
(2000) 08 AP CK 0017

In the Andhra Pradesh High Court

Case No : IT Case No. 79 of 1994 4 August 2000 A.Y. 1987-88

R.B. MITTAL

APPELLANT

Vs

COMMISSIONER OF INCOME TAX

RESPONDENT

Date of Decision : 04-08-2000

Acts Referred:

Income Tax Act, 1961 — Section 256, 68

Citation : (2001) 165 CTR 366 : (2001) 112 TAXMAN 480

Hon'ble Judges : S.R. Nayak, J;P. Venkatarama Reddi, J;Nayak, J

Bench : Full Bench

Advocate : Y. Ratnakar and A. Satyanarayana, for the Assessee and S. R. Ashok, for the Revenue, for the Appellant;

Judgement

Nayak, J.

This petition is filed u/s 256(2) of the Income Tax Act, 1961 Income Tax Act against the decision of the Tribunal, Hyderabad A-Bench in R.A. No. 36 (Hyd.) of 1993, dated 30-4-1993. The petitioner, assessee filed an application before the Tribunal u/s 256(1) seeking the following questions, said to be questions of law arising out of the order of the Tribunal dated 15-12-1992 to this court for its opinion.

"1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in law in confirming the addition of Rs. 3,55,000 u/s 68 of the Income Tax Act, 1961, being loans obtained by the assessee from different parties and confirming the disallowance of interest of Rs. 12,964 thereon.

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the assessee has not discharged the onus of proving the genuineness of the loans on the ground that the creditworthiness of the creditors was not established ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal should have held that when the creditors had confirmed the loans and explained

their sources and it was not for the assessing officer to make further investigations regarding the correctness and adequacy of the sources of the parties and since it was not done, the impugned addition was not justified ?

4. Whether, on the facts and in the circumstances of the case, the Tribunal should have held that the assessment was violative of the principles of natural justice and should have remanded the case to the assessing officer for further enquiry inasmuch as the assessee has been given a day's/a few days time to rebut the inferences drawn by the assessing officer after taking the depositions of the parties, and the assessment was rushed through in the course of few days ?"

The Tribunal by its order dated 30-4-1993 refused to refer the questions to this court and rejected the application on the ground that the decision of the Tribunal is arrived at on appreciation of the facts of the case and no question of law can be said to arise out of its order.

2. The material facts that led to filing of the present Income Tax case be stated briefly as under. The petitioner/ assessee who is assessed in the status of "individual" carries on business in Iron and Steel Scrap at Visakhapatnam. For the assessment year 1987-88, the petitioner filed return declaring an income of Rs. 99,210. During the course of assessment proceedings, the assessing officer found certain cash credits in the names of certain persons. After investigation, the assessing officer came to the prima facie conclusion that the assessee had not proved creditworthiness of the parties and genuineness of the transactions. , ,

3. The assessee submitted that the loans in question were taken from the parties through Pay Orders, Demand Drafts or Cheques, that the parties were identifiable and that the loans were genuine. The assessing officer summoned the parties and recorded their depositions.

After necessary investigation and for the reasons and on the facts brought on record by him, the assessing officer, though satisfied as far as the identity of the creditors, entertained doubt about the capacity of the creditors to advance the money and genuineness of the transactions. The assessing officer, therefore, concluded that the petitioner/assessee had not proved the creditworthiness of the creditors. He, accordingly, made an addition of Rs. 3,55,000 and interest thereon Rs. 12,964. On appeal the additions were upheld by the Commissioner (Appeals). The assessee further preferred an appeal to the Tribunal.

