

**HON'BLE SRI JUSTICE L. NARASIMHA REDDY
AND
HON'BLE SRI JUSTICE T. SUNIL CHOWDARY**

REFERRED CASE No. 64 OF 2002

24-10-2014

BETWEEN

The Commissioner of Income Tax, Karnataka, Central, Bangalore
...Applicant

And

Shri Ramdas Motor Transport Ltd, Kakinada
.....Respondent

**HON'BLE SRI JUSTICE L. NARASIMHA REDDY
AND
HON'BLE SRI JUSTICE T. SUNIL CHOWDARY**

REFERRED CASE No. 64 OF 2002

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ORDER: (per the Hon'ble Sri Justice L. Narasimha Reddy)

This reference under Section 256(1) of the Income Tax Act, 1961 (for short, 'the Act') is at the instance of the Revenue.

The facts, in brief, that gave rise to the making of the present reference are as under:

The respondent is a manufacturer of automobile parts. It also undertakes several other business activities including the one in transport. For the assessment year, 1984-85, it submitted returns wherein deduction of a sum of Rs.84,76,463/- was claimed towards commission and brokerage on sale of automobile parts, said to have been made in favour of four firms, namely (1) Shri Bhanu Enterprises, Kakinada (2) Shri Bhaskara Auto Service, Kakinada (3)

Shri Prabhakar Enterprises, Kakinada and (4) Mehta Trading Company, Bombay. That plea however was not accepted and deduction was denied. The assessing officer relied upon a statement recorded from the Managing Director of the assessee company, during the course of search conducted in the year 1988 and took the view that the so-called payment of commission and brokerage to authorised dealer-firms was nothing but a device to evade tax. For the assessment year 1985-86, claim for deduction under the same heading for a sum of Rs.97,67,302/- was made. Here again, the assessing officer relied upon the statement recorded under Section 132(4) of the Act and disallowed the claim to the extent of Rs.56,16,426/-. Against the order of the assessing officer for the two assessment years, two appeals were filed before the Commissioner of Income Tax (Appeals), Vijayawada. The Commissioner (Appeals) partly allowed the appeals and allowed deduction, to the extent of Rs.76,76,463/- for the assessment year 1984-85 and Rs.21,29,278/- over and above what was allowed by the assessing officer for the assessment year 1985-86. The Revenue, on the one hand and the assessee, on the other hand filed two appeals each, before the Hyderabad Bench 'A' of the Income Tax Appellate Tribunal (for short, 'the Tribunal') feeling aggrieved by the orders passed by the Commissioner (Appeals).

The principal contention before the Tribunal was as to whether it was open for the assessing officer to take into account, the statement recorded under Section 132(4) of the Act, at a subsequent point of time. The department pleaded that in view of the amendment to the provision, it was open to them to place reliance upon the statement even in respect of the proceedings that are referable to earlier assessment years. The contention of the respondent-assessee was two fold. The first was that the amendment was prospective in nature and the second was that even on merits, the statement recorded under Section 132(4) has no evidentiary value since it has been retracted by the person from whom it was recorded.

The Judicial Member accepted the contention of the Revenue, whereas the Accountant Member held the other way. Therefore, the matter was referred to a third member. He agreed with the Accountant Member. As a result, the appeals preferred by the assessee were allowed and those preferred by the Revenue were dismissed. The Revenue filed R.A Nos.250, 251, 430 and

431/Hyd/1991 in the appeals, with a request to refer the following questions to this Court, for answer:

“1. Whether the interpretation of Appellate Tribunal as regards the scope and ambit under section 132(4) is correct?

2 . Whether the Appellate Tribunal is justified in holding that Explanation to sec.132(4) is prospective in nature though the said explanation laid down only rule of evidence and in that sense it is only procedural in nature?”

Questions were accordingly referred. However, on an earlier occasion this Court refused to answer the reference. Thereupon, the matter was carried by the department to the Hon’ble Supreme Court. The appeals were allowed by the Supreme Court. In addition to directing that the questions framed in the application be answered, the Supreme Court directed as under:

“Should the High Court come to the conclusion that the Explanation to section 132(4) is retrospective in nature. It shall consider whether the Tribunal was right in the order that it passed, having regard to the evidence on record.”

In view of this development, the Tribunal passed an order dated 11-12-2001, referring the questions to this Court.

