
(2014) 03 BOM CK 0182
In the Bombay High Court
Case No : Income Tax Appeal No. 133 of 2014

Dr. Dinesh Jain

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 24-03-2014

Acts Referred:

Income Tax Act, 1961 — Section 132, 133A, 133A(3), 143(3), 260A

Citation : (2014) 272 CTR 73 : (2014) 363 ITR 210 : (2014) 226 TAXMAN 27

Hon'ble Judges : Mohit S. Shah, C.J.; M.S. Sanklecha, J

Bench : Division Bench

Advocate : Firoze Andhyarujina, Senior Advocate and Maneck F. Andhyarujina instructed by Samir Dalal, Advocate for the Appellant; Chottaray, Advocate for the Respondent

Judgement

M.S. Sanklecha, J.—In this appeal u/s 260A of the income tax Act, 1961 ("the Act") the appellant-assessee has challenged the common order dated April 10, 2012, passed by the income tax Appellate Tribunal ("the Tribunal") for the assessment year 2006-07. The impugned order dated April 10, 2012, of the Tribunal was a common order for assessment years 2004-05, 2005-06, 2006-07 and 2007-08. The following questions of law have been raised in this appeal for our consideration:

(A) Whether, in the present facts and in the circumstances of the case and in law, the Tribunal erred in relying on the statement u/s 133A of the Act recorded on oath, during the survey proceedings, ignoring the ratio laid down by the apex court in the case of Commissioner of Income Tax Vs. S. Khader Khan Son, ?

(B) Whether, in the present facts and in the circumstances of the case and in law, the Tribunal erred by relying on the statement u/s 133A recorded after midnight in the course of survey proceedings ignoring the ratio laid down in the case of Kailashben Manharlal Chokshi Vs. Commissioner of Income Tax, ?

(C) Whether, in the present facts and in the circumstances of the case and in law,

the Tribunal failed to appreciate that the onus of evidence shifted to the respondent, when the appellant explained "page 17", its author, its origin and purpose and the clarification of the statement of the employee of the appellant that is of Ms. Brenda?

(D) Whether, in the facts and in the circumstances of the case and in law, the Tribunal was justified in disregarding the crucial affidavit dated December 12, 2008, on record of the proceedings, by Shri Ramesh Shetty, the author of the loose paper explaining "page 17" thereby ignoring the apex court judgment in the case of Mehta Parikh and Co. Vs. Commissioner of Income Tax, Bombay, ?

(E) Whether the Tribunal, in the facts and in the circumstances, erred in treating the receipts as income and further by arriving at an ad hoc/arbitrary net profit rate of 90 per cent on an incorrect premise, that in case of a professional, no cost is involved and ignoring the net profit ratios and material to gross receipt ratios of the prior years?

2. Brief facts

(a) The appellant-assessee is a practicing dentist. On August 30, 2007, a survey was conducted u/s 133A of the Act at the appellant-assessee's clinic. During the course of survey, some diaries and loose documents were found. One such diary was marked as "A1 Fantasy". In this diary, professional receipts from August 6, 2007, to August 30, 2007, were recorded but the pages before August 6, 2007, were torn therefrom. The receptionist of the appellant one Ms. D'Souza made a statement during the course of survey pointing out that the receipts from each patient is recorded in diary and note book which are handed over to the appellant-assessee along with fees received. From the perusal of the fees recorded in the diary and note book with that recorded in the regular books of account, it is found that the regular books of account recorded receipts which were much lower than the amounts received as evidenced in the diary and the note book. The discrepancies noticed between the alleged actual receipts and that shown in books of account were pointed out to the appellant-assessee as under:

The appellant-assessee, in the course of his statement, during survey proceedings, admitted that the amounts collected by the receptionist from patients were being entered in the diary/note book.

