

(2011) 12 KL CK 0033
In the High Court Of Kerala
Case No : Income Tax A. No. 1288 of 2009

Commissioner of Income Tax	Vs	APPELLANT
O. Abdul Razak		RESPONDENT

Date of Decision : 23-12-2011

Acts Referred:

Evidence Act, 1872 — Section 3
Income Tax Act, 1961 — Section 131, 132, 132(4), 158BB

Citation : (2013) 350 ITR 71

Hon'ble Judges : K. Vinod Chandran, J; C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : P.K.R. Menon, GOI Taxes and Jose Joseph, Income-tax, for the Appellant; K.B. Muhamed Kutty and K.M. Firoz, for the Respondent

Final Decision : Allowed

Judgement

K. Vinod Chandran, J.—The above appeal is filed by the Revenue against the order of the Tribunal in the appeal of the assessee deleting certain additions made by the Assessing Officer confirmed by the first appellate authority. The assessee, who was adjudged as a "resident not ordinarily resident" by the first appellate authority and confirmed by the Tribunal, was before the Tribunal challenging certain additions made by the Assessing Officer for the block period 1988-89 to 1998-99. Pursuant to a search conducted at the residential premises of the assessee on October 22, 1998, based on the seized records as also the statement recorded u/s 132(4) of the income tax Act, the Assessing Officer proceeded to assess the assessee, for the block period 1988-89 to 1998-99. On the basis of the seized documents, recovered during search, relating to purchase of land as also the sworn statement recorded u/s 132(4), the Assessing Officer computed the undisclosed income. The addition made with respect to the purchase of lands was on the strength of the admission made by the assessee regarding the actual amount paid as disclosed voluntarily in his sworn statement and the amounts disclosed in the cash flow statement corroborated by the recovery and seizure of title deeds. Personal expenses was estimated on the

basis of the admissions made, again in the statement u/s 132(4) and the attendant circumstances. The adoption of the statement made u/s 132(4) as evidence for the purpose of assessment was substantially confirmed in first appeal. The Tribunal, however, finding the materials and the statement u/s 132(4) as being devoid of evidentiary value deleted three of the additions.

2. The Revenue in the present appeal before this court challenges the findings of the Tribunal based on which the additions are deleted. Questions raised are on the evidentiary value of the statement recorded from the assessee u/s 132(4) and also the materials seized in search based on which undisclosed income is computed. The Revenue's grievance is against the deletion by the Tribunal with respect to three additions made by the Assessing Officer and confirmed by the first appellate authority. The first of these is the addition made with regard to the actual money paid by the assessee for purchase of three properties respectively at Tirurangadi, Thenhipalam and Francis Road in the years 1993-94, 1994-95 and 1995-96 as also the actual money paid for the purchase and subsequent development of another property at Tirurangadi for the assessment year 1996-97. The total addition made with respect to these four transactions came to Rs. 35,37,227. The said additions were made by the Assessing Officer placing reliance on the title deed seized corroborated by the statement recorded u/s 132(4) on October 22, 1998, both in the course of search made at the assessee's residence. The second addition was with respect to the personal expenses of the assessee estimated by the Assessing Officer, again on the strength of the statement made u/s 132(4) of the income tax Act, as also the attendant circumstances at Rs. 5,11,000. Last of the additions disputed by the assessee and allowed by the Tribunal was an amount of Rs. 3,00,000 which the assessee claimed as an NRI loan in his cash flow statement and later in a reply stated to be a loan from his elder brother.

3. The first appellate authority made some modifications with respect to the addition with regard to one item of the property, which is not challenged by the Revenue and confirmed the additions under all other heads. The Tribunal, while considering the additions, made with respect to the purchase of properties held that the statement recorded u/s 132(4) cannot be the sole ground for making addition and the Assessing Officer ought to have obtained sufficient evidence to make the additions especially in the context of the statement u/s 132(4) of the Act having been retracted by the assessee. The addition made on account of personal expenses was deleted on the ground that since the Assessing Officer had made additions with respect to the costly items purchased, there cannot be any further addition on account of personal expenditure. The addition with respect to Rs. 3,00,000 was also deleted on the ground that nothing has been brought on record to show that any materials were seized in the course of search.

