(1983) 09 PAT CK 0013

In the Patna High Court

Case No : Taxation Cse No. 17 of 1973

Additional Commissioner of Income Tax APPELLANT

Vs

Hanuman Agarwal RESPONDENT

Date of Decision : 22-09-1983

Acts Referred:
Income Tax Act, 1961 — Section 131, 68

Citation : (1984) 42 CTR 15 : (1984) 40 CTR 15 : (1985) 151 ITR 150 : (1984) 17 TAXMAN 19

Hon'ble Judges : Sushil Kumar Jha, J;Ashwini Kumar Sinha, J

Bench : Division Bench

Advocate : B.P. Rajgarhia, S.K. Sharan and Sarnendu Pratap Singh, for the Appellant; Kashi Nath, for the Respondent

Judgement

Ashwini Kumar Sinha, J.—In pursuance of this court''s order dated November 8, 1978, the Income Tax Appellate Tribunal, ''A'' Bench, Patna, was directed to state the case and refer the following question of law for the opinion of this court :

" Whether, on the facts and in the circumstances of this case, the deletion of the addition of Rs. 41,500 and allowing the interest by the Tribunal is legal and proper ? "

2. The assessee is a registered firm and derives income from jute. The ITO found a credit of Rs. 41,500 in the name of M/s. Laxmi Narayan Atma Ram of 36, Indian Exchange Place (4th floor), Calcutta-1. The assessee was called upon to explain the nature and source of the deposit. The assessee filed a confirmatory letter stating the address and the G.I.R. number of the creditor. The ITO, on information to the effect that the creditor had made a confession before the Income Tax authorities at Bombay, where the head office of the creditor is situated, that the loans and advances and other transactions recorded in their books at their head office at Bombay and at the branch office at Calcutta were not genuine, came to the conclusion that the transactions were not genuine and, accordingly, added Rs. 41,500 and disallowed interest thereon. The order of the

ITO is marked annexure ''A'' to the statement of case.

3. The assessee went in appeal before the AAC and contended that the confirmatory letter was filed from the creditor and the creditor had also stated in the certificate that the books of the appellant for ''the relevant year were lost. The AAC confirmed the addition on the sole ground that the creditor having made a confession before the ITO, Bombay, the confirmatory letter issued subsequently became meaningless. The AAC further observed that it was the duty of the appellant-assessee to satisfy the ITO by producing the creditor and his books of account which was not done. The AAC thus also confirmed the disallowance of interest. The order of the AAC is marked annexure ''B'' to the statement of case.

4. The assessee thereafter went before the Tribunal and contended that it had filed a confirmatory letter showing the address and the G.I.R. number of the creditor. The assessee further contended that the ITO did not refer the matter to the creditor for verification. It was further contended by the assessee that whatever confession was made by the creditor before the Income Tax authorities at Bombay, if at all made, was not made available to the assessee. As such, the primary onus was properly discharged and the addition had to be deleted. On the other hand, it was contended on behalf of the Revenue, that the creditor was not traceable at the Calcutta address and as the creditor had made the confession to the effect that all the transactions done by it were bogus, the addition was properly made and it did not call for any interference.

5. Having heard the arguments of both sides, the Tribunal observed as follows:

" The assessee took a loan of Rs. 41,500 as stated from M/s. Laxmi Narayan Atma Ram. Being called upon to explain the nature and source of the deposit, it filed the confirmatory letter from the party. The confirmatory letter contained the address of the party at Bombay as well as at Calcutta. It also contained the G.I.R. number of the creditor (wrongly printed as assessee). As such the primary onus was shifted to the Department and it was the duty of the Department to refer the matter for verification either through the assessing ITO or by issue of notice u/s 131 to the Calcutta or Bombay address for verification of the loan. In turn, the Department did not choose either of the methods and simply relying on the confession which was purported to have been made by the party at Bombay, made the addition. It is a well-settled view that when the deposit stands in the name of the third party and the assessee furnishes the complete address of the depositor and the file number, the initial onus is discharged by the assessee. If something contrary is found against it, the onus may be shifted to the assessee if the facts so found are brought to its knowledge. Applying the above principle, it could be said that the initial onus was discharged by the assessee and the Department never shifted the onus to the assessee. "

6. The Tribunal also considered the matter from different angles and as a matter of fact found that the confession made by the Bombay party was never made available to the assessee nor to the Tribunal as well. Accordingly, the Tribunal

came to the conclusion that the confession made in a third party case by the creditor could not be used against the assessee and, thus, the Tribunal deleted the addition. The order of the Tribunal is marked annexure '' C'' to the statement of case.

7. It is desirable to mention here that, in the ends of justice, we directed the learned senior standing counsel for the Department to produce the original records before us so that we could find out the true nature of the confession made by the Bombay party in a third party case. The learned senior standing counsel, despite his efforts, was not able to produce the so-called confessional statement before us, though other papers on the record were there. Thus, the position remains that the confession was never made available either to the assessee or to the Tribunal or to us.

