

(2004) 09 CAL CK 0013

Calcutta High Court

Case No: GA No. 2171 of 2000 and IT Appeal No. 210 of 2000

Exoimp Resources (India) Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision: Sept. 30, 2004**Acts Referred:**

- Income Tax Act, 1961 - Section 68

Citation: (2005) 195 CTR 226 : (2005) 276 ITR 87**Hon'ble Judges:** Tapan Kumar Dutt, J; D.K. Seth, J**Bench:** Division Bench**Advocate:** J.P. Khaitan, S.K. Poddar and Raj Lakshmi De, for the Appellant; S.N. Dutt, for the Respondent**Final Decision:** Allowed

Judgement

D.K. Seth, J.

The question :

The question of law that has been raised by Mr. Khaitan in this appeal is that despite the explanation in terms of Section 68 was furnished by disclosing the list of subscribers along with the particulars of the permanent Income Tax account number, wherever available, and the numbers of shares allotted and the face value of the shares, the AO added the share capital as undisclosed income of the assessee without arriving at any conclusion as to the question whether the explanation was satisfactory or not.

The appellant's contention :

2. Mr. Khaitan submits that this was done by the AO on the ground that no documents were furnished by the assessee despite opportunity being given. The CIT(A) affirmed the said order of the AO on the same ground. The details of the documentary evidence were not furnished. The Tribunal affirmed the order of the

CIT(A) and the AO on two-fold reasons : (1) that the paper book that was filed did not bear any certificate that the documents included in the paper book are corrected copies of the records before the AO, and (2) that the statement of facts and the ground of appeal were not signed.

2.1 According to Mr. Khaitan, this was an infraction of the principle laid down in the decision in [Hindusthan Tea Trading Co. Ltd. Vs. Commissioner of Income Tax](#), and [Commissioner of Income Tax Vs. Kundan Investment Ltd.](#), . Inasmuch as it was incumbent on the AO, if any explanation was submitted, to record his observation as to the satisfactory nature of the explanation before adding the share capital as undisclosed income. The CIT(A) ought to have noticed whether this explanation was on record or not without proceeding with the surmises that this was not on record. The Tribunal ought not to have proceeded on purely technicalities.

Respondent's contention :

3. Mr. Dutt, on the other hand, contends that no explanation was ever submitted before the AO. As such, there was no scope for infraction of the principle laid down in those two decisions on which he relied upon to contend that the power of the AO u/s 68 is absolute where no explanation is submitted. In the present case, no explanation having been submitted there was no infraction of the principle laid down in the said decision and as such, the appeal should be dismissed.

Irregularities : Technicalities : Whether should prevail :

4. After having heard the learned counsel for the parties, it appears that the learned Tribunal had dismissed the appeal on two-fold reasons; first, that the paper book was not appended with a certificate that the papers included in the paper book were correct copies of the papers on the record; and second, that the statement of facts and the ground of appeal before the CIT(A) were not signed. From the facts, it appears that CIT(A) did not hold that the appeal was not maintainable on the ground that the statement of facts and the ground of appeals before it were not signed. Thus, if in the paper book the signature does not appear or the certificate in the paper book is not incorporated, in that event, the same may be an irregularity but not an illegality, which is not capable of being corrected. The authorities are not supposed to proceed only on technicalities. If there are irregularities, which can be corrected without inflicting any prejudice to the other side, in that event, such technicalities should not be allowed to prevail. Such irregularities should be allowed to be corrected. The authorities should not proceed purely on technicalities. The only thing the CIT(A) or the Tribunal could do was to find out as to whether the explanation was filed before the AO or not simply by calling for and examining the record of the AO itself.

Scope of Section 68 vis-a-vis the present case :

4.1. When Section 68 of the IT Act, 1961 is invoked and a notice is issued if the assessee furnishes an explanation, it is incumbent upon the AO to examine the explanation and arrive at a conclusion as to whether the explanation was satisfactory. The conclusion arrived at by the AO is to be communicated to the assessee if the explanation is not satisfactory. If thereupon the assessee submits any comments or furnishes further information, in that event, the AO has to examine the same and arrive at his own conclusion. The inbuilt safeguard provided in Section 68 cannot be ignored by the AO. The AO can add the share capital as an undisclosed income if no explanation is offered by the assessee. But since the explanation was offered, it was incumbent on the AO to examine the same and arrive at a conclusion.

