

T. S. Venkatesan Vs. Assistant Commissioner of Income

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Court : Income Tax Appellate Tribunal ITAT West Bengal

Decided On : Jul-13-1999

Appellant : T. S. Venkatesan

Respondent : Assistant Commissioner of Income

Judgement :

1. This appeal by the assessee for block period 1986-87 to 27th August, 1996, is directed against the block assessment order under s. 158BC(c) dated 29th August, 1997.

2. A search under s. 132 of IT Act, was conducted at the residence of the assessee at Calcutta on 27th August, 1996. The assessee filed return in Form No. 2B showing nil undisclosed income. During the assessment proceedings the assessee was examined under s. 131 of IT Act on 28th January, 1997. A bunch of loose sheets (Annexure A-2) was found during search at the residence of Shyam Lutheria. In that bunch of papers, marked A-2, p. No. 397 written by P. R. Pandia showed payment of Rs. 10 lacs in the name of the assessee. Pages 442 to 444 of the said bunch were in the handwriting of the assessee who stated that the said entries appear to be made in the course of business of Shaw Wallace & Co. The AO made an addition of Rs. 10 lacs as assessee's undisclosed income on the basis of said p. 397 of Annexure A-2. The AO also made addition of Rs. 4,500 on account of undisclosed investment in shares of TVS Woolpool India Ltd. for asst. yr. 1992-93 and a sum of Rs. 1,000 as undisclosed investment in shares of Sarat Sea Foods Ltd. for asst. yr. 1995-96. Aggrieved by this said block assessment

order the assessee has preferred this appeal before the Tribunal.

3. We have heard the arguments of both the sides and also perused the record.

4. The assessee had raised as many as 6 grounds of appeal. Ground Nos.

1 and 2 dispute the block assessment order as being arbitrary and illegal for being in violation of principle of natural justice and fairplay and containing findings/observations alleged to be perverse as based on extraneous consideration. Ground Nos. 3 and 4 dispute the addition of Rs. 10 lacs as undisclosed income of the assessee on the basis of a document (p. 397 of Annexure A-2) seized from the residence of Shyam Lutheria allegedly containing an entry of payment of Rs. 10 lacs to the assessee. As these grounds are inter-related and also as the learned authorised representative of the assessee has raised his arguments on these grounds, we take up them in a composite manner. The learned authorised representative of the assessee has contended that the block assessment order is illegal and liable to be struck down as such for the reason that up to August, 1997, the assessee was not asked anything about Rs. 10 lacs in respect of which the AO has made the addition in the block assessment order, and that only on assessee's appearance before AO on 21st August, 1997, the AO gave notice at 5 p.m.

to the assessee under s. 131 seeking to record his statement and also gave to the assessee, at the same time, a letter regarding Rs. 10 lacs stating an entry thereof being on p. 397 of Annexure A-2, a document seized from the residence of Shyam Lutheria on 3rd August, 1995 (pp. 1 and 2 of the paper book). He has contended that at this stage also the AO did not hand over the copies of the relevant papers to the assessee and simply showed him the papers and on that basis alone the AO recorded the statement of the assessee under s. 131 on 21st August, 1997. He has referred to para 5.7 wherein an extract of assessee's statement recorded under s. 131 is reproduced wherein question No. 2 specifically contains that page No. 397 of Annexure A-2 as also relevant extract of statement of P. R. Pandiya, dated 19th June, 1996, being shown to the assessee. He has contended that it is evident from the same that this paper was not still handed over to the assessee. He has contended that Annexure 7 of assessment order has a total of Rs.

