

(2014) 09 AP CK 0066
In the Andhra Pradesh High Court
Case No : I.T.T.A. No. 112 of 2003

Commissioner of Income Tax

APPELLANT

Vs

Naresh Kumar Agarwal

RESPONDENT

Date of Decision : 09-09-2014

Acts Referred:

Constitution of India, 1950 — Article 20(3)
Criminal Procedure Code, 1973 (CrPC) — Section 162, 94
Evidence Act, 1872 — Section 132, 132(4), 31
Income Tax Act, 1961 — Section 132, 132(4), 142(2A), 143(3), 158BC

Citation : (2014) 369 ITR 171

Hon'ble Judges : L.N. Reddy, J;Challa Kodanda Ram, J

Bench : Division Bench

Advocate : S.R. Ashok, Senior Counsel, Advocate for the Appellant; Y. Ratnakar, Senior Counsel, Advocate for the Respondent

Judgement

L. Narasimha Reddy, J.—The respondent is an assessee under the Income-tax Act, 1961 (for short, "the Act"). A search was conducted in his premises on January 9, 1996, under section 132 of the Act. Nothing tangible was discovered during the course of search. However, a sworn statement of the respondent was recorded under sub-section (4) of section 132 of the Act on March 20, 1996. It was alleged that the respondent declared a sum of Rs. 15,00,000 as his undisclosed income. Based upon that, a notice under section 158BC of the Act was issued on August 21, 1996. On receipt of the same, the respondent pleaded that the statement dated March 20, 1996, was forcibly extracted from him and that there is no truth in it. He stated that his undisclosed income is Rs. 65,020 and that he is prepared to pay tax thereon. Faced with this situation, the Assessing Officer caused special audit under section 142(2A) of the Act. The respondent is said to have not extended co-operation. Ultimately, an order was passed on July 20, 1997, by the Assessing Officer in exercise of the powers under section 158BC read with section 143(3) of the Act determining the undisclosed income of the respondent as Rs. 15,00,000. A sum of Rs. 9,00,000

was levied as tax thereon. Aggrieved by that, the respondent filed I.T.A. (S.S.) A. No. 204/Hyd/1997 before the Hyderabad A. of the Income-tax Appellate Tribunal (for short, "the Tribunal"). The Tribunal allowed the appeal through order, dated December 27, 2001. Hence, this appeal by the Revenue.

2. Sri S.R. Ashok, learned senior counsel for the appellant, submits that the Tribunal was mostly guided by the fact that the respondent has retracted from the sworn statement and it did not take into account the evidentiary value of such a statement. He contends that the statement recorded on oath cannot be brushed aside just because the assessee has retracted from it, at a later point of time. Placing reliance upon the judgment of the Kerala High Court in Commissioner of Income Tax Vs. O. Abdul Razak, , learned counsel submits that though the burden is upon the Department to prove its case in the context of a search operation, the burden stands discharged, when it persuades the assessee to make the statement and the same is recorded.

3. Sri Y. Ratnakar, learned senior counsel for the respondent on the other hand, submits that the very sworn statement recorded from the respondent on March 20, 1996, under sub-section (4) of section 132 of the Act is not true. He submits that it is only when a statement is recorded during the course of search, that it can be treated as the one under sub-section (4) of section 132 of the Act and that, in the instant case, the search took place on January 9, 1996, but and the statement was recorded two months thereafter, i.e., on March 20, 1996. The learned counsel further submits that certain observations made by the Kerala High Court run contrary to the very basic principles of evidence and at any rate, the facts of that case are totally different from those of the present case. He has drawn our attention to the instructions issued by the Central Board of Direct Taxes in the year 2003, and submitted that a statement, even if properly recorded under sub-section (4) of section 132 of the Act cannot constitute the sole basis for levying penal tax under Chapter XIV-A of the Act.

4. It is not in dispute that the search was conducted in the premises of the respondent on January 9, 1996. It appears that nothing incriminating was found or recovered during the search. It was only two and half months thereafter, i.e., on March 20, 1996, that a statement was recorded from the respondent. The statement is sought to be treated as the one under sub-section (4) of section 132 of the Act.

5. At the out set, it needs to be examined as to whether the said statement can be treated as the one, under sub-section (4) of section 132 of the Act. The provision reads as under:

"The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax

Act, 1922 (11 of 1922), or under this Act."

6. From a perusal of this, it becomes clear that the statement is required to be made during the course of search or seizure. The provision does not permit of any doubt that the statement must be recorded while the search is in progress and before the search is concluded. The question of recording a statement, referable to the provision, after the conclusion of the search, does not arise. There is not even any scope, to explain the delay, once the statement is recorded, after the search.