4. Before the Tribunal the following were the contentions on behalf of the assessee: There was no material before the assessing officer to come to the conclusion that the sums of money found credited in the books of accounts of the assessee were not genuine entries. The assessee had borrowed the funds for the purpose of his business and to support no genuineness of the transactions, enough evidence was produced before the assessing officer to show that the parties who advanced the money to the assessee were genuine. The creditors had in their confirmation letters clearly admitted to have given the loans to the

assessee and the creditors were also produced by the assessee before the assessing officer who recorded their depositions in detail. The assessee had paid interest on the loans and the loans had been taken by the account payee cheques or cross demand drafts. By way of production of confirmation letters and the creditors, the assessee had fully discharged his onus and also proved the identity of the creditors. Beyond proving the identity of the creditors and the genuineness of the transactions, the assessee was not required to do anything further. The assessing officer also failed to note that all the creditors were assessed to Income Tax and their returns were accepted by the revenue under the Amnesty Scheme. Having assessed the creditors on the income, it was not open to the department to doubt the genuineness of the transactions and again subject the assessee to tax on the genuine advances made by the creditors out of their own resources. In the facts and circumstances of the case, the cash credits found in the books of accounts of the assessee should be held to be genuine and should, therefore, be accepted. The assessment proceeding was rushed through by the assessing officer without affording a reasonable opportunity to the assessee and in violation of principles of natural justice.

5. The revenue, on the other hand, urged the following contentions: All the facts collected by the assessing officer led to the only conclusion that the transactions were not genuine and the creditors were not financially sound to advance huge sums of money to the assessee. A plain reading of the depositions of the creditors clearly indicates that the alleged creditors had made self-serving statements with a view to accommodate the assessee to conceal his income. No credence should, therefore, be placed on the statements of the creditors. It was not enough for the assessee to prove only the identity of the creditors, but it was necessary for the assessee to establish the capacity of the creditors to advance the monies and also the genuineness of the transactions. Though the assessee had proved the identity of the creditors, creditworthiness of the parties and the genuineness of the transactions had not at all been proved by the assessee. The burden to prove the creditworthiness of the creditors and the genuineness of the transactions is indisputably on the assessee. The creditors were not assessed before or subsequent to the filing of the returns under the Amnesty Scheme. As per the provisions of the Amnesty Scheme, an assessee, who had concealed income or wealth, could file return of income or wealth and avail of the benefits under the said scheme. The immunity from penalty and prosecution was available only to the declarant and not to any other person. The other person could still be questioned about the sources of the money found credited in his books of account. The assessee was given fair and reasonable opportunity by the assessing officer. There was no necessity for the assessing officer to make any further enquiries as no further details had been furnished. Even the assessee did not desire any further investigation to be made into the sources of the alleged creditors.

6. The Tribunal, on consideration of rival contentions of the parties, and after threadbare discussion of the entire evidence on record, recorded its finding that

the assessee had failed to prove the creditworthiness of the creditors and genuineness of the transactions. In that view of the matter, the Tribunal dismissed the appeal filed by the assessee and affirmed the order of the Commissioner (Appeals).

7. The main contention advanced by Shri. Y. Ratnakar, the learned counsel appearing for the petitioner is that the assessing officer despite recording the finding that the assessee discharged the onus of identifying the creditors and confirmation of the credits, seriously erred in law in placing the onus on the assessee to prove further the creditworthiness of the creditors and the genuineness of the transactions. The learned counsel would maintain that u/s 68 of the Act what the assessee is required to do is to identify the creditors and confirm the credits, and he is not expected to prove the source or genuineness of the credit. In support of this contention, the learned counsel would place reliance on the decision of the Patna High Court in Sarogi Credit Corporation Vs. Commissioner of Income Tax, . The counsel would also meekly submit that the assessment proceeding was concluded with haste by the assessing officer without giving reasonable opportunity to the assessee.

8. Shri S.R. Ashok, the learned senior standing counsel for the revenue, on the other hand, would contend that the facts and circumstances of the case and particularly the evidence of the creditors themselves would clearly establish the fact that they did not have creditworthiness, and the transactions are not genuine and they are collusive in nature. The learned standing counsel would maintain that since the creditors are either the employees of the assessee or their relations, the burden on the assessee to prove the creditworthiness of the parties and genuineness of the transactions is relatively heavier than in a normal case and he has utterly failed to discharge the burden.

9. In view of the rival contentions, what falls for our consideration and decision at this stage is whether the questions sought to be referred to this court for its opinion u/s 256(2) are questions of law, and if so, whether those questions involve arguable points warranting opinion of the High Court on such points.

10. Section 68 reads as under:

"Cash credits-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."

