

(2012) 03 KAR CK 0180

In the Karnataka High Court

Case No : IT Appeal No's. 421-422 of 2011 and Others

Commissioner of Income Tax-III

APPELLANT

Vs

Saravana Constructions (P) Ltd.

RESPONDENT

Date of Decision : 14-03-2012

Acts Referred:

Income Tax Act, 1961 — Section 132, 153 A, 292 (c), 68

Citation : (2012) 208 TAXMAN 188

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

**Advocate : E.R. Indrakumar and E. Sanmathi Indirakumar, for the Appellant;
Ashok Kulkarni, for the Respondent**

Judgement

N. Kumar, J.—In these batch of appeals filed against the common order, both the revenue and the assessee are challenging that portion of the order, which is against their interest. Therefore, all these appeals are taken up for consideration together and disposed of by this common order. The assessee's premises was searched u/s 132 of the Income Tax Act (for short hereinafter referred to as "The Act") on 8.10.2003. Various documents were found during search. In response to the notice u/s 153A of The Act, the returns were furnished for the accounting years 1998-99 to 2003-04. In all the assessment years, except for the accounting year 1998-99, losses were declared by the assessee. In the course of search, certain books of account and papers had been seized. It was observed in the assessment order that as per the seized materials, the assessee had received loans from various partners, some of which have been reflected in the regular books of account. After filing the return, in response to the notice issued u/s 153A of the Act; the assessee enclosed Balance Sheet and Profit and Loss account along with trial balance incorporating Kuchcha book entries for the relevant year. The trial balance so submitted showed credits of unsecured loans from different parties aggregating to Rs. 4,54,07,931/-and debits of Rs. 1,09,46,081. The Assessing Officer called upon the assessee to produce persons claimed to have advanced money and file their confirmations. The assessee

expressed inability to furnish confirmations. Therefore, the Assessing Authority added Rs. 4,54,07,931 on the ground that the assessee had failed to substantiate his claim. While preparing the returns u/s 153A of the Act, the assessee also incorporated expenses appearing in the seized books of account and has re-drawn the P & L Account in which the increase in expenses was found to be Rs. 92,77,880/-. The Assessing Authority made two types of additions in all the assessment years. One, in terms of Section 68 of the Act and another with regard to additions on account of increase in the expenses claimed in the returns furnished in pursuance of notice u/s 153A in comparison to the audited accounts. The total of the additions made in terms of Section 68 is of Rs. 28.92 crores and the addition on account of increase in expenses is Rs. 3,06,48,385/-. Aggrieved by the said order, the assessee preferred an appeal to the Commissioner of Income Tax (Appeals). The Appellate Authority deleted the additions made in terms of Section 68 of the Act holding that onus was on the Assessing Authority to substantiate that the credits entered in the kuchha cash book were not the loans from others but the assessee's own money reflected in the shape of credits in the seized books. The Assessing Authority did not discharge the primary onus cast on it and it was wrong on the part of the assessing authority to throw the burden on the assessee to prove the genuineness of the credits. Regarding the additions made on account of increase in expenses, the Appellate Authority confirmed the additions made by the Assessing Authority. Two sets of books were found i.e. audited books and kuchha cash books, it was noticed by the Assessing Authority that in the returns of income filed by the assessee, the expenses claimed on the basis of audited books were more than what was recorded in the kuchha cash books. The difference was treated as inflation of expenses and confirmed the order of the Assessing Authority. The assessee preferred further appeal before the Tribunal and the Tribunal by the impugned order partly confirmed the order of Commissioner in respect of the deletion made in respect of income assessed in terms of Section 68 of the Act and observed that the Assessing Authority wrongly added the opening balances in each of the assessment year and further observed that loans were taken through cheques as well as cash and held that the total loans of Rs. 61,36,831/- are by way of cheques. It further held that the Assessing Authority should accept the genuineness of the loans wherever the lenders have confirmed for having lent the money to the assessee either before the Investigating authorities or through the letters. Regarding the additions made and confirmed by the Commissioner, on account of excess expenditure, the Tribunal directed the Assessing Authority to take into account the increase in expenditure while computing the income of the assessee. It is against the said order, both the assessee as well as the revenue have preferred these appeals.

2. Learned counsel for the assessee assailing the impugned order contends that in terms of Section 132(4A) if any books of account and other documents are found in possession of the assessee in the course of search, it may be presumed that such books of account and other documents belonged to the assessee and

the contents of the said documents are true and correct. If the assessing authority is not prepared to act on that entries, the burden is on him to disprove the correctness of the said entries and till it disproves the correctness of the said entries, no additions can be made u/s 68 of the Act. He also relied upon Section 292(c) of the Act, which reaffirms the said position.

3. Per contra, the learned counsel for the revenue submitted that the assessee has not denied that the kachcha books of account belongs to him and has not denied the entries therein and therefore, the burden is on him to show that the transactions reflected in the said books are genuine. It is in this context, the assessee has failed to establish the genuineness of the transactions. Therefore, the assessing authority was justified in acting on mere entries without the said entries being supported by corroborative evidence. Therefore, he submits that this being purely a question of fact, no case for interference is made out as no substantial question of law is involved.

