
(2016) 04 PAT CK 0054

In the Patna High Court

Case No : Miscellaneous Appeal No. 289 of 2008

Ashok Kumar

APPELLANT

Vs

Commissioner of Income Tax-I and Others

RESPONDENT

Date of Decision : 20-04-2016

Acts Referred:

Income Tax Act, 1961 — Section 132, Section 132(4A), Section 139, Section 147, Section 148, Section 148, Section 149, Section 150, Section 151, Section 152, Section 153, Section 23(3), Section 260A

Citation : (2016) 04 PAT CK 0054

Hon'ble Judges : Hemant Gupta and Ramesh Kumar Datta, JJ.

Bench : Division Bench

Advocate : Ajay Kumar Rastogi and Parijat Saurav, Advocates, for the Appellant; Rishi Raj Sinha, Sr. S.C. and Archana Prasad, Jr. S.C., for the Respondent

Final Decision : Dismissed

Judgement

Hemant Gupta, J.—1. The assessee is in appeal under Section 260A of the Income-tax Act, 1961 (for short, "the Act") arising out of an order dated 31.12.2007 passed by the Income Tax Appellate Tribunal, Patna Bench, Patna (for short, "the Tribunal") in ITA No. 128 (Pat)/05 relating to assessment year 1987-88.

2. The facts, in brief, are that a search was conducted in the premises of the father of the assessee on 11th February, 1988. A notice under Section 148 of the Act was issued to the assessee on 24th October, 1989. No return had been filed till then for the assessment year 1987-88. Another notice was issued on 18th of January, 1990, but the representative of the assessee replied that return can be submitted only after taking photocopy of the seized materials. The documents were supplied. A detailed questionnaire was issued on 20th February, 1991, but the assessee did not reply to this questionnaire nor filed return of the income before the assessing officer. The Assessing Officer, thereafter, proceeded to frame assessment to the best of his judgment.

3. The assessment officer took into consideration a loose sheet marked KS-19 taken in possession from the house of the father of the appellant. It is an account in the name of the assessee maintained by M/s. Bhagwati Cold Storage (P) Ltd. of which the father of the assessee is the Managing Director and the assessee is a share holder. This account has several debit and credit entries on regular basis. The assessee was asked to explain the entries vide an interim order dated 20th February, 1990, but the assessee did not give reply. The peak credit as per the loose sheet was Rs. 1,70,000/-.

4. However, the assessee in the subsequent year of 1988-89 pointed out that it is his father who used to take money from Bhagwati Cold Storage (P) Ltd. and used to return it back when required. The Assessing Officer did not accept the said plea for the reason that the paper recovered clearly shows his name written on it and if his father had taken out the money then his father's name should have been found on the paper. After observing so, the Assessing Officer held, "the presumption u/s. 132(4A) is also on the assessee". On the basis of such discussion, the unexplained investment of Rs. 1,70,000/- was added in the total income of the assessee and taxed accordingly.

5. In an appeal against the said order, the Commissioner of Income Tax (Appeals)-II, Patna found that the assessee and the father of the assessee have gone to the Settlement Commission, but the Settlement Commission did not entertain the petition for the assessment year in question on technical grounds. The Commissioner of Income Tax (Appeals) did not find any error in the order of the learned Assessing Officer. The further appeal before the Tribunal has also remained unsuccessful.

6. This Court while admitting appeal on 05.02.2013 framed the following substantial questions of law for consideration:

"(a) If Section 132(4A) raises an absolute presumption against the person from whose possession the documents are recovered or is it a rebuttable presumption.

(b) The presumption is raised against the person from whose possession it is recovered or is it raised against the person to whom it may relate.

(c) If liability has been fastened in pursuance of a search, will procedures relating to the same govern the proceedings or will the provisions relating to regular assessment and income escaping assessment during the same take precedence over Section 132?"

7. Learned counsel for the appellant vehemently argued that presumption under Section 132(4A) of the Act can be raised only against the person whose premises were searched and the documents seized. Since the document marked as KS-19 was found from the residential portion of his father, therefore, no presumption can be raised against him. He relies upon the judgments passed by the Hon'ble Supreme Court in cases of P.R. Metrani v. Commissioner of Income-Tax, , [2006] 287 ITR 209(SC); and also Additional Commissioner of Income-Tax, Bombay City-

I v. Miss Lata Mangeshkar, , [1974] 97 ITR 696 (Bom). He relies on the judgment reported as Central Bureau of Investigation v. V.C Shukla and others, , (1998) 3 SCC 410 to contend that loose sheets of paper are not the books of account which can be relied upon to fasten any liability on the appellant.

8. On the other hand, learned counsel for the Revenue argued that in fact, the expression used by the Assessing Officer in the assessment order that "the presumption u/s. 132(4A) is also on the assessee" is surplusage. In substance, from the reading of the entire order it is clear that it is an assessment framed under Section 147 of the Act for the reason that income of the assessee has escaped assessment. Therefore, it is not a case of raising a presumption, but on the basis of material found during the search which was a relevant material for framing an opinion of escaped income of the assessee. It was also argued that the judgment in V.C. Shukla case (supra) pertains to criminal trial where the rules of the Evidence Act, 1872 are strictly applicable as in such cases, proof beyond reasonable doubt is required, but in the case of assessment under the Act, the rules of evidence as contained in Evidence Act, 1872 are not applicable as the principles of natural justice alone are required to be complied with.

