

(2003) 07 GAU CK 0009

In the Gauhati High Court

Case No : Income-tax Appeal No's. 22 and 23 of 2002

Greenview Restaurant

APPELLANT

Vs

Assistant Commissioner of Income Tax

RESPONDENT

Date of Decision : 30-07-2003

Acts Referred:

Income Tax Act, 1961 — Section 132(4), 143(2), 143(3)

Citation : (2003) 185 CTR 651 : (2004) 1 GLR 85 : (2003) 263 ITR 169

Hon'ble Judges : P.P. Naolekar, C.J.; Amitava Roy, J

Bench : Division Bench

Advocate : A.K. Saraf and D. Baruah, for the Appellant; K.P. Sharma, for the Respondent

Final Decision : Partly Allowed

Judgement

Amitava Roy, J.—By these appeals, the appellant has assailed the judgment and order dated March 11, 2002, passed by the Income Tax Appellate Tribunal, Gauhati Bench, Guwahati (hereinafter referred as the "Tribunal"), disposing of I. T. A. Nos. 201/Gauhati of 1996 and 334/Gauhati of 1997 filed by the Revenue. As the questions of fact and law were similar both the appeals were heard analogously and we propose to dispose of the same by this common judgment and order.

2. We have heard Dr. A. K. Saraf, senior advocate, assisted by Mr. D. Baruah, advocate, for the appellant, and Mr. K. P. Sharma, senior advocate, for the Revenue.

3. It would be necessary to set out the bare facts to comprehend the issue under examination. The appellant claims to be a partnership firm carrying on the business of running a restaurant in Paltanbazar area of Guwahati in the District of Kamrup. On September 22, 1993, a search was conducted in its premises and those of its other groups in the course of which the books of account of the appellant was seized by the authorised officer under the Income Tax Act, 1961

(hereinafter referred to as the "Act"). During the search and seizure made u/s 132(1) of the Act, certain statements of one of its partners were recorded u/s 132(4) thereof. It is the case of the appellant that the said partner, Sri Baban Singh, was not a literate person and the Income Tax authorities used force and coercion to compel him to sign the said statements which the said person did out of fear and compulsion. A copy of such statement as alleged by the appellant was made available after repeated requests only in the last part of November, 1993, whereafter Sri Baban Singh addressed a letter to the concerned Income Tax Officer retracting the statements made by him contending, inter alia, that as in the course of the search neither any bullion, money, jewellery or other valuable articles were found, nor had remained unexplained or unaccounted for, the question of making any disclosure of such assets for availing of immunity therefore u/s 271(1)(c) read with Section 132(4) of the Act did not arise at all. This was followed up by another letter dated February 20, 1995, by the appellant to the Assistant Commissioner of Income Tax, Investigation Circle II, Guwahati, in the course of the regular assessment proceeding before the Assessing Officer reiterating the same stand with a request to leave out of consideration the statements of its partner purportedly recorded u/s 132(4) of the Act. The Assessing Officer, however, by orders dated March 31, 1995, and March 29, 1996, while computing the total income of the appellant, to assess its tax liability for the assessment years 1992-93 and 1993-94, respectively, added Rs. 4,00,000 for both the assessment years by way of an undisclosed income, acting on the statements made to that effect by the above named partner of the appellant firm.

4. Being aggrieved, the appellant preferred two appeals, namely, Appeal No. Guwa-166 of 1995-96 and Appeal No. Guwa 64 of 1996-97 before the Commissioner of Income Tax (Appeals), Guwahati, challenging the two orders of the Assessing Officer. The Commissioner of Income Tax (Appeals), Guwahati, by orders dated January 22, 1996, and March 20, 1997, disposed of the appeals allowing the same and deleted the addition of Rs. 4,00,000 for both the assessment years. In Appeal No. 64 of 1996-97 pertaining to the assessment years 1993-94, the Commissioner of Income Tax (Appeals), Guwahati, further reduced the estimated net income of the appellant quantified at Rs. 30,000 by the Assessing Officer to Rs. 25,000.

5. This time the Revenue being aggrieved approached the Tribunal with the aforementioned two appeals. I. T. A. No 201/Gauhati of 1996 relates to the assessment year 1992-93 and I. T. A. No. 334/Gauhati of 1997 to the assessment year 1993-94. The learned Tribunal by the consolidated order under challenge allowed the appeals. While doing so, it held that the appellant's partner had made his statements suo motu u/s 132(4) of the Act and that in the facts and circumstances of the case it was satisfied that neither there was any coercion nor any inducement or threat at the time of making the disclosure under the aforesaid provision of law. It further noticed that no statements of the witnesses in whose presence the disclosures were recorded had been produced in

support of the allegation of threat, inducement or coercion and further there was a considerable time lag between the search and the letter dated December 24, 1993, retracting the statements. The orders of the Commissioner of Income Tax (Appeals), Guwahati, were set aside and the Tribunal directed that the orders of the Assessing Officer adding Rs. 4,00,000 to the taxable income of the appellant for both the assessment years be restored.

