

Smt. Reena Jain Vs. Cit

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Court : Allahabad

Decided On : Oct-12-2006

Reported in : (2007)210CTR(All)491

Judge : R.K. Agrawal and ;Vikram Nath, JJ.

Appeal No. : I.T. Appeal Nos. 8 To 11, 13,15 and 31 of 1999

Appellant : Smt. Reena Jain

Respondent : Cit

Advocate for Pet/Ap. : Sri. Krishna Agrawal

Judgement :

ORDER

R.K. Agrawal, J.

1. All these appeals under Section 260A of the Income-tax. Act, 1961, hereinafter referred to as 'the Act' have been filed by different appellants against the order dated 9-3-1999 passed by the Income Tax Appellate Tribunal, Delhi, hereinafter referred to as 'the Tribunal' in respect of five persons, namely, Sri Rakesh Kumar Jain, Sri Sanjay Kumar Jain, Smt. Reena Jain, Smt. Usha Chawla and Smt. Sushma Jain and order dated 15-3-1999 in the case of M/s. Jagdish Chand & Sons and M/s. Gurbachan Lal & Sons. In all these appeals originally when filed,

the appellants have sought to raise the twelve substantial questions of law, however, by way of an application, which has been allowed vide order dated 16-11-2000, the appellants have sought leave of the court to substitute them by the following questions of law:

(1) whether on the facts and in the circumstances of the case, the Tribunal is legally justified in holding the initiation of proceeding under Section 148 valid without mentioning the reasons recorded for the initiation of the proceeding and without giving any reason?

(ii) whether in view of the fact that the reasons recorded has not been communicated to the appellant which appellant had a right to get, Tribunal is legally justified in holding that there was violation of the principles of natural justice in this regard without adjudicating the real issue?

(iii) whether the Tribunal is legally justified in confirming the addition under Section 69C relying upon the statement of Sri Mohd. Shamim Khan which was taken at the back of the appellant without giving opportunity of cross examination?

(iv) whether the observation of the Tribunal with regard to cross examination of Sri Mohd. Shamim Khan is legally correct and in accordance with law?

(v) whether the statement of Sri Mohd. Shamim Khan which was taken on the back, the appellant could be relied upon against the appellant without giving opportunity of cross examination?

(vi) whether the observation of the Tribunal that the assessing officer provided opportunity to the assessee to cross examine Sri Mohd. Shamim Khan but that opportunity was not availed of is correct and based on any material while on the date fixed, the Assessing Authority could not produce Sri Mohd. Shamim Khan for cross examination'?

(vii) whether the addition under Section 69C is legally justified and based on material?

(viii) whether on the facts and circumstances of the case, the provision of Section 69C is applicable while no expenditure has been incurred?

(ix) whether the Tribunal is justified in not adjudicating the real submission with regard to interest namely that since interest could not be charged in the order, same could not be charged in notice of demand?

2. Briefly stated the facts giving rise to the present appeals are as follows:

All the appellants received gift from one person, namely, Sri Mohd. Shamim Khan, son of Late Sri Hamid Ullah Khan, R/o 3/547, Khan Alampura, Saharanpur (U.P.). It was claimed that Mohd. Shamim Khan was holding NRI status and the gifts were given out of his NRI account. It was claimed that Sri Mohd. Shamirn Khan had given the following gifts to various appellants:

(i)

M/s. Vijentra Kr. Jain & Sons

Rs. 2,00,000

(ii)

Smt. Sushma Jain W/o Rajesh Jain

Rs. 2,00,000

(iii)

Sh. Sanjay Kr. Jain S/o Sukhmal Chand Jain

Rs. 50,000

(iv)

Rakesh Kr. Jain

Rs. 50,000

(v)

Smt. Reena Jain W/o Sanjay Jain.

Rs. 2,00,000

(vi)

M/s. Avinash Chand & Sons

Rs. 1,00,000

(vii)

M/s. Jagdish Chand & Sons

Rs. 2,00,000

(viii)

M/s. Gurubachan Lal & Sons

Rs. 1,00,000

(ix)

Smt. Usha Chawla

Rs. 2,00,000

3. All the appellants had filed their return declaring their income. The assessing officer made a detailed enquiry about the genuineness of the gifts and found the following facts, which are reproduced below from his order:

(a) A copy of the bank account of the donor No. 14477 with Central bank of India, Shahid Ganj, Saharanpur, wherefrom the gift has been made was obtained. A perusal of this account revealed that most of the credits of substantial amount were in round figures. Since credits in a N.R.E. account should be out of Foreign remittances, the credits in round figures appeared to be doubtful.