Section 68 gives statutory recognition to the principle that cash credits, which are not satisfactorily explained, may be assessed as income. Section 68 seeks to bring to tax any cash credits appearing in the books of accounts which are not satisfactorily explained as the income of the previous year. Judicial opinion even prior to the enactment of section 68 for the first time under the Act, was that in the event of credit entry in the books of account, the assessing officer had to

make an enquiry and give the assessee an opportunity to explain the credit entry, and if the assessee did not render the satisfactory explanation with regard to the nature and source of the cash received by him, then the assessing officer was entitled to draw the inference that the receipts are of an income nature and subject to charge. The judgment of the Supreme Court in *A. Govindarajulu Mudaliar Vs. Commissioner of Income Tax, Hyderabad*, reflects this position. Section 68 constitutes a charging provision which applies when the assessee's explanation regarding a cash credit is rejected as being unsatisfactory or when the assessee does not render any explanation. Section 68 provides that the assessing officer may bring to charge a sum as income of the previous year if (i) the sum is found credited in the books of the assessee for any previous year and (ii) the assessee offers no explanation about the nature of source of that sum; or (iii) the explanation is not in the opinion of the assessing officer satisfactory, whether the sum so credited may be in the assessee's name or in the name of the third party.

11. The Supreme Court in the case of *Udhavdas Kewalram v. CIT* (1969) 66 ITR 462 held that before an amount of cash can be deemed to be income of the assessee the assessing officer and the Tribunal is duty bound to consider all facts and to record its findings on all contentions. In the case of *Smt. Srilekha Banerjee and Others Vs. Commissioner of Income Tax, Bihar and Orissa*, the Supreme Court held that the enquiry must be conducted in accordance with the rules of natural justice and all materials for and against the assessee must be shown to him and an opportunity must be given to the assessee to rebut and meet the case of the revenue.

12. It is well established by the decisions of the Supreme Court and High Courts that the burden of proving that a cash credit entry appearing in the assessee's account books does not represent income of the assessee is on the assessee. Where any sum is found credited in the books of the assessee, the initial onus is on the assessee to offer an explanation of the nature and source of cash credit. If the explanation is not found satisfactory or reasonable, the assessing officer can treat such money as the assessee's income from undisclosed source. It is not necessary for the assessing officer to locate the exact source of the credits. The assessee can prove the genuineness of the credits, the identity of the creditor and his creditworthiness by establishing some plausible evidence. The Calcutta High Court in the cases of *Commissioner of Income Tax Vs. Precision Finance Pvt. Ltd.*, ; *Commissioner of Income Tax Vs. United Commercial and Industrial Co. (P.) Ltd.*, *Oriental Wire Industries (P.) Ltd. Vs. Commissioner of Income Tax*, *C. Kant and Co. Vs. Commissioner of Income Tax*, ; *Prakash Textile Agency Vs. Commissioner of Income Tax*, *Shankar Industries Vs. Commissioner of Income Tax, Central*, and the Kerala High Court in the case of *M.A. Unneeri Kutty Vs. Commissioner of Income Tax*, dealing with the extent of onus of the assessee have laid down that the assessee is expected to establish (a) proof of identity of his creditors, (b) capacity of creditors to advance money and (c) genuineness of the transactions. The view taken by the Kerala High Court in *M.A.*

UnneeriKutty's case (supra) is affirmed by the Supreme Court in M.A. Unneeri Kutty v. CIT (S.L.P. (Civil) No. 4789 of 1993) - (1993) 201 ITR 23. The Bombay High Court in the case of Velji Deoraj and Co. Vs. Commissioner of Income Tax Bombay City II, has held that the assessee's duty to prove that an unexplained entry in his account books does not represent undisclosed income is not discharged by merely showing that the entry appears in the account of third party and that the party in whose name the amount is credited is not a fictitious party but a real party but the assessee also has to prove further that the entry made in the account book is a genuine entry.

