G.A.No.905 of 2015
G.A.No.904 of 2015
ITAT 46 OF 2015

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

CIT, BURDWAN
Versus
MIHIR KANTI HAZRA

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA
The Hon'ble JUSTICE ARINDAM SINHA

Date : 28th April, 2015.

Appearance :

Mr. S.Mookherjee,Advocate

Mr. Avratosh Mazumder,ld.Govt.Pleader & Advocate
Mr. Avra Mazumder, Advocate

The Court: The application for condonation of delay of 38 days in filing the appeal, after hearing the parties, is allowed. The application being G.A. No.904 of 2015 is thus disposed of.

The subject matter of challenge in the appeal is a judgement and order dated 10th September, 2014 passed by the learned Income Tax Appellate Tribunal pertaining to the assessment year 2006-07 by which the learned Tribunal reversed an order passed by the CIT (Appeals) concurring with the views of the assessing officer in so far as the addition under section 68 of the Income Tax Act

was made. The revenue has come up in appeal. The following questions have been suggested.

"(I) Whether the Income Tax Appellate Tribunal was correct in law in deleting the addition of Rs.41,15,000/-, which was made by the Assessing Officer under Section 68 of the Income Tax Act, 1961, and which was upheld by the Commissioner of Income Tax (Appeals) by ignoring the facts recorded by the Assessing Officer as also the Commissioner of Income Tax (Appeals) and whether in such view of the mater the decision of the Tribunal could be said to be perverse?

(II) Whether on the facts and in the circumstances of the present case the Tribunal was justified in law in applying the ratio in the case of Dataware Private Limited (being I.T.A.T. No.263 of 2011 passed by the Hon'ble Calcutta High Court) as such decision is clearly distinguishable from the facts of the present case?"

The facts and circumstances of the case, briefly stated, are that the assessee, in this case, has allegedly received unsecured loans for an aggregate sum of Rs.41,15,000/- from 39 persons.

Summons were issued to all 39 alleged lenders under section 131 of the Income Tax Act. Notices sent to 9 of them came back with the endorsement "Not

Known". Notices were served upon the balance 30 persons. 22 of them did not turn up. 8 of them did. Some of them deposed that they never lent any money. Some of them were undecided. The assessing officer, for reasons recorded, was of the opinion that the creditworthiness of the alleged creditors and the genuineness of the transactions were not proved by the persons who responded to the summons under section 131. Those who did not turn up, naturally, were not examined. The assessee failed to furnish any further explanation.

It is, in that view of the matter, the addition under section 68 of the Income Tax Act was made for the aforesaid sum of Rs.41,15,000/-. The CIT (Appeals) concurred with the views of the assessing officer. The learned Tribunal, however, has set aside the order of the CIT (Appeals) for the following reasons:-

" We have considered the rival submissions. A perusal of the paper book as filed by the assessee shows that the assessee has provided Permanent Account Numbers and the confirmation of the loans by all the loan creditors. Further a perusal of the paper book clearly shows that all the creditors are assessed to income tax and they have filed their returns on income for the assessment year 2006-07 in March, 2007. The assessment in the case of the assessee has been initiated only after March, 2007, so obviously it cannot be assumed that the returns had been filed by the creditors after the initiation of the assessment proceedings in the case of the assessee. Further a perusal of the paper book clearly shows that the

return acknowledgement, computation of income along with the Capital A/c. and the affidavits of the creditors were before the Assessing Officer. This fact being undisputed clearly the decision dated 21.09.2011 of the Hon'ble jurisdictional High Court in the case of Dataware Private Limited is squarely applicable on the facts of the assessee's case. Consequently respectfully following the decision of the Hon'ble jurisdictional High Court in the case of Dataware Private Limited referred to supra as also the decision dated 15.07.2014 of the coordinate Bench of this Tribunal in the case of Jyoti Saraf referred to supra, the addition as made by the Assessing Officer and as confirmed by the Ld.CIT (Appeals) stands deleted."

The learned Tribunal, it is obvious, did not examine the correctness of the views expressed by the assessing officer and the CIT (Appeals). No reasons have been disclosed as to why the views expressed by the CIT (Appeals) and the assessing officer are wrong.