7. In the instant case, the statement was not recorded during the course of search or seizure. To be precise, the search was made on January 9, 1996, and the statement was recorded on March 20, 1996. Such a statement cannot at all, be brought under the fold of section 132(4) of the Act.

8. Secondly, the recording of statement even during the search is not a matter of course. It is only when the material such, as, books of account, documents, money, bullion, jewellery and the like are found or discovered during search, that the statement can be recorded. If the search did not lead to the discovery of any matters, referred to above, there would not be any occasion to record the statement at all. In this case, admittedly, nothing was recovered from the respondent during the search. Hence, there was no occasion or basis to record the statement, even if it is done when the search was in progress. Hence, there is a basic infirmity in the very foundation of the case, upon which the appellant sought to rest their block assessment vis-a-vis the respondent.

9. Assuming that a statement, which fits into sub-section (4) of section 132 of the Act was recorded from the respondent, it needs to be seen as to how far that can constitute the basis for the appellant to proceed against the respondent. Sub-section (4) of section 132 of the Act itself is to the effect that the statements recorded shall be treated as piece of evidence in the proceedings under the Act. That would be so, as long as the statement is not retracted. If the assessee comes forward with a plea that his statement was recorded under threat or coercion, the evidentiary value of the statement suffers a serious dent.

10. The mandate under sub-section (4) gets honoured only when there is no other version from the assessee, vis-a-vis the statement. In such a case, the statement would constitute the basis for making block assessment even if the Department does not have any other material to buttress its case. However, if the statement is retracted by the person from whom it is said to have been recorded, it has to be subjected to the same test, as is done in matters of similar nature. This is particularly so, when the person, from whom it is recorded, is going to be visited with penal consequences. Sub-section (4) of section 132 of the Act cannot be taken as a provision laying down any new principle in the law of evidence.

11. For all practical purposes, the statement recorded under sub-section (4) of section 132 of the Act, partakes of the character of the one recorded by an

investigating officer under section 162 of the Code of Criminal Procedure. However desirable, it may appear to be, it cannot be ascribed the status of a proven fact. At the most, it would constitute the basis for the prosecution to frame its case and correspondingly be a material for the defence to ensure that the prosecution sticks to its version. The question of a statement of that nature being treated as the clinching evidence, by itself, leading to any penal action does not arise.

12. In Abdul Razak's case (supra), the Kerala High Court took the view that a statement recorded under sub-section (4) of section 132 of the Act can constitute the basis for passing a block assessment order, notwithstanding the retraction from it, by the assessee. The discussion in this behalf reads as under (page 76 of 350 ITR):

"It cannot be doubted for a moment that the burden of proving the undisclosed income is squarely on the shoulders of the Department. Acquisition of properties by the assessee are proved with the documents seized in search. Since understatement of consideration in documents is the usual practice the officer questioned the assessee on payments made over and above the amounts stated in the documents. The assessee gave sworn statement honestly disclosing the actual amounts paid. The question now to be considered is whether the sworn statement constitutes evidence of undisclosed income and if so whether it is evidence collected by the Department. In our view, the burden of proof is discharged by the Department when they persuaded the assessee to state details of undisclosed income, which the assessee disclosed in his sworn statement, on being confronted with the title deeds seized in search."

13. With great respect to the learned judges of the Kerala High Court, who rendered the judgment, we express our inability to subscribe to that view. To the extent, their Lordships have taken note of the fact that the burden of proving undisclosed income squarely rested on the Department, there is hardly any doubt. However, the manner in which the burden can be said to have been discharged; as mentioned in the underlined portion, runs contrary to the very basic tenets of law of evidence. Though the fact that the assessee therein retracted from the sworn statement, no discussion was undertaken about it.

14. The question of discharge of burden, arises in respect of a fact, to be proved. If the contents of the statement recorded from an assessee are to be proved, that very statement cannot be a proof, by itself. Such a course would bring about hypallage logic, which is illustrated by a well known example.

Question: who is a doctor?

Answer: The one who administers medicine.

Question: What is medicine?

Answer: The one that is administered by a doctor. Such discussion does not lead one, any further.

15. The discharge of burden must be in respect of the plea taken by the Department and the burden can be discharged only through material, which is over and above what was stated in their case. The statement assumes the character of proven fact, only when it is not denied by the assessee.