(b) Besides a loose paper titled page 17 was found during the survey. This loose paper page 17 recorded the monthly receipts from April, 2003, to June, 2006. On being confronted with page 17, the appellant-assessee agreed to offer additional receipts shown in the loose paper page 17 to tax. However, thereafter, the appellant-assessee sought to explain page 17 by stating that this page had been prepared by his financial consultant one Mr. Ramesh Shetty who was preparing a project report to obtain funds from bank for purchase of equipment. Therefore, it was stated that monthly receipts were inflated so as to enable larger finance from the bankers.

(c) On December 30, 2008, the Assessing Officer completed the assessment for the assessment year 2006-07 u/s 143(3) of the Act and, inter alia, enhanced the income from profession declared at Rs. 8.68 lakhs to Rs. 45.15 lakhs. The enhancement being essentially on the basis of cash receipts not recorded in the books of account aggregating to Rs. 12 lakhs and income shown in the loose paper "page 17" not shown in regular books of account aggregating to Rs. 24.36 lakhs. To support his finding that there was undisclosed income earned by the appellant, the Assessing Officer also recorded the fact that the appellant-assessee had purchased a flat at Bandra for Rs. 92.50 lakhs whereas the market value as per the stamp duty valuation of the said flat at Bandra was Rs. 1.18 crores. Similarly a shop had been purchased for Rs. 21.50 lakhs whereas the market value as per the stamp duty valuation was Rs. 48.86 lakhs. During the course of assessment proceedings, the affidavit of Mr. Ramesh Shetty the consultant was submitted in support of the appellant's contention that the figures contained in "page 17" were fictitious figures prepared only with a view to enable the appellant-assessee to obtain larger financial facilities from the bank. However, the Assessing Officer concluded that the affidavit of Mr. Ramesh Shetty was an after thought and not supported by any evidence.

(d) Being aggrieved, the appellant-assessee filed an appeal to the Commissioner of income tax (Appeals) ("the CIT(A)"). By an order dated January 19, 2009, the Commissioner of income tax (Appeals) dismissed the appellant's appeal, inter alia, holding that the figures given at "page 17" pertained to the appellant-assessee. The explanation of the appellant for the figures of receipts shown in "page 17" as made for impressing bankers was not accepted on the ground that it reflects a month-wise receipt while a banker normally does not seek monthly receipts but yearly receipts. Besides, during the course of survey proceedings the appellant had admitted that the receipts shown in "page 17" were from his profession and it is only thereafter that he subsequently came up with the theory of fictitious/inflated receipts attributable to a financial consultant one Mr. Ramesh Shetty. The Commissioner of income tax (Appeals), on a consideration of all facts, concluded that the affidavit of Mr. Ramesh Shetty and the appellant-assessee's own affidavit are mere afterthought. This the Commissioner of income tax (Appeals) held is evidenced by the fact that no such claim of purchase of equipment or appointment of financial consultant was ever made when the statement of the appellant was recorded during the survey proceedings. Further, no appointment letter or fees had been paid to Mr. Ramesh Shetty nor the name of the bank to whom these figures were to be tendered are pointed out nor is the equipment which the appellant-assessee proposes to purchase, even mentioned. Thus, the affidavit was not creditworthy.

(e) Being aggrieved the appellant preferred a second appeal before the Tribunal. The Tribunal by the impugned common order dated April 10, 2012 dismissed the appellant's appeals for the assessment years 2004-05, 2005-06, 2006-07 and 2007-08. This appeal has been filed by the appellant-assessee for the assessment year 2006-07.

3. We shall now consider the questions as proposed for the appeal relating to the assessment year 2006-07 for our consideration.

(a) Regarding question No. A

(i) The grievance of the appellant before us is that no reliance can be placed upon the statement made by the appellant during the survey proceedings u/s 133A of the Act for the reason that it was recorded on oath. It is undisputed that even u/s 133A of the Act dealing with survey proceedings, the Revenue authorities are entitled to record the statement of any person which may be useful or relevant to proceedings under the Act. The power to record a statement during survey proceedings is found in section 133A(3) of the Act. The relevant portion of which reads as under:

Power of survey.--... (3) An income tax authority acting under this section may,--...

