
(1996) 08 GAU CK 0015
In the Gauhati High Court
Case No : Income-tax Reference No. 1 of 1991

Anand Ram Raitani

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 20-08-1996

Acts Referred:

Income Tax Act, 1961 — Section 68

Citation : (1997) 139 CTR 235 : (1997) 223 ITR 544

Hon'ble Judges : S.B. Roy, J;D.N. Baruah, J

Bench : Division Bench

Advocate : J.P. Bhattacharjee, M.L. Jain and R.K. Joshi, for the Appellant; U. Bhuyan, for the Respondent

Judgement

D.N. Baruah, J.—In this reference u/s 256(1) of the Income Tax Act, 1961 (for short "the Act"), the following question has been referred by the Income Tax Appellate Tribunal for the opinion of this court :

" Whether, in the facts and in the circumstances, Section 68 of the Income Tax Act, 1961, has any application at all to this case ?"

2. The facts for answering this reference may be stated thus :

This reference relates to the assessment year 1982-83. The Assessing Officer found that there was a cash credit of Rs. 2 lakhs as on April 1, 1981, standing in the name of six persons including minors. The Assessing Officer asked the assessee to produce the creditors, but the assessee replied that the parties had confirmed the credits by their letters given earlier. The Assessing Officer observed that the assessee did not give any reason for non-production of the creditors in spite of the specific direction given by him. He examined the records of some of these parties and held that those parties would not have made the credits as claimed by the assessee. The Assessing Officer also observed that as the assessee was reluctant to produce the persons for verification, the cash credit could not be accepted.

3. Being aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) agreed with the assessee that the creditors were independent people and were Income Tax assesseees in respect of their business income, etc. The Commissioner of Income Tax (Appeals) allowed the appeal and deleted such addition as well as the interest paid by the assessee on such credits. The Revenue preferred an appeal before the Income Tax Appellate Tribunal against the order of the Commissioner of Income Tax (Appeals). The Tribunal, after hearing the Revenue, reversed the finding of the Commissioner of Income Tax (Appeals) and restored the order passed by the Assessing Officer. The Tribunal found that the Commissioner of Income Tax (Appeals) did not properly consider the findings of the Assessing Officer and he simply applied the ratio of the decisions relating to Commissioner of Income Tax, Orissa Vs. Orissa Corporation (P) Ltd., The Tribunal noticed that the Assessing Officer did pursue the matter for verification of the assessment records of the parties, after obtaining confirmation, etc., as the assessee declined to produce the creditors. The Tribunal also held that the findings given in the assessment of the creditors would not ipso facto prevent the Income Tax Officer from verification of the assessee's claim in the present case. It was further observed that the assessee had the burden to prove that the creditors were genuine. However, the assessee failed to discharge his burden. Thus, the Appellate Tribunal was of the opinion that the Income Tax Officer was justified in not accepting those materials. The assesseees requested the Tribunal to refer the above question.

4. This reference was heard by this court at some length on March 30, 1994, and after hearing the parties, this court felt that in order to answer the question certain more facts were necessary. Accordingly, an order was passed by this court u/s 258 of the Act by observing thus :

" In the statement of the case drawn up by the Tribunal we do not find anything in this regard. Therefore, we direct the Income Tax Appellate Tribunal to prepare a supplementary statement of the case indicating clearly as to whether the assessee maintained and produced the books of account before the Assessing Officer and whether the amount of Rs. 2,00,000 was shown as cash credit in the said books of account."

5. Pursuant to the said order passed by this court, the Tribunal submitted a supplementary statement of the case. In paragraph 2 of the said supplementary statement, the Tribunal mentioned that the Departmental Representative submitted that nothing could be said about the production of the books of account at the assessment stage but it was clear from the assessment order that the assessee's account in respect of the income from other sources and capital account with the partnership firms were scrutinized and cash credits were found and accordingly, cash credits were added u/s 68 by the Assessing Officer, rejecting the assessee's submission that the cash credits should be accepted as genuine.

6. We have heard Mr. J.P. Bhattacharjee, learned senior counsel appearing for the assessee assisted by Mr. R.K. Joshi, and Mr. U. Bhuyan, learned standing counsel for the Revenue. Mr. Bhattacharjee submits that in the facts and circumstances of the case, addition of the amount by the Assessing Officer invoking the power u/s 68 of the Act is not permissible and the Tribunal totally ignored that aspect of the matter. On the other hand, Mr. Bhuyan challenges the reference itself by submitting that the question does not arise out of the order passed by the Tribunal.