Sri S.R. Ashok, learned Senior Counsel for the Revenue submits that the companies to which the respondent is said to have paid commission are nothing but name lenders and they are in fact the branches or establishments of the same family that owns and controls the respondent. He submits that through a specific amendment, the Parliament empowered the authorities under the Act, to rely upon the statement recorded during the course of a search of the premises of an assessee, not only in the proceedings pertaining to the block period, but also in relation to any other proceedings and that the amendment being clarificatory in nature would cover all the proceedings that were pending, by the time the statement was recorded. He further submits that Section 132(4) of the Act is purely procedural in nature and any amendment to it would date back to the origin of the provision. He has placed reliance upon the judgments of the Supreme Court in ***Commissioner of Wealth Tax v. Sharvan Kumar Swarup*** and ***Pooran Mal v. Director of Inspection***.

Sri Y. Ratnakar, learned counsel for the respondent, on the other hand, submits that the search took place in the year 1988 and the assessment orders in question are referable to 1984-85 and 1985-86 and that the returns for those two years cannot be processed with reference to the events that have taken place at a later stage. He contends that mere delay in passing of assessment orders cannot be a factor to superimpose the subsequent events, particularly when each year constitutes a unit by itself, under the Act. Learned counsel further submits that any provision that entails in disadvantage or penal consequences cannot be given retrospective effect.

It is also urged that even on merits, the so-called statement of the Managing Director cannot constitute basis since it was already retracted and that the assessing officer did not press into service, any independent material other than the statement.

The orders passed, in relation to the returns filed by the respondent for the assessment years 1984-85 and 1985-86 are in question. In respect of both the assessment years, the respondent claimed deduction of amounts said to have been paid towards “commission and brokerage, to authorised dealer-firms”. The amounts are indeed substantial. For one reason or the other, there was delay in passing assessment orders for those two years. In the meanwhile, a search was conducted in the premises of the respondent in the year 1988. Statement is said to have been recorded under Section 132(4). The concerned person however retracted from the contents thereof and alleged that the statement was forcibly extracted from him.

Through amendment caused to Section 132(4) of the Act, the Parliament empowered the authorities under the Act to use the statements recorded thereunder, for the proceedings under other sections, also in relation to the same assessee. After the amendment, the provision reads:

“132(4): The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act (XI of 1922), or under this

Act.”

The assessing officer relied upon this and, took into account, the statement recorded from the Managing Director in the year 1988. On that basis, he disbelieved the very payment of commission to the dealers. According to him, the so-called dealers, are none other than the puppet establishments of the respondent. For the assessment year 1984-85, he totally disallowed the claim, and for 1985-86, he allowed the claim in part. In the appeals preferred by the assessee, the Commissioner granted substantial relief. He expressed the view that the statement recorded in the search conducted in the subsequent years cannot constitute the basis to disallow the deduction. In the further appeals preferred by the department, on the one hand and the assessee, on the other hand, initially there was a difference of opinion. Therefore the appeal was listed before a third member. Ultimately, the majority view was in favour of the assessee.

The gist of the reference as sought by the department is as to whether the explanation added to Section 132(4) of the Act can be said to be retrospective or prospective in nature. If it is held that the explanation is retrospective in operation, the second question that arises, in view of the observation made by the Hon'ble Supreme Court is as to whether on merits, the statement recorded under Section 132 of the Act could constitute proper evidence to support the conclusion arrived at by the assessing officer.

Answering the first question is by no means a simple task. Several concepts need to be taken into account in this behalf. The discussion must start from the ordinary basic premise that unless the Legislature expresses the view otherwise, the provision enacted by it is always deemed to be prospective in operation. There are certain exceptions to this general principle. If the amendment is to a provision which is purely procedural in nature, the amendment is treated as retrospective, meaning thereby that the provision carried the meaning ascribed to it through the amendment, from the initial stage itself. Though it is not difficult to express this in theory, several problems arise in practice.

The first is in the context of the classification itself. Many a time, a

provision though occurs in an enactment which is procedural in nature, partakes the substantive characters. Further, in a given case, a particular provision can be purely procedural in nature or though may appear to be procedural, may contain substantive aspects hidden therein. It is only on reading the relevant provision and by taking into account, the purport of the enactment, that the Court can make an attempt to answer a question of that nature. It becomes difficult to formulate a general principle, covering all the situations.

The Income Tax Act contains substantive as well as procedural provisions. For example, the provisions concerning the method of determination of income or allowing depreciations or deductions do not have any traces of procedure in them. They are substantive provisions, pure and simple. In contrast, the provisions stipulating the time within which a return must be filed or the advance tax must be paid, the form in which the notices must be issued or the method in which the appeals must be preferred, are procedural in nature. Section 132(4) can be treated as procedural as long as it enables the authority under the Act to record a statement. However, the legal effects flowing from the statement so recorded as mentioned in explanation, cannot be treated as purely procedural.