8. Learned senior standing counsel for the Department contended that the assessee cannot be said to have discharged the initial onus u/s 68 of the I.T. Act, 1961 (hereinafter referred to as " the Act") as, in law, it is necessary for the assessee to prove prima facie the transaction which results in a cash credit in his books of account and such proof includes the proof of the identity of the creditor, the capacity of such creditor to advance the money and, lastly, the genuineness of the transaction. According to the learned senior standing counsel, these things must be proved prima facie by the assessee and only after the assessee has adduced evidence to establish prima facie the aforesaid, the onus shifts on the Department. The learned senior standing counsel relied in support of his contention Upon the case of Prakash Textile Agency Vs. Commissioner of Income Tax, and also on the case of Bharati Pvt. Ltd. Vs. Commissioner of Income Tax, . He also relied upon the case of Jamnaprasad Kanhaiyalal Vs. Commissioner of Income Tax, M.P., Bhopal, . The facts in the case of Prakash Textile Agency are clearly distinguishable. In that case, the Income Tax Officer had issued a summons u/s 131 of the Act on a creditor from whom a loan was shown by the assessee, a registered firm. By a letter, the creditor expressed his inability to produce the relevant books of account. The Income Tax Officer, therefore, added the sum as income of the assessee from undisclosed sources. On appeal, the Appellate Assistant Commissioner rejected the contentions of the assessee and confirmed the assessment. On further appeal to the Tribunal, the assessee contended that it had discharged its onus of proving the genuineness of the loan as also the existence of the creditor, that a confirmatory letter from the creditor had been filed before the Income Tax Officer, that the creditor was an Income Tax assessee and had responded to the summons u/s 131 of the Act. The Tribunal disbelieved the evidence of the proprietor of the creditor company and held that only the payment of interest by cheque was recorded in the books of the creditor to give a colour of genuineness to the transaction although neither the loan nor the repayment were recorded and the creditor was not in a position to advance the loan.

9. On consideration of all these facts and materials, the Tribunal had come to the

conclusion that from the resources available to the creditor, he was not in a position to advance the loan and his creditworthiness was not established. The Tribunal further found that though the assessee had established the existence and identity of the creditor, yet he had failed to establish the capacity of the creditor to advance the loan or the genuineness of the transaction. When the matter went to the Calcutta High Court, it was held by the Bench that it could not be said that there was no material or evidence to support the inference or the conclusions of the Tribunal that the loan represented the assessee''s income from undisclosed sources.

10. Thus, in that case, from the facts mentioned above, it was abundantly clear that after the confirmatory letter was filed by the assessee, a notice u/s 131 of the Act was issued to the creditor by the Department in order to verify the statements in the confirmatory letter ; and it was further clear that the creditor having received the notice could not produce its books of account for one reason or the other. The proprietor of the creditor-company was also examined in that case and the Tribunal disbelieved the evidence of the proprietor of the creditor company. In this background, the Tribunal agreed with the orders of the ITO and the AAC and affirmed the addition as income of the assessee from undisclosed sources. Thus, that case is clearly distinguishable and does not support the contention put forth by the learned senior standing counsel for the Revenue in the instant case.

11. The other case, Bharati Pvt. Ltd. Vs. Commissioner of Income Tax, , relied upon by the learned senior standing counsel for the Department, also is of no help to the Revenue. In this case, in the course of the assessment proceedings, the ITO found that the assessee had shown Rs. 20,000 as loan in its books taken from two parties. The assessee produced confirmatory letters from those parties before the ITO in support of the two loans. Thereafter, the moment the assessee filed the two confirmatory letters from the two parties, the ITO served notices u/s 131 of the Act on the alleged creditors. Notices were not served on the creditors and came back un served. However, the ITO treated the Joan as the assessee''s income from undisclosed sources. The AAC dismissed the assessee''s appeal on the ground that the assessee could not establish the identity of the parties and on further appeal by the assessee, the Appellate Tribunal held that mere filing of confirmatory letters did not discharge the onus that lay on the assessee and that there was no material on the record to establish the identity of the creditors.

12. The matter went to the High Court and the High Court affirmed the Tribunal''s view arid held that the Tribunal had taken all the relevant facts into Consideration and the conclusion arrived at by the Tribunal that the loans represented the assessee''s income from undisclosed sources was not perverse or unreasonable.

13. Thus, in this case as well, it is clear that after the assessee had filed the confirmatory letters, the Department very correctly thought that the onus had

shifted on the Department and the Department took all possible steps that could be taken in law for the purpose of identification of the creditor as well as his capacity to pay and a notice u/s 131 of the Act was sent by the Department. In this view of the matter, this case also is clearly distinguishable and does not support the contention advanced by the learned senior standing counsel for the Revenue. The other case, Jamnaprasad Kanhaiyalal Vs. Commissioner of Income Tax, M.P., Bhopal, , on the facts, is also clearly distinguishable.