(iii) record the statement of any person which may be useful for, or relevant to, any proceeding under this Act.

The requirement of recording a statement on oath is found in section 132 of the Act, i.e., during search and seizure proceeding and such a requirement is not found in section 133A of the Act. Nevertheless a statement u/s 133A of the Act does not lose its evidentiary value merely because it is made on oath. Besides the statement in this case is one of the evidences being relied upon and not the sole evidence. The Tribunal in the impugned order has recorded that the addition of income is based not only on the statement of the appellant-assessee but also based on "page 17".

The case law relied upon by the appellant in the matter of Commissioner of Income Tax Vs. S. Khader Khan Son, arising from the decision of the Madras High Court in The Commissioner of Income Tax Vs. S. Khader Khan Son, proceeded on the fact that the authorities did not accept the retraction made by a deponent of a statement made on oath during the survey proceedings u/s 133A of the Act. This was on the ground that the statement was made on oath. Besides the sole evidence against the assessee in that case was the statement made on oath during the survey proceedings which is not the case in the present facts. Further, in this case, the appellant-assessee has not been able to show that the statement made is not correct and/or unbelievable. Therefore, the case law relied upon by the appellant-assessee is completely distinguishable and not applicable to the present facts.

(ii) In view of the above, we do not find that question (A) raises any substantial question of law. Accordingly, we do not entertain question (A).

(b) Regarding question B

The grievance of the appellant is that statement u/s 133A of the Act during the survey proceedings were recorded after midnight and thus the same could not be

relied upon.

The Tribunal in the impugned order has rendered a finding of fact to the effect that there is no evidence to show that the statement u/s 133A of the Act was recorded during the middle of the night. This is a finding of fact and the appellants have not been able to demonstrate that the aforesaid finding of fact as recorded by the Tribunal is perverse and/or arbitrary. It is pertinent to note that in the grounds of appeal before the Tribunal raised by the appellant no ground has been raised regarding the statement being recorded in the middle of the night and, therefore, cannot be relied upon. Be that as it may, the finding of the Tribunal is a finding of fact and in the absence of the same being shown to be arbitrary and/or perverse, no substantial question of law arises. Therefore, no occasion to entertain question B arises.

(c) Regarding question C

The grievance of the petitioner is that the impugned order failed to appreciate that the onus of proof had been shifted to the Department as "page 17" has been explained by the appellant.

The Tribunal has recorded a finding of fact that document titled as "page 17" contained monthly receipts from April, 2003, to June, 2006. During the survey proceedings, the appellant did not dispute the loose paper "page 17" but merely stated that it may be estimated figure of receipts during the period covered in "page 17". However, later during the course of the assessment proceedings the appellant-assessee came up with a explanation that the document "page 17" is as estimated income prepared by his consultant, Mr. Ramesh Shetty, for the purpose of obtaining loan from the bank for the purchase of equipment. However, the Tribunal did not examine the deponent of the affidavit, i.e., Mr. Ramesh Shetty as no evidence was furnished regarding the appointment of Mr. Ramesh Shetty as consultant nor any fees are shown to have been paid to the consultant, Mr. Ramesh Shetty. The Tribunal also records the fact that during the survey proceedings there was no mention regarding the consultant having been appointed by the appellant-assessee for the purpose of obtaining loan from the bank. In view of the above facts, the Tribunal holds that the explanation offered later is clearly an afterthought as also been held by the lower authorities. In fact, during the survey proceedings, the assessee in his statement recorded on September 6, 2007, has categorically stated that the discrepancy in the figures of receipts shown in the books of account and the actual collection of figures are required to meet corruption at various levels. Further, with regard to loose paper "page 17" the assessee had during the course of survey stated that he will offer the same as additional income. The fact that there was certain additional undisclosed income was further substantiated by the Assessing Officer pointing out certain undisclosed income being invested in property at lower value than that of its value for the purpose of stamp on the property. The Tribunal by the impugned order has confirmed the finding of fact arrived by the Commissioner of income tax (Appeals). In view of the concurrent finding of facts, we see no

substantial question arising so as to entertain question C.

