

(1996) 09 GAU CK 0019
In the Gauhati High Court
Case No : Income-tax Reference No. 4 of 1995

Khandelwal Constructions

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 04-09-1996

Acts Referred:

Income Tax Act, 1961 — Section 131, 68

Citation : (1997) 227 ITR 900

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

Bench : Division Bench

Advocate : A.K. Saraf, K.K. Gupta and R.K. Agarwalla, for the Appellant; G.K. Joshi, for the Respondent

Judgement

D.N. Baruah, J.—As per direction in Civil Rule No. 7(M) of 1992, the following two questions have been referred to this court u/s 256(2) of the Income Tax Act, 1961 (for short "the Act"), for the opinion of this court.

" 1. Whether the Tribunal has any material to justify its finding and conclusion that the assessee failed to prove the capacity of creditors to advance a sum of Rs. 82,000 and whether this amount was genuinely reflected in the books of account of the assessee ?

2. Whether, on the facts and circumstances of the case, the Tribunal was justified in law in upholding that the cash credit of Rs. 82,000 appearing in the name of the three cash creditors in the books of account of the assessee were correctly treated as the assessee's income from undisclosed sources by the Revenue within the meaning of Section 68 of the Income Tax Act, 1961 ?"

2. We may state the following facts :

The assessee, a firm registered under the Indian Partnership Act, carried on the business of contract work. The questions relate to the assessment year 1981-82. An amount of Rs. 1,70,000 had been shown as cash credit received from seven creditors, namely, Bhagchand Jain, Surajmal Royal, Tarachand Sharma, Fulchand

Sharma, Ramawater Chouduary, Matadeen Saraf and Niranjn Kr. Sharma.

The Assessing Officer doubted the genuineness of the transactions. Accordingly, notice was issued to the assessee to satisfy the Assessing Officer about the transactions invoking the power u/s 68 of the Act. Pursuant to that, the confirmation letters had been produced by the assessee. The assessee also gave the GIR numbers of the creditors inasmuch as they were also assesseees under the Income Tax Department. Yet, the Income Tax Officer did not believe and, therefore, issued notice u/s 131 in respect of all the seven creditors. Out of the above, only four creditors, namely, Bhagchand Jain, Surajmal, Tarachand Sharma and Niranjn Kr. Sarma, appeared before the Assessing Officer and explained the transactions satisfactorily and accordingly the Assessing Officer accepted these transactions to be genuine. However, notices in respect of the remaining three creditors, namely, Fulchand Sharma, Ramawater Choudhury and Matadeen Saraf, were returned unserved. In the previous assessment year, the address of these creditors has been shown as C/o R.D. Sharma and Co., another partnership-firm. It may be mentioned here that R.D. Sharma and Co. was also an assessee. The notices were issued through process server with remarks that the persons were not known. Situated thus, the Assessing Officer deputed one Inspector of Income Tax to make enquiry from C/o. R.D. Sharma and Co. The Inspector, however, without meeting the persons who are at the helm of affairs, met the accountant of the said firm. The accountant informed the Income Tax Inspector that there were no such persons. The Inspector of Income Tax, however, did not consider it necessary to make any further enquiry and take the statement of the owners of the said firm. On the basis of the information received by the Inspector of Income Tax from the accountant of the firm of R.D. Sharma and Co. that the addressees were fictitious persons, the Assessing Officer added the said amounts in the hands of the assessee as income from other sources. This was challenged by the assessee before the Commissioner of Income Tax (Appeals). As the fact of the information given by the accountant of the said R.D. Sharma and Co. was not intimated to the assessee, it had no opportunity to agitate before the Assessing Officer. However, in the grounds of appeal, it was specifically stated that the amount was paid by one of the creditors, namely, Matadeen Saraf from R. D. Sharma and Co. But while disposing of the said appeal, the Commissioner of Income Tax (Appeals) did not take into consideration this aspect of the matter. The Commissioner of Income Tax (Appeals) also did not feel it necessary to give a direction to the Assessing Officer to make further enquiry regarding the receipt of money from R.D. Sharma and Co. by the assessee. The appeal was, however, allowed following a decision of the apex court in Commissioner of Income Tax, Orissa Vs. Orissa Corporation (P) Ltd., . The Revenue took up the matter before the Income Tax Appellate Tribunal. The Tribunal reversed the order of the Commissioner of Income Tax (Appeals) by observing as follows ;

"But in view of the clear findings of the Income Tax Officer which have not been dislodged or contradicted by any subsequent findings of the Commissioner of Income Tax (Appeals) and keeping in view the decisions mentioned earlier in the

preceding paragraphs, we cannot support the above conclusion of the Commissioner of Income Tax (Appeals) in the present circumstances of the case. Accordingly, we support the conclusion arrived at by the Income Tax Officer that the assessee had failed to discharge the burden which lay on it in view of the circumstances and findings of fact given by both the authorities below in their respective orders. In such a situation, the order of the Commissioner of Income Tax (Appeals) cannot be maintained.

Accordingly, we support the conclusion arrived at by the Income Tax Officer that the assessee has failed to discharge the burden in view of the circumstances of the finding of facts in the respective orders. In such a situation, the appeal cannot be sustained."