14. In the instant case, it appears from the orders before us that the confirmatory letter issued by the creditor is subsequent to the so-called confession made by the creditor before the Income Tax authorities at Bombay in a third party case. As it has already been stated above, the confession was not made available to the assessee. The so-called confession by the creditor is not in relation to the amount in question but it seems clear that the so-called confession was made by the creditor in a third party case. The ITO while dealing with the confession has observed in his order as quoted below :

" It is seen that Laxmi Narayan Atma Ram of Calcutta is the Branch of Ramgopal Nand Kishore of 4/8, Kalbadevi Road, Bombay-2, who have made confession before the Income Tax authorities at Bombay that the loans and advances or any other transaction, recorded in their books (Both of the head office at Bombay and branch office at Calcutta) were bogus and not genuine."

15. In order to satisfy ourselves whether the so-called confession contained the part in parenthesis, we directed the learned senior standing counsel to produce the original record, but as already stated above, the learned senior standing counsel was not able to produce the confession before us. It is apparently clear that the words in parenthesis is a gloss by the Income Tax authority himself. If the confirmatory letter was issued by the creditor subsequent to the so-called confession, it was much more incumbent upon the Department to summon the creditor in order to verify the statements made in the confirmatory letter. This was never done. The so-called con- fession is not quoted in either of the three orders. The so-called confession, admittedly, is made in a third party case and, hence, it is no pointer to the fact that it also related to the amount in question. The assessee having been called upon to explain the nature and the source of the deposit, it immediately filed the confirmatory letter from the creditor. The confirmatory letter contained the address of the party at Bombay as well as at Calcutta. It also contained the G.I.R. number. In my opinion, the asses-see having furnished the correct name and address of the creditor, having given the G.I.R. number and having filed the confirmatory letter from the creditor, did all that it could do and these three materials showed prima facie not only the identity of the creditor but also the genuineness of the transaction and also the capacity of the creditor and, as such, the assessee completely discharged its initial onus u/s 68 of the Act. The Revenue, on its part, did not summon the creditor u/s 131 of the Act. It took no steps to verify the statement of the assessee. Thus, after the assessee filed the confirmatory letter with the correct

name and address of the creditor and the G.I.R. number as well, in my opinion, the onus immediately shifted on the Department which was not discharged by the Department in this case and the Tribunal has rightly held so.

16. It is true that the onus having shifted on the Department, if the Department would have found to the contrary, the onus would have shifted back on the assessee to discharge the onus by adducing positive evidence. Thus, I hold that, on the facts of the case, the initial onus put upon the assessee u/s 68 of the Act was fully discharged by the assessee and the Tribunal took a correct view in law. I, accordingly, answer the question in the affirmative and hold that, on the facts and in the circumstances of this case, the deletion of addition of Rs. 41,500 and allowing the interest by the Tribunal was legal and proper. Thus, the question is answered in the affirmative, in favour of the assessee and against the Revenue. Hearing fee Rs. 250.

Sushil Kumar Jha, J.

17. I agree none the less, in order to highlight the provision of the Act, I feel obliged to make a few observations of my own.

18. As my learned brother has already observed, the assessee had given the identity of the creditor against whose name cash credit was shown for a sum of Rs. 41,500. He had also furnished the G.I.R. number of the creditor as well as the correct address. The question then remains in such cases as to how the capacity to prove the competence of the creditor for furnishing such a loan can be decided. The answer, to my mind, is very plain and simple. The very object of Section 131 of the Act is for that purpose. It can never be within the exclusive knowledge of the debtor to know the sources of income of the creditor. Once he is supplied the credit that he wants, he is satisfied. Once he has furnished the true identity, the correct address, the correct G.I.R. number of the creditor, he fulfils his obligation under the Act. The question then still remains with regard to the genuineness of the transaction and the capacity of the creditor to furnish the loan concerned. It is for that specific purpose that Section 131 has been engrafted in the Act. Section 131 provides, inter alia, that the ITO, the AAC, the IAC and the Commissioner shall, for the purpose of this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters, namely, (a) discovery and inspection, (b) enforcing the attendance of any person, including any officer of a company and examining him on path, (c) compelling the production of books of account and other documents, and (d) issuing commissions.

19. It is by now well-settled that Section 131(1)(b) empowers but does not oblige the revenue authorities concerned to administer oath. Therefore, the statements of witnesses taken without administration of oath are equally admissible in evidence. When the evidence of such witness is being taken in the course of the assessment proceeding, the witness has no right, but the assessee has, to be represented by a lawyer or other authorised representative. The

assessee is not supposed to know the capacity of the money-lender or the cash creditor. It is within the exclusive domain or the dark trusses of the minds of the creditors to know as to whether and how their sources of income are arrived. It is for that specific purpose that Section 131 of the Act has been introduced so that in case of any suspicion, the ITO or the authorities concerned may exercise the powers of a civil court u/s 131 and call upon the creditor concerned to prove his capacity to pay and the genuineness of his transaction. Once the ITO or the authority concerned is satisfied that the creditor is not telling the truth, it has been left open to the assessee to discharge his subsequent onus of proving the genuineness of the transaction and the capacity of the creditor to pay by cross-examining him. Where, therefore, an assessee gives the correct name, address and the G.I.R. number of the creditor, as my learned brother has observed, he has discharged his onus and unless a notice in due form u/s 131 of the Act is issued by the revenue authority concerned to test the veracity or the genuineness of the transaction or the capacity of the creditor to pay, the assessee has to succeed.