6. Dr. Saraf has argued before us that the statements of the appellant's partner purportedly recorded in the course of the search conducted on September 22, 1993, having been made under inducement, threat and coercion, the same in any view of the matter, could not have been made the sole basis of assessment of the taxable income of the appellant firm and that therefore the learned Tribunal had grossly erred in law in reversing the orders of the Commissioner of Income Tax (Appeals). According to him, as in the course of the search, no money, bullion, jewellery or other valuable articles or any incriminating and/ or unaccounted assets have been found or seized by the authorised officer, it was inconceivable that the appellant's partner would volunteer to make the statements as recorded in order to avoid penalty as contemplated under Clause (b)(2) of Explanation 5 to Section 271(1) of the Act and the learned Tribunal having overlooked this vital aspect of the matter in upholding that the addition of Rs. 4,00,000 by way of undisclosed income by the Assessing Officer, the impugned order is clearly not sustainable in law and on the facts and is liable to be interfered with by this court. He insisted that as the purpose of making a disclosure, is for avoiding penalty under the law, there being no such necessity in the present case for the appellant's partner to make the said, statements this reinforces the contention that the same were not volunteered and were instead obtained by using threat and coercion thus making it wholly inadmissible in law for the purpose of assessment of the taxable income of the appellant. He further maintained, in the alternative, that assuming that the statements made by the appellant's partner were recorded as voluntary disclosures made by him, the same could at best be taken to be a piece of evidence for the assessment, but could not have been taken to be the sole basis therefor. He, therefore, contended that as the assessment admittedly has been made u/s 143(3) of the Act, the appellant ought to have been provided with all reasonable opportunities to explain the said disclosure before accepting it on its face value for determining its tax liability. In other words, Dr. Saraf contended that even after the disclosures were recorded by the authorised officer, the appellant was entitled to an opportunity to explain the same and the omission on the part of the Assessing Officer in that regard has patently vitiated the order of assessment. He argued that the learned Tribunal in passing the impugned order had totally left out of consideration the above aspect of the matter and on that count alone the impugned orders as well as the assessment orders passed u/s 143(3) of the Act are liable to be set aside. The learned senior counsel in support of his argument pointed out that the Department as well had been discouraging the trend of recording statements during the search, seizure and survey operations and

placed before us a departmental communication being File No. 286/2/2003-IT(Inv.) dated March 10, 2003, issued by the Ministry of Finance and Company Affairs, Department of Revenue, Central Board of Direct Taxes, Government of India. By the said communication, the officers concerned had been advised to focus and concentrate on the collection of evidence of income leading to information as to what had been disclosed or not likely to be disclosed before the Department and as not to make attempts to obtain confessions as to the undisclosed income. Dr. Saraf sought to draw sustenance for his above submissions from a decision of the apex court in Pullangode Rubber Produce Co. Ltd. Vs. State of Kerala and Another, .

7. In reply, Mr. Sharma while supporting the impugned orders has argued that in view of the categorical findings of the Tribunal that neither any coercion was used nor there was any threat or inducement while recording the submission of the appellant's partner, no further opportunity to the appellant firm was necessary to be afforded and the Assessing Officer was perfectly justified in acting on the said disclosures to add Rs. 4,00,000 as its undisclosed income for assessing its tax liability. He further argued that no opportunity as such was also prayed for by the appellant before the Assessing Officer for producing its books of account and other relevant records to explain the said undisclosed income and the realisation of tax liability. Therefore, there was no room for it to express any grievance on that count at this belated stage of the proceeding. The learned senior counsel relied on a decision of the Kerala High Court in V. Kunhambu and Sons Vs. Commissioner of Income Tax, .

8. At the time of admission of the appeal the following question of law was framed :

"Whether, on the facts and in the circumstances of the case addition of an amount of Rs. 4,00,000 only on the basis of statement made by the assessee u/s 132(4), without taking into consideration the retraction of the confession made by the letters dated December 24, 1992, and February 20, 1995, is in accordance with law ?"

9. The primary facts pertaining to the search of the premises of the appellant firm and its other groups on September 22, 1993, and the recording of statements of Baban Singh, its partner, are admitted. The appellant's objection is that the statements were recorded by using force and coercion on its said partner. The statement on which the Assessing Officer made the addition is set out hereinbelow for ready reference :

"Question No. 12 : I have explained to you the provisions of Section 271(1)(c) read with Section 132(4) of the Income Tax Act, 1961, do you like to disclose any amount and thus offer for taxation ?

