IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.58 OF 2001

H.R. Mehta .. Appellant.
Vs.
The Assistant Commissioner
of Income Tax, Mumbai .. Respondent.

Mr. Deepak Tralshawalla for the appellant.
None for the respondent.

CORAM : M. S. SANKLECHA &
A.K. MENON , JJ.

DATED : 30TH JUNE, 2016

JUDGMENT (PER A.K.MENON, J.) :

1. This appeal under Section 260A of the Income Tax Act, 1961 (the 'Act') challenges the order dated 29th September, 2000 passed by the Income Tax Appellate Tribunal (the 'Tribunal'). The appeal (relates to the Assessment Year 1983-84).

2. The appeal was admitted on the following questions of law :

"(1) Whether the Tribunal erred in law and fact in not deleting the addition made by the Respondent to the Appellant's income of the above loan of

Rs.1,45,000/- taken by the Appellant from Nuwan and the disallowance of interest thereon of Rs.16,684 ?

(2) Whether the Tribunal erred in law in holding that the amendment to Sections 147 to 153 of the Act, made with effect from 1st April, 1989 were applicable in judging the validity of the reassessment proceedings taken against the Appellant for the Assessment Year 1983-84 ?"

3. It will be necessary to briefly set out the facts of the case : The Original assessment was completed in January 1986 under Section 143(1) of the Act. It was later reassessed under an Amnesty Scheme in January 1987. Subsequently, the Assessing Officer (AO) learnt from the appraisal report in the case of one Sewa Charitable Trust that during relevant period the assessee appeared to have taken a bogus hawala loan of Rs.1,45,000/- from one M/s. Nuwan Investment and Trading Co. Pvt. Ltd. (Nuwan) whereby the assessee introduced his unaccounted funds in the form of bogus loan from Nuwan. A notice under Section 148 came to be issued but only in July 1993. The assessee sought reasons and also queried with the AO whether permission of superior authorities have been taken prior to issuance of notice. The AO contended that notice was issued within time as per amended Act of 1987 under Section 149 (1)(b)(iii) read with

Section 151(2) of the Act. The AO found that there was no evidence of a bonafide loan transaction between the assessee and Nuwan. The said amount was therefore added to the assessee's income. In appeal before the Commissioner of Income Tax (Appeals) [CIT (A)], the addition of Rs.1,45,000/- made by the AO under Section 68 of the Act was upheld. The issue pertaining to the applicability of the amended provision of the Act was also decided against the assessee. Being aggrieved, the assessee approached the Tribunal which confirmed the order of the AO upholding the addition by partly allowing the credit of amount of Rs.1,650/- as TDS. This is how the assessee is now before us in appeal.

4. Mr.Tralshawalla, learned counsel appearing on behalf of the assessee in support of the appeal contended that amended provisions of the Act could not have been applied in the facts and circumstances of the case and that the notice under Section 148 of the Act was clearly barred by limitation inasmuch as the notice was issued in July 1993 although the transaction pertained to assessment year 1983-84 and exfacie barred by limitation, if one considers the fact that the amended provision could not have been invoked in the facts and circumstances of the present case. He, therefore, submitted that the order of the Tribunal and of the authorities below were not justified and urged us to answer the

question in relation to validity of reassessment in favour of the assessee.

5. According to Mr.Tralshawalla, the Assessing Officer erred when he observed that since the amount has been credited in the books of account, the onus of proving genuineness of the transaction lies squarely on the assessee and that even during reassessment proceedings, the assessee had not filed a Confirmatory letter from Nuwan or any other justifiable evidence. Even the CIT (A) had failed to find substance in plea of assessee that it was not for the assessee to provide further evidence, although the loan was advanced and repaid vide account payee cheques. The learned counsel submitted that once prima facie bonafides of the loan transaction were established as aforesaid, it was for the revenue to establish that it was not bonafide.

6. As regards the revenue's (AO's) contention that the assessee has failed to obtain conformity letter from Nuwan, Mr.Tralshawalla submitted that the assessee had in fact sought confirmation from Nuwan but Nuwan had shifted its office and the assessee was unable to locate the party. He therefore submitted that in the facts of the case there was no occasion for the Assessing Officer and CIT(A) to uphold addition of Rs.1,45,000/-. Mr. Tralshawalla then submitted that even

otherwise and even assuming that the assessee was required to obtain a confirmation letter which he had failed to do, no proper opportunity was given to the assessee at the time of reassessment inasmuch as the AO had admittedly acted on the appraisal report in the case of M/s. Sewa Charitable Trust and had relied upon some evidence collected in that behalf including statements on oath said to have been made on behalf of persons whose identity was not disclosed.

