

(1992) 02 CAL CK 0040

In the Calcutta High Court

Case No : Income-tax Reference No. 112 of 1991

Commissioner of Income Tax

APPELLANT

Vs

Active Traders (P.) Ltd.

RESPONDENT

Date of Decision : 03-02-1992

Acts Referred:

Income Tax Act, 1961 — Section 143, 263

Citation : (1993) 115 CTR 69 : (1995) 214 ITR 583 : (1993) 69 TAXMAN 281

Hon'ble Judges : Shyamal Kumar Sen, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : Jayanta Prasad Khaitan, Amicus curiae, for the Appellant;

Judgement

Ajit K. Sengupta, J.—In this reference u/s 256(1) of the Income Tax Act, 1961, for the assessment year 1986-87, the following question has been referred to this court :

" Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in annulling the order u/s 263 of the Income Tax Act, 1961, passed by the Commissioner of Income Tax ?"

The facts leading to this reference are that the assessment of the assessee, a private limited company was completed by the Income Tax Officer u/s 143(3) on September 4, 1986. The Commissioner of Income Tax called for and examined the assessment records. He noticed that the assessee-company was incorporated on May 11, 1985, and that the issued and subscribed capital of Rs. 10 lakhs was divided into 1 lakh equity shares of Rs. 10 each fully paid up. On enquiry, he found that the Assessing Officer did not make a proper and detailed enquiries into the genuineness and creditworthiness of the persons who subscribed to the equity capital of the assessee-company. Relying on the case of Gee Vee Enterprise Vs. Additional Commissioner of Income Tax, , he opined that the assessment order framed by the Assessing Officer was erroneous in so far as it was prejudicial to the interests of the Revenue. He, accordingly, initiated

proceedings u/s 263 of the Act. The assessee's representative submitted before the Commissioner that the Assessing Officer passed the assessment order after full scrutiny of the relevant documents and personal discussions with the authorised representative and that the list of shareholders with permanent account numbers had been filed. He also submitted that the Assessing Officer, from the confirmatory letters, verified at random the authenticity and the genuineness of the subscribers and so the Commissioner was not right in applying the decision in the case of *Gee Vee Enterprise Vs. Additional Commissioner of Income Tax*, and the assumption or allegation made in the notice u/s 263 was based on surmise, conjecture and suspicion.

2. The Commissioner of Income Tax rejected the pleas of the assessee. He observed that, out of the list of subscribers to shares, the Assessing Officer asked only six persons to be produced but on the production of those six persons, no examination whatsoever was done. It also appeared from the records that the Assessing Officer did neither make any enquiry nor any investigation as to the genuineness and creditworthiness of other persons who had subscribed to shares of the assessee-company. There was nothing to indicate in the record as to why and under what circumstances the Assessing Officer selected only six persons out of the list. It was also found from the record that the Assessing Officer issued summons to 34 persons to appear and make depositions before him. But, out of these, 13 notices came back unserved with the postal remarks "not known". With respect to 17 other persons, though summonses were served, they did not appear and simply they sent letters confirming the subscription to the share capital of the assessee-company. It was also found that these letters were written on similar papers and typed in the same typewriter. No acknowledgment or reply was received from six persons. From the facts and circumstances of the case, the Commissioner of Income Tax was convinced that the present case is covered by the decision of the Delhi High Court in *Gee Vee Enterprise Vs. Additional Commissioner of Income Tax*, , on the face of the further information which was available to him and, therefore, the assessment made by the Assessing Officer was erroneous in so far as it was prejudicial to the interests of the Revenue. The Commissioner of Income Tax accordingly, passed an order u/s 263 of the Act and directed the Assessing Officer to frame the assessment order de novo.