4. The learned counsel for the revenue further pointed out in respect of their appeals that the Tribunal remanded the matter back to the assessing authority with a direction to the assessing authority to allow the transactions, which are claimed to be genuine, after confirming that the transactions are through the banking channels. He pointed out that the assessing authority before disallowing, not only has to verify whether those transactions are through banking channels but also should verify that the said transactions are genuine.

5. Per contra, the learned counsel for the assessee submitted that the transactions which are claimed by cheques are all genuine transactions and therefore, the assessee is entitled to the benefit of disallowance once it is found to be through the banking channels and the authority is satisfied about the nature of transactions.

6. Though several questions have been raised by both the parties, the parties agree that the substantial questions of law that arise for consideration in these appeals are as follows:-

(1) Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding the inclusion of any sum u/s 68 of the Act in the hands of the assessee?

(2) Whether the Tribunal in the facts and circumstances of the case is justified in treating the unsecured loans as genuine and bona fide merely because they are received by cheques without conducting an enquiry with regard to the identify of the payer i.e. creditors, creditworthiness of the said payer and the genuineness of the transaction?

First Substantial question of law

7. The material on record discloses that the loan amounts appeared to have been received by cash during the accounting years 1998-99 to 2004-05, was to the tune of Rs. 5.97 crores. In the body of the judgment, the Tribunal has set out the

details of the cash receipts in the assessment year wise, confirmed on enquiries by the Department and balance amounts. Thereafter, they have given the particulars of cash loans, year wise. Thereafter, direction was issued to the assessing authority to accept the cash credits wherever the lenders have confirmed for having lent the monies to the assessee either before the Investigation authority or through letters. The grievance is that once the kachcha account books are admitted and the assessee admits the entries in the said book, there is a presumption that the amounts mentioned therein are true. Therefore, all the entries in the account books are deemed to be true and correct. If the assessing authority were to dispute those entries, it is for him to place such evidence to disprove the correctness of those entries. Admittedly, no such attempt is made to disprove the entries. In those circumstances, the Tribunal committed a serious error in directing the Assessing Authority to take note of only those credits where the lenders have confirmed for having lent monies to the assessee. On the contrary, the entire credits should have been taken into consideration and obtained explanations and extended the benefit to the assessee. Admittedly, from the material on record, it is clear that the assessee has maintained two books of account. But for the search, the kachcha books would not have come to light. The entries in the kachcha books are not reflected in the regular books of account maintained by the assessee. Merely because the kachcha books are found during investigation and that the assessee owns the said books and also contends that the entries found therein are true and correct, it is not safe for the authorities to act on such entries. If the assessee wants to have the benefit of the entries in the said books, as he did not produce voluntarily before the authorities and those entries are not reflected in the regular accounts, it is for him to substantiate it by such acceptable evidence as to the correctness of those entries. In fact, he has taken the trouble to examine those creditors who have confirmed those entries. If he had not examined those creditors, in whose name the entries are made, only inference that could be drawn is that they are not real entries. No explanation is forthcoming for not examining those creditors who in the normal course would have come forward and confirmed those entries. In those circumstances, the Tribunal was justified in excluding those credit entries which are confirmed by the creditors and those entries which are not supported by creditors and was justified in issuing directions to the assessing authority to accept the cash credits wherever the lenders have confirmed for having lent the monies to the assessee and not in other cases. Therefore, we do not see any error committed by the Tribunal in passing the impugned order on this aspect. Hence, the first substantial question of law is answered in favour of the revenue and against the assessee.

Second substantial question of law

8. The material on record discloses that the Tribunal has taken note of the particulars of the loan creditors for the assessment years 1998-99 to 2003-04 furnished in a paper book in the course of hearing along with the copies of ledger

accounts, copies of bank statements of Lord Krishna Bank, ING Vysya Bank Limited, the Lakshmi Vilas Bank Limited. The same was not furnished for the perusal of the assessing authority. Further, it has observed that in the absence of the above relevant particulars, the assessing authority could have arrived at the conclusion that the alleged loan creditors were not genuine and concluded the assessments as such. Therefore, while issuing the direction, the Tribunal has directed the Assessing Authority as under:-

Since the transactions are claimed to be by cheques the question of disallowance does not arise. However, as a matter of caution, the learned Assessing Authority is directed to allow the same after confirming that the transactions are through banking channels.

9. The grievance is that the benefit can be given only for those cheque transactions, which are found to be genuine. Merely because the transactions are through bank channels, the assessee would not be entitled to the benefit. It is true that when a cheque is issued it has to be encashed through bank only. There is no presumption that merely because the payment is made by cheque, it is a genuine transaction. First it has to be found out whether the transaction in question is genuine and only thereafter, the assessee would be entitled to the benefit of disallowance. Probably, the Tribunal while issuing direction did not notice its reasoning in the earlier part of its very same order. That is how a direction in the aforesaid manner is issued, which is not correct. Therefore, in addition to what has been stated by the Tribunal, the assessing authority shall first find out, whether the cash credit claimed represents a true and genuine transaction. If the answer is "Yes" then accept the credit otherwise not.

10. In that view of the matter, the second substantial question of law framed is answered in favour of the revenue and against the assessee. In all other respects, the order of the Tribunal stands confirmed.

11. Accordingly, all these appeals are disposed of. Sri. Ashok Kulkarni and Sri. E.I. Sanmathi, are permitted to file their power within four weeks.