7. Accordingly, upon receipt of communication dated 24th January, 1996 a copy of which appears at Exhibit-F calling upon the assessee to reply before the next date of hearing i.e. 5th February, 1996, the assessee vide its Chartered Accountant's letter dated 15th February, 1996 (Exhibit-G) pointed out that the amount of Rs.1,45,000/- cannot be added under Section 68 of the Act on the basis of third party confession without allowing the assessee to meet the revenue's case including by cross examining such deponent. He requested the Assistant Commissioner of Income Tax (ACIT) to provide copies of the statements recorded by the revenue as also disclose material, if any, that the revenue wished to rely upon before making any addition and further to allow the assessee an opportunity to cross examine the party from whom the loan was received thus indicating that the statements relied upon by the revenue were that of Nuwan.

8. According to Mr.Tralshawalla, no reply was received. No opportunity was given to cross examine the party whose statement was relied upon by the revenue. The copies of the statement(s) or deposition(s), if any, were not provided to the assessee and the ACIT completed the reassessment merely on the basis that no confirmation letter had been obtained from Nuwan and nor any other verifiable evidence in respect of loan transaction had been filed. This Mr.Tralshawalla submitted is a fundamental flaw inasmuch as it amounts to denial of opportunity of meeting the revenue's case and therefore in breach of rules of natural justice. When we queried Mr.Tralshawalla if this was one of the grounds before the CIT (A), Mr.Tralshawalla was quick to point out that in the grounds of appeal dated 18th March, 1996 Exhibit-I ground no.(2) clearly set out that the assessee was not given opportunity of cross examining the parties. These statements were relied upon by the revenue and the reassessment was made in violation of the principles of natural justice and were accordingly liable to be set aside. Despite this the assessee had also written on 6th January, 1997 to the CIT (A) urging very same grounds. However, the order of the CIT (A) ignores this objection. He, therefore, submitted that on the grounds of denial basic rules of natural justice, this appeal may be allowed and questions answered in favour of the assessee.

9. In support of his contention Mr. Tralshawalla relied upon the following decisions : Mather and Platt (India) Ltd. Commissioner of Income Tax 168 ITR 493 (Cal); S. Hastimal vs. Commissioner of Income Tax 49 ITR 273 (MAD); Additional Commissioner of Income Tax vs. Bahri Brothers (P) Ltd. 154 ITR 244 (PAT); Nemi Chand Kothari vs. Commissioner of Income Tax and Anr. 264 ITR 254 (Gauhati); Deputy Commissioner of Income Tax v. Rohini Builders 256 ITR 360 (Gujarat); Kishinchand Chellaram vs. Commissioner of Income Tax 125 ITR 173 (SC); Commissioner of Income Tax v. Ashwani Gupta 322 ITR 396 (Del); unreported decision in M/s. Andaman Timber Industries v. Commissioner of Central Excise, Kolkata in Civil Appeal No.4228 of 2006 dated 2nd September, 2015; Ranchi Handloom Emporium v. Commissioner of Income Tax & Anr. 235 ITR 604 (Pat).

10. We do not have benefit of hearing the revenue. At the time of admission the Revenue had waived service. After this matter came to be admitted, on several occasions counsel on behalf of respondent had appeared and had undertaken to file Vakalatnama interalia on 24th July, 2008, 4th August 2008, 28th August 2008 and even thereafter on 29th September 2008. No appearance has been filed till date. Even after the matter first appeared for final disposal on 10th August 2015 although

Mr.Suresh Kumar, learned Advocate for the revenue had appeared and stated that there has been a reallocation of briefs and revenue would be represented and the matter came to be adjourned on 10th August 2015 to 13th October 2015 and thereafter when once again at the instance of the revenue time was granted but since then on 8th June 2016 and 9th June 2016 when this matter was taken up for hearing, none appeared for the revenue.

11. We have therefore proceeded to hear and decide the matter unassisted by the revenue. In the course of his submissions Mr. Tralshawala had pressed into service inter alia the decision of the Calcutta High Court in Mather and Platt (India) Ltd. (supra) and submitted that merely because a person is not found at an address after several years it cannot be held that he is non-existent and that the assessee had discharged his primary onus by identifying the source of the amount paid. The Court observed that once the primary onus is discharged, the onus shifted to the revenue to verify genuineness of the transaction. In the present case no such effort was made by the revenue. We find that in Hastimal (supra) the Madras High Court observed that after a lapse of several years the assessee should not be placed upon the rack and called upon to explain not only merely, the origin and source of his capital contribution but the origin of origin and the source of source as well. In yet another case of Bahri Brothers (P)

Ltd. (supra) the Division Bench of Patna High Court observed that where the assessee upon whom the initial burden lies, produces bank certificate to establish that the transaction was carried out through account payee cheques thus disclosing the identity of the creditors as also the source of income, the burden shifts on to the department and the department cannot add the cash credits to his income from undisclosed source.

