
(2011) 08 CAL CK 0096
In the Calcutta High Court
Case No : Income Tax A. No. 175 of 2003

S.K. Bothra and Sons, HUF

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 02-08-2011

Acts Referred:

Income Tax Act, 1961 — Section 131, 143(3), 260A

Citation : (2012) 347 ITR 347 : (2011) 203 TAXMAN 436

Hon'ble Judges : Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : J.P. Khaitan, S. Bhowmick and R. Bharadwaj, for the Appellant; M.P. Agarwal, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This appeal u/s 260A of the income tax ("Act") is at the instance of an Assessee and is directed against order dated 26th February, 2003 passed by the income tax Appellate Tribunal, "B" Bench, Kolkata in ITA No. 293/Kol/2002 for the Assessment Year 1997-1998 dismissing the appeal filed by the Assessee.

2. Being dissatisfied, the Assessee has come up with the present appeal.

3. The facts leading to filing of this appeal may be summed up thus:

a) The Appellant is a Hindu Undivided Family (HUF) and is an Assessee under the income tax Act, 1961 ("Act"). For the Assessment Year 1997-98, after the assessment u/s 143(3) of the Act was initiated, the Assessing Officer issued summons u/s 131 of the Act to Sri K. K. Pant and Sri Asharam Mohata, the alleged creditors of the Assessee. Sri Pant expired before issue of notice. Sri Mohata produced relevant documents along with a forwarding letter dated 15th January, 2000 confirming the genuineness of the loan.

b) On 30th March, 2000, the Assessing Officer completed the assessment,

adding Rs. 15,00,000/- as unexplained cash credit and Rs. 2,84,602/- as interest payable to the loan creditors.

c) Being dissatisfied, the Appellant preferred an appeal before the Commissioner of income tax (Appeals) but the said appeal was dismissed.

d) Against the aforesaid order passed by the Commissioner of income tax (Appeals), the Appellant preferred an appeal before the Tribunal below and by the order impugned in this appeal the Tribunal has dismissed the said appeal.

e) Being dissatisfied, the Appellant has come up with the present appeal.

4. A Division Bench of this Court at the time of admission of the appeal formulated the following substantial questions of law for determination.

1. Whether the Tribunal was justified in law in upholding the order of assessment passed after taking into consideration Department Inspector's report, copy of which was not supplied to the Appellant.

2. Whether the Tribunal was justified in law in upholding the addition of Rs. 15,00,000/- on account of principal and disallowance of Rs. 2,84,602/- on account of interest in respect of loans taken by the Appellant from and repaid to income tax assesses by account payee cheques and confirmed by them and the purported findings of the Tribunal in that behalf are arbitrary, unreasonable and perverse.

5. Mr. Khaitan, the learned Senior Counsel appearing on behalf of the Appellant, has vehemently contended before us that the authorities below failed to consider the fact that the Appellant took loan from the above two persons by account payee cheques and that the loan- confirmation-certificates were also produced which bore signatures of those two persons as well as their permanent account numbers as income tax Assessee. According to Mr. Khaitan, as K. K. Pant, one of those persons, was dead at the relevant point of time, there was no question of his appearing and the other creditor, namely, Sri Mohata, due to his cardiac ailment could not himself appear. But he admitted the loan by responding to the summons. In such circumstances, according to Mr. Khaitan, the Assessing Officer acted illegally in disbelieving the transactions merely on the basis of the alleged report given by the Income tax Inspector who enquired into the matter although the copy of such report was neither handed over to his client nor did the Assessing Officer ask for any explanation from the Assessee on such report. Mr. Khaitan submits that apart from the aforesaid fact, all the authorities below did not consider the principles which were required to be followed in deciding whether the cash credits in question were genuine. Mr. Khaitan, therefore, prays for setting aside of the order of assessment and for deletion of the amount.

6. Mr. Agarwal, the learned Advocate appearing on behalf of the Revenue, has, on the other hand, opposed the aforesaid contention of Mr. Khaitan and has contended that in this case, the initial onus cast upon the Assessee to show that the transaction was a genuine one, was not discharged and as such, the

authorities below rightly concluded that the transactions were not genuine. Mr. Agarwal contends that by merely producing loan-confirmation-certificates and disclosing the permanent account numbers of the creditors, the initial onus was never discharged. In support of his contention, Mr. Agarwal places strong reliance upon the following decisions:

1. K.M. Sadhukhan and Sons Pvt. Ltd. Vs. Commissioner of Income Tax,
2. Commissioner of Income Tax Vs. Korlay Trading Co. Ltd.,
3. Commissioner of income tax v. Precision Finance Pvt. Ltd., reported in (1994) 298 ITR 465.

7. Mr. Agarwal, therefore, prays for dismissal of the appeal.

8. After hearing the learned Counsel for the parties and after going through the materials on record, we find that the Appellant allegedly took loan from those two persons by account payee cheques and the factum of such loan is also admitted by those creditors by confirming the loan account. It further appears that the Appellant disclosed the names of those persons as well as the address and pursuant to that, the Assessing Officer issued notice u/s 131 of the Act. The notice sent to K. K. Pant came back with the report "deceased" whereas the other creditor, namely, Sri Mohata produced a medical certificate showing that he was suffering from cardiac-ailment but at the same time, he responded to the said summons by disclosing his permanent account number and also confirming the details of loan transaction with the Appellant.