4. The Revenue has raised five questions of law for being considered, which we reframe as under:

(i) Whether the Tribunal was correct in holding that no addition can be made

based on the statement of the assessee u/s 132(4) of the income tax Act without further material having evidentiary value and whether on the assessee making a mere retraction statement the evidentiary value of the statement u/s 132(4) is completely extinguished?

(ii) On the above findings, whether the Tribunal was right in deleting the addition made with respect to property transactions and with respect to estimated personal expenses?

(iii) Whether the Tribunal was correct in finding that the addition of Rs. 3 lakhs claimed by the assessee to be a loan; was not based on any evidence found at the time of search?

5. The additions made by the Assessing Officer was on the basis of clear admission made by the assessee in the statement recorded u/s 132(4) of the Act. The Tribunal has proceeded to deal with the issues on the premise that no evidentiary value can be attributed to the statement u/s 132(4) of the Act especially in the context of there being a retraction and that for making additions, the Assessing Officer should necessarily unearth materials during the search.

6. The statement on oath given by the assessee is produced by the Revenue as annexure A. From a reading of the statement, it is evident that the assessee had voluntarily submitted before the income tax Officer that the amount shown in the document with respect to purchase of four properties were not the actual amounts and that he had paid more than that shown in the document. The assessee has also categorically stated the amounts actually paid with reference to the total extent of each of the properties. In fact, it is the case of the assessee as is revealed from page 25 of the order of the Tribunal, that the documents recovered during the search were put across to the assessee and it was looking into these documents that the assessee had stated the details of the various transactions. The statement given under oath has to be considered in the context of the long prevalent practice of not stating the actual consideration with respect to transactions of immovable properties, for the purpose of evading stamp duty. True, the assessee has a case in his retraction statement, as also before the first appellate authority and the Tribunal that he was threatened and coerced into stating the facts recorded in the statement u/s 132(4) of the Act. It is pertinent to note that the first appellate authority has clearly found that the appellant had volunteered the information and the demeanour of the deposition belies the contention of threat and coercion. Strangely, the Tribunal refused to go into that aspect as is discernible from paragraph 31 in so man)" words:

Though we are not going into the aspect of duress or coercion on the assessee as mentioned in the retraction statement, we do not find that the Revenue had at least brought anything on record in respect of on money payment except the sworn statement (which has also been retracted by the assessee later on).

7. The Tribunal without going into that aspect merely disbelieves the statement

recorded u/s 132(4) relying on the retraction statement as also on the lack of any material on record with respect to the alleged actual payments. The deletion made by the Tribunal is on the premise that the burden of proving undisclosed income in search is not established by the Department.

8. 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.

9. Section 132 of the income tax Act deals with search and seizure and sub-section (4) of section 132 empowers the authorised officer during the course of the search and seizure to examine on oath any person who is found to be in possession or control of any books of account, documents, money or valuable articles or things, etc., and record a statement made by such person which can be used in evidence in any proceedings under the income tax Act. The Explanation appended to clause (4) also makes it clear that such examination can be in respect of any matters relevant for the purpose of any investigation and need not be confined to matters pertaining to the material found as a result of the search. A plain reading of section 132(4) would clearly show that what was intended by empowering an officer conducting the search to take a statement on oath was to record evidence as contemplated in any adjudication especially since section 131 confers on all officers empowered therein with the same powers as vested in a court under the Code of Criminal Procedure, 1973, for the purpose of the income tax Act.

10. A Division Bench of this Court in Commissioner of Income Tax Vs. Hotel Meriya, considered the scope of a statement recorded u/s 132(4) and found that such statement recorded by the officer as well as the documents seized would come within the purview of evidence u/s 158BB of the income tax Act read with section 3 of the Evidence Act and section 131 of the income tax Act. Based on the above finding, it was also held that such evidence would be admissible for the purpose of block assessments too. The Explanation to section 132(4) of the income tax Act was also noticed by the Division Bench to further emphasise that the evidence so collected would be relevant in all purposes connected with any proceedings of the income tax Act.