16. The circumstances under which a statement is recorded from an assessee, in the course of search and seizure, are not difficult to imagine. He is virtually put under pressure and is denied of access to external advice or opportunity to think independently. A battalion of officers, who hardly feel any limits on their power, pounce upon the assessee, as though he is a hardcore criminal. The nature of steps, taken during the course of search are sometimes frightening. Locks are broken, seats of sofas are mercilessly cut and opened. Every possible item is forcibly dissected. Even the pillows are not spared and their acts are backed by the powers of an investigating officer under section 94 of the Code of Criminal Procedure by operation of sub-section (13) of section 132 of the Act. The objective may be genuine, and the exercise may be legal. However, the freedom of a citizen that transcends, even the Constitution cannot be treated as nonexistent.

17. It is not without reason that Parliament insisted that the recording of statement must be in relation to the seized and recovered material, which is in the form of documents, cash, gold, etc. It is, obviously to know the source thereof, on the spot. Beyond that, it is not a limited licence, to an authority, to script the financial obituary of an assessee.

18. At the cost of repetition, we observe that if the statement made during the course of search remains the same, it can constitute the basis for proceeding further under the Act even if there is no other material. If, on the other hand, the statement is retracted, the Assessing Officer has to establish his own case. The statement that too, which is retracted from the assessee cannot constitute the basis for an order under section 158BC of the Act.

19. This, in turn, is referable to a time-tested right of an individual which is recognised under article 20(3) of the Constitution of India which mandates no person, accused of any offence, shall be compelled to be a witness against himself. The citing of a statement of an individual as the only evidence, in the penal proceedings initiated against him, is never treated as part of a developed and mature legal system. Section 31 of the Evidence Act, 1872, also assumes significance in this regard. It reads:

"Admissions not conclusive proof, but, may estop: Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained."

20. Parliament never intended to place the proceedings under the Income-tax Act on a higher pedestal than those under the criminal enactments.

21. The Department itself took note of the indiscriminate use of such statements

recorded under sub-section (4) of section 132 of the Act and almost issued a note of advice, if not caution to the authorities under the Act, through its communication, dated March 11, 2003. It reads:

"Confession of additional income during the course of search and seizure and survey operation regarding:

Instances have come to the notice of the Board where assesseees have claimed that they have been forced to confess the undisclosed income during the course of the search and seizure and survey operations. Such confession, if not based upon credible evidence, are alter retracted by the concerned assesseees while filing returns of income. In these circumstances, on confessions during the course of search and seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income, which leads to information on what has not been disclosed or is not likely to be disclosed before the Income-tax Departments. Similarly, while recording statement during the course of search and seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.

Further, in respect of pending assessment proceedings also, Assessing Officer should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders."

22. Though this circular was not available when the adjudication vis-?-vis the respondent was taking place at various stages, it is not difficult to take note of the fact that the circular has only made manifest, what was already hidden in the provision. The provision is deemed to have carried the same purport, all through.

23. This court in Commissioner of Income Tax Vs. Shri Ramdas Motor Transport, dealt with the question and held as under (page 183):

"A plain reading of sub-section (4) shows that the authorised officer during the course of raid is empowered to examine any person if he is found to be in possession or control of any undisclosed books of account, documents, money or other valuable articles or things, elicit information from such person with regard to such account books or money which are in his possession and can record a statement to that effect. Under this provision, such statements can be used in evidence in any subsequent proceeding initiated against such person under the Act. Thus, the question of examining any person by the authorised officer arises only when he found such person to be in possession of any undisclosed money or books of account. But, in this case, it is admitted by the Revenue that on the dates of search, the Department was not able to find any unaccounted money, unaccounted bullion nor any other valuable articles or things, nor any unaccounted documents nor any such incriminating material either from the premises of the company or from the residential houses of the managing director and other directors. In such a case, when the managing director or any other

persons were found to be not in possession of any incriminating material, the question of examining them by the authorised officer during the course of search and recording any statement from them by invoking the powers under section 132(4) of the Act, does not arise. Therefore, the statement of the managing director of the assessee, recorded patently under section 132(4) of the Act, does not have any evidentiary value. This provision embedded in sub-section (4) is obviously based on the well established rule of evidence that mere confessional statement without there being any documentary proof shall not be used in evidence against the person who made such statement. The finding of the Tribunal was based on the above well settled principle."

24. Learned counsel for the appellant is not able to point out any differentiating factors. The precedent covers the facts of the present case.

25. Viewed from any angle, we do not find any basis to interfere with the order under appeal. Hence, the appeal is dismissed. There shall be no order as to costs. Miscellaneous petitions, if any, pending in this appeal shall also stand disposed of.