12. The Hon'ble Supreme Court in Nemi Chand Kothari (supra) observed that in order to establish the receipt of a cash credit, the assessee must satisfy three conditions i.e. identity of the creditor, genuineness of the transaction and creditworthiness of the creditor. In the instant case by virtue of the fact that the transaction was completed by cheque payments, the appellant has contended that it had satisfied all the three tests.

13. In Kishanchand Chellaram (supra) wherein the Supreme Court observed that the revenue authorities had not recorded the statement of the Manager of the bank and it was difficult to appreciate as to why it was not done and why the matter was not probed further by the revenue.

14. The Delhi High Court in Ashwani Gupta (supra)held that once there is a violation of the principles of natural justice

inasmuch as when its seized material was not provided to an assessee nor was he permitted to cross examine a person on whose statement the Assessing Officer relied, it would amount to deficiency, amounting to a denial of opportunity and therefore violation of principles of natural justice. In that case CIT (A) had deleted addition made by the Assessing Officer since the Assessing Officer had failed to provide copies of seized material to the assessee nor had he allowed the assessee to cross-examine the party concerned. The Division Bench held that once there is violation of the principles of natural justice inasmuch as seized material was not provided to the assessee nor was given opportunity of cross examining the person whose statement was being used against the assessee the order could not be sustained.

15. In M/s.Andaman Timber Industries (supra) the Supreme Court found that the Adjudicating Authority had not granted an opportunity to the assessee to cross examine the witnesses and the tribunal merely observed that the cross examination of the dealers in that case, could not have brought out any material which would not otherwise be in possession of the appellant-assessee. The Supreme Court set aside the impugned order and observed that it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross examination and make the remarks such as was done in

that case.

16. In the instant case although the appellant assessee has called upon us to draw an inference that the burden shifted to the revenue in the present case once it was established that the payments were made and repaid by cheque we need not hasten and adopt that view after having given our thought to various issues raised and the decisions cited by Mr.Tralshawalla and finding that on a very fundamental aspect, the revenue was not justified in making addition at the time of reassessment without having first given the assessee an opportunity to cross examine the deponent on the statements relied upon by the ACIT. Quite apart from denial of an opportunity of cross examination, the revenue did not even provide the material on the basis of which the department sought to conclude that the loan was a bogus transaction.

17. In our view in the light of the fact that the monies were advanced apparently by the account payee cheque and was repaid vide account payee cheque the least that the revenue should have done was to grant an opportunity to the assessee to meet the case against him by providing the material sought to be used against assessee in arriving before passing the order of reassessment. This not having been done, the denial of such opportunity goes to

root of the matter and strikes at the very foundation of the reassessment and therefore renders the orders passed by the CIT (A) and the Tribunal vulnerable. In our view the assessee was bound to be provided with the material used against him apart from being permitting him to cross examine the deponents. Despite the request dated 15th February, 1996 seeking an opportunity to cross examine the deponent and furnish the assessee with copies of statement and disclose material, these were denied to him. In this view of the matter we are inclined to allow the appeal on this very issue.

18. Once we take this view it is not necessary to consider the second question as to whether or not the Tribunal had erred in law in holding that the amendment to Section 147(3) with effect from 1st April, 1989 were applicable to reassessment proceedings against the appellant in respect of assessment year 1983-84. This issue can be considered in an appropriate case and need not detain us any further. Mr. Tralshawala had relied upon the decision in Ranchi Handloom Emporium (supra) which held that the Direct Tax Laws (Amendment) Act, 1987 came into force from 1st April, 1989. The case before that Court related to assessment year 1988-89 and the relevant accounting year being 9th July, 1986 to 27th June, 1987 and hence the Court held that there was no doubt that the assessment in that year would be

governed by the unamended provisions. The applicability of the amended provisions need not be gone into by us in the present case since we are of the view that on very first question, we are inclined to hold against the revenue and in favour of the assessee.

19. In the circumstances we pass the following order :

(i) We answer question no.(1) in favour of the assessee and against the revenue. In the above view in the present facts, question no.(2) becomes academic.

(ii) Appeal is allowed. No order as to costs.

(A.K. MENON,J.) **(M. S. SANKLECHA,J.)**