
(1996) 08 GAU CK 0041
In the Gauhati High Court

Case No : IT Reference No. 2 of 1992 & Income-tax Reference No. 2 of 1992

Jalan Timbers

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 07-08-1996

Acts Referred:

Income Tax Act, 1961 — Section 68

Citation : (1997) 137 CTR 649 : (1997) 223 ITR 11

Hon'ble Judges : S.B. Roy, J;D.N. Baruah, J

Bench : Division Bench

Advocate : A.K. Saraf, K.K. Gupta and R.K. Agarwal, for the Appellant; U. Bhuyan, for the Respondent

Judgement

1. As directed by this court, vide judgment dated March 6, 1991, in Civil Rule No. 5(M) of 1991, the Tribunal has referred the following questions u/s 256(2) of the Income Tax Act, 1961 (for short "the Act"), for opinion of this court :

" 1. Whether the Tribunal has any material to justify its finding and conclusion that the assessee has failed to discharge the onus to prove the genuineness of the three cash creditors in all amounting to Rs. 2,15,000 ?

2. Whether the Tribunal was justified in law in upholding the addition of three cash creditors in all amounting to Rs. 2,15,000 as income of the assessee ?

3. Whether the Tribunal was justified in upholding the disallowance of interest on the cash credit treated as income of the assessee ?"

2. The facts for the purpose of answering the questions may be narrated as follows :

The assessee carries on timber business and the matter relates to the assessment year 1981-82. In the accounting year 1980-81, the assessee received a loan of Rs. 1,50,000 from Hans Kumar Jain, a partnership firm, Rs. 35,000 from Malchand Killa and Rs. 30,000 from Malchand Radheshyam. While

making the assessment for the said period, the Income Tax Officer disbelieved the cash credit received and directed the assessee to produce evidence to prove the genuineness of the transaction. Pursuant to that the assessee produced confirmatory letters from the cash creditors. In spite of that the Assessing Officer was not inclined to accept the cash credits as genuine. Therefore, the Assessing Officer called all the three creditors for further verification. The manager of Hans Kumar Jain appeared and confirmed the letters and also gave evidence. The other two creditors also appeared before the Assessing Officer and confirmed the transaction. The Assessing Officer did not believe the transaction and issued notice u/s 131 of the Act for production of the books of account and in spite of the notice the books of account were not produced. The Assessing Officer, therefore, called for the Income Tax files for the relevant year of the three creditors. After examination of the Income Tax files of the aforesaid creditors, the Assessing Officer disbelieved the same holding the genuineness of the transaction was doubtful.

3. Being aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) and the Commissioner of income tax (Appeals) after hearing the appeal disposed of the same holding that the assessee discharged their onus regarding receipt of the cash credit. The Revenue being dissatisfied with the appellate order passed by the Commissioner of Income Tax (Appeals) preferred an appeal before the Income Tax Appellate Tribunal. The Tribunal disposed of the appeal holding that although the identity of the person was not doubtful the capacity to advance the loan was doubtful and, therefore, set aside the appellate order passed by the Commissioner of Income Tax (Appeals) and restored the order passed by the Assessing Officer. The assessee requested the Tribunal to refer the aforesaid questions to this court, which, however, the Tribunal refused. Situated thus, the assessee filed an application u/s 256(2) of the Act which was numbered as Civil Rule No. 5(M) of 1991 and this court by judgment dated March 6, 1991, directed the Tribunal to refer the aforesaid questions to this court. Hence, this reference.

4. We have heard Dr. A. K. Saraf, learned counsel appearing on behalf of the assessee, and Mr. U. Bhuyan, learned counsel appearing for the Revenue.