(d) Regarding question D

The grievance of the appellant-assessee is that the affidavit dated December 12, 2008, of Shri Ramesh Shetty was completely ignored by the Tribunal even though the affidavit completely explains the loose paper titled "page 17".

In fact, according to the Department, the "page 17" records income received by the appellant during the period 2003 to 2006 much more than that recorded in his books of account. The Commissioner of income tax (Appeals) in his order records the fact that there was no claim made during the survey proceedings of any project or of any consultant much less about any Mr. Ramesh Shetty being involved for preparing a report to enable the appellant for taking loan from bank. Therefore, the affidavit of Mr. Ramesh Shetty and his own affidavit filed subsequently are self-serving affidavit. The Commissioner of income tax (Appeals) as well as the Tribunal in the impugned order have reached a finding of fact that the affidavit of Mr. Ramesh Shetty is not creditworthy to be examined. This was on the basis that there was no evidence to show Mr. Ramesh Shetty's appointment as consultant or any evidence of fees being paid to him. Moreover, no details were ever furnished by the appellant of the equipment which they are seeking to purchase for which loan is required or even the name of the banker to whom the appellant was approaching for loan. On the aforesaid finding of fact, the Tribunal by the impugned order concluded that no credence can be given to the affidavit filed by Mr. Ramesh Shetty. The aforesaid finding is one on appreciation of fact and does not give rise to any substantial question of law. The decision of the apex court relied upon by the appellant in the case of Mehta Parikh and Co. Vs. Commissioner of Income Tax, Bombay, would only apply where identity of a person is established before the affidavit is looked into. In this case, the identity of Shri Ramesh Shetty as a consultant to the appellant-assessee was not established. Accordingly, question D also does not raise any substantial question of law. We, therefore, see no reason to entertain question D.

(e) Regarding question E

The grievance of the appellant-assessee is that the impugned order erred in treating the undisclosed receipt as income by arriving at an ad hoc net profit rate of 90 per cent of the total receipts. It was submitted on behalf of the appellant that only the amount of net profit can be added as undisclosed income to the appellant's total income. The Tribunal held that whatever extra expenses had been incurred by the appellant-assessee out of its undisclosed receipts have already been booked as expenses in his income and expenditure account. The Tribunal held that in any case the appellant has not shown any evidence in support of his claim for the cash expenses incurred which were not recorded in the regular books of account of the appellant. Moreover, the explanation of the appellant-assessee that the cash receipts had been suppressed for the purposes of taking care of corruption at various levels also disentitles them for claiming

expenditure. In fact the impugned order holds that the expenditure incurred to make payments of bribe, etc., cannot be allowed as an expenditure incurred for the purpose of business or profession in view of the Explanation to section 37 of the Act. In spite of the aforesaid finding the impugned order modified the order of the Commissioner of income tax (Appeals) and reduced the net profit to 90 per cent, of the undisclosed receipts. This finding of fact was also supported by the fact that the appellant had not led any evidence before the authorities and/or even before the Tribunal to show that any expenditure was incurred out of undisclosed income which was not recorded in his books of account. The aforesaid finding of the Tribunal upholding the order of the Commissioner of income tax (Appeals) is a finding of fact and based on appreciation of evidence. Accordingly, no substantial question of law arises. Hence, we see no reason to entertain question E.

In view of the above, questions Nos. A to E as proposed by the appellant-assessee do not raise any substantial question of law. Accordingly, the appeal is dismissed. No order as to costs.