
(2014) 02 RAJ CK 0091
In the Rajasthan High Court
Case No : IT Appeal No. 269 of 2011

Commissioner of Income Tax

APPELLANT

Vs

Jai Kumar Bakliwal

RESPONDENT

Date of Decision : 06-02-2014

Acts Referred:

Income Tax Act, 1961 — Section 131, 260A, 68

Citation : (2014) 267 CTR 396 : (2014) 366 ITR 217

Hon'ble Judges : J.K. Ranka, J;Ajay Rastogi, J

Bench : Division Bench

Advocate : Parinitoo Jain, Advocate for the Appellant

Judgement

Jainendra Kumar Ranka, J.—This appeal under s. 260A of the I.T. Act, 1961 (for short, "IT Act") has been preferred by the appellant-Revenue against the order of the Tribunal dt. 6th Aug., 2010 passed in ITA No. 349/Jp/2009 by which the Tribunal has dismissed the appeal filed by the appellant-Revenue against the order of the Commissioner of income tax (Appeals), Ajmer [for short, the "CIT(A)"]. The relevant assessment year is the asst. yr. 2006-07. The brief facts, as emerging on the face of record, are that the respondent-assessee is carrying on the business of finance and earns income by way of interest and during the course of work of financing and money lending, had raised loans from certain parties and as per the AO most of the parties are relatives of the respondent-assessee and they are said to be unsecured loans. It has been claimed by the AO that in most of the cases, though the amount was received by account payee cheque and most of the creditors are assessed to I.T. Act and had even provided their PAN but on the desire of the AO of producing the said parties, it transpired that none of the parties were able to prove the source of amount advanced to the respondent-assessee. It is further claimed by the AO that immediately before the amount was advanced to the respondent-assessee by account payee cheque, cash was deposited in their respective bank accounts and thereafter the cheque could be cleared and the total amount is Rs. 17,27,250 In the name of the

following creditors:

2. Accordingly, a show cause notice was issued to the respondent-assessee as to why the addition may not be made under s. 68 of the aforesaid amount.

3. The respondent-assessee submitted that all the cash creditors are assessed to I.T. Act, they are people of means, they have their own bank accounts and they had their sources of income through which they deposited the money and advanced money by account payee cheque and permanent account number had also been provided. It was further submitted that the identity, capacity and genuineness of the transaction stands proved by the respondent-assessee and he is not required to prove source of the amount which had been deposited by the creditors in their respective bank accounts. However, they stood to the testimony in the cross-examination and primary facts were proved and therefore, no adverse inference be drawn, however, the AO was not satisfied and made addition of Rs. 17,27,250 under s. 68 as income from undisclosed sources.

4. An appeal was preferred by the respondent-assessee before the CIT(A). Detailed submissions appears to have been filed and the CIT(A) agreed with the submission of the respondent-assessee and accordingly held that source of cash creditors is not required to be proved by the assessee once the identity, capacity and genuineness stands proved and therefore, he deleted the addition.

5. The appellant-Revenue challenged the matter in further appeal before the Tribunal. The Tribunal also, after considering the submissions, held that the onus, which lay on the respondent-assessee, was discharged and the Tribunal also came to the conclusion that the amounts had been advanced through proper banking channel and therefore, dismissed the Revenue's appeal. Hence this appeal.

6. Smt. Parinitoo Jain, learned counsel for the appellant-Revenue submitted that in this case, the respondent-assessee's main income is by way of income from other sources and the funds were not required for any business purposes, rather the funds were taken on interest at a lower rate and advanced at higher rate. She contended that the respondent-assessee was unable to prove by acceptable evidence about the source of the funds advanced by those parties and prime duty of the respondent-assessee was to show by acceptable evidence that the cash creditor had sufficient means to advance funds to the respondent-assessee. She contended that the Tribunal has wrongly mentioned that the respondent-assessee was able to discharge the onus laid upon it and the onus has not been discharged. She contended that when statements were recorded, then none of the creditor was able to prove pin pointedly as to how cash was deposited in their respective bank account immediately before issuance of cheque and as to how immediately the cash was received by them. She further contended that most of the creditors have stated that they received gifts on festivals and occasions and were unable to prove the generation of the funds. She contended that merely advancing money by account payee cheque is not sufficient to

discharge the onus and contended that substantial question of law arises out of the order of the Tribunal.

7. We have heard the arguments advanced by counsel for the appellant-Revenue and also perused the impugned order as well as the orders passed by the lower authorities.