11. The Tribunal's finding that the statement recorded u/s 132(4) has no evidentiary value, hence cannot be sustained. The reliance placed by the Tribunal

on the retraction statement is totally untenable in so far as any statement recorded u/s 132(4), statutorily deemed to have evidentiary value; cannot be retracted at the mere will of the party. A statement made under oath deemed and permitted to be used in evidence, by express statutory provision, has to be taken as true unless there is contra evidence to dispel such assumption. A self-serving retraction, without anything more cannot dispel the statutory presumption. The admission made by the assessee before the Assessing Officer corroborated by the title deeds seized in search absolved the Department from discharging any burden regarding the additions made on the strength of such admission. Admission as has been often held is the best evidence on a point in issue and though not conclusive is decisive of the matter unless successfully withdrawn or proved erroneous. Any retraction of a clear admission made has to be on the ground of it being either erroneous or factually incorrect or one made under threat or coercion. In the instant case, the first appellate authority has clearly found that the plea of the assessee that the admissions were made under threat and coercion is clearly unfounded. The Tribunal also has categorically refused to consider the issue of threat and coercion. In such circumstances, the Tribunal ought to have seen if the assessee has established that the admissions made were erroneous and factually incorrect. It was well within the capacity of the assessee to have shown before the fact finding authorities either at the original or at the appellate stage that the assessee had only paid amounts as disclosed in the documents for the various property transactions entered into by him. The assessee having not proved any threat or coercion and further having failed to prove that the amounts shown in the documents were the only payments made, the Tribunal was not right in casting a burden on the Department. The assessee, in the instant case, has failed to successfully disprove the admissions made by him and the admissions made in a statement u/s 132(4), by the clear provisions in the statute has to be considered to have evidentiary" value. In the circumstances, we proceed to answer the first question of law in favour of the Revenue and against the assessee.

12. The sustainability of the additions made by the Assessing Officer with respect to undisclosed income vis-?-vis the property transactions as also that made on account of personal expenditure has to be decided with reference to the answer in the first question, since both additions are on account of admissions made in section 132(4) statement corroborated by documents recovered in search and the attendant circumstances. The Tribunal placed much reliance on the retraction and even went to the extent of stating that it was the Department's burden to prove the retraction to be untrue by bringing in any corroborative, evidence. The Hon"ble Supreme Court has considered the question of burden of proof in the decision reported in Commissioner of Income Tax, Madras Vs. Best and Co., and specifically dealt with it in paragraph 6 (page 18):

At this stage, the question of burden of proof raised at the Bar may be noted. In Commissioner of Income Tax, Madras Vs. Chari and Chari Ltd., , this court observed (page 407):

... it must in the first instance be observed that it is for the Revenue to establish that a particular receipt is income liable to tax...

We may point out, as some argument was advanced on the question of burden of proof, that this court did not lay down that the burden to establish that an income was taxable was on the Revenue was immutable in the sense that it never shifted to the assessee. The expression "in the first instance" clearly indicates that it did not say so. When sufficient evidence, either direct or circumstantial, in respect of its contention was disclosed by the Revenue, adverse inference could be drawn against the assessee if he failed to put before the Department material which was in his exclusive possession. This process is described in the law of evidence as shifting of the onus in the course of a proceeding from one party to the other. There is no reason why the said doctrine is not applicable to income tax proceedings. While the income tax authorities have to gather the relevant material to establish that the compensation given for the loss of agency was a taxable income, adverse inference could be drawn against the assessee if he had suppressed documents and evidence, which were exclusively within his knowledge and keeping.

13. In the instant case, on the clear admission of the assessee corroborated by the documents the burden on the Department ceases to exist. On the retraction being filed by the assessee, there is a burden cast on the assessee to prove the detraction or rather disprove the admissions made. It is not a shifting of the onus but a new burden cast on the assessee to disprove the earlier admissions having evidentiary value. As noticed earlier, retraction made by the assessee can only be considered as a self-serving after thought and no reliance can be placed on the same to disbelieve the clear admissions made in the statement recorded u/s 132(4). Deletion of the additions vis-?-vis the property transactions on the reasoning that the Department cannot do so on the basis of the admission made u/s 132(4) and on the premise that the Department ought to have proved retraction to be untrue cannot be countenanced in view of the specific words employed in section 132(4).

