(2010) 12 P&H CK 0219

In the Punjab And Haryana At Chandigarh

Case No : IT Appeal No. 912 of 2008

Commissioner of Income Tax — APPELLANT

Vs

Hakumat Rai — RESPONDENT

Date of Decision : 22-12-2010

Acts Referred:
Income Tax Act, 1961 — Section 143(1), 147, 148, 260A, 54F

Citation : (2011) 237 CTR 513

Hon'ble Judges : Ajay Kumar Mittal, J;Adarsh Kumar Goel, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Adarsh Kumar Goel, J.—This appeal has been preferred by the Revenue u/s 260A of the IT Act, 1961 (hereinafter referred to as "the Act") against order dt. 12th Oct., 2007 passed by the Tribunal, Amritsar Bench, Amritsar in ITA No. 48/Asr/2007, for the asst. yr. 1997-98, proposing following substantial question of law:

Whether in the face of specific records maintained by the company and stock exchange showing the claimed transaction of shares having not taken place, the Hon''ble Tribunal was justified in law in deleting the addition simply on the plea that the Department had not allowed opportunity to the Assessee to cross-examine the share broker through whom the Assessee claimed to have carried out the transaction ?

2. Return of the Assessee for the year in question was processed u/s 143(1) of the Act. The Assessee claimed exemption of Rs. 7,92,232 u/s 54F of the Act as capital gain from purchase of shares by him for Rs. 47,313.75 on 21st March, 1995 which were sold for Rs. 8,43,587.50 on 22nd June, 1996. After initial assessment, information was received that the transaction of sale of shares by the Assessee was sham and accommodation entries were given to him, after taking cash amount equal to the value of profit, by M/s R.K. Aggarwal & Co., the

alleged broker. Entries in share register of M/s Globe Commercial Ltd. whose shares were allegedly purchased and sold revealed that no transaction of shares was entered in the said register. M/s R.K. Aggarwal & Co. was not member of Kanpur Stock Exchange. The company in question was formed in the year 1985 and its issue came only in 1986. After 1999 only 55 transfers of shares had taken place. On receiving this information, the AO issued a notice u/s 148 of the Act for the reassessment and issued a questionnaire with regard to the claim of the Assessee for capital gain. The Assessee was confronted with the information received by the AO. The Assessee denied that the transaction was sham and claimed the same to be genuine. However, neither the Assessee was able to furnish the details of persons to whom shares were sold nor disputed the information that there was no entry in the share register about the transaction in question and also that the alleged broker was not registered with the Kanpur Stock Exchange. In the circumstances, the AO held that the Assessee failed to discharge the burden of showing that the transaction was genuine. It was further held that in case of transaction taking place otherwise than through stock exchange, onus was on Assessee to prove the genuineness of the transaction. Further instance relied upon against the Assessee was that this was the only transaction of the Assessee for dealing with the shares in which the Assessee made a huge profit from the shares of an unknown company through an unknown broker and profit was treated as exempted income on account of investment in construction of a house. Coupled with the denial of the transaction by the company and failure of the Assessee to rebut the material with which he was confronted, it was held that transaction could not be held to be genuine. Reliance was also placed on the judgment of the Supreme Court in Sumati Dayal Vs. Commissioner of Income Tax Bangalore, for holding that the test of human probabilities could be applied to assess the genuineness of the transaction. It was further held that Assessee used colourable device to introduce his own undisclosed money. Accordingly, addition of Rs. 8,85,587 was made to the declared income of the Assessee.