9. We have heard learned counsel for the parties and find no substantial questions of law arise for consideration.

10. The appellant was served with a notice under Section 148 of the Act. The assessment was framed thereafter under Section 147 of the Act. Section 147 of the Act as was prevalent prior to 01.04.1989, i.e. prior to Direct Tax Laws (Amendment) Act, 1989 read as under:

"If-

(a) the Assessing Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Assessing Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Assessing Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,

he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year).

Explanation 1.--For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:--

- (a) where income chargeable to tax has been under-assessed; or
- (b) where such income has been assessed at too low a rate; or
- (c) where such income has been made the subject of excessive relief under this Act or under the Indian Income- tax Act, 1922 (11 of 1922); or
- (d) where excessive loss or depreciation allowance has been computed.

Explanation 2.--Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of this section."

11. A perusal of the aforesaid provision would show that if the Assessing Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Assessing Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax can be said to have escaped assessment for that year.

12. As per the facts on record, the assessee has not filed any return for the assessment year 1987-88 even after notice was served upon him nor he responded to the questionnaire. He was asked to explain the entries in loose sheets marked as KS-19, but did not respond in respect of the relevant assessment year. However, he submitted response in the subsequent year that it was his father's account. Since the assessee has not filed return nor answered questionnaire, therefore, the assessment has been framed in terms of Section 147 of the Act as the loose sheet marked as KS-19 was found to be relevant to return a finding that the income of the assessee has escaped assessment. The expression used in the assessment order that "the presumption u/s. 132(4A) is also on the assessee" will not change the nature of the order passed by the Assessing Officer which was passed by invoking provision of Section 147 of the Act after issuing notice under Section 148 of the Act.

13. It may be mentioned that the Constitution Bench in the case of Dhakeswari Cotton Mills Ltd., v. Commissioner of Income Tax, West Bengal, , AIR 1955 SC 65 held that Income Tax Officer is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law. The Court held to the following effect:--

"8. As regards the second contention, we are in entire agreement with the learned Solicitor-General when he says that the Income-tax Officer is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a Court of law, but there the agreement ends; because it is equally clear in making the assessment under sub-section (3) of Section 23 of the Act, the Income-tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare

suspicion to support the assessment under Section 23(3). The rule of law on this subject has, in our opinion, been fairly and rightly stated by the Lahore High Court in the case of Seth Gurmukh Singh v. Commissioner of Income-tax, Punjab, , AIR 1944 Lah 353 (2) (FB)(A).

9. In this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the company to rebut the material furnished to it by him, and, lastly, it declined to take all the material that the assessee wanted to produce in support of its case. The result is that the assessee had not had a fair hearing. The estimate of the gross rate of profit on sales, both by the Income-tax Officer and the Tribunal seems to be based on surmises, suspicions and conjectures. "

14. In a later Constitutional Bench Judgment in the case of Union of India v. T.R. Verma, , AIR 1957 SC 882, the Supreme Court held that the evidence of the respondent and his witnesses was not taken in the mode prescribed in the Evidence Act; but that Act has no application to enquiries conducted by tribunals, even though they may be judicial in character. The Court held to the following effect:

"10. Now, it is no doubt true that the evidence of the respondent and his witnesses was not taken in the mode prescribed in the Evidence Act; but that Act has no application to enquiries conducted by tribunals, even though they may be judicial in character. The law requires that such tribunals should observe rules of natural justice in the conduct of the enquiry, and if they do so, their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that, which obtains in a Court of law.

Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them.

If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed. Vide the recent decision of this Court in New Prakash Transport Co. Ltd. v. New Suwarna Transport Co. Ltd., , 1957 S C R 98 : ((S) AIR 1957 S C 232) (C), where this question is discussed."

15. In view of the aforesaid judgments, we find that the reliance of the appellant on the judgment in V.C. Shukla case (supra) is wholly misconceived as that is a case arisen out of a criminal trial. In a proceeding under the Act, the Evidence Act is not applicable as it applies only to the judicial proceedings. The principle of

natural justice stands complied with when an opportunity was given to the assessee to explain the entries in the loose sheet marked as KS-19. Having chosen not to answer during the relevant assessment year and attributed the burden on his father in the subsequent year will not debar the Assessing Officer to rely upon such documents to return a finding that the income of the assessee has escaped assessment.

16. The judgment referred to in P.R. Metrani case arises out of the assessee whose premises were searched and presumption was raised under Section 132 of the Act. Present is not a case of presumption, but of escaped assessment for which a proceeding under Section 147 of the Act was initiated. Therefore, the said judgment is of no help to the argument raised.

17. Similarly, in Miss Lata Mangeshkar case (supra), the Bombay High Court found the findings of the Tribunal as findings of fact when it rejected the stand of the Revenue in respect of certain entries in the assessment in question. Such judgment does not provide any assistance to the arguments raised as it is a categorical case of escaped assessment on the basis of loose sheet found during the search operation of the premises of the father of the assessee.

18. The loose sheet marked KS-19 is the information on the basis of which the Assessing Officer has framed an opinion that income of the assessee has escaped assessment. Such information formed a reasonable basis for the authorities to believe that income chargeable has escaped assessment. Thus, the order as affirmed by the Tribunal is based upon correct appreciation of law and facts.

19. In view of the findings that the income of the assessee has escaped assessment, therefore, the aforesaid substantial questions of law are not involved in the appeal and further we find no merit in the appeal.

20. The appeal thus stands dismissed.

Ramesh Kumar Datta, J.—I agree.