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(2013) 10 KL CK 0031

In the High Court Of Kerala

Case No : IT Appeal No. 1451 of 2009

Commissioner of Income Tax — APPELLANT

Vs

E.S. Jose — RESPONDENT

Date of Decision : 22-10-2013

Acts Referred:

Citation : (2014) 220 TAXMAN 32

Hon'ble Judges : Manjula Chellur, C.J;A.M. Shaffique, J

Bench : Division Bench

Advocate : P.K.R. Menon and Jose Joseph, for the Appellant; N.N. Sugunapalan and S. Sujin, for the Respondent

Judgement

A.M. Shaffique, J.—This appeal is filed against the order of the income tax Appellate Tribunal, Cochin Bench in I.T.A. No. 508/COCH/98, dated 13/09/2002. The respondent is the assessee and the issue involved is with reference to assessment year 1995-96. The assessment was completed on 27/03/1998 determining the total income at Rs. 19,75,350/-. While arriving at the total income, the Assessing Officer disallowed the commission payment to the extent of 4,03,853/- to agents and two relatives of the assessee by restricting such commission to 196 of the total turnover. The Assessing Officer has also made addition of Rs. 11,91,600/- being credit in the account of the assessee as not proved to be genuine.

2. An appeal was filed by the assessee before the Commissioner of income tax (Appeals). The appellate authority interfered with the assessment order and in the case of commission payments it is held that 2.596 of the total turnover has to be excluded. In respect of the unproved loan credits, the appellate authority deleted the addition except in respect of two credits totalling Rs. 25,600/-.

3. The Revenue preferred an appeal before the Appellate Tribunal and the Tribunal confirmed the first appellate order. The Revenue has filed this appeal inter alia contending that none of the vouchers produced by the assessee in

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respect of payment of commission to agents contained the signature of the recipients. The same was the situation in respect of commission paid to two relatives. In the absence of any evidence to prove the payment of commission, allowance given by reducing 2.5% of the total turnover as against 196 given by the assessing authority is absolutely without any basis and therefore the decisions of the appellate authority and the Tribunal was perverse.

4. In respect of loan credits it is contended that no corroboratory evidence was adduced by the assessee in the form of confirmation letters to prove the loans, before the Assessing Officer. The 1st appellate authority should not have relied upon a document produced by the assessee at the appellate stage without complying with Rule 46A of the income tax Rules. The following substantial questions of law arise for consideration in the above appeal

(i) In the absence of signatures in the vouchers produced by the assessee in regard to payment of commission to agents, whether the Tribunal is justified in upholding the order of the 1st appellate authority restricting the addition on account of disallowance of commission payments at 2.5%.

(ii) Whether the Tribunal was justified in confirming the order passed by the 1st appellate authority in regard to compliance of Rule 46A in relation to the credit of Rs. 10 lakhs while producing documents before the appellate authority.

5. The assessee, in his return, had mentioned several credits for different amounts totalling more than Rs. 11 lakhs. The assessing authority after taking evidence found that two creditors disowned to have given any loan to the assessee. The amount involved is Rs. 26,600/-. In respect of one Sri. Joseph Mathew who is shown to have given loan credit of Rs. 5,00,000/-, on taking evidence it was found that the outstanding amount was only Rs. 4 lakhs. Therefore, it was found that the aforesaid amount i.e. Rs. 1,26,600/- was stated as income of the assessee under the head ''other sources''.

6. In respect of four other creditors as well, the Assessing Officer found that they have not signed the confirmation letters. It was observed that the confirmation letters signed by the assessee in the name of such persons were not genuine and were fabricated. Therefore, the Assessing Officer found that the loan credits from four persons totalling Rs. 50,000/- are unproved and was assessed as income under the head other sources. In respect of another person also, an amount of Rs. 15,000/- was shown as outstanding in his name which was also treated as unproved. The assessee has shown a further credit of Rs. 5,50,000/- on 27/10/1994 and Rs. 4,50,000/- on 03/11/1994. Though the assessee was requested to produce evidence of the person who had given such amounts, according to the Assessing Officer the assessee did not produce any evidence in respect of the said creditor Mr. C.C. Thampi. When another opportunity was granted, the assessee requested for two months time. The Assessing Officer did not accept the same in the absence of any evidence.

7. In regard to sales commission, a sum of Rs. 6,26,388/- was shown as sales

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commission. This worked out to 2.81% of the total turnover. The Assessing Officer found that though notice was issued to few of those persons there was no response and ultimately found that even though there is a practice of giving commission, normally the rate of commission is 0.5%. But having regard to the fact that the petitioner has only started business, 1% of the total turnover is treated as commission payment.