(b) Credit vouchers pertaining to this account No. 14477 were examined. It was seen that most of these credits were on account of clearing of cheques of local Banks as such Punjab National Bank, Shahid Ganj, Saharanpur and Allahabad Bank, Saharanpur. Enquiries from these banks revealed that the cheques from Allahabad bank were issued from Saving bank account No. 3896/18 in the joint names of Smt. Farhat Khanam (w/o appellant) & Mohd. Shamim Khan (appellant). The cheques from P.N.B. were issued out of Saving bank account No. 39112 in the name of the appellant himself.

(c) A perusal of these Savings account revealed that the cash has been deposited in these accounts and the money has been transferred to the account from which gifts have been made by clearing cheques e.g., cash of Rs. 2,30,000 has been deposited in Saving bank account No. 39112 on 27-1-1995 of Mohd. Shamim Khan and a sum of Rs. 2,00,000 has been transferred to the above mentioned account on 31-1-1995. Similarly, cheques have been issued from the other accounts after depositing cash in the same.

(d) Summons were issued to Sh. Mohd. Shamim Khan and his statement was recorded by the assessing officer on 12-12-1997. He stated on oath that his family consisted of himself, his wife, one widow mother and two younger brothers. One brother was appointed Station Master in Railways on compassionate grounds after the death of his father who was also working in the Railways as Guard. The other brother was running a medical store by name M/s. Popular Medical Store at Gonda. Regarding movable and immovable properties owned by him and other family members, he received on marriage and one plot in the name of his wife of approximately 150 sq. yds. at Gonda. He denied having any other movable or immovable property. It was further stated by him that he was running a shop at Gonda which was on a rent of Rs. 450 per month. At present, he was residing in a rented house at Gonda on a rent of Rs. 500 per month.

(e) Regarding the various gifts made by him, it was stated by Shri Mohd. Shamim Khan that one Shri K. Singh, CA, court Road, Saharanpur approached him when he came to know that he was an NRI. He was enticed into making such gifts on a commission of 10 per cent i.e., on a gift of Rs. 2,00,000, he got Rs. 2,20,000 in

cash which was deposited by him in such Saving bank accounts and from there the money was transferred to his account from where gift was made. It was stated by him that it was stated by Sh. K. Singh that there would be no legal or other problems if he did so.

(f) Regarding the persons to whom Shri. Mohd. Shamim Khan made gifts, he stated that he had neither met these persons ever nor had any sort of relations with them or their families. He reiterated that such cheques had been issued by him on the directions of Sh. K. Singh.

4. The assessing officer came to the conclusion that all the nine appellants were family members of two groups and it was quite unbelievable that Sri Mohd. Shamim Khan would go on giving huge gifts to various family members without any consideration. Proceedings under Section 147/148 of the Act were initiated as the assessing officer had reason to believe that sum claimed to have been received as gift was purchased of NRI gift by paying 10 per cent commission and, therefore, chargeable to tax under Section 69C of the Act. The appellants filed their reply in which it was stated that the return already filed may be treated as return in compliance to notice under Section 148 of the Act.

5. The assessing officer had provided the gist of the reasons recorded for the issuance of notice under Section 148 of the Act to the appellants in the form of a show-cause notice. The appellants were required to prove the genuineness of the credit entry. It may be mentioned here that the appellants had not maintained books of account and they had filed the affidavit of the donor and the genuineness was being claimed with reference to the same.

6. The assessing officer examined the statement of Sri Mohd. Shamim Khan, which was recorded under Section 131 of the Act, and concluded on the basis of the said statement that it was a case of Hawala receipt. The gift cheques were purchased by paying equal amount in cash and a commission of 10 per cent over and above that amount. As expenditure was incurred in purchase of the same NRI gifts, the source of which was not proved, provisions of Section 69C of the Act were found to be attracted. The assessing officer vide letter dated 26-2-1998 had given an opportunity to the appellants to attend his office on 5-3-1998 at 3-00 P.M.

for cross-examination of the donor Sri Mohd. Shamim Khan which was adjourned to 9-3-1998. The appellants instead of cross-examining the donor, submitted their reply on 9-3-1998 raising legal issues seeking adjournment. The assessing officer came to the conclusion that the appellants were avoiding cross examination of the donor by diverting the issue and accordingly brought to tax the entire amount of gift claimed by the different appellants plus 10 per cent as commission incurred by the appellants under Section 69C of the Act. The appeals preferred by the appellants under Section 246 of the Act have been dismissed by the Commissioner (Appeals), which order has been upheld in further appeals, by the Tribunal.

