(1995) 03 GAU CK 0029

In the Gauhati High Court

Case No : Income-tax Reference No. 22 of 1990

Dhansiram Agarwalla APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 08-03-1995

Acts Referred:
Evidence Act, 1872 — Section 34
Income Tax Act, 1961 — Section 143(3)

Citation : (1996) 217 ITR 4

Hon'ble Judges : V. Dutta Gyani, J;J. Sangma, J

Bench : Division Bench

Advocate : G.K. Joshi and R.K. Joshi, for the Appellant; D.K. Talukdar and B.J. Talukdar, for the Respondent

Judgement

V. Dutta Gyani, J.—In compliance with this court''s order dated January 31, 1989, passed in Civil Rule No. 29/M of 1981, directing the Tribunal to draw up and submit a statement of the case, the Tribunal has accordingly submitted the same and referred the following question of law for this court''s opinion :

"Whether, on the facts and in the circumstances of the case, the Tribunal is justified in upholding the addition of Rs. 90,000 as income from undisclosed sources and in reversing the order of the Appellate Assistant Commissioner ?"

2. The assessee, following the mercantile system of accounting, was assessed in the status of an individual for the assessment year 1973-74. The assessment was completed u/s 143(3) on March 31, 1976. It was found by the Income Tax Officer that the assessee had deposited Rs. 1,58,400 with the Bank of India, Netaji Subhash Road Branch, Calcutta, on April 5, 1972, at Calcutta, through the assessee''s son, Dayaram. The Income Tax Officer observed that unless the person concerned had travelled by air to Calcutta, it was otherwise not possible to reach Calcutta on the 5th, the date of deposit. The Income Tax Officer then enquired about the mode of journey. The assessee, by his reply dated February 16, 1976, informed that as far as he could remember, Dayaram Agarwal travelled

by air to Calcutta on April 4, 1972. The same was confirmed by Dayaram as well vide his letter dated February 20, 1976. Subsequent enquiries with the Indian Airlines, revealed that it was not there but in the meantime, the assessee by his letter dated March 5, 1976, informed the Income Tax Officer that Dayaram travelled by car, but the Income Tax Officer did not accept this story. Considering the distance between Tinsukia and Calcutta, the Income Tax Officer noted that it was improbable for any carrier to reach Calcutta within banking hours, on the 5th had he started from Tinsukia on the 4th by car.

3. It was also found that on April 4, 1972, the assessee had no sufficient opening cash balance. So he had to borrow from other firms on that day and in such a circumstance the person carrying the money could start late in the morning and under the circumstances Dayaram could not have reached Calcutta on the 5th by forenoon. Therefore, this amount of Rs. 90,000 was treated as the assessee''s income from undisclosed sources.

4. The assessee took up the matter in appeal. It was urged that the assessment proceedings started four years after the event ; with fading human memory, the, information supplied earlier to the Income Tax Officer was based on a certain amount of guess work in recalling the event. The correct information was given vide letters dated February 20, 1976, and March 5, 1976, which have been ignored by the Income Tax Officer. It was also pointed out to the Appellate Assistant Commissioner that the assessee had actually withdrawn the money on April 3, 1972, and Dayaram had started by the 3rd evening from Tinsukia along with his friends by car reaching Calcutta on the 5th forenoon. This explanation was not considered at all by the Income Tax Officer. The Appellate Assistant Commissioner, on a consideration of all the facts and explanations as offered, came to the conclusion that the finding as recorded by the Income Tax Officer was not proper, and accepting the assessee''s explanation, and referring to the Tribunal''s decision (in I. T. A. No. 323/(Gau) of 1976-77, annexure "C-1") allowed the appeal and deleted the addition.

5. The Revenue came in appeal before the Tribunal, and the Tribunal reversed the Appellate Assistant Commissioner''s order and restored that of the Income Tax Officer.