8. Before the appellate authority, the 1st ground considered was regarding the sales commission. It is held that it is an accepted trade practice for businessmen dealing in sanitary equipments, ply woods and floorings etc. to pay commission to the Plumbers who introduce customers to business establishments. It is found that to achieve a sales turnover of Rs. 2.22 Crores, the appellant has to pay certain percentage of commission and the percentage of commission paid is not on the higher side. The 1st appellate authority also found that the commission paid by other agencies cannot be compared with the commission paid by the respondent herein as the respondent was marketing a new product and there was stiff competition. Having regard to the said finding it was found that restricting the claim at 1% of the total turnover is not correct and it was held that commission at 2.5% of the total turnover has to be allowed as deduction.

9. In regard to the addition of Rs. 11,91,600/- it was found that in respect of loan given by Sri. K.M. Jayachandran, it was found that the loan was availed in the assessment year 1993-94 relating to assessment year 1994-95 and hence the same was deleted. In regard to the addition of Rs. 1,00,000/- it was found that when M/s. Quality Builders have confirmed that there was some misclassification in giving credit of Rs. 1,00,000/- and when the payments received by M/s. Quality Builders correspond with the entries made in the books of the assessee, the books of M/s. A 2 Z Builders Pvt. Ltd. and since the assessee was a Director in the said company, the payment was made through him which was mistook as received from the assessee. Hence the addition made for the said amount was deleted. In regard to the loans relating to Rs. 50,000/- as well, the appellate authority formed an opinion that all the four persons had confirmed before the Assessing Officer that they have advanced various amounts. Hence there was no reason to doubt their statements and accordingly the said amount of Rs. 50,000/- was deleted.

10. In regard to addition of Rs. 10 lakhs, it is found that the assessee had produced before the Assessing Officer copy of the bank account of Nedungadi Bank Ltd. wherein, on 27/10/1994 and 03/11/1994 two sums of Rs. 5,50,000/- and Rs. 4,50,000/- were deposited to the account of the assessee by bank clearing. These amounts were paid by Sri. C.C. Thampi through his bank account in Federal Bank Ltd. The appellant produced a confirmation letter also from the loan creditor. Hence the addition of the said amount was also deleted.

11. Though the Revenue preferred an appeal before the Tribunal for the same reasons, the Tribunal had confirmed the directions issued by the Commissioner of Income tax (Appeals) and accordingly dismissed the appeal.

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12. The learned counsel appearing for the Revenue relied upon the judgment of the Supreme Court in Commissioner of Income Tax Vs. P. Mohanakala, for the proposition that in the cases where the explanation offered by the assessee about the nature and source of the sums found credited in the books is not satisfactory but there is, prima facie, evidence against the assessee in regard to the receipt of money and thereafter the burden is on the assessee to rebut the same and if he fails to rebut it, it can be held against the assessee that it was a receipt of an income nature. Another judgment relied upon is Commissioner of Income Tax Vs. United Commercial and Industrial Co. (P.) Ltd., This is a judgment of the Division Bench of Calcutta High Court. The proposition is that mere production of the confirmation letters before the income tax officer would not by itself prove that the loans have been obtained from those loan creditors or that they have creditworthiness.

13. It is argued that as far as commission is concerned, there is no basis for allowing commission at 2.5%. No evidence was adduced by the assessee to prove the said fact. No materials are relied upon by the appellate authority to come to such a conclusion. Hence the said finding by the 1st appellate authority and the Tribunal is perverse and is liable to be set aside.

14. In regard to the deletion of other income especially Rs. 10 lakhs paid by Mr. C.C. Thampi it is argued that no evidence was produced before the Assessing Officer and the appellate authorities had committed serious error in relying upon the additional document produced by the assessee which was contrary to Rule 46A of the income tax Rules.

15. On the other hand, learned counsel for the assessee placed reliance on the judgment in Addl. Commissioner of Income Tax Vs. Bahri Bros. P. Ltd., to contend that when the assessee has disclosed the names of the creditors and the names of the banks on which the cheques were drawn, the assessee can be said to have discharged the primary onus since the assessee not only disclosed the identity of the creditors but also the source of income. The onus therefore shifts to the department to verify that the creditors were having bank account. The learned counsel for the assessee also placed reliance on the Division Bench judgment of the Orissa High Court in Commissioner of Income Tax Vs. Baishnab Charan Mohanty, wherein it is held that when a question arises whether cash credit appearing in the books of accounts of an assessee has to be accepted, the assessee is required to establish the identity of the creditor, capacity of the creditor to advance money and the genuineness of the transaction. If these three conditions are satisfied, it would be for the department to disprove the same. Another judgment relied upon is Commissioner of Income Tax Vs. R.S. Sibal, This is a judgment of the Division Bench of the Delhi High Court. It is held that if both the lower appellate authorities have recorded a categorical finding that by producing the documents, the assessee had discharged the onus which lay on him with regard to the genuineness of the gifts, the inference drawn would be on the appreciation of the evidence and facts. It will not give rise to any question of

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law much less a substantial question of law. It is argued that the findings by the appellate authorities are based on appreciation of evidence and therefore, no substantial question of law arises for consideration in the matter.

