
(2011) 08 CAL CK 0176
In the Calcutta High Court
Case No : Income Tax A. No. 324 of 2003

Dinesh B. Parikh

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 02-08-2011

Acts Referred:

Income Tax Act, 1961 — Section 260A

Citation : (2012) 246 CTR 51 : (2012) 347 ITR 420

Hon'ble Judges : Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : J.P. Khaitan, Sanjoy Bhowmik and C.S. Das, for the Appellant; D.K. Shome, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This appeal u/s 260A of the income tax ("Act") is at the instance of an Assessee and is directed against an order dated July 7, 2003 passed by the income tax Appellate Tribunal, "C" Bench, Kolkata, in income tax Appeal bearing ITA (SS) No. 5(Cal) of 2001 for the block period comprising the Assessment Years 1987-88 to 1997-98 and thereby dismissing the appeal filed by the Appellant.

Being dissatisfied, the Assessee has come up with the present appeal.

The facts giving rise to filing of this appeal may be summed up thus:

- a) The Appellant is assessed to tax under the income tax Act, and the present appeal arises out of the Appellant's block assessment under the Act comprising the Assessment Years 1987-88 to 1997-98.
- b) On February 18, 1997, a search was conducted by the income tax Department at the place of the business and residential premises of the Appellant. In course of the said search, the Appellant was required to make a statement between midnight on February 18, 1997 and 2 p.m. on February 19, 1997.

c) The Appellant stated, inter alia, as regards his total investment in shares. He had disclosed shares in the company called Jamshedpur Cement Ltd. of Rs. 11 lac and that shares amounting to Rs. 8 lac in Jamshedpur Cement Ltd. were purchased in different names which the Appellant admitted as belonging to him.

d) According to the Appellant, subsequently on going through the record, he found that the shares of amount of Rs. 8 lac adverted to in his statement in course of search were actually held by two limited companies, namely, Fairdeal Automobiles Pvt. Ltd. (55,000 shares of Rs. 10/- each amounting to Rs. 5,50,000/-) and Usha Karna India Pvt. Ltd. (38,500 shares of Rs. 10/-each amounting to Rs. 3,85,000/-). The said two companies had made the investments out of their own funds and the same were duly reflected in their accounts and balance-sheet.

e) According to the Appellant, the said two companies are his group concerns and the Appellant is the common signatory. It is further alleged that the Appellant had signed the application/transfer deed in respect of the said shares acquired by the said two companies and made statement as he did in the confusion of the search in the abnormal situation then prevailing.

f) The Appellant subsequently explained the position to the Assessing Officer in course of block assessment proceeding by two letters dated January 14, 1995 and February 22, 1999.

g) In course of search a piece of paper was found reflecting certain dates, names, quantity, rate and amount and the period mentioned was from December 9, 1994 to April 28, 1995 total quantity 43,800 and the total amount of Rs. 7,82,800/-. No question was further put to the Appellant in respect of the said paper in course of the search. However, in course of block assessment proceeding, the Appellant sought to explain that the said paper contained particulars of the quotations put to the Stock Exchange in order to show frequent dealings in shares of Jamshedpur Cement Ltd. before and during the rights issue made by the said company and the same did not reflect any actual transaction of purchase or sale. The Appellant subsequently got an affidavit affirmed by a stock broker who allegedly had put to the quotations mentioned in the seized papers stating on oath that the seized paper was a list of quotations put through to the stock exchange and that there was no actual transaction of purchase or sale and such affidavit was annexed to the written notes of submission filed by the Appellant before the Commissioner of income tax (Appeals) in the appeal against the block assessment order.

h) By the block assessment order passed on February 25, 1999, the Assessing Officer made an addition of Rs. 7,82,800/- on the basis of the said paper and the statement of the Appellant recorded at the time of search. The Assessing Officer proceeded that the seized paper reflected particulars of the shares purchased by the Appellant.

i) Being aggrieved, the Appellant preferred an appeal before the Commissioner of

income tax (Appeals) and before the Commissioner of income tax (Appeals), the Appellant filed written submission in respect of the said addition of Rs. 7,82,800/-. The Commissioner of income tax (Appeals) by an order dated October 11, 2000 deleted the said addition of Rs. 7,82,800/- made in the assessment.

j) Being dissatisfied, the Revenue preferred an appeal against the said appellate order before the income tax Appellate Tribunal and the Tribunal by order dated July 7, 2003 allowed the appeal filed by the Revenue.

k) The Tribunal proceeded on the basis that the seized paper in fact reflected actual transaction whereby the Appellant purchased the shares and as such the Appellant's statement was corroborated by the said seized paper.

Being dissatisfied, the Appellant has come up with the present appeal.