7. We have heard Sri Krishna Agrawal, learned Counsel for the appellants and Sri A.N. Mahajan, learned standing counsel appearing for the revenue.

8. Learned Counsel for the appellants submitted that the appellants had asked for an opportunity for cross examination of the donor, Sri Mohd. Shamim Khan, which had not been afforded and, therefore, the action of the Assessing Authority making addition of the amount of gift plus 10 per cent commission charges under Section 69C of the Act as upheld by the Tribunal are wholly illegal and contrary to law. He further submitted that it is not correct to say that the appellant were avoiding cross examination of the donor Sri Mohd. Shamim Khan, in fact they were all along requesting the Assessing Authority to make available the said person for cross-examination, which for reasons best known, was not acceded to by the Assessing Authority resulting in gross failure of justice. He further submitted that the appellants have only been supplied with the gist of the reasons recorded by the Assessing Authority for forming the belief instead of full reasons, which have been recorded in absence of which the appellants could not submit their full reply. This approach has vitiated the entire proceedings. He further submitted that the Assessing Authority was not justified in invoking the provisions of Section 69C of the Act. In support of his various pleas he has relied upon the following decisions:

1. CIT v. Indian Card Clothing Co. (P.) Ltd. : [1977]110ITR103(Bom) .

2. Kalra Glue Factory v. Sales Tax Tribunal : [1987]167ITR498(SC) .

3. Mukund Singh & Sons v. Presiding Officer, Sales Tax Tribunal(1997) 107 STC 300 (Punj. & Har.)

9. Sri A.N. Mahajan, learned standing counsel on the other hand submitted that the Assessing Authority had supplied the gist of the reasons recorded by him for taking proceedings under Section 147/148 of the Act and the appellants cannot be said to have suffered any prejudice; more so when the proceedings under Section 147/148 have not been challenged by them. According to him, the Assessing Authority had informed the appellant about the date and time for cross-examination of Sri Mohd. Shamim Khan, which was initially fixed for 5-3-1998 at 3-00 P.M. subsequently adjourned to 9-3-1998 and instead of cross-examining the said person, the appellants for reasons best known to them did not avail of the opportunity and filed legal objections. Thus, it cannot be said that the opportunity of cross-examination was not afforded to the appellants. The additions made under Section 69C of the Act have been justified.

10. We have given our anxious consideration to the various pleas raised by the learned Counsel for the parties and find that the appellants have not challenged the initiation of proceedings under Section 147/148 of the Act and their only grievance is that they were not supplied the full reasons which had been recorded by the Assessing Authority for forming his belief'. It is not in dispute that the gist of the reasons had been supplied by the Assessing Authority in the form of show-cause notice. The appellants have submitted their replies and in the gist of reasons the question of alleged validity of the gifts made by Sri Mohd. Shamim Khan, donor, was mentioned. The appellants were having full knowledge of the entire matter and in fact they have met the same by submitting their reply/ explanation. Thus, it cannot be said that non-supply of full reasons in place of gist of reasons had prejudiced them. All the appellants have not questioned the jurisdiction of the Assessing Authority in initiating the proceedings under Section 147/148 of the Act. Thus, the substantial questions of law Nos. 1 and 2, raised by the appellants cannot be said to be substantial questions of law.

11. It. So far as the question of making assessment without affording opportunity of cross examination of Sri Mohd. Shamim Khan is concerned, we find that the

Tribunal had dealt with the matter in paragraphs 10 to 12 of the order, which is reproduced below:

10. Coming now to the right of assessee to cross examine the witness, we find that initially the assessee filed an affidavit of Shri Mohd. Shamim Khan in support of the said gift. Law casted burden on the assessee to prove the genuineness of the gift. It was open for the assessing officer to examine the veracity of the affidavit. This affidavit was the witness of the assessee. The assessee failed to produce Shri Mohd. Shamim Khan. The assessing officer issued notice under Section 131 of the Act. Shri Shamim Khan was examined. He stated the facts. Thereafter also the assessing officer provided opportunity to the assessee to cross examine Shri Mohd. Shamim Khan. But that opportunity was not availed of.