8. In our view as well, three things are required to be proved by recipient of money i.e. (1) identity of the creditor (2) capacity of the creditor to advance money and (3) genuineness of the transaction. From the facts emerging on the face of record, we notice that it is an admitted fact that all the above cash creditors (12 in number) are assessed to income tax and they provided a confirmation as well as their permanent account number. They have their own respective bank accounts which they have been operating and it is not the claim of the AO that the respondent-assessee was operating their bank accounts rather they have categorically stated that they issued cheque to the respondent-assessee. It is also an admitted fact that most of the cash creditors appeared before the AO and their statements under s. 131 were also recorded on oath. The cash creditors appeared to be from small place and it is quite possible that they may not be in a position to pin pointedly or specifically say about everything but by and large stood to the testimony and were able to explain various issues as per the question and answer reproduced by the AO himself in the assessment order. It may be that most of the cash creditors are relatives of the respondent-assessee and heavy burden lay on the respondent-assessee to prove about the cash credit but once all the cash creditors appeared before the AO, their statements having been recorded under s. 131, then insofar as the respondent-assessee is concerned, the onus which lay upon him (assessee), in our view, stood discharged as he was able to prove identity of the creditors. Once the amount was advanced by account payee cheque from their respective own bank accounts and were being assessed to income tax, then in our view, capacity of the creditor and genuineness of the transaction stood proved. In so far as the respondent-assessee is concerned, it is correct that he is not required to prove source of the source and if the AO had any doubt, then the AO assessing the respondent-assessee, could have sent the information to the AO assessing the cash creditors for appropriate action in their cases but insofar as the respondent-assessee is concerned, in our view, the respondent-assessee has been able to discharge the burden which lay upon him.

9. Certainly, deposit of cash and immediate transfer of cheque or clearance of the cheque within a day or two casts a doubt as the transaction appears to be somewhat doubtful but suspicion howsoever strong it may be is not sufficient itself. On perusal of the facts in the present case, we observe that the amounts advanced are not substantial and in most of the cases, the amounts are ranging from Rs. 25,000 to Rs. 90,000 and in some cases, it is exceeding Rs. 1,50,000. On perusal of the facts, it is also apparent that in some of the cases (Uttam Chand Jain, HUF) even the Karta of the HUF had produced the cash book and

their ledger account before the AO. Smt. Anju Gangwal had also produced her cash book so also Mr. Vinay Kumar Gangwal as well as Mr. Akhilesh Kumar Ankur Jain (HUF) and the AO has drawn adverse inference finding some discrepancies in their respective cash books but as observed hereinabove, the doubt, if any, may be true but insofar as the respondent-assessee is concerned, that issue cannot be converted into an addition of income under s. 68 of the Act in the hands of the assessee and appropriate course, as observed hereinabove, was that the AO could have informed the AO assessing the respective cash creditors for appropriate action in their case.

10. The Hon"ble apex Court in the case of Commissioner of Income Tax, Orissa Vs. Orissa Corporation P. Ltd., held as under:

In this case, the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income tax assesseees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under s. 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do anything further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises.

11. Hon"ble apex Court in the case of Commissioner of Income Tax (Central), Calcutta Vs. Daulat Ram Rawatmull, held as under:

The onus to prove that the apparent is not the real is on the party who claims it to be so. As it was the Department which claimed that the amount of fixed deposit receipt belonged to the respondent firm even though the receipt had been issued in the name of Biswanath, the burden lay on the Department to prove that the respondent was the owner of the amount despite the fact that the receipt was in the name of Biswanath. A simple way of discharging the onus and resolving the controversy was to trace the source and origin of the amount and find out its ultimate destination. So far as the source is concerned, there is no material on the record to show that the amount came from the coffers of the respondent-firm or that it was tendered in Burrabazar Calcutta branch of the Central Bank, on 15th Nov., 1944, on behalf of the respondent. As regards the destination of the amount, it has already-been mentioned that there is nothing to show that it went to the coffers of the respondent. On the contrary, there is positive evidence that the amount was received by Biswanath on 22nd Jan., 1946. It would thus follow that both as regards the source as well as the destination of the amount, the material on the record gives no support to the claim of the Department.