3. Before the Tribunal, the assessee submitted that, after verification and examination of the shareholders, the Assessing Officer made his assessment order. The Commissioner of Income Tax passed his order without applying his mind and it was based on preconceived notions. Reliance was also placed on the decisions of the (1988) 24 ITD 504 and *Vingal Leasing and Finance Ltd. v. ITO* [1988] 41 Taxman 62 (Delhi). The departmental representative, while supporting the order of the Commissioner, contended that the Commissioner had not drawn any inference. He kept the matter open for a fresh decision after giving proper opportunity to the assessee for placing supporting evidence.

4. The Tribunal, after considering several other orders of the Tribunal, held that the Commissioner was not justified in holding the assessment order dated September 4, 1986, was erroneous and prejudicial to the interests of the Revenue and in setting aside the same and in directing the Assessing Officer to frame an assessment afresh.

5. Since no one appeared for the assessee, we directed Mr. Jayanta Prasad Khaitan, an advocate, to assist the court which he has ably done.

6. At the very outset, it has to be observed that, although an issue was raised before the Tribunal as to whether an enquiry from the assessee-company about the source of investment of its shareholders in the shares of the assessee-company was authorised and called for in the assessment of the assessee-company, in the view we have taken on the facts, it is not necessary to go into that question or to decide the issue one way or the other. The Tribunal proceeded on the footing that there could be no enquiry regarding the source of investment of the shareholders in the shares of the company but we are not in a position to accept this extreme proposition. If the shares had been purchased by the shareholders out of their unaccounted for money, such investment may be liable to be added as the undisclosed income of such shareholders and as such the assessment of the company may not be affected. If a cash credit is shown by the company in its books of account and if the source cannot be explained properly, the Income Tax Officer may assess the sum as the income of the company from undisclosed sources. We do not find any reason why the Income Tax Officer will be precluded from making an enquiry where such enquiry is called for on the facts and in the circumstances of a case. Whether or not ultimately the shareholder fails to disclose the income out of which the shares of the assessee-company were acquired will be for the Assessing Officer to deal with, depending on the facts and circumstances of the case. Before any sum is added as the undisclosed income of the assessee-company, a link has to be established between the company and the shareholders' unaccounted money and, unless such link is established, it may not be possible to sustain the assessment ultimately. It is one thing to adjudge the validity of an assessment, but another to say as to what procedure should be followed by the Assessing Officer in making the assessment of the company. In our view, on the facts of this case, it cannot be said that the Assessing Officer has no jurisdiction to ask for information from the shareholders regarding the source of investment made in the company. As a matter of fact, the Commissioner of Income Tax, in this particular case, came to the conclusion on the facts that the matter relating to shareholders and their subscription to the shares of the assessee-company was not looked into by the Assessing Officer while framing the assessment relevant to the subsequent assessment year and it was found that the Assessing Officer issued summons to all the 34 persons to appear before him and to make depositions in this connection. Out of that, 13 notices came back unserved with the postal remark "not known". With respect to 17 other persons, though the summons was served, they did not appear and they simply sent letters

confirming their subscription to the share capital of the company. It was also seen that the letters were written on similar papers and typed in the same typewriter. No acknowledgment or reply was received from six others.

7. The examination of records by the Commissioner revealed that there was no existence of N. K. Trading Company, at 132, Cotton Street, where Atmaram Goel and Mahendra Kedia were stated to be working. They could not also produce any document to show that they were the employees of N. K. Trading Co., and that they were receiving salaries from the alleged firm in the year under reference. The Income Tax Officer only enquired of six of the shareholders. Having regard to all these facts, if the Commissioner was of the view that the assessment was not made after proper and detailed enquiries which should have been made before the subscription on account of share capital was accepted, it cannot be said that the conclusion of the Commissioner on these facts is erroneous. In our view, the Tribunal decided the question purely on a question of law and not on the facts found by the Commissioner of Income Tax.

8. For the reasons aforesaid, we answer the question in this reference in the negative and in favour of the Revenue,

9. There will be no orders as to costs.

Shyamal Kumar Sen, J.

10. I agree.