6. Mr. Joshi, learned counsel appearing for the assessee, placing reliance on Tolaram Daga Vs. Commissioner of Income Tax, Assam, contended that the books of account having not been rejected either by the Tribunal or the Assessing Officer, they are prima facie proof of correctness. Referring to Udhavdas Kewalram Vs. Commissioner of Income Tax, Bombay City I, and COMMISSIONER OF Income Tax, LUCKNOW Vs. RAMESHWAR PRASAD BAGLA., it was strenuously urged by learned counsel that the Tribunal was duty bound to consider all the facts and the totality of circumstances, human probabilities vis-a-vis all the contentions advanced before it and record a finding thereon which, in the instant case, the Tribunal has omitted to do. Turning to the support of S. Hastimal Vs. Commissioner of Income Tax, Madras, learned counsel urged that the

explanation of a very old transaction should be approached keeping in mind the difficulties of the assessee in adducing evidence in such matters and the said difficulties should not be underestimated. An alternative plea taken by the assessee, should not be lightly brushed aside or rejected by the Tribunal. It was also submitted that in the instant case, the explanation offered by the assessee has been rejected without any evidence.

7. Mr. Talukdar, learned standing counsel appearing for the Revenue, on the other hand, stoutly defending the Tribunal''s order maintained that believing or disbelieving a particular fact does not render a question referred a question of law, to determine and decide a question of facts and on the basis of facts found by the Tribunal, the question should be answered in the affirmative.

8. Before proceeding to deal with the rival contentions it would be worthwhile to recapitulate the basic facts as found by the Tribunal. While it is true that the mode of travel from Tinsukia to Calcutta as initially disclosed was by air, so far as the assessee could remember, by letter dated March 5, 1976 (annexure "A-3"), it was explained that Dayaram had travelled by car from Tinsukia to Calcutta with the amount in question (Rs. 90,000) and handed over the same to the assessee at Calcutta on the 4th. In the assessee''s appeal, the Tribunal in I. T. A. No. 323/ (Gau) of 1976-77 for the assessment year 1972-73, vide its order dated December 22, 1977, having upheld in identical circumstances and accepted the explanation furnished by the assessee, consistency demanded and dictated that the Tribunal should not have rejected the explanation for the subsequent year which has been rejected simply because the second/alternative explanation regarding the mode of conveyance was not found to be acceptable.

9. This court in Tolaram Daga Vs. Commissioner of Income Tax, Assam, has held that where the genuineness and regularity of the accounts have not been challenged, the accounts are relevant prima facie proof of the entries and the correctness thereof u/s 34 of the Evidence Act, 1872. It needs to be noted here that in the instant case, books of account have not been rejected either by the Income Tax Officer or the Tribunal. Now, going to the explanation offered by the assessee, as pointed out by the Allahabad High Court in COMMISSIONER OF Income Tax, LUCKNOW Vs. RAMESHWAR PRASAD BAGLA., the totality of the circumstances and their combined effect are to be taken into consideration while deciding the question as to whether or not a particular fact is proved. It is expected of the Tribunal to consider all the material facts and to record its findings on all the contentions raised by the assessee as held in Udhavdas Kewalram Vs. Commissioner of Income Tax, Bombay City I, Going through the order as passed by the Tribunal, it cannot be said that the Tribunal has taken into account the surrounding facts and dealt with the contentions advanced by the assessee. The Tribunal has noted in paragraph 10 of its judgment--"The explanations of the assessee that the amount was withdrawn on the evening of April 3, 1972, but remitted only on April 4, 1972, due to late hours remains only an assertion and contention made on behalf of the assessee, but we find no fact

or material to support this claim." Earlier, the Tribunal has noted in paragraph 9--"Actually, it is for the assessee to prove and establish the correctness of a return of income filed by it, i.e., the assessee has to prove the correctness of the accounts claimed to have been maintained by such assessee. In the instant case, the Income Tax Officer did ask the assessee to prove this point which the assessee could not and actually failed, by giving incorrect statement at different times".