Answer : Yes, I like to offer/disclose for taxation in respect of Green View Restaurant as under :

Rs.

Assessment year 1992-93 4,00,000

Assessment year 1993-94 4,00,000

Total 8,00,000"

10. This was on September 23, 1993, in the presence of two witnesses. The retraction of the statement came only on December 24, 1993, followed by a reiteration on the part of the appellant on February 20, 1995, in the course of the assessment proceeding. There is evidently a delay on the part of the appellant and its partners in retracting the statements recorded. The attention of this court has not been drawn to any material on record to establish that any attempt was made on behalf of the appellant to prove the allegation of inducement threat or coercion through the witnesses. We have examined the impugned orders rendered by the learned Tribunal with the reasonings in support of its finding against the complain of threat, inducement or coercion and we find no good and sufficient reason to differ from it. In our view, in the facts and circumstances of the case, having regard to the materials on record, the appellant has failed to establish that the statements of its partner, Baban Singh, had been recorded in the course of the search by using coercion, threat or inducement. We, therefore, dismiss the contentions advanced by the learned senior counsel for the appellant in this regard and affirm the conclusion of the learned Tribunal on this count.

11. The argument advanced on behalf of the appellant pertaining to the denial of opportunity to explain its disclosure however merits consideration. Admittedly, the assessment for both the years had been made u/s 143(3) of the Act. A bare reading of the assessment orders reveals that the returns had been filed by the appellant firm for both the assessment years, and a notice u/s 143(2) had been issued by the Assessing Officer. The said orders, however, do not disclose as to what evidence the appellant had produced in respect of the said notice and whether the Assessing Officer had taken into consideration the same before making the assessment of the total income of the appellant firm. Instead it is apparent that the Assessing Officer added Rs. 4,00,000 as undisclosed income acting on the statements of the appellant's partner made in the course of the search. Though, in the meantime, the statements made in the course of the search had been retracted, there is no reference thereto in the orders. There is nothing to indicate either that in view of the retraction of the statements, the appellant firm was provided with any opportunity of explaining the disclosure vis-a-vis its tax liability in respect thereof.

12. We consider it appropriate in the above premises to extract Sub-sections (2) and (3) of Section 143 at this juncture.

"(2) Where a return has been made u/s 139, or in response to a notice under Sub-section (1) of Section 142, the Assessing Officer shall, if he considers it

necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not underpaid the tax in any manner, serve on the assessee, a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced there, any evidence on which the assessee may rely in support of the return :

Provided that no notice under this sub-section shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished.

(3) On the day specified in the notice issued under Sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment."

13. A plain reading of the above provision of law makes it manifestly clear that if the Assessing Officer while making the assessment of the tax liability considers it necessary to ensure that the assessee had not understated the income or had not computed excessive loss and had not underpaid the tax in any manner he shall serve on the assessee a notice requiring him either to attend his (Assessing Officer) office or to produce or cause to be produced any evidence on which the assessee may rely in support of the return. It is thereafter on the date specified in the notice or subsequent thereto as may be, that the Assessing Officer, after hearing such evidence as the assessee may produce as well as any other evidence as he may require on specified points and after taking into account all relevant materials make the assessment of the total income or loss of the assessee and determine the sum payable by him or refundable to him on the basis of such assessment.

14. The underlying purpose of the exercise outlined in Sub-sections (2) and (3) of Section 143 of the Act is evidently to ascertain correctly the tax liability of the assessee and if for the said purpose, the Assessing Officer, for good reasons considers it necessary to issue a notice u/s 143(2) in respect thereof, and the assessee produces evidence in support of his return, the Assessing Officer is obligated to consider the same and make further inquiries, if called for before making the final assessment of the total income to determine his tax liability. The clear mandate, therefore, is that in case the Assessing Officer is not inclined to accept the returned income he has to afford an opportunity to the assessee to produce evidence in support of the return already filed. It is axiomatic thus, that the Assessing Officer cannot take note of any material beyond those contained in the return to assess the income in excess of that reflected in the return or to enhance the assessee's tax liability without affording him an opportunity to produce evidence in support of the return. The purpose being to ensure a correct assessment of the tax liability in accordance with law, the above provision of the

Act contains inbuilt safeguards to prevent possible abuse of the power of the Assessing Officer to the prejudice of the assessee in a given fact situation. The live concern of the Legislature in this regard therefore manifests itself in the mandatory requirement of granting an opportunity to the assessee in the assessment proceeding so as to guarantee a correct determination of the taxable income for the consequential liability on the basis thereof. Having regard to the scheme contemplated u/s 143, no departure from the precepts thereof can be either comprehended or countenanced. As a corollary, any assessment u/s 143(3) in violation of the peremptory guidelines in the parent provision would render it untenable in law. When the law prescribes a mode of doing a thing, it has to be done in that way alone and all other modes of execution are impliedly prohibited.