4.2. In the present case, it is being alleged by Mr. Dutt that no such explanation was given. On the other hand, Mr. Khaitan submits that such explanation was furnished. Copy of such explanation has been included in the paper book before the CIT(A) as well as before the Tribunal. These were discarded on the ground that these were copies and it is also recorded in the respective orders that no documentary evidence was furnished. It is immaterial whether documentary evidence was furnished or not. It is necessary to examine the explanation furnished and arrive at a conclusion. If such conclusion cannot be arrived at without a document, in that event, it is open to the AO to ask for production of such document. From the record, it does not appear that any such step was taken. Even if, thereafter, no such document is produced, in that event, the AO has to record his conclusion that the explanation without the documentary evidence is not satisfactory. From the orders that has been placed before us, it does not appear that it can be Conclusively determined that no such explanation at all ever submitted. Therefore, it is necessary to examine the records of the AO to find out the truth as to whether any explanation was at all submitted or not.

4.3. We are arriving at this conclusion relying on the decision of this Court in [Kali Charan Ram Chander Vs. Commissioner of Income Tax](#), . In that case the Court had held that ordinarily an appeal should be decided by the Tribunal on the materials before it. This rule is, however, subject to a further rule, namely, that if the Tribunal is unable to decide the appeal on the materials before it or if the relevant facts for deciding the appeal are not before it, it may adopt any one of the three alternative courses which are open to it in order to do substantial justice between the parties. It may admit further evidence and decide the appeal. Or it may keep the appeal pending before it and direct any one of the authorities below to ascertain further facts, which are essential for the purpose of determination of the appeal and then on the basis of the remand report may decide the appeal or it may remit the appeal. In such a case merely because the parties did not ask for an opportunity of adducing further evidence, the Tribunal is not debarred from directing the AAC to take additional evidence on the lines indicated in its order and on the basis of such additional evidence to decide the appeals. The above decision in Kali Charan Ram

Chander (supra) had followed the decision of the Gujarat High Court in [Commissioner of Income Tax, Gujarat-II Vs. Sayaji Mills Ltd.,](#) .

Conclusion :

5. When such situation arises before the CIT(A) or the Tribunal, in that event, it is incumbent on the authority concerned to examine the record itself and find out for himself as to whether this explanation is on record or not. In the circumstances, it appears that the authorities had failed to act in accordance with the principles to be followed while invoking Section 68 and adding back share capital as undisclosed income.

5.1 For the reasons aforesaid, we purpose to remit the case back to the Tribunal in order to take a decision as to whether the explanation as is appearing at pp. 28 to 37 of this paper book was furnished to the AO before the assessment was made by the AO. In case no such explanation was filed before the AO before the assessment was made, in that event, the order passed by the Tribunal and the CIT(A) shall stand affirmed. In case it is found that such explanation was furnished to the AO before the assessment was made by the AO, in that event, the matter should be remitted by the learned Tribunal to the AO for examining the said explanation and arrive at a conclusion after giving opportunity to the assessee in terms of the principles laid down in Hindustan Tea Trading Co. Ltd. (supra) and Kundan Investment Ltd. (supra).

Order :

6. In the result, this appeal succeeds and is allowed. The order of the learned Tribunal subject to this order shall remain suspended and the appeal is remitted to the Tribunal for examining the record in the light of the observation made in para 5.1 above. The Tribunal shall examine the record of the AO and find out as to whether such explanation was filed before the AO before the assessment was made. If the Tribunal finds that no such explanation was furnished before the AO, in that event, the order of the AO, the CIT(A) and that of the Tribunal shall stand affirmed. In case Tribunal finds that such explanation was filed before the AO, in that event, the order of Tribunal and the CIT(A) shall stand set aside and the Tribunal shall remit the matter before the AO only to the extent of the case in relation to the adding back of the share capital u/s 68 with direction to the AO for deciding the question in accordance with law after giving opportunity to the parties upon examining of the explanation furnished on the principle laid down in Hindustan Tea Trading Co. Ltd. (supra) and Kundan Investments (supra).

6.1 The appeal is, thus, allowed. There will, however, be no order as to costs.