9. Pursuant to such information, the Assessing Officer, as it appears from assessment order, sent an Inspector to verify the returns of those two persons. The said Inspector allegedly informed the Assessing Officer that no return for the relevant Assessment Year was filed on behalf of K. K. Pant and that in the return submitted by Sri Mohata, the Appellant was not shown as one of the creditors. The Assessing Officer on the basis of such information received from the inspector concluded that the transactions were not genuine and the Appellant failed to discharge the initial burden to prove genuineness, creditworthiness and capability of the creditors.

10. Being dissatisfied, the Appellant preferred an appeal before the Commissioner of income tax (Appeals) and took a specific point that the Assessing Officer acted illegally in holding against the Appellant without disclosing the alleged report submitted by the Inspector to the Appellant to enable him to controvert those materials.

11. It appears that the Commissioner of income tax (Appeals) did not advert to the aforesaid point taken by the Appellant and mechanically affirmed the order of the Assessing Officer.

12. In the appeal before the Tribunal, the Appellant took the selfsame point that the order passed by the Assessing Officer as well as the Commissioner of income

tax (Appeals) were illegal as the Appellant could not controvert the report of the Inspector.

13. The Tribunal below, however, also did not deal with the aforesaid question raised by the Appellant and affirmed the order of the Assessing Officer.

14. In such circumstances, we find substance in the contention of Mr. Khaitan that the order of assessment cannot be supported as the materials collected by the Assessing Officer through the Inspector which were relied upon were neither disclosed to the Appellant nor was the Appellant asked to explain the report submitted by the Inspector.

15. It is now a settled law that while considering the question whether the alleged loan taken by the Assessee was a genuine transaction, the initial onus is always upon the Assessee and if no explanation is given or the explanation given by the Appellant is not satisfactory, the Assessing Officer can disbelieve the alleged transaction of loan. But the law is equally settled that if the initial burden is discharged by the Assessee by producing sufficient materials in support of the loan transaction, the onus shifts upon the Assessing Officer and after verification, he can call for further explanation from the Assessee and in the process, the onus may again shift from the Assessing Officer to Assessee.

16. In the case before us, the Appellant by producing the loan- confirmation- certificates signed by the creditors, disclosing their permanent account numbers and address and further indicating that the loan was taken by account payee cheques, no doubt, prima facie, discharged the initial burden and those materials disclosed by the Assessee prompted the Assessing Officer to enquire through the Inspector to verify the statements.

17. We find substance in the contention of Mr. Khaitan that on the basis of the report submitted by such Inspector, the Assessing Officer could not straightway arrive at the conclusion that the transactions were not genuine without giving further opportunity to the Appellant to explain the alleged information disclosed by the Inspector to the Assessing Officer.

18. It appears that Pant died after Assessment Year was over and in the next Assessment Year, according to the Appellant, before the death of Pant, the loan was paid back to Pant. If the information given by the Inspector that the heirs of Pant did not file any income tax return for the relevant period was disclosed to the Appellant by the Assessing Officer, the Assessee could produce the heirs of the deceased to explain the position but for non-disclosure of the information given by the income tax Inspector to the Assessee, the Appellant could not get further opportunity to explain the position.

19. Similarly, as regards the transaction with Sri Mohata, according to the Assessing Officer, the income tax Inspector disclosed to him that in the Income tax return of Sri Mohata the transaction with the Appellant was not disclosed; but if such information was given to the Appellant, he could charge Sri Mohata, with

such irregularity and could also explain what the actual fact was. We are even not in a position to know what the text of the actual information was that was conveyed by the said Inspector to the Assessing Officer except those recorded in the assessment order.

20. In our view, equity and justice demand that the full text of the information given by the Inspector to the Assessing Officer which is the basis of the conclusion of the assessment should be made known to the Assessee before the same is used against him so that the genuineness of the said information can be rebutted by the Appellant-Assessee or at least, the Assessee can get an opportunity to explain the said information.

21. We thus find that in the fact of the present case the order of assessment was made without giving adequate opportunity to the Appellant to explain the undisclosed information received by the Assessing Officer from his Inspector.

22. We, therefore, set aside the order of assessment and remand the matter to the Assessing Officer for communicating the report of the Inspector to the Appellant with further liberty to the Assessing Officer to enquire from the Assessee any other information he desires. Similarly, the Assessee will be entitled to explain the report submitted by the Inspector and after consideration of such explanation, the Assessing Officer will come to a final decision whether the transactions were genuine or not.

23. As we propose to set aside the order of assessment on the ground of not affording adequate opportunity to the Appellant to prove his case, we do not deal with the decisions cited by Mr. Agarwall as those deal with the principles which are required to be followed in arriving at the conclusion as to acceptance of the plea of loan taken by an Assessee.

24. The order impugned is, therefore, set aside and the appeal is allowed by answering the first question formulated by the Division Bench in the negative and against the Revenue and the second point in the affirmative and against the Revenue.

25. In the facts and circumstances, there will be, however, no order as to costs.