subject land is a farfetched inference based on misconception, until some un-rebutable evidence is placed on record to the contrary no such addition under section 111 could be made.

8). The taxation officer has failed to probe the nature of transaction from the other members of the AOP including Ghulam Nabi Cheema and Ahsan Mehmood. It was incumbent upon the taxation officer to dig out the truth and reach to the correct nature of the transaction, which even otherwise flows out of the assessment record of the taxpayer AOP. It is settled principle that one cannot sell or purchase same thing by himself which is impliedly in his ownership. He further submits that the present appellant by the reason of constitution of AOP and taking over of land from one partner as his investment and by making investment in the erection of the building etc. in the cold storage, the taxpayer and partners making investment in cash became owners of land and building machinery and each bit thereof to the extent of their shares, while the partner only investing land representing of capital also became share holder/owner of all assets of the AOP along with the part of land beneath to the extent of his share settled interse the partners.

9). The Learned counsel emphasis that the assessing officer, in fact has approbated and re-

approbated in one breath, the facts narrated by taxpayer remained un-rebutted on one hand while he has confirmed the existence of AOP qua record of assessment of the AOP but at the same time impresses hard about the investment in the same asset in which the taxpayer already has 40% share as per the balance sheet, since no new investment was made. The addition under section 111(1)(b) is pleaded to be unlawful. It may also be noted that the changed provisions of section 111(2) have also been ignored, which stood changed at the time of making assessment. It is also important that while completing wealth tax assessments the appellant was assessed to tax in respect of said land independently in respect of his capital in the business, which fact remained un-rebutted.

10). It has further been agreed that the assessment in the instant case was completed on 30th June, 2009 and at the relevant time the provisions of section 111(2) read as under:--
"(2) The amount referred to in subsection (1) shall be included in the person's income chargeable to tax in the Tax Year immediately preceding the financial year."

11). The above law was subsequently changed by substitution of the words "immediately preceding the financial year" with the words "to which such amount relates" through Finance Act, 2010. Since the law was changed on a subsequent date, therefore the law as it existed on the relevant date of completion of assessment viz. 30th June, 2009 shall prevail and shall be applicable. It is submitted that admittedly the notice under section 111(1)(b) in the instant case was issued on 15th September, 2007 which relate to Tax Year 2008, whereas the final notice under section 111(1)(b) read with section 111(2) was admittedly issued on 2nd June, 2009, which is relevant to Tax Year 2009. Therefore, it has to be looked into that what was the date of discovery on the relevant date. If it is reckoned as 15th September, 2007, the relevant date falls within Tax Year 2007 and consequently the addition could have lawfully been made in Tax Year 2007, whereas if the final notice issued under section 111(1)(b) read with section 111(2) of the Income Tax Ordinance, 2001 is reckoned viz., 2nd June, 2009, reckoned as the year of discovery then the financial year for the purposes will be 2009 (ended on 30th June, 2009 and immediate). Therefore, immediate preceding year for the impugned addition could Tax Year 2008. The superior courts in number of cases i.e., I.T.As. Nos. 1054/LB/2010 and 1055/LB/2010 dated 9th August, 2011 inasmuch as case reported as 2011 PTD 693 and 2011 PTD 321, the learned Tribunal itself has held that the date of discovery for the purposes of addition under section 111(2) shall be the date of issuance of notice under section 111(1) (b) read with section 111(2) of the Ordinance. Since the notice referred to above were admittedly issued firstly on 15th September, 2007 and secondly on 2nd June, 2009, the relevant financial year respectively comes to 2007-2008 (Tax Year 2008) or financial year 2008-2009 (Tax Year 2009), the addition in view of the judgments of the Tribunal could have lawfully been made either in Tax Year 2007 or 2008 as the case may be. Consequently, the addition made in Tax Year 2004 under section 111 is wholly unlawful for the reason that the law itself require that any such addition could have been made in the immediate preceding year of

the financial year in which the discovery was made. Therefore, by no stretch of imagination the addition made in Tax Year 2004 can be held as a lawful addition and, therefore merits deletion.

12). The learned DR supports the orders of the authorities below on the grounds recorded in the said orders.

13). We have considered the submissions made at bar by both the parties consciously and we have found that the assessment in this case was completed on 30th June, 2009 and at the relevant time the additions in terms of section 111(1) (b) read with section 111(2) can only be made in the Tax Year immediately preceding the financial year in which the discovery was made. It is important that the assessment in this case was completed on 30th June, 2009 and at the relevant time of assessment, the un-amended law was available on the statute. Therefore, the addition under section 111(1) (b) read with section 111(2) could have only be made in the immediate preceding year in which the discovery was made. Perusal of the assessment order reveals that the first notice under section 111 was issued on 15th September, 2007, which falls within the financial year 2007-2008 (i.e., Tax Year 2008). It is further noticed that the final notice under section 111(1)(b) read with section 111(2) of the Income Tax Ordinance, 2001 was issued on 2nd June, 2009, which falls within the financial year 2008-2009 (i.e., Tax Year 2009). Consequently, the date of discovery has to be reckoned from the date on which the notice under section 111(1)(b) was issued. Therefore, in our considered opinion, the Taxation Officer and the Learned Commissioner Inland Revenue (Appeal) were not right in reckoning the date of discovery from the date of investigation letter. The Full Bench of this Tribunal in I.T.As. Nos. 1054 and 1055/LB/2010 dated 9th August, 2011 has already held that the date of discovery for the purposes of addition under section 111 of the Income Tax Ordinance, 2001 has to be reckoned from the date of issuance of notice under section 111(1) (b) of the Income Tax Ordinance, 2001. We respectively following the judgments of this Tribunal reported as 2011 PTD 693 and 2011 PTD 321 are of the view that the addition could not lawfully been made in the instant case in Tax Year 2004.

14). In this view of the matter, we hereby vacate the orders of both the authorities below on the issue of aforesaid, the other grounds raised by the appellant made not to be adjudicated.

The appeal succeeded to extent indicated above.