13. The Calcutta High Court in the cases of Precision Finance (P.) Ltd. (supra) and United Commercial & Industrial Co. (P.) Ltd. (supra) and the Allahabad High Court in the case of NIZAM WOOL AGENCY Vs. COMMISSIONER OF Income Tax., have opined that simply because some of the transactions are by cheques, it cannot be said that the transactions are genuine. As held in the cases arising under the Indian Income Tax Act, 1922 and similarly u/s 68 of the 1961 Act, the initial burden is on the assessee to establish the identity of creditors, the capacity of the creditors to advance monies and genuineness of the transactions, and the burden may then shift to the department in some circumstances. It is not correct to state that the assessing officer is not entitled to reject the explanation of the assessee if he has some other positive evidence to falsify the assessee's case. The reasonable view, according to us, is that though the assessing officer is not bound to accept each and any possible explanation that the assessee may put forth and it is his power to independently satisfy himself about the proof of identity of the creditors, the creditors' capacity to advance money and genuineness of the transactions, he cannot arbitrarily reject the assessee's explanation without assigning reasons.

From the above discussion of the case law on the point what transpires is that the assessee, in order to discharge the onus cast on him u/s 68, has to establish not only the identity of his creditors and confirmation of the credits but also the capacity of the creditors to advance money as well as the genuineness of the transactions. However, the learned counsel for the petitioner would pointedly draw our attention to the following observations of the Patna High Court in Sarogi Credit Corpn.'s case (supra) in support of his contention

If the credit entry stands in the names of the assessee's wife and children, or in the name of any other near relation, or an employee of the assessee, the burden lies on the assessee, though the entry is not in his own name, to explain satisfactorily the nature and source of that entry. But, if the entry stands not in the name of any such person having a close relation or connection with the assessee, but in the name of an independent party, the burden will still lie upon him to establish the identity of that party, and to satisfy the Income Tax Officer that the entry is real and not fictitious. Once the identity of the third party is established before the Income Tax Officer and other such evidence are prima facie placed before him pointing to the fact that the entry is not fictitious, the

initial burden lying on the assessee can be said to have been duly discharged by him. It will not, therefore, be for the assessee to explain further as to how or in what circumstances the third party obtained the money and how or why he came to make an advance of the money as a loan to the assessee. Once such identity is established and the creditors, as in the instant case, have pledged their oath that they have advanced the amounts in question to the assessee, the burden immediately shifts on to the department to show as to why the assessee's case could not be accepted and as to why it must be held that the entry, though purporting to be in the name of a third party, still represented the income of the assessee from a suppressed source. And, in order to arrive at such a conclusion, even the department has to be in possession of sufficient and adequate materials.. ." (p. 349)

We do not think the above observations of the Patna High Court in any way advance the case of the petitioner. The above judgment of the Patna High Court is not an authority to state that the assessing officer cannot call upon the assessee to prove creditworthiness of the creditors and genuineness of the transactions nor is it an authority to state that the assessee need not prove the creditworthiness of his creditors and genuineness of the transactions in order to discharge the onus cast on him u/s 68. From the above observations of the Patna High Court what could be ascertained is that once the assessee establishes the identity of the creditors and confirmation of the credits, the burden shifts on to the department to show as to why the assessee's case should not be accepted, and as to why it must be held the entries still represent the income of the assessee from undisclosed sources. In the instant case, even assuming that petitioner/assessee has discharged the initial burden by proving identity of the creditors as well as the confirmation of the credits and, therefore, the burden shifted to the department to show as to why the assessee's case should not be accepted, we should state, the assessing officer has satisfactorily discharged the burden as to why the assessee's case should not be accepted by examining the creditors and collecting relevant materials in support of the case of the revenue. However, with great respect of the learned Judges of the Patna High Court, we may state the classification made by their Lordships in the matter of extent of discharge of onus between a case where the creditors are relations or employees of the assessee and a case where the creditors are not relations or employees of the assessee is not based on any rational differentia- We are afraid the classification made by the Patna High Court is not grounded on any rationale which could sustain the classification. On our part, we do not find any discernible rationale for the classification. At the most, it can be said that if the creditors are close relatives of the assessee or his employees the burden of the assessee to prove the creditworthiness of the creditors and genuineness of the transactions will be heavier in relative terms than in a case where the creditors are the outsiders. Therefore, the contention of the learned counsel for the petitioner that u/s 68 the assessee is not expected to establish the capacity of the creditors to advance money and genuineness of the transactions is not acceptable to us, and

we hold that the assessee is expected to establish proof of identity of his creditors, capacity of his creditors to advance money and genuineness of the transactions in order to discharge the onus imposed on him u/s 68. In the instant case, the petitioner/assessee has not discharged the burden relating to capacity of his creditors to advance money and genuineness of the transactions.