12. The Gauhati High Court, in the case of Nemi Chand Kothari Vs. Commissioner of Income Tax and Another, , held that it is not the business of the assessee to find out the source or sources from where the creditor had accumulated the amount which he had advanced in the form of loan to the assessee and s. 68 cannot be read to show that in the case of failure of sub-creditors to prove their creditworthiness the amount advanced as loan to the assessee by the creditor shall have to be read as corollary as the income from undisclosed source of the assessee himself.

13. The Calcutta High Court, in the case of Shankar Industries vs. CIT (1978) 114 ITR 689 (Col) had observed that mere establishing identity of the creditor and nothing more is not sufficient and something more is to be proved by the assessee and in the aforesaid case, the assessee was unable to prove beyond identity and therefore, the Calcutta High Court upheld the findings of the Tribunal. However, in the present case, we notice that not only the identity of the creditor has been proved but from the facts which have been culled out, the assessee has been able to prove genuineness also.

14. This Court, in the case of Kanhailal Jangid vs. Asstt. CIT (2008) 217 CTR (Raj) 354 : (2008) 8 DTR (Raj) 38, held that the burden does not go beyond to put the assessee under an obligation to further prove that wherefrom the creditor has got or procured the money to be deposited or advanced to the assessee. The fact that the explanation furnished by the creditor about the source from where he procured the money to be deposited or advanced to the assessee is not relevant for the purposes of rejecting the explanation furnished by the assessee and make additions of such deposits as income of the assessee from undisclosed sources by invoking s. 68 unless it can be shown by the Department that source of such money comes from the assessee himself or such source could be traced to the assessee itself.

15. This Court, in the case of Aravali Trading Co. vs. ITO (2008) 220 CTR (Raj) 622 : (2008) 8 DTR (Raj) 199 has gone to the extent of observing the fact that the explanation furnished by the four creditors about the sources where from they acquired the money was not acceptable by the Revenue could not provide necessary nexus for drawing inference that the amount admitted to be deposited by these four persons belonged to the assessee. The assessee having discharged his burden by proving the existence of the depositors and the depositors owning their deposits, he was not further required to prove source of source.

16. As observed hereinabove, though under s. 68, AO is free to show with the help of the enquiry conducted by him into the transaction which has taken place between the creditor and the sub-creditor that the transaction between two were not genuine and that the sub-creditor had no creditworthiness, it will not necessarily mean that loan advanced by the sub-creditor to the creditors was income of the assessee from undisclosed sources unless there is evidence direct or circumstantial, to show that the amount which had been advanced by the sub-creditor to the creditor had actually been received by the sub-creditor from the

assessee.

17. The logical interpretation will be that while the assessee has to prove as special knowledge i.e. from where he has received the credit and once he disclosed the source from which he has received money, he must also establish that so far as his transaction with his creditor is concerned, the same is genuine and his creditor had the creditworthiness to advance the loan which the assessee had received. When the assessee discharges the burden so placed on him, onus then shifts to the AO, if the AO assesses the said loan as the income of the assessee from undisclosed source he has to prove either by direct evidence or indirect/circumstantial evidence that the money which the assessee received from the creditor actually belong to and was owned by the assessee himself.

18. If there is direct evidence to show that the loan received by the assessee actually belongs to the assessee, there will be no difficulty in assessing such amount as the income of the assessee from undisclosed source but if there is no direct evidence in this regard, then the indirect or circumstantial evidence has to be conclusive in nature and should point to the assessee as the person from whom the money has actually flown to the hands of the creditor and then from the hands of the creditor to the hands of the assessee.

19. When we peruse the facts hereinabove, it is an admitted position that all the cash creditors have affirmed in their examination that they had advanced money to the assessee from their own respective bank accounts. Therefore, when there is categorical finding even by the AO that the money came from the respective bank accounts of the creditors, which did not flow in the shape of the money, then, in our view, such an addition cannot be sustained and has been rightly deleted by both the two appellate authorities. There is no clinching evidence in the present case nor the AO has been able to prove that the money actually belonged to none but the assessee himself. The action of the AO appears to be based on mere suspicion.

20. Accordingly, in our view, the Tribunal, after appreciation of evidence has rightly come to the aforesaid conclusion and when there is appreciation of evidence, then it is purely a finding of fact and no question much less substantial question of law can be said to emerge out of the said order of the Tribunal and we do not find any infirmity or perversity in the order of the Tribunal so as to call for any interference of this Court. In our view, no substantial question of law arises out of the order passed by the Tribunal. Consequently, the appeal, being devoid of merit, is hereby dismissed in limine. No order as to costs.