14. The next addition deleted on the ground that the estimation vis-?-vis the personal expenses was based on mere assumptions and presumptions also has to be examined in the context of the admissions made u/s 132(4). The assessee himself had admitted to having monthly personal expenses of Rs. 7,000 but confined the disclosure to the years 1993-94 to 1999-2000. The only explanation offered by the assessee for the years 1989-90 to 1992-93 was that his personal expenses in the said years were met by his parents. The Assessing Officer disbelieved the same and estimated the monthly expenses at Rs. 7,000 for the years 1989-90 to 1992-93 and for 1993-94 to 1995-96 increased it to Rs. 84,000 from the amount of Rs. 42,000 disclosed in the cash flow statement. For the balance years, i.e., from 1996-97 to 1999-2000, the Assessing Officer estimated the personal expenses at the rate of Rs. 1,00,000 per annum. The said estimate was made by the Assessing Officer based on the clear admission made by the

assessee in the statement recorded u/s 132(4) as also the attendant circumstances.

15. The estimate was made by the Assessing Officer considering the life style of the assessee as revealed from the furniture and gadgets available in the house of the assessee. The first appellate authority confirmed the said addition on the finding that the Assessing Officer was correct in relying on the statement u/s 132(4) of the Act and that the estimate made is reasonable. The Tribunal would, however, delete the said additions on the ground that the Assessing Officer having estimated the amounts for probable purchase of costly equipment and furniture could not have made any additions towards inadequate drawings mainly on the basis of the presence of costly articles. In our view, the approach of the Tribunal is perverse in so far as the additions made for purchase of items is distinct and different from the additions for personal expenses. The presence of costly articles, as rightly held by the Assessing Officer, is a pointer to the life style of the assessee and the same is further buttressed by the statement made by the assessee u/s 132(4) of the Act. In the circumstances and in view of our findings regarding question No. 1, we answer the second question in favour of the Revenue and against the assessee holding that the deletion made by the Tribunal was not on a proper appreciation of law and the admitted facts and circumstances in the case.

16. The last question is with reference to the addition made of Rs. 3 lakhs in the year 1993-94. The cash flow statement furnished by the assessee shows the credit of Rs. 3 lakhs termed to be NRI loans and on notice for showing cause, the assessee by a written reply dated October 12, 2000, states that the said amount was a loan obtained from Sri Muhammadali, the assessee's elder brother. On a further examination on October 16, 2000, the assessee reiterated his contention regarding the loan, which was recorded by the officer. The assessee offered absolutely no evidence to prove the transaction and the contradictions regarding the disclosure in the cash flow statement as a NRI loan and the later explanation as a loan received in cash, hits at the root of the genuineness of the transaction. The assessee having admitted the receipt of the amount onus was on him to prove that the receipt was only by way of loan and was not in the nature of an income taxable under the Act. The assessee having failed to prove satisfactorily, the source and nature of the receipt it was open to the Assessing Officer to draw an inference that the said receipt is an assessable income as has been held in *A. Govindarajulu Mudaliar Vs. Commissioner of Income Tax, Hyderabad*, . The Assessing Officer, hence found the credit to be unexplained and unproved and treated the same as undisclosed income, which was confirmed by the first appellate authority. The Tribunal, however, found that nothing has been brought on record to show that any materials were seized during the course of search in respect of this particular loan and deleted the addition as not one arising out of the search materials. The assessee having disclosed the receipt explained it as NRI loan in the cash flow statement and subsequently claimed it to be a loan in cash from his brother. But for the claim there was absolutely no material to

establish the nature or source of the receipt and the Assessing Officer rightly disbelieved the explanation. The receipt having been admitted the burden of proving that it was not taxable lies upon the assessee. When the assessee had voluntarily disclosed the same in the cash flow statement and had failed to explain the genuineness of the transaction, we are at a loss to understand why the Tribunal insisted on "search materials" to substantiate the addition. In the result, the third question is also answered in favour of the Revenue and against the assessee. The income tax appeal filed by the Revenue is allowed answering all the questions in favour of the Revenue and against the assessee.