16. On a perusal of the assessment order as well as the orders passed by the appellate authorities, in regard to the deletion made by the appellate authorities with reference to the credit shown in the accounts to an extent of Rs. 11,60,000/-, the evidence clearly indicated that the persons who appeared before the authorities have confirmed having given loans to the assessee in their sworn statements. Once such statements had been given and merely because they have not given any confirmation letter, the said credits cannot be excluded appears to be wrong. The same is the situation with reference to the credit of Rs. 10 lakhs. The assessee had indicated that the said amount was sent by Sri. C.C. Thampi through bank account and the particulars of bank account were also produced. The only reason for not deleting the said amount was non-production of confirmation letter. The same was produced at the appellate stage. The said confirmation letter was taken as evidence by the appellate authority and the said act had been confirmed by the Tribunal. Apparently, deletion of various amounts which were reflected as credits in the books of the assessee was purely a factual matter which was required to be considered by the fact finding authorities. Though the Assessing Officer had decided against the assessee on those points, the appellate authority had accepted the explanation given by the assessee and had deleted the said amount from the income as the evidence available was sufficient to prove the source. This apparently is a finding of fact which was confirmed by the Tribunal and for that reason we do not think that any question of law arise for consideration to reconsider the said deletion.

17. Reference was made by the learned counsel for the Revenue on Rule 46A to indicate that no application was filed for producing the confirmation letter from Mr. C.C. Thampi. The appellate authority had found that the assessee had already produced sufficient documents to prove the credit. That by itself was enough to prove that the loan was taken in two instalments and that too by receiving cheques drawn on Federal Bank Ltd. and those amounts were deposited in the Savings Bank account of the assessee maintained in Nedungadi Bank Ltd. It is stated that the assessee had produced copy of the bank account of Nedungadi Bank Ltd. which shows the deposits made to the assessee''s bank. The confirmation letter produced by the assessee during the appellate stage was only a further document to prove such a credit. It is found by the appellate authority that since the transaction was done through the bank account, the loan transaction was genuine and hence the addition made has to be deleted. Though it is argued on the basis of the judgment in Mohanakala''s case (supra) that payment through cheques sent from abroad by itself will not prove that the transaction was genuine, having regard to the fact that the appellate authority as well as the Tribunal had accepted the said finding, we do not think that non-compliance of Rule 46A of the Rules by itself would amount to a substantial question of law as even otherwise the appellate authority was convinced about

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the genuineness of the transaction.

18. In regard to the disallowance of the commission paid, we do not find any material on record, verified or relied upon by the appellate authority to increase the commission from 1% to 2.5%. The assessing authority had permitted commission in the absence of any other evidence to prove the same at 1% of the total turnover taking into account the commission paid by similar agencies. The assessing authority had found that normally the commission would come only to 0.5% of the total turnover. The appellate authority found that the commission would be in excess of 1% taking into account the fact that the assessee had to promote a new company''s product. It is not in dispute that none of the vouchers produced by the assessee was signed by any of the persons who had received the commission. Therefore, normally such amounts are to be added to the income of the assessee. For deletion of such income, necessarily evidence has to be adduced. No evidence worth appreciating was available other than a general contention that commission had been paid. The Assessing Officer permitted allowance of 1% as commission and we do not find any reason for the appellate authority to have increased the said commission to 2.596. This finding apparently is perverse as it is not substantiated by any material on record. Such an approach has been made purely based on surmises. The Tribunal has also approved the finding of the 1st appellate authority without considering the matter any further. This finding, according to us, is hence perverse and is liable to be set aside. Having regard to the aforesaid consideration, we partly allow the appeal setting aside the finding of the CIT (Appeals) and the Appellate Tribunal in respect of the deletion of 2.596 of the turnover as commission and sustaining the order of the Assessing Officer in regard to the same. In all other aspects, the finding of the CIT (Appeals) and the Appellate Tribunal are confirmed.

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