3. Situated thus, the assessee requested the Tribunal to refer the questions to this court u/s 256(1) which however was refused and the assessee, therefore, filed the aforesaid Civil Rule No. 7(m)/92 and this court directed the Tribunal to refer the said questions. Hence, the present reference.

4. We have heard both sides. Dr. Saraf, learned counsel for the assessee, submits before this court that the Tribunal committed a manifest error by directing the assessee to discharge its burden of proving beyond what was necessary. Dr. Saraf submits that the assessee in its return shows these amounts were found/received from the creditors of which four persons mentioned above have been accepted by the assessing authority and disbelieved in respect of three on the ground that they were not available when notices u/s 131 were issued and also on the basis of enquiry made by the Inspector of Income Tax that no such persons were known to the accountant of R.D. Sharma and Co. Learned counsel further submits that it is true that the Assessing Officer u/s 68 of the Act has full authority to make enquiry if any of the entries made is not believable. But the enquiry should be in a manner which is reasonable and in consonance with the principles of natural justice and a hasty conclusion on a perfunctory enquiry cannot be the basis for rejecting the claim of the assessee. In the instant case, learned counsel submits that returns had been filed by these creditors continuously for a long time ranging from five years to six years. Therefore, without considering this matter, the Assessing Officer had no jurisdiction to give conclusion. Mr. Joshi, on the other hand, supports that the order passed by the Tribunal as not bad in law. According to Mr. Joshi, the assessee must know the present address that (sic) these are the persons genuine in giving the loan, Mr. Joshi also submits that at the time when they received the loan they knew the persons and definitely the assessee must have received all the information about the persons granting loan. Mr. Joshi further submits that Section 68 empowers the Assessing Officer when he is not satisfied the cash creditors in terms of coming to a conclusion (sic).

5. On the rival contentions of learned counsel, it is to be seen whether the Tribunal's order is just and proper. Section 68 of the Act empowers the Assessing Officer to make enquiry specifically satisfied regarding the cash credit. If he is

satisfied that these entries are not genuine he has every right to add these income as income from other sources. The satisfaction of the Assessing Officer is the basis of invocation of the powers u/s 68 of the Act and the satisfaction must be derived from relevant factors on the basis of proper enquiry. The enquiry envisaged u/s 68 is an enquiry which is reasonable and just. In the present case seven persons took (sic) the loan of which the Assessing Officer had given notices on four persons mentioned above. But the remaining three persons were suspected, solely on the ground that confirmation letters were not satisfactory to the Assessing Officer. The Assessing Officer in the notices had reiterated observing remarks that the whereabouts are not known. The address as mentioned showing R.D. Sharma and Co., is a registered firm and also an assessee. As the notices were unserved, the Assessing Officer deputed the Income Tax Inspector to enquire into the matter. The Income Tax Inspector simply met the accountant. We do not know what led the Income Tax Inspector about the whereabouts or genuineness of the firm made by the accountant (sic). Records did not show anything that the accountant has any connection with the whereabouts of the aforesaid creditors. The address is given under the care of the firm. The accountant of the firm, in our opinion, has got nothing into (sic) it as admittedly those creditors have on the face of it nothing to do with the business of the firm. In our opinion, the Income Tax Inspector was not proper on the part of the enquiry made with the accountant. Besides, at what time enquiry was made is not available. The assessee had specifically stated that the said Matadeen Saraf received the money from R.D. Sharma and Co. If this is true by stretch of imagination that these persons were fictitious, it is an admitted fact that those three creditors were assessees. Mr. Joshi submits that the assessee having a small income, and returns have been filed by those three persons. If the amount was shown to be received as loan by the assessee that ought not to have been in the return. There is nothing on record to show that the Assessing Officer made any attempt in this regard to verify the same. The Tribunal observed thus :

" The Income Tax Officer has given a finding of fact that the creditors have filed the returns voluntarily for a number of years and that too without submitting copies of accounts, i.e., profit and loss account, balance-sheet, etc., from which it could be seen or verified whether such credits in the accounts of the assessees were claimed from those persons concerned."

6. Now, emphasis is given in respect of non-submission of the statement of account for some years. It is not very clear whether the same years include the relevant years. It was the duty of the Tribunal to look into and direct the Assessing Officer to produce all returns and verify the same. Unfortunately, it was not done though the appeal was preferred by the Revenue. From this, it appears that, in our opinion, the Tribunal abdicated the power and responsibility in discharging the duty. The Assessing Officer surely had the jurisdiction to look into the cash credit and make necessary enquiry and come to a finding on such an enquiry in a proper and fair manner. As indicated above, the enquiry was not

properly made. On the basis of this, the Assessing Officer could not come to a conclusion holding that the creditors were fictitious. The Tribunal also totally overlooked the matter on the grounds that the amount was received from R. D. Sharma and Co., that aspect was also not considered.

7. Considering all these aspects, we are of the opinion that the Tribunal without proper materials came to the conclusion regarding the capability. Besides, this court also has held in ITR No. 2 of 1992, Jalan Timbers Vs. Commissioner of Income Tax,

8. In view of the above, we answer both the questions in the negative and in favour of the assessee and against the Revenue.