4,16,80,715 by way of payment but it is not clear as to what kind of payment it is and the Department is not saying as to whether this is revenue payment or capital payment or an expenditure or what He has contended that the Department is not saying as to what is the nature of the payment of Rs. 10 lacs. He has contended that the Department has to show its nature and the onus is on Department. He has contended that this paper (p. 397 of Annexure A-2) was not found from the assessee's possession nor found from the possession of assessee's employer M/s Shaw Wallace & Co., nor this paper is in assessee's hand-writing. He has contended that in such a situation the presumption is not available against the assessee. He has contended that in the statement of the assessee recorded under s. 131, the assessee has clearly denied to have received this amount of Rs. 10,00,000. He has referred to para 5.1 on p. 3 of the assessment order and contended that these loose papers were found from the residence of Shyam Lutheria during search of his residential premises at Bombay on 2nd/3rd August, 1995, and that several cases/litigations were already going on and this fact is known to the assessee being employee of M/s Shaw Wallace & Co. He has contended that regarding K. R. Chabaria's papers the assessee has clearly stated that he has no knowledge. He has referred to pp. 6 to 11 of the assessment order and contended that the AO has referred to extraneous matters not related to the assessee rendering the assessment order to be illegal. He has cited the following decisions in support of his contention : (2) CIT vs. S. M. S. Investment Corpn. (P) Ltd. (1994) 207 ITR 364 (Raj) (3) CIT vs. Eastern Commercial Enterprises (1995) 123 CXTR (Cal) 217 : (1994) 210 ITR 103 (Cal) (6) Amar Singh vs. ITO (1995) 53 TTJ (Del) 692 : (1995) 54 ITD 375 (Del) 5. He has contended that the AO has as such abused his powers and that in view of his conduct of showing an extract of the document of last date and then recording the assessee's statement without giving copy of the document to the assessee and an opportunity to rebut the same the order of AO is illegal. He has referred to the assessee's letter, dated 22nd August, 1997 (pp. 6 and 7 of assessee's paper book) and contended that the assessee has narrated all these facts, in the said letter of objections of the assessee. He has contended that the AO has not replied this letter of the assessee. He has contended that the assessee has furnished assessee's assessment orders for four assessment years from 1990-91 to 1993-94 placed on

pp. 11 to 17 of paper book. He has contended that in asst. yr. 1990-91 the assessee's gross salary is Rs. 2,65,659, and in asst. yr. 1991-92 it is Rs. 2,90,333 and in asst. yr.

1993-94 it is Rs. 3,08,664, as revealed from the respective assessment orders, and this shows that the assessee's employers are giving the assessee only a small increment. He has contended that if the employer of the assessee were so happy with him so to give him Rs. 10 lacs why should they have not given him huge increment and big salary He has also contended that with the assessee's assessment order the AO has attached those papers as Annexure Nos. 1, 2 and 3 and are stated to be the assessee's handwriting as alleged by Mr. Pandiya but these are loose sheets and not green book. He has also contended that the period of these annexures of assessment order, being pp. 442 at 444 is of May to August, 1989 whereas the said payment of Rs. 10 lacs is alleged to have been made on 16th January, 1992. He has contended that thus there is no co-relation between pp. 442 to 444 alleged by Mr. Pandiya to be assessee's hand-writing and p. 397 alleged by Mr. Pandiya contain an entry of payment of Rs. 10 lacs to the assessee. He has also contended that the nature of entries of Annexure-2 of assessment order are different from the nature of entries on Annexure-4 of the assessment order. He has contended that the assessee is not recording such entries as are on Annexure-4 and so there is no evidence regarding the assessee having received Rs. 10 lacs. He has contended that the Revenue has failed to discharge its onus that lay on it.

6. As against this the learned Departmental Representative of Revenue has contended that the mere fact that these loose papers were seized from the possession of some other person will not make the assessment illegal. He has contended that search was conducted at M/s Shaw Wallace & Co., and its various concerned persons. He has contended that the assessee was senior Vice President in M/s Shaw Wallace & Co. He has contended that in the search of M/s Shaw Wallace & Co. the Department found that lot of cash was generated out of which payments were also made to top executives who were involved actively in the activities of the company leading to generation of cash and assessee is one of them.