The point of distinction can be demonstrated by taking the example of the filing of an F.I.R in a criminal case under the Criminal Procedure Code. The filing of the F.I.R is procedural from the point of view of the complainant and the prosecution. However with the submission thereof, a set of rights stand accrued to the accused. He may take advantage of any inconsistency in the F.I.R at a later stage or can attack the very authenticity of the F.I.R if it is filed with unexplained delay. The examples can be multiplied. The effort is only to demonstrate that there hardly exists a universal test, which can yield a result vis-à-vis the classification of the provisions of the enactment. Similar examples can be culled out from the Code of Civil Procedure, and other enactments.

Even while leaning towards the principle that amendment to a provision which is procedural in nature can be taken as retrospective, the Courts have been cautious. For example, in ***Sharvan Kumar Swarup's*** case (1 supra) after referring to Indian and English precedents on the subject, the Supreme Court observed:

“No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done.”

It is true that if one traces any substantive right back far enough it will be found secreted in the interstices of procedure.

(Emphasis is of ours)”

The distinction between the charging provision on the one hand and machinery provisions on the other, in a tax enactment is also explained as under:

“It is important to distinguish between charging provisions, which impose the charge to tax, and machinery provisions, which provide the machinery for the quantification of the charge and the levying and collection of the tax in respect of the charge so imposed. Machinery provisions do not impose a charge or extend or restrict a charge elsewhere clearly imposed.”

The subject matter before the Hon’ble Supreme Court was the right of appeal, and their Lordships held that no individual has a substantive right of appeal and much would depend upon the procedure that is in vogue, at the relevant point of time.

In ***Pooran Mal v. Director of Inspection*** (2 supra), a Constitution Bench of the Supreme Court examined the constitutional validity of certain parts of Section 132 itself. Even while upholding the provision, their Lordships stressed the importance of fair play and reasonableness. After referring to the protection given under the constitution against self-incrimination, their Lordships observed:

“In other words, search and seizure for the purposes of preventing or detecting crime reasonably enforced was not inconsistent with the constitutional guarantee against search and seizure. It was held in that case that the search of the appellant by a police officer was not justified by the warrant nor was it open to the officer to search the person of the

appellant without taking him before a Justice of the Peace Nevertheless it was held that the court had a discretion to admit the evidence obtained as a result of the illegal search and the constitution protection against search of person or property without consent did not take away the discretion of the court. Following *Kuruma v. Queen* ([1955] A.C. 197 (P.C.)) the court held that it was open to the court not to admit the evidence against the accused if the court was of the view that the evidence had been obtained by conduct of which the prosecution ought not to take advantage. But that was not a rule of evidence but a rule of prudence and fair play. It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law of evidence obtained as a result of illegal search or seizure is not liable to be shut out.”

We are therefore of the view that the effect of explanation to Section 132(4) of the Act is that the assessing officer can rely upon it in respect of pending proceedings also, as a piece of evidence, but not as the sole basis for imposing additional financial liability upon an assessee either in the form of denial of benefits which an assessee is otherwise entitled to, or subjecting him to prosecution. To be more precise, if there exists any other supportive material, the statement recorded under Section 132(4) can certainly be taken aid of. Conversely, in the absence of other supporting material, a statement of that nature cannot constitute the basis to burden an assessee.

The second question which is referable to the observation of the Hon’ble Supreme Court, namely, whether the statement recorded under Section 132(4) in the instant case would constitute valid evidence is equally important. In a way, it stood answered in the preceding paragraph. However, to be more clear we express the view that even in relation to the very block assessment, a statement referable to

Section 132(4), but retracted by the person cannot constitute the sole basis. It can be relied upon if (a) it is not retracted from and (b) even if it is retracted from, it is supported by other material. The communication dated 11-03-2003 of the department to its officials throws light upon this. In ITTA No. 112 of 2003, decided on 09-09-2014, this Court took the said communication and the relevant provisions of the Act, and held:

“If the statement made during the course of search remains the same, it can constitute the basis for proceeding further under the Act, even if there is no other material. If, on the other hand, the statement is retracted, the

Assessing Officer has to establish his own case. The statement that too, which is retracted from the assessee, cannot constitute the basis for an order under Section 158BC of the Act.”

The same factual situation obtains in the present case also. The statement has been retracted and the department did not press into service, any other material. If such a statement cannot constitute the basis in respect of the very block assessment, the question of it being treated as adequate for the assessments preceding the search, does not arise.

We, therefore, answer the questions against the Revenue. There shall be no order as to costs.

L. NARASIMHA REDDY, J

T. SUNIL CHOWDARY, J

24-10-2014

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Note:

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