The learned Tribunal proceeded to set aside the order without any examination whatsoever of the views expressed as would appear from the paragraph quoted above.

It is now well settled that creditworthiness of the alleged creditors and the source of the source are relevant enquiries. Reference, in this regard, may be

made to the judgement in the case of CIT –Vs- Precision Finance Pvt. Ltd. reported in (1994) 208 ITR 465 wherein the following views were expressed:-

"It is for the assessee to prove the identity of the creditors, their creditworthiness and the genuineness of the transactions. In our view, on the facts of this case, the Tribunal did not take into account all these ingredients which have to be satisfied by the assessee. Mere furnishing of the particulars is not enough. The enquiry of the Income-tax Officer revealed that either the assessee was not traceable or there was no such file and, accordingly, the first ingredient as to the identity of the creditors had not been established. If the identity of the creditors had not been established, consequently the question of establishment of the genuineness of the transactions or the creditworthiness of the creditors did not and could not arise. The Tribunal did not apply its mind to the facts of this particular case and proceeded on the footing that since the transactions were through the bank account, accordingly, it is to be presumed that the transactions were genuine. It was not for the Income-tax Officer to find out by making investigation from the bank accounts unless the assessee proves the identity of the creditors and their creditworthiness. Mere payment by account payee cheque is not sacrosanct nor can it make a non-genuine transaction genuine."

An appellate authority, it is well settled, does not interfere because the order is not right. The appellate authority has jurisdiction to interfere only when the order is wrong.

Reference may be made to the judgement of the Apex Court in the case of The Dollar Company –Vs-Collector of Madras reported in AIR 1975 SC 1670.

Mr. Majumdar, learned counsel appearing for the assessee-respondent drew our attention to a judgment of the Apex Court in the case of *C.I.T. Vs. Orissa Corporation Pvt. Ltd.* reported in *1986 (Supp.) SCC 110*. What had happened in that case was that a loan for a sum of Rs.1,50,000/- allegedly obtained by the assessee had been added back under Section 68 of the Income Tax Act. The assessee had produced documentary evidence to show that the loan was backed by hundi transaction. Discharged hundies were also produced by him. But the lenders could not be produced for the purpose of giving evidence. The assessee wanted more time to adduce evidence in support of the loans he had obtained which the assessing officer refused to give. It is in that case that the Tribunal and the High Court had held in favour of the assessee and the Supreme Court refused to interfere. The views expressed by the Supreme Court in paragraph 13 are as follows;-

"13. In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income tax assessees. Their index number was in the file of the Revenue. The Revenue, apart from issuing notices under Section 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assesee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."

The law laid down by their Lordships in the peculiar facts of that case does not apply to the case before us because in this case the assessee was given fullest opportunity to prove his case. The view that the source of income of the creditors and their creditworthiness was required to be gone into militates against the view taken by the Tribunal.

In the case of Sreelekha Banerjee referred to in paragraph 11 of the judgement, the views expressed were as follows:-

"11. In Sreelekha Banerjee v. CIT, this Court held that if there was an entry in the account books of the assessee which showed the receipt of a sum on conversion of high denomination notes tendered for conversion by the assessee himself, it is necessary for the assessee to establish, if asked, what the source of that money was and to prove that it was not income. The department was not at that stage required to prove anything. It could ask the assesse to produce any books of account or other documents or evidence pertinent to the explanation if one was furnished, and examine the evidence and the explanation. If the explanation showed that the receipt was not of an income nature, the department could not act unreasonably and reject that explanation to hold that it was income. If, however, the evidence was unconvincing then such rejection could be made. The department cannot by merely rejecting unreasonably a good explanation, convert good proof into no proof."

For the aforesaid reasons, we are of the opinion that the view taken by the learned Tribunal is not sustainable. The first question is answered

in the negative and in favour of the revenue. The second question need not be answered except for observing that the facts and circumstances are distinguishable. The appeal is thus admitted and disposed of.

(GIRISH CHANDRA GUPTA, J.)

(ARINDAM SINHA, J.)

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