7. On the rival contentions of the parties, it is to be seen whether in the facts and circumstances of the case the question referred can be said to be arising out of the order. Mr. Bhuyan vehemently argues that the question of maintenance of books of account was never raised at any stage and the Tribunal had no opportunity to go through that aspect of the matter, therefore, it cannot be said to be an order arising out of the order. In this connection, Mr. Bhuyan has drawn our attention to a decision in Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., Referring to this decision, Mr. Bhuyan submits that the question does not arise out of the order of the Appellate Tribunal. He has also drawn our attention to a decision of the Madras High Court in K. Lakshminarayanan, Coimbatore Vs. The Commissioner of Income Tax, Madras,

8. Mr. Bhattacharjee, on the other hand, contends that this question was raised before the Commissioner of Income Tax (Appeals). Mr. Bhattacharjee further submits that u/s 68 of the Act where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to Income Tax as the income of the assessee of that previous year. We have gone through Section 68 of the Act. The Assessing Officer before invoking the power u/s 68 of the Act must be satisfied that there are books of account maintained by the assessee and the cash credit is recorded in the said books of account and if the assessee fails to satisfy the Assessing Officer, the said sum so credited has to be charged to Income Tax as the income of the assessee of that previous year. The existence of books of account is a condition precedent for invoking of the power. Discharging of burden is a subsequent condition. If the first point is not fulfilled the question of burden of proof does not arise. The Assessing Officer made the assessment by making addition of the amount for which disallowance was claimed. Mr. Bhuyan very candidly admits that addition was made in exercise of the power u/s 68 of the Act, therefore, the first condition necessary for invocation of the power is the existence of the books of account. The Tribunal restored the order passed by the Assessing Officer, who in his order clearly mentioned that he invoked the power u/s 68 of the Act as the assessee could not explain the income satisfactorily.

9. Now, the question is whether the order of addition of the amount by the Assessing Officer was challenged before the appellate authority. The

Commissioner of Income Tax (Appeals) allowed the appeal filed by the assessee and thereafter, the Revenue preferred appeal before the Tribunal. In order to justify the addition of the amount, it was the duty of the Tribunal to look to Section 68 of the Act, which required that maintenance of books of account was necessary. The Tribunal had no jurisdiction to affirm the order passed by the Assessing Officer without first looking as to whether the conditions necessary were fulfilled. This itself is sufficient to indicate that the Tribunal was aware of this aspect of the matter. In order to give a finding about the applicability of Section 68, the condition necessary is to see whether there were any books of account maintained by the assessee. In that view of the matter, we are of the opinion that the question definitely arises out of the order passed by the Appellate Tribunal. Besides, it was the Revenue, who preferred an appeal before the Tribunal. Moreover, when the reference was made to this court, as stated above, this court gave a direction to the Tribunal to examine the fact whether any books of account was maintained by the assessee. This court very clearly indicated in the order dated March 30, 1994, that this fact was necessary to answer the question referred. Regarding the applicability of Section 68, this was accepted by the Revenue and no objection was raised at that time. It is only today after recording the evidence this point has been raised. Mr. Bhuyan has also relied upon the observation made by the Tribunal and submits that this point was never raised. Mr. Bhuyan further points out that the supplementary statement of the case, where the Tribunal observed that such point was never raised. This court never asked for such comments. In our opinion, the Tribunal was a little over zealous in giving the information which was not called for.

10. The next submission of Mr. Bhattacharjee is that invocation of power u/s 68 was not applicable inasmuch as the condition necessary for invocation of power u/s 68 was the existence of books of account. Before the Tribunal, the representative of the Revenue has very categorically stated that there were no such books of account. However, reference was made regarding books of account by the firm stating that cash credits had been found and those were added u/s 68 of the Act by the Assessing Officer, rejecting the assessee's submission that the cash credits would be accepted as genuine. In our opinion, these books of account are not the books of account as contemplated u/s 68 of the Act. A partnership firm is a separate entity and may be the assessee was a partner of the said firm, but that does not mean that these books of account were maintained by the assessee in his individual capacity.

11. In this connection, Mr. Bhattacharjee has drawn our attention to a decision of the Punjab and Haryana High Court in Smt. Shanta Devi v. CIT [1988] 171 ITR 532. In the said decision, the Punjab and Haryana High Court had the occasion to consider a similar point. While deciding the point the court observed that a perusal of Section 68 of the Act shows that in relation to the expression "books", the emphasis is on the word "assessee" meaning thereby that such books have to be the books of the assessee himself and not of any other assessee. A partnership firm is an assessable entity distinct from the individual partner. The

books of account of a partnership cannot be treated as those of the individual partner. We are in respectful agreement with the decision and. conclusion arrived at by the Punjab and Haryana High Court.

12. In view of the above, we answer the question in negative, i.e., in favour of the assessee and against the Revenue.

13. A copy of this judgment under the signature of the Registrar and the seal of the High Court shall be transmitted to the Income Tax Appellate Tribunal.

14. In the facts and circumstances of the case, there will be no direction as to costs.