2. At the time of admission of this appeal, a Division Bench of this Court formulated the following substantial question of law:

Whether the Tribunal was justified in law in withdrawing the relief granted by the Commissioner of income tax (Appeals) and its purported findings that the Appellant had not furnished any evidence and upholding the addition of Rs. 7,82,800/- made by the Assessing Officer have been arrived at by ignoring the relevant materials and/or by taking into consideration irrelevant and/or extraneous materials and/or are otherwise arbitrary, unreasonable and perverse?

Mr. Khaitan, the learned Senior Advocated appearing on behalf of the Appellant, strenuously contended before us that the Tribunal below completely ignored the affidavit of the stock broker and the seized paper was only a list of quotations put to the stock exchange and did not represent any actual transaction of purchase or sale of shares. According to Mr. Khaitan, the Tribunal proceeded on the basis that the burden of proof lay upon the Appellant to establish that the seized paper did not reflect any actual transaction but completely ignored the evidence in the form of affidavit of the stock broker which established that the said paper did not reflect any actual transaction. According to Mr. Khaitan, the Tribunal failed to consider that the Appellant by his letter dated February 22, 1999 had informed the Assessing Officer that the names mentioned in the seized papers were of stock brokers and the Appellant had provided their address and telephone numbers also. But no enquiry of any sort was made by the Assessing Officer from the persons named in the seized paper or for that matter from M/s. Jamshedpur Cement Ltd. Mr. Khaitan, contends that in the circumstances, the Tribunal should have accepted the position that the seized paper did not reflect any actual transaction of purchase or sale of shares.

3. Mr. Khaitan, thus, prays for setting aside the order impugned and relies upon the following decisions of the Supreme Court in support of his contentions:

1) Mehta Parikh and Co. Vs. Commissioner of Income Tax, Bombay,

2) Dilip Kumar Roy Vs. Commissioner of Income Tax, Poona,

3) HANUTRAM RAMPRASAD Vs. COMMISSIONER OF Income Tax, ASSAM.,

4. Mr. Shome, the learned Senior Counsel appearing on behalf of the Revenue, has on the other hand, opposed the aforesaid contention of Mr. Khaitan and has contended that the so-called affidavit was annexed to the written argument but the same could not form part of record so long the appellate authority did not admit such additional evidence on the prayer of the Appellant. According to Mr. Shome, the Tribunal below rightly ignored the aforesaid submission that the affidavit allegedly filed by the broker should be taken into consideration. Mr. Shome contends that in the case before us no application was even filed for taking into consideration the said affidavit and thus there is no occasion for taking into consideration such affidavit. Mr. Shome further contends that till today even the Appellant has not filed any application for taking note of additional evidence even before this Court. He, therefore, prays for dismissal of the appeal filed by the Assessee.

5. The only question that arises for determination in this appeal is whether the Tribunal below was justified in setting aside the order of Commissioner of income tax (Appeals).

6. After hearing the learned Counsel for the parties and after going through the materials on record, we find that the Assessing Officer took note of the letter subsequently written by the Assessee vide his letter dated January 14, 2000 by which he sought to retract from his statement earlier made. By the said letter, he explained that the investment was made out of the fund in form of capital/loan/advance amount with J. Motors Accessories Stores where he was a partner, Fairdeal Automobiles Ltd. and J. Motors Accessory Stores Ltd. of which he was a director and apart from the above sources, the investments in shares were made through the accumulated savings lying in the Savings Bank A/C in a span of over four decades. The Assessee further explained that his group companies were also holding shares in Jamshedpur Cements Ltd. The Assessee gave xerox copies of the balance sheets of Fairdeal and one Usha Karna Ltd. to show that those two companies held shares worth Rs. 9,35,000/-. We find that the Assessing Officer discarded the said reply on the ground that his two earlier replies did not match such statement. In his statement, the Assessee clearly stated that apart from Rs. 11 lakh disclosed share investment, he had invested Rs. 8 lakh in different names but the shares actually belonged to him and he never mentioned the names of Fairdeal and Usha Karno at that time.

7. Before the CIT (Appeals), without filing any application for admission of additional documents, he relied upon affidavits of the broker confirming that the list did not represent the shares purchased on behalf of the Assessee but represents the list of quotation made by him with various brokers.

8. It appears that the CIT (Appeals) did not take into consideration such affidavit but deleted the amount of Rs. 7,82,000/- by making the following observations:

I have duly considered the submissions made by the Id. Counsel. Considering the fact that statement made earlier can be retracted and considering the evidence namely balance sheets of the two companies wherein the investment in shares of Jamshedpur Cements Ltd. had been shown, I would direct the assessing officer to delete the addition of Rs. 7, 82,000/- from the total income of the Appellant.

9. In our opinion, the Tribunal was quite justified in setting aside such a perverse finding made by CIT (Appeals) in deleting the said sum of money. It was rightly pointed out by the Assessing Officer that the explanation offered subsequently was not sufficient to rebut the earlier statement and the subsequent explanation was not matching with the earlier statements.