He has contended that Mr. Pandiya was actively involved in such activities of M/s Shaw Wallace & Co. He has contended that K. R.Chaberia was Managing Director of M/s Shah Wallace & Co. and Shyam Lutheria is brother-in-law of Kishore Chabaria, He has contended that these loose papers were secret documents which were seized. He has contended that Chapter-XIVB contains s. 158BB of which sub-s. (1) speaks of the computation of total income on the basis of also "such other materials or information as are available with AO." He has contended that these documents fall within the expression by such other materials or information. He has in this regard cited Parakh Foods Ltd. vs. Dy. CIT (1998) 64 ITD 396 (Pune). He has contended that "such other material or information" could be any material/information and that may be even not connected with search. He has contended that in the instant case there is a document showing payment and its authenticity is now to be considered. He has contended that this document "p. 397 of Annexure A-2" was examined along with other seized materials. He has contended that it was also examined as to what the left-hand side of the document means and what the right-hand side of the Department means. He has contended that Mr. Pandiya is the author of the document and he has explained regarding payment and receipt etc. He has contended that the Department has tried to examine these entries co-related with cash generated in M/s Shaw Wallace & Co. and if not all, at least some of them. He has also contended that regarding some of the pages alleged by Mr. Pandiya to be the hand writing of the assessee, the assessee has not denied the same to be in his hand writing but stated only that due to long time he does not remember. The learned Departmental Representative has, in this regard, referred the answer to question No.5 on p. 13 of the assessment order relating to pp. 442 to 444 of Annexure A-2. He has contended that accordingly Rs. 10 lacs was paid, and it was paid to the assessee. He has contended that no third person was involved therein and so this entry of payment of Rs. 10 lacs was for the assessee. He has also contended that it was never the case of the assessee that this receipt is not taxable. He has contended that when it is a receipt in the hands of the assessee then only the question whether the receipt is taxable or not will arise. He has contended that the paper (p. 397 of Annexure A-2) no doubt was seized from other person but relates to payment by M/s Shaw Wallace & Co. He has referred to s. 17(3)(ii) and contended

that any amount received from employer is taxable income. He has, in this regard, referred to p.

1422 of Sampat Iyenger Commentary of Law of Income-tax (9th Edition) Vol. 1 (top para) wherein it has been observed that by virtue of this provision of payments made by an employer to an employee are brought under "profit in lieu of salary". He has contended that this amount of Rs. 10 lacs is a payment/receipt. The question thereafter arises as to under what hand this receipt is to be taxed. He has contended that the intention of legislature is not to exempt and if a particular receipt/income cannot be taxed under heads of income (A) to (E) then the same is to be taxed under the head (F). He has, in this regard, cited Mrs. Roma Bose vs. ITO (1974) 95 ITR 299 (Cal). He has contended that even if a particular receipt does not fall within the ambit of any specific clause even then it may be income and once a receipt is an income then it is to be taxed and that is the intention of the legislature. He has cited CIT vs. G. R. Karthikeyan (1993) 201 ITR 866 (SC) in this regard. He has also contended that the learned authorised representative's argument that papers were not given to the assessee and were only shown to him does not carry weight for the reason that there is a provision under s. 132(9) whereunder the assessee has a right to make copy from documents. He has contended that when some information is going to be utilised by AO then opportunity should be given to the assessee and that is what the AO has done. He has contended that opportunity to the assessee has very much given by the AO. He has also contended that so far as the question of evidence regarding payment of Rs. 10 lacs to the assessee is concerned, this document p. 397 of Annexure A-2 is the required evidence. He has contended that the statement of Mr. Pandiya is only a corollary to that and is corroborative of what was already there in the document. He has also contended that as regards the opportunity of cross-examination not being provided to the assessee does not amount to violation of principle of natural justice and does not make the assessment order illegal, and he has cited GTC Industries Ltd. vs. Asstt. CIT (1998) 65 ITD 380 (Bom) in his support.