10. As already noted above, the account books submitted by the assessee have not been rejected by the Income Tax Officer. The same explanation has been held to be valid by the same Tribunal in I. T. A. No. 323/(Gau) of 1976-77 for the assessment year 1972-73. Although it is true that neither the principle of res judicata nor the rule of estoppel is applicable to assessment proceedings, yet the rule of consistency does apply to such proceedings as has been held in Commissioner of Income Tax Vs. Godavari Corporation Ltd., . The Supreme Court in Joint Family of Udayan Chinubhai, etc. Vs. Commissioner of Income Tax, Gujarat, has held that (at page 423)--"A decision reached in one year would be a cogent factor in the determination of a similar question in a following year, but ordinarily there is no bar against the investigation by the Income Tax Officer of the same facts on which a decision in respect of an earlier year was arrived at". No doubt, there is no bar, but learned counsel appearing for the assessee has rightly urged that the Tribunal without considering this aspect of the matter, had made a convenient departure, from the previous order. It was open to the Tribunal which had considered this aspect to come to a finding either way but that has not been done.

11. Mr. Talukdar, learned standing counsel, has submitted that the assessee came out with two different versions as regards his mode of travel which naturally failed to inspire confidence. In this connection, it is to be borne in mind that it was years after the event that the assessee was called upon to explain a particular entry and he initially explained to the best of his memory so far as he could remember. Human memory is fading in these factors, and as already noted above, have to be taken into account which the Tribunal has omitted to consider and as pointed out in Addl. Addl. Commissioner of Income Tax Vs. Ghai Lime Stone Co., Section 68 of the Income Tax Act does not debar an assessee from offering an alternative explanation. If either of them has been accepted, the cash credit cannot be assessed as the income of the assessee.

12. The only dispute that was before the Income Tax Officer was regarding the mode of travel of Sri Dayaram Agarwalla from Tinsukia to Calcutta, asking the assessee about his mode of travel almost four years after the date of travel, the assessee could state the mode of travel only so far as he could recollect. Exactitude and accuracy, in face of the long lapse of time, cannot be expected as human memory is fading and failing ; the replies (annexures "A-1" and "A-2") are naturally, therefore, uncertain about the mode of travel. Even Dayaram also stated in his letter (annexure "A-2") that as far as he could recollect, he travelled

by air. For this indefiniteness the Tribunal rejected the subsequent explanation as contained in annexure "A-3", by simply saying--"This explanation is, however, not acceptable on the ground that the man who himself travelled knows his mode of travelling and Shri Dayaram Agarwalla himself stated that he travelled by air." It may be noticed that Dayaram in his reply (annexure "A-2") did not make a categorical statement. It was qualified by two conditions-- (i) the usual mode of travel, and (ii) as far as he could recollect. It is not such a thing where there can be no exception.

13. While it is the case of the assessee that Dayaram travelled by car leaving Tinsukia on April 3, 1972, along with his friends, Shri Pannalal Kojani and Amarchand Jain, the date of journey has been wrongly taken both by the Income Tax Officer and the Tribunal, who on that count rejected the second explanation. The Tribunal has also confirmed this finding without adverting to the assessee''s case that Dayaram started from Tinsukia on the 3rd.

14. Mr. Talukdar, learned standing counsel for the Revenue, argued that the Tribunal, disbelieving the explanation of the assessee is essentially a question of fact, but even a finding of fact recorded by the Tribunal can be assailed on the ground that it is not supported by any evidence or that it is unreasonable or perverse (see Commissioner of Income Tax, Bombay City II Vs. Deviprasad Khandelwal and Co. Ltd., The Kerala High Court in K.S. Kannan Kunhi Vs. Commissioner of Income Tax, dealing with a similar question has held that the finding of the Appellate Tribunal was not valid and justified, because, though the explanation given by the assessee was not found acceptable, the other important aspect, whether on the facts and circumstances of the case it should be inferred that the amounts constituted income of the previous year, did not receive the consideration of the Appellate Tribunal.

15. In view of the foregoing discussion and taking into consideration the facts that the Tribunal has omitted to bear in mind the rule of consistency and consider the second explanation from the angle of human probabilities in the totality of circumstances, and the assessment and the findings as recorded in and the assessment order, annexure "B", it cannot be said in the circumstances of the case that the Tribunal was justified in affirming the addition of Rs. 90,000.

16. In the result, our answer to the question referred to is in the negative, i.e., in favour of the assessee and against the Revenue.