10. We do not find any substance in the contention of Mr. Khaitan that the learned Tribunal committed substantial error of law in not considering the affidavit of the broker. It is rightly pointed out by Mr. Shome that additional evidence can be adduced before the CIT (Appeals) on compliance of the statutory provisions for acceptance of the same and formal application must be filed and at the same time, specific order must be recorded by the CIT (Appeals) allowing such prayer and specifying the point on which such additional evidence should be taken. If such application is allowed, the other side must be given opportunity to adduce evidence of rebuttal.

11. In the case before us, the CIT (Appeals) did neither accept the affidavit by passing any order nor did it rely upon such affidavit annexed to the written note of argument but allowed the appeal on a different ground which is not tenable in the eye of law. The Assessee did not even pray before the Tribunal for allowing the acceptance of the affidavit of the broker and even before us, no application has been filed for acceptance of such affidavit as additional evidence.

12. Thus, we do not find any substance in the contention of Mr. Khaitan that a duty was cast upon the Tribunal to look into such affidavit annexed to the written note of argument filed before the CIT (Appeals).

13. From the materials on record we are convinced that no sufficient evidence has been produced by the Appellant to rebut the statement made at the time search that he had invested Rs. 8 lakh in different names but the shares actually belonged to him and the Tribunal below rightly set aside the order of the CIT (Appeals) which was not based on any cogent reason.

14. We, now propose to deal with the decisions cited by Mr. Khaitan.

15. In the case of Mehta Parikh and Company (supra), pursuant to Clause 6 of the High Denomination Bank Notes (Demonetization) Ordinance, 1946, the Assessee firm on January 18, 1946 encashed high denomination notes of Rs. 1,000/- each of the face value of Rs. 61,000/-. The account books of the Assessee showed that on the relevant date, i.e., January 12, 1946 the Assessee had 67 high denomination notes each of Rs. 1,000/- out of which 61 notes could be encashed on January 18, 1946. The entries in the account books were

supported by affidavits. The account books were accepted by the income tax authorities but the Tribunal thought that the cash balance on January 18, 1946 could not have sixty one high denomination notes. It came to the conclusion that the Assessee appeared to have put in high denomination notes in the cash balance and taken the other notes away. It accepted the Assessee's explanation only in regard to 31 notes and directed the assessment of Rs. 30,000/- from out of the sum of Rs. 61,000/- representing the value of high denomination notes. In such a case, the Supreme Court held that the decision of the Tribunal must rest not on suspicion but on legal testimony. The conclusion of the Tribunal that it was impossible for the Assessee to have 61 high denomination notes in the cash balance in their hands on January 12, 1946 was pure surmise and had no basis in the evidence. The Assessee had furnished a reasonable explanation for the possession of the high denomination notes of the face value of Rs. 61,000/- and there was no justification for having accepted it in part and discarded it in relation to a sum of Rs. 30,000/-. There was, therefore, no materials out of the sum of Rs. 61,000/- for income tax and Excess Profits Tax purposes representing the value of the high denomination notes which were encashed on January 18, 1946. In the case before us, the Tribunal rightly held that the admission made by the Assessee at the time of search was not properly explained and thus, the principles laid down in the above decision where the finding was based on surmise cannot have any application to the facts of the present case.

16. In the case of Dilip Kumar Roy (*supra*), the Bombay High Court held that the High Court can interfere with a finding of fact by the Tribunal if it appears that the Tribunal acted without any evidence or upon a view of the facts which could not reasonably be entertained or the facts found are such that no person acting judicially and properly instructed as to relevant law would have come to the determination in question. It was further held that a conclusion recorded by the Tribunal by wrongly throwing the burden of proof on the Assessee is not binding upon the Assessee. We do not for a moment dispute the aforesaid proposition of law. But in this case, the finding of the Tribunal was quite reasonable and it is rightly held that the explanation given by the Assessee is not sufficient to wipe out the admission made at the time of search and seizure. We thus find that the said decision is of no assistance to the Appellant.

17. In the case of Hanutram Ramprosad (*supra*), the Gauhati High Court was dealing with a case where a valid piece of evidence was excluded from consideration by the Tribunal below and thus, it was held that the order of the Tribunal was vitiated. In the case before us, we are of the firm view that the affidavit filed before the CIT (Appeals) without any formal application and not even allowed by the said authority cannot form part of additional evidence and that too, without giving opportunity to the Revenue to rebut the said evidence.

18. Thus, the Tribunal was quite justified in not taking into consideration such document.

19. The decisions cited by Mr. Khaitan are, thus, of no avail to his client.

20. We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal by answering the formulated question in the affirmative and against the Assessee.

21. In the facts and circumstances, there will be, however, no order as to costs.