5. Dr. Saraf submits that in respect of the three cash credits, the assessee showed the receipt of the amount in the Income Tax return. Similarly, the creditors also entered the respective amounts in the statement of accounts which were filed along with the return. In respect of Hans Kumar Jain an amount of Rs. 1,50,000 was shown to have been given on credit to the assessee. Not only that an amount of Rs. 9,375 was shown as interest received from the assessee. The amount has also been reflected in the return filed for the assessment year 1981-82 which will appear from page 15 of the paper book. Similarly, in the case of Malchand Killa an amount of Rs. 35,000 was shown by the assessee that it had received as a cash credit and the creditor also had shown the amount in their return. In respect of Malchand Radheshyam an amount of Rs. 30,000 had

been shown in the return of the assessee as a loan received from the creditor and the creditor entered the amount in the statement of accounts and the returns filed by the creditors were accepted by the Income Tax Officer and there was no further appeal/revision against the said return.

6. Dr. Saraf submits that the return filed by the creditors should be accepted as final. That being so, when the matters were before the Income Tax Officer, the onus to prove the transaction had been fully discharged. However, the Tribunal without considering that aspect of the matter brushed aside the case of the assessee holding that mere identity of the transaction was not enough, the capability also ought to have been considered. Dr. Saraf further submits that the assessment made by the Income Tax Officer in respect of the creditors itself is sufficient to indicate the genuineness of the transaction and capability of giving cash credit. Mr. Bhuyan, however, opposed the submissions made by Dr. Saraf. He strenuously argued that the Tribunal was fully justified in holding that mere identity was not enough, there should be at least some evidence to show that the creditors had the capability to advance cash credit and the transaction was genuine. As the assessee miserably failed to discharge that burden the Tribunal was justified in holding that the assessee failed to discharge its burden in proving the transaction.

7. On the rival contentions of the parties it is to be seen whether there was any material before the Tribunal to come to a conclusion that the assessee had failed to discharge its onus. Section 68 of the Act provides as follows :

" 68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to Income Tax as the income of the assessee of that previous year."

8. From the above it is clear that it is the duty of the assessee to fully satisfy the Assessing Officer as to the genuineness of the transaction and the capability of the person giving the credit.

9. Dr. Saraf has drawn our attention to a decision of this court reported in Tolaram Daga Vs. Commissioner of Income Tax, Assam, which is quoted below (at page 635) :

" It would appear that the accounts of the firm which had been produced in the case had been accepted and acted upon by the Department and no serious challenge had been made to their genuineness or that they were kept regularly in the course of business. That being the case, the accounts are relevant and afford prima facie proof of the entries and the correctness thereof u/s 34 of the Evidence Act, so that where a deposit is found to have been made by a third party in the accounts of the firm, that entry is prima facie proof that that amount in question was deposited by the person in whose name the deposit stands. To require the firm or the individual partners to go further and adduce proof of the

sources from which the deposits in question appearing in the accounts in the name of third parties were derived by them, would be placing a burden on the firm as well as the partners, which is not required or justified by law."

10. Dr. Saraf has also drawn our attention to a decision of the apex court in Commissioner of Income Tax (Central), Calcutta Vs. Daulat Ram Rawatmull, In the said case, the apex court, while considering the genuineness of the entries made regarding the deposit, observed thus (at page 359) :

"From the simple fact that the explanation regarding the source of money furnished by A, in whose name the money is lying in deposit, has been found to be false, it would be a remote and far-fetched conclusion to hold that the money belongs to B. There would be in such a case no direct nexus between the facts found and the conclusion drawn therefrom."

11. Another decision of the Calcutta High Court in Commissioner of Income Tax Vs. S.C. Ghosal, has also been placed before us by Dr. Saraf. In the said decision, it has been held that the Tribunal had not decided the matter only on the basis of onus but had accepted the positive evidence which had been adduced by the assessee. The positive evidence was : (1) the existence of the creditors, (2) the assessment file numbers of the creditors, (3) the confirmation letters of the creditors in support of the assessee's claim, and (4) books of account at least in the case of one creditor. Besides this, Dr. Saraf also submits before us that even if after production of all the evidence the Assessing Officer or for that matter the Tribunal rejects the contention, the authority must give cogent reasons. In this connection, our attention has been drawn by Dr. Saraf to a decision in Sona Electric Co. Vs. Commissioner of Income Tax, , wherein the Delhi High Court held that Section 68 of the Income Tax Act makes it clear that in respect of a cash credit entry the explanation offered by the assessee can be rejected by the Income Tax Officer on cogent grounds. When such grounds themselves are based on no evidence, the question of presumption against the assessee does not arise.