14. Question Nos. 1 and 2 which are sought to be referred to this court u/s 256(2) for opinion, strictly speaking, fall within the realm of appreciation of evidence, and they do not involve questions of law. The Tribunal is the final fact-finding authority under the Act and, therefore, its finding of fact is not liable to be interfered with unless, in a given case, it is shown that the finding of fact recorded by it is perverse or based on "no evidence". Only if a finding of fact recorded by the Tribunal is perverse or based on no evidence, a question of law may arise out of it warranting reference u/s 256(2) to the High Court for its opinion if there is any arguable point in such question. The Supreme Court in Commissioner of Income Tax (Central), Calcutta Vs. Daulat Ram Rawatmull, held that findings on questions of pure fact arrived at by the Tribunal are not to be disturbed by the High Court on a reference unless it appears that there was no evidence before the Tribunal upon which they, as reasonable men, could come to the conclusion to which they have come and this is so even though the High Court would on the same evidence have come to a conclusion entirely different from that of the Tribunal. Such situation is not obtaining in the present case. We have perused the order of the Tribunal. The Tribunal has threadbare and in considerable elaboration considered the entire evidence on record for recording the finding that the loans claimed to have been advanced by Smt. Bhanumathi Chowdary and Shri Dasaradha Chowdary, Rajiv Kumar Patwari, Miss Leena Patwari and Janak Kumari Patwari who are the minor children of Shri Suresh Kumar Patwari and Smt. P. Sarada Gupta are not genuine transactions. The Tribunal has held that Smt. Bhanurnathi Chowdary and her husband Shri Dasaradha Chowdary had no means or source of income to advance huge sums of monies to the assessee and, in fact, they were staying in a hutment in a slum. Dealing with the loans said to have been advanced in the names of minor children of Shri Suresh Kumar Patwari, the Tribunal found that the minor children of Shri Suresh Kumar Patwari had no means or source of their own or of their father to advance monies to the assessee. Similarly, in the case of Smt. Sarada Gupta, the Tribunal has pointed out that the cash deposited in her bank account has not been explained from any known source. In recording the findings against each of the creditors, the Tribunal re-appreciated the entire evidence on record relevant to the decision-making. Having perused the reasons given by the Tribunal, we should state that the findings recorded by the Tribunal are based on substantive and acceptable legal evidence. In that view of the matter, as pointed supra, no questions of law would arise out of such findings of fact.

15. Adverting to question No. 3, though that question seems to be a question of law outwardly, that question of law is no longer res in legra. As held by us supra, the assessee in order to escape the clutches of section 68 has to discharge not

only the onus of identifying the creditors and confirmation of the credits but also establish the capacity of the creditors to advance money and genuineness of the transactions by adducing satisfactory evidence. In that view of the matter, we do not find any arguable point in question No. 3 also which is sought to be referred to this court for its opinion.

16. Lastly, it may be noted that question No. 4 is not a question of law at all. As a matter of fact, there was no violation of principles of natural justice. It is true that in an inquiry u/s 68, the rule of audi alteram partem has to be observed, and the assessee must be given a reasonable and fair hearing to discharge the burden cast on him u/s 68. In the instant case, we find from the records that the petitioner/assessee was afforded fair and reasonable opportunity. The assessing officer examined the creditors of the assessee and recorded their depositions and supplied the copies of the depositions to the assessee. The assessing officer gave opportunity to the assessee to have his say on the depositions of the creditors recorded by him. The assessee was also given an opportunity to lead evidence to prove that his creditors had means and source of income to advance the monies to him. Therefore, there is no merit in the contention of the learned counsel for the petitioner that the assessment proceeding was concluded with unreasonable haste and without giving reasonable and fair opportunity to the assessee.

17. To sum up, we do not find any arguable question of law in the present case which is required to be referred to this court for its opinion u/s 256(2). In that view of the matter, we dismiss IT Case No. 79 of 1994, with no order as to costs.