3. On appeal, the CIT(A) set aside the addition mainly on the ground that Satish Goel proprietor of M/s R.K. Aggarwal & Co., the alleged broker was not called for cross-examination. It was held that the AO could not rely upon his statement in absence of his production for cross-examination. On reassessment the burden was on the Revenue to prove that the transaction was not genuine. The appeal of the Revenue against the order of the CIT(A) was dismissed by the Tribunal. It observed:

11. We have heard the parties and have perused the material on record. Undisputedly, the AO refused the cross-examination of Shri Satish Goel, proprietor of M/s R.K. Aggarwal & Co., to the Assessee. He did so, observing inter alia, that "......there is no provision for permitting a cross-examination of the person, whose statement is recorded during survey or in response to notice u/s 131. The burden is rather on the Assessee to call upon the share broker in whose name the alleged sales were made to prove the genuineness of the

transactions......... After the statement of the alleged broker, Shri Satish Goel, was communicated to the Assessee, it was the responsibility of the Assessee to produce him in order to prove the genuineness of the transactions in purchase and sale of shares.

12. In Kirpa Ram Ramji Dass v. ITO 14 TLR 553 (Asr Trib), a copy is placed at pp. 31 to 40 of the Assessee''s paper book ("APB", for short), it was held that it was not the onus on the Assessee to prove the correctness in support of the entries of the credits appearing in his books of account; that in proceedings u/s 143, for regular assessment, the onus is on the Assessee to prove the genuineness of the entries in the books of account, but when the assessment is reopened u/s 147, the onus shifts to the Revenue, that u/s 147, it is the AO who claims that the income has escaped and, therefore, the onus in the reassessment proceeding is on him and him alone; that he cannot shift the onus to the Assessee by holding that the onus is on the Assessee to prove the genuineness of the entries appearing in his books; and that in the case of Miani Trunk House v. ITO in ITA No. 695/Asr/1980, for the asst. yr. 1970 12 TLR 246, it was held that admission and statement of person who was not availed for cross-examination could not be received as evidence admissible in law.

12.1 In ITO v. Shri Surinder Singh in ITA No. 624/Chd/2000, for the asst. yr. 1995-96, the Chandigarh Tribunal, vide its order dt. 7th Oct. 2004 (copy at APB 41 to 46) held, following Kishinchand Chellaram Vs. Commissioner of Income Tax, Bombay City II, Bombay, that if any evidence sought to be used against the Assessee, is not shown to him and an opportunity to controvert the same is not given to the Assessee, that evidence shall not be admitted in support of the addition; that the IT authorities are bound to accede to the Assessee''s request and if they did not do so, the addition cannot be sustained in the absence of any other evidence in support of it.

13. In Sanjay Kumar Bansal v. ITO in ITA No. 1476/Del/2004, for the asst. yr. 1995-96, the SMC-1 Delhi Bench of the Tribunal, vide its order dt. 29th Oct., 2004 (copy at APB 42 to 54), held that the Department had relied on a statement as a piece of evidence to make the impugned reassessment; that therefore, onus was on the Revenue to confront the same to the Assessee in an effective manner so as to provide the Assessee with an opportunity to rebut the same for cross-examination; that it was upon the Revenue to produce it before the Assessee so that the Assessee got an opportunity to controvert the statement contained therein with reference to the material in his possession; that admittedly no such effort ever had been made by the Revenue; and that therefore, to put the onus on the Assessee to produce such parties for cross-examination was not tangible in the eyes of the law.

14. In CIT v. Pradeep Kumar Gupta (2007) 207 CTR (Del) 115 (copy filed on record), where the reopening was based on the statement of a third party, the Hon''ble Delhi High Court held that it was mandatory for the Revenue to produce such party for cross-examination by the Assessee on their specific demand in this

regard; that the AO must first discharge the burden of showing that income had escaped assessment; that the opportunity to cross-examine was denied to the Assessee; and that therefore, the reopening of the assessment was not valid.