7. We have considered the rival contentions as also the materials placed on record and have also gone through the cited decisions. From the perusal of record this is

clear that the copy of the statement of Mr. P. R. Pandiya was not supplied to the assessee and it was only shown to him but however this very fact that the copy of the statement was not supplied to the assessee together with the other fact with the factum of Rs. 10 lacs having been paid to the assessee was not confronted to the assessee prior to 5 p.m. of 21st August, 1997, does not, in our view make the assessment order illegal so as to render it liable to be quashed. However, these facts may effect the merits of the case which will consider ahead while appreciating the evidence.

Accordingly ground Nos. 1 and 2 of the appeal fail.

8. In V. C. Shukla's case (supra) the Hon'ble Supreme Court has held that loose sheets of papers cannot be treated as 'book' within the meaning of s. 34 of Evidence Act. It has also been held therein by the Hon'ble Supreme Court that even correct and authentic entries in books of account cannot, without independent evidence of their trustworthiness, fix a liability upon a person. The Hon'ble Supreme Court also observed that even assuming that the entries in loose sheets are admissible under s. 9 of the Evidence Act to support an inference about correctness of the entries still those entries would not be sufficient without supportive independent evidence. In Amar Singh's case (supra) it has been held by Delhi Bench of Tribunal that a statement made by a person in assessment proceedings relating to SLBP will not be relevant evidence under s. 33 in the assessment proceedings relating to a party different from SLBP. In Rama Trader's case (supra) the Patna Bench of Tribunal has held that the onus for proving the correctness of the entries appearing in the books of third party M/s Raj Trading Co. was not on the assessee but on the Revenue. It was also held that presumption under s. 132(4A) could not be raised against the assessee who was a third party and additions to the assessee's income could not be made. In Kishinchand Chellaram's case (supra) it has been held that though proceedings under IT Act are not governed by strict rules of evidence and the letter could be taken into account as evidence even without calling manager of the bank in evidence to prove his letter, but before the IT authorities could rely on the letter they are bound to produce letter before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross-

examine the manager of the bank. In Eastern Commercial Enterprises case (supra) the hon'ble Calcutta High Court has held that the right to cross-examine a witness adverse to the assessee is an indispensable right and the opportunity of such cross-examination is one of the corner stones of natural justice. It is the necessary requirement of the process of taking evidence and of testing the truth of oral evidence of witness. In Smt. Panna Devi Chowdhary's case (supra) the Hon'ble Bombay High Court has held that "IT Act imposes a liability to tax upon income. It does not provide that whatever is received by a person can be regarded as his income liable to tax. In all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision. It is only in a case where the receipt is in the nature of income that the burden of proving that it is not taxable lies upon the assessee." It has also been held that "merely because an assessee carries on a vocation there is no presumption in law that any amount received by him is income subject to tax. The test in such cases is to find out if the sum is paid to the assessee in respect of his services and accrues to him by virtue of his office." In Parakh Food Ltd.'s case (supra) the Tribunal has held in para 24 on p. 417 that the words 'such other material' used in s. 158BB has to be understood, as any other material'. The contention regarding such other material to have nexus with material seized in search was also not accepted. In GTC Industries Ltd.'s case (supra) the Bombay Tribunal has held that right to cross-examine witness who made adverse report is not an invariable attribute of requirement of dictum audi alteram partem, and that where statement of witnesses were only secondary and of subordinate material used to buttress main matter connected with amount of additions, it has to be held that there was no denial of principles of natural justice if witnesses were not allowed to be cross-examined by assessee. In Mrs.

Roma Bose's case (supra) the Hon'ble Calcutta High Court has held that under s. 14 of the IT Act, 1961, income and not heads of income has been made chargeable to income-tax. If an income cannot be charged to income-tax under any of the heads mentioned in cls. A to E of s. 14, the same shall be chargeable to income-tax under the head "income from other sources" mentioned in cl. F of the said s. 14, under the express provision of s. 56(1) of the Act. In G. R. Karthikeyan's case (supra) the Hon'ble Supreme Court has held at p. 873 H "even

if a receipt does not fall within the ambit of any of the sub-clauses in s. 2(24), it may still be income if it partakes of the character of the income. The idea behind providing an inclusive definition in s. 2(24) is not to limited meanings but to widen its net.