12. To counter the submissions of Dr. Saraf, Mr. U. Bhuyan strenuously argued that the Tribunal has come to a clear finding that the assessee could discharge a portion of the burden, namely, the identity and not other matters. Learned counsel has pointed out that the Tribunal has specifically stated that the identity itself was not sufficient to come to a conclusion regarding the genuineness and the capability of the creditors is also required to be looked into. Mr. Bhuyan submits that as the assessee miserably failed to discharge that part of the onus, the finding of the Tribunal was just and proper. In this connection, Mr. Bhuyan had placed the following three decisions of the Calcutta High Court :

1. Prakash Textile Agency Vs. Commissioner of Income Tax,
2. Commissioner of Income Tax Vs. United Commercial and Industrial Co. (P.) Ltd.,
3. Commissioner of Income Tax Vs. Precision Finance Pvt. Ltd.,

13. In all these three decisions, the Calcutta High Court observed that in order to establish the fact of receipt of the cash credit as required u/s 68 of the Act, the assessee must prove three important conditions, namely, (1) the identity of the person, (2) the genuineness of the transaction, and (3) the capability of the person giving the cash credit.

14. Relying on the decisions of the Calcutta High Court, Mr. Bhuyan has submitted that except the identity nothing could be proved. Mr. Bhuyan has also placed a decision of the apex court in Smt. Srilekha Banerjee and Others Vs. Commissioner of Income Tax, Bihar and Orissa, Relying on the said decision, Mr. Bhuyan has submitted that if the assessee failed to prove by convincing evidence then the Assessing Officer will be fully justified in rejecting the claim of receipt of the cash credit. In the said decision, the apex court observed thus (at page 117) :

" From the last two cases, it is plain that if there is receipt of an amount in the accounting year, it is incumbent in the first instance upon the assessee to show that it does not bear the character of income. If he fails to do this, the Income Tax Officer may hold that it represents income of the assessee either from the sources he has disclosed or from some undisclosed source."

15. On the basis of the cases cited above, it is to be seen whether in the present case the assessee could discharge the onus regarding the receipt of the cash credit. The Tribunal in its judgment indicated that the identity of the creditor was not enough. It is true that by proving the identity the assessee cannot be said to have discharged its onus. In the instant case, the amounts were shown in the Income Tax return of the assessee. Besides, the creditors had also shown in the returns about the giving of the loan to the assessee. Strangely, the Income Tax Officer while making the assessment in respect of the three creditors above named accepted the returns. This itself will go to show that the amount received by the assessee was at least prima facie genuine. As the Income Tax Officer had accepted the returns of the three creditors it should go to mean that the amounts given by those creditors were also genuine. On going through the Tribunal's judgment, we find that the Tribunal observed thus :

" Of course, confirmation letter was filed but in the instant case, the Income Tax Officer went further and verified the assessment records of that creditor from which he found various facts as mentioned in the assessment order and as discussed by us above. Thus, in our opinion, identity of the creditor alone is not sufficient. It has also to be shown that the creditor had the capacity to advance the loan and that the loan itself was genuine."

16. The Tribunal, however, did not make any endeavour to give any cogent reason why the Income Tax returns filed by the creditors and accepted by the Income Tax Officer should be ignored. In our view, the assessee had at least proved its case.

17. Accordingly, we answer the three questions in the negative, i.e., against the Revenue and in favour of the assessee.