15. It thus clearly emerges that in the reassessment proceedings it is the AO who contends that income has escaped assessment. It is thus for the AO, at the outset, to discharge the burden of showing that it is so. The denial of cross-examination by the Assessee of a statement recorded at the back of the Assessee is nothing but violation of the principles of natural justice. ''Audi alteram partern''--hear the other party meaning that nobody shall be condemned unheard. This is the basic dictum of natural justice requiring affording of due opportunity to a party to rebut the material sought to be used against him. This basic principle was not complied with by the AO in the present case, which action was correctly rectified by the learned CIT(A) by virtue of the impugned order. Therefore, finding no error in the action of the learned CIT(A), we hereby upholding the same. The grievance of the Department is, therefore, rejected.

We have heard learned Counsel for the parties.

4. Learned Counsel for the Revenue submits that CIT(A) as well as the Tribunal committed a serious error of law in setting aside the addition on the ground that Department did not produce the share broker for cross-examination by the Assessee. It was wrongly assumed that burden of proving that the transaction was not genuine was on the Department while in fact the exemption of tax was claimed by the Assessee placing reliance upon the transaction of capital gains. It was for the Assessee to establish that such transaction had taken place as the transaction is in the knowledge of the Assessee. The Assessee could substantiate the genuineness of the transaction by positive evidence including evidence of transfer of shares. The information about transaction not being genuine was adequate for reassessment and after assessment was reopened, the amount introduced by the Assessee as consideration for sale of shares could be treated to be undisclosed income, in absence of proof of genuineness of the transaction. Even if the information which was the basis for reassessment was not taken into account for reassessment, adverse inference could certainly be drawn against the Assessee for his failure to lead evidence in support of genuineness of the transaction of sale of shares. The circumstances showing that the transaction was not normal and genuine accordingly were duly considered by the AO by applying test of human probabilities as held by the Hon''ble Supreme Court in Sumati Dayal''s case (supra). In these circumstances the mere fact that Satish Goel, proprietor of M/s R.K. Aggarwal & Co., the alleged broker was not produced by the Department for cross-examination did not provide sufficient basis for proving genuineness of transaction by drawing adverse inference against the Revenue as held by the CIT(A) and the Tribunal. The reassessment could stand independent of the evidence of Satish Goel in view of failure of the Assessee to prove genuineness of his transaction.

5. Learned Counsel for the Assessee supported the view taken by the CIT(A) and

the Tribunal.

6. We have considered the rival submissions.

7. It is well-settled that burden of proving genuineness of a transaction of receipt of income by him from a claimed source particularly income on the basis of which exemption of tax is claimed is on the Assessee. The said burden can be discharged by him either by leading evidence or from the circumstances on record. In absence of positive evidence of the Assessee, the AO, by applying test of human probabilities can draw an inference of money being undisclosed income of the Assessee. Reference may be made to judgments of Hon''ble the Supreme Court in Commissioner of Income Tax (Central), Calcutta Vs. Daulat Ram Rawatmull, : Commissioner of Income Tax, West Bengal Vs. Durga Prasad More, and Commissioner of Income Tax Vs. P. Mohanakala, In the present case, the AO has, inter alia relied upon the following circumstances against the Assessee:

(i) Transaction being solitary transaction of purchase and sale of shares resulting in huge amount of profit;

(ii) Transaction of Assessee being not through broker registered with the stock exchange;

(iii) Information from the company that transaction of shares did not take place nor any entry in the share register had been made nor the broker confirmed the transaction.

8. The above circumstances taken together certainly placed the burden on the Assessee which he failed to discharge and, therefore, test of human probabilities could be relied upon to reject the claim of the Assessee that income was generated from the source of sale of shares which was exempted from tax u/s 54F of the Act.

9. In our view, the CIT(A) as well as the Tribunal erred in law in holding that burden of proof was only on the Department and in absence of production of proprietor of the share broker (concern) for cross-examination, the transaction should have been held to be valid and genuine and the Assessee should have been held to have earned income by sale of shares which on investment in house was exempted u/s 54F of the Act. Accordingly, we answer the question of law in favour of the Revenue and against the Assessee.

10. Accordingly, the appeal is allowed.