11. In our opinion, right to cross examine the witness, who made adverse report, is not an invariable attribute of the requirement of the dictum audi alteram partem. The principles of natural justice do not require formal cross examination. Formal cross examination is a part of procedural justice. It is governed by the rules of evidence and is the creation of the court. It is part of legal and statutory justice, and not a part of natural justice, therefore, it cannot be laid down as a general proposition of law that the revenue cannot rely on any evidence which has not been subjected to cross examination.

12. In the instant case, cross examination was made in relation to the witness of the assessee. Despite opportunity was given to him to cross examine the witness, he did not avail this opportunity. The deposition recorded under Section 131 of the Act was relied upon in framing the assessment. The statement was recorded under oath. Therefore, it is a valid piece of evidence and, in our opinion revenue authorities rightly considered the same for the purpose of deciding the issue.

12. From the order of the Tribunal reproduced above, we find that despite sufficient opportunity having been given to the appellants to cross examine the witness they did not avail of this opportunity. Sri Mohd. Shammi Khan had given an affidavit in support of the appellants' claim which subsequently on statement being recorded under Section 131 of the Act did not inspire confidence. The opportunity to cross examine on 9-3-1998 was provided to the appellants which

they did not avail of and, therefore, the appellants have no cause to complain. The question Nos. 4, 5 and 6, therefore, cannot be said to be substantial questions of law. In the case of *Indian Card Clothing Co. (P.) Ltd.* (supra), the question before the Bombay High Court was whether under Section 15C of the Indian Income Tax Act, 1922, machinery and plant used in any business for the purpose of claiming exemption should be used in India or anywhere in the world. This decision is of no help as the issue decided therein was entirely different. In the case of *Kalra Glue Factory* (supra) the Apex court has allowed the appeal filed by the assessee solely on the ground that the statement of Banke Lal which was not tested by cross examination was used in order to reach the conclusion that the transaction was an inter-State sale. However, in the present case, we find that opportunity to cross examine Sri Mohd. Shamim Khan was given to the appellants but was not availed of. Thus, the appellants cannot take the benefit of the aforesaid decision. In the case of *Mukund Singh & Sons* (supra), the Punjab and Haryana High Court in Para 8 of the judgment has held as follows:

These provisions show that the Assessing Authority is obliged to adopt a procedure consistent with the principles of natural justice. This necessarily implies that the Assessing Authority must disclose every such piece of material which it may have collected at the back of the assessee and which may be used for framing the assessment. The assessee is also entitled to produce evidence to support the returns filed by him. In cases where the Assessing Authority has collected some information from a third party, then the assessee is entitled to apply for cross-examination of such person for the purpose of eliciting the truth or for proving that the information furnished by such person is not genuine!

In the aforesaid case the Assessing Authority had rejected the request made by the petitioner for summoning the concerned official who had furnished the information and was used against the petitioner. This decision is also not applicable in the facts of the present case as the opportunity to cross examine was afforded but for reasons best known was not availed of. The reliance placed by the appellants on the various decisions referred to above is wholly misconceived inasmuch as in those cases the opportunity was not afforded whereas in the present case the opportunity to cross examine Sri Mohd. Shamim Khan was

afforded but the appellants did not avail.

13. So far as additions under Section 69C of the Act are concerned, we find that in view of the specific finding recorded by the Assessing Authority, which has been upheld in appeal by the Tribunal that the alleged gifts were purchased by the appellants after paying 10 per cent commission, the additions have rightly been made under Section 69C of the Act. The question Nos. 3, 7 and 8, therefore, cannot be said to be substantial questions of law.

14. So far as the question No. 9 is concerned, we find that the Tribunal has held that the levy of interest is consequential. In any event the learned Counsel for the appellants has not been able to disprove the levy of interest.

15. In view of the foregoing discussion, we are of the considered opinion that no substantial question of law arises in the present appeals.

Thus, all the appeals are dismissed in limine.

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