9. Consciously considering and keeping in view the aforesaid judicial pronouncements we find that the statement of Mr. P. R. Pandiya recorded under s. 131 on 19th June, 1996 by Asstt. CIT, Bombay relates to p. 397 of Annexure A-2 being the document forming very basis of payment of Rs. 10 lacs to the assessee cannot be said to be only secondary or of subordinate material used to buttress main matter connected with the amount of addition but is rather of primary character and related to very main material forming the basis of addition. In such a situation when the addition made in the hands of the assessee is directly connected with the document being p. 397 of Annexure A-2 and statement of P. R. Pandiya related to said document the requirement of justice and fairplay regarding supplying a copy of the statement of Mr. Pandiya to the assessee and providing the assessee an opportunity to rebut the contentions made therein and also to avail of the opportunity to cross-examine witnesses on the point cannot justifiably be denied.

Besides, even taking an evidentiary material, as it is, we find from the record that the statement of Mr. P. R. Pandiya is only to the effect that in document p. 397 of Annexure A-2 the left-hand side represents the receipts and the right-hand side represents the payments made and that TSV stands for T. S. Venkatesan. He has thus explained the entry that the entry represents payment and TSV stands for the name of the assessee but he has not stated that a sum of Rs. 10 lacs was paid to T. S. Venkatesan that is the assessee. This entry being in the handwriting of Mr. P. R. Pandiya he is the author of the entry and so he has given the above explanation regarding the entry. In this above explanation he has nowhere stated that he made the payment of Rs. 10 lacs to T. S. Venkatesan or that anybody else made the said payment to T. S. Venkatesan. May be that he made the entry on hearsay basis as instructed. In order to fasten a liability of receipt of Rs. 10 lacs as mentioned in the aforesaid entry on p. 397 of A-2 there ought to have been some further corroborative evidence. We cannot lose sight of the fact-situation that this

entry is on a loose sheet and not in a book of account regularly maintained in the course of business, nor the books of account is found from the possession of the assessee but it is found from the possession of a third person Mr. Shyam Lutheria. Any other information falling within the words "such other material" or information under s. 158BB(1) can be used for the purpose of computing total income no doubt but the information/material in order to be used to form the basis of addition forming part of the computation of total income the said material/information has to be a reliable evidence. In that view of the matter a mere entry on a loose sheet found from the possession of a third person and a statement given by another third person in connection with search/assessment proceedings of still another third person without the copy of the statement being furnished to the assessee and thereby allowing the assessee an opportunity to rebut the contentions made in the statement and an opportunity to cross-examine the witness coupled with the fact-situation that the statement too is quite vague and general in nature simply stating that the entry represents payment and TSV stands for T. S. Venkatesan without stating that the amount entered therein was paid by him or before him to the assessee together with the fact that the assessee has denied to have received the said sum of Rs. 10 lacs in his sworn statement recorded by AO, we are of the considered opinion that it cannot justifiably be assumed/inferred that the sum of Rs. 10 lacs was paid to the assessee. In the circumstances as they stand it cannot also be presumed/inferred that the said payment to the assessee, if at all the same had been there, was a sort of income in the hands of the assessee. We may also note that the provisions of s. 132(9) are not applicable in the matter in hand for the reason that the said document was not recovered from the possession of the assessee and the said provision applies to the person from whose custody the document is seized. As such considering all the facts and circumstances of the case as also the legal principles enunciated in the aforesaid judicial pronouncements we are of the view that the addition of Rs. 10 lacs as assessee's undisclosed income cannot justifiably be made, and the addition made by AO is unwarranted and not justified. We, therefore, delete the addition.

10. In the result, the assessee's appeal is allowed in part as indicated above.