15. It is apposite to recall in this context an observation of the apex court in *National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax*, that the purpose of an assessment proceeding before the taxing authority is to assess correctly the tax liability of the assessee in accordance with law. Logically, therefore, if a procedure is established by law governing the said assessment it is incomprehensible that a deviation therefrom can be permitted and that too to the prejudice of the assessee.

16. In *Pullangode Rubber Produce Co. Ltd. Vs. State of Kerala and Another*, relied upon by the learned senior counsel for the appellant the Kerala High Court had refused to direct the Tribunal to submit the two questions relating to disallowance of Rs. 79,680 as revenue expenditure of the appellant company. The disallowance had been on the ground that the expenses had been capitalised in the appellant company's accounts. The entries in the account books of the appellant company disclosed that the said amount was laid out or expended for the cultivation, upkeep or for maintenance of immature plants from which no agricultural income was derived during the previous year and therefore under Explanation (2) to Section 5 of the Kerala Agricultural Income Tax Act, 1950, no deduction was permissible. It was, inter alia, contended on behalf of the appellant company that in spite of the above . entries in its books of account, it should have been provided with an opportunity to show that those did not disclose correct state of facts. The apex court in the above factual backdrop, while noticing that the order of the Tribunal did not indicate that such an opportunity was afforded to the assessee concluded that no such opportunity had been granted and resultantly directed the Tribunal to refer those questions as set out in the application of the asses-see to the High Court for its opinion. The apex court in this regard observed that the entries in the account books of the assessee-company amounted to an admission and though was an important piece of evidence could not be said to be conclusive and that it was open to the person to make an attempt to show that it was incorrect. The legal proposition as can be gleaned from the above dicta, in our view supports the contention of the learned senior counsel for the appellant to the extent that the appellant firm was entitled to an opportunity to explain the disclosures even if the same be taken to

be an admission on its behalf.

17. In *V. Kunhambu and Sons Vs. Commissioner of Income Tax*, a search in the premises of the assessee was conducted by the officers of the Income Tax Department in which its managing partner admitted that there were certain discrepancies in the accounts maintained by the assessee. He further conceded that there were some unaccounted investments and further the stock as found in the premises was much more than the stock admitted for Income Tax purposes. The Income Tax Officer while making the assessment included in the total income an amount of Rs. 3 lakhs in the total turnover on the basis of the statement. On appeal it was reduced. An appeal before the Income Tax Appellate Tribunal was filed. The matter eventually reached the High Court. It was, inter alia, contended that the Income Tax Officer was not empowered to obtain the statement u/s 132 of the Act and that the actual stock not having been ascertained, the admission to that effect was not voluntary. Both the contentions were rejected by observing that the assessee had failed to discharge the burden that the statement was not voluntary and that there was no grievance that the same was made in a mistaken belief of facts or law. This decision, in our opinion, does not further the case of the Revenue in so far as the non-compliance with Section 143(3) is concerned. No complaint was made therein that the assessee-company had been denied the opportunity of explaining the disclosure as revealed by the statement of its managing partner.

18. On an over all consideration of the facts and circumstances of the case discussed above, we are of the considered view that the mandatory requirement of affording opportunity to the appellant firm to adduce evidence in support of the return and explain the disclosures made in the statement of its partner recorded on September 23, 1993, has not been complied with. The learned Tribunal in passing the impugned orders also did not address itself to this vital aspect of the matter. We are, therefore, unable to sustain the impugned orders of the learned Tribunal restoring the amount of Rs. 4,00,000 as undisclosed income of the appellant firm for the assessment years in question. We, therefore, set aside the same. The assessment orders are also set aside. The matter is remitted to the Assessing Officer for fresh assessment of the taxable income and the tax liability of the appellant firm for the assessment years 1992-93 and 1993-94 by strictly following the procedure prescribed for assessment u/s 143(3) of the Act. The finding of the learned Tribunal that the statements of the appellant partner were made suo motu and there had been no inducement, threat or coercion at the time of making the disclosures u/s 132(4) of the Act is, however, affirmed.

19. The appeals are thus partly allowed to the extent indicated above. In the facts and circumstances of the case, there would be no order as to costs.