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**(2003) 03 CAL CK 0033**

**Calcutta High Court**

**Case No:** IT Ref. No. 104 of 1995 17 March 2003

Commissioner of Income Tax

APPELLANT

Vs

Kamdhenu Vyapar Co. Ltd.

RESPONDENT

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**Date of Decision:** March 17, 2003

**Acts Referred:**

- Income Tax Act, 1961 - Section 68

**Citation:** (2003) 182 CTR 600 : (2003) 130 TAXMAN 147

**Hon'ble Judges:** R.N. Sinha, J; D.K. Seth, J

**Bench:** Full Bench

**Advocate:** D.K. Someand P.K. Bhowmick, for the Revenue S. Bagchiand R.C. De, for the Assessee, for the Appellant;

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### **Judgement**

@JUDGMENTTAG-ORDER

D.K. Seth, J.

This matter was disposed of by an order dated 13-3-2003. After the order was dictated, Mr. Bagchi appeared and mentioned. He submitted that because of some unforeseen circumstances, he was unable to come to the court within time and, therefore, he could not present himself at the time of hearing. We, therefore, did not sign the order dictated and kept the matter for hearing. The order dated 13-3-2003 is hereby recalled. By consent of parties, the matter is treated as on days list for hearing. The matter is taken up for hearing today.

2. Mr. Bagchi points out that he is only concerned with one question that there was a request for issuing summons u/s 131 of the Income Tax Act, 1961 by the assessee which finds mention at page 13 of the paper book being the order of the assessing officer (Income Tax Officer) and at page 29 of the paper book being the order of Commissioner (Appeals). According to him, in the proceeding u/s 68 of the Act, the onus or burden is on the assessee to establish the identity of the subscribers and

prove their creditworthiness and the genuineness of the transaction. According to him, in this case the material particulars relating to these ingredients had since been produced. The assessing officer had accepted the contention of the assessee with regard to those persons who were Income Tax assesseees. But in respect of 21 persons, who were not Income Tax assesseees, the assessing officer had added the amount to the income of the assessee u/s 68 of the Act. The Commissioner (Appeals) had held that it was the responsibility of the assessee to establish the identity of the shareholders and prove their creditworthiness and the genuineness of the transactions. By reason of prima facie discharge through disclosure of some materials, the onus did not shift on the department. Therefore, there was no scope for issuing summons u/s 131 at the request of the assessee. Here Mr. Bagchi joins issue. According to him, as soon a request for issuing summons u/s 131 was made, it was incumbent on the assessing officer to issue the summons. Without such summons, it could not be examined as to whether the assessee was able to discharge the prima facie proof of the genuineness of the transaction. Therefore, failure to do so had vitiated the whole process of the enquiry contemplated u/s 68 of the Act. He relies on two decisions viz., [Munnalal Murlidhar Vs. Commissioner of Income Tax](#), and [Food Corporation of India Vs. Provident Fund Commissioner and Others](#),, to support his contention.

3. Mr. Some, on the other hand, contends that until and unless the prima facie proof was discharged by the assessee, the onus would never shift on the assessing officer. Therefore, there was no necessity of issuing any summons u/s 131 on his part. He secondly contended that even if the assessee had made a request for issuing of summons, such summons could not be issued u/s 131 until and unless the assessee took effective steps for issuing summons as contemplated under order 16 rule 1 of the CPC (hereinafter referred to as the CPC). According to him, it was incumbent on the assessee to prove the genuineness of the transaction. Mr. Some relies on the decisions in [Thiagarajar Charities Vs. Additional Commissioner of Income Tax](#), and [Sri Jagdish Saran Shukla Vs. Commissioner of Income Tax](#), , [Shankar Industries Vs. Commissioner of Income Tax, Central](#), and [Sarogi Credit Corporation Vs. Commissioner of Income Tax](#), to support his contention.

4. After hearing the learned counsel for the parties, it appears from the order of the assessing officer at page 13 of the paper book that by two letters, the assessee had requested in the matter of production of shareholders which finds more elaborated and clarified in the order of the Commissioner (Appeals) at page 20 of the paper book. Whereas the Commissioner (Appeals) had observed that there was no doubt that at the assessment stage request was made to the Income Tax Officer to issue notice u/s 131 to the individual shareholders. But the Commissioner (Appeals) had held that the onus of proving the genuineness of credits was on the assessee as was held in Shankar Industries case (supra). Therefore, the Income Tax Officer was not required to issue notice u/s 131 to those alleged shareholders simply on the basis of their names and addresses furnished by the assessee. It appears from the order of

the learned Tribunal, at pages 35-36 of the paper book, that the learned Tribunal was satisfied that the assessee-company had filed adequate evidence and materials to justify and substantiate its claim, therefore, the Commissioner (Appeals) was not justified in spite of positive evidence on record in confirming-the addition u/s 68 of the Act.

5. Thus, it appears that the Commissioner (Appeals) proceeded on the basis that it was not necessary to issue summons u/s 131 until the assessee was able to prove at least prima facie the genuineness with regard to the transaction; whereas the learned Tribunal had found that there were sufficient materials to hold otherwise. But at the same time, the learned Tribunal was oblivious of the situation as available u/s 68 and there being in fact no material to establish the identity of those 21 shareholders or to prove their creditworthiness or the genuineness of the transaction, It cannot be said that there was sufficient material and the onus could not be said to have been shifted on the department. There the learned Tribunal was incorrect.

6. Simple disclosure of certain materials will not help the assessee to discharge the onus lay on him. Admittedly, as was held in Shankar Industries case (supra), until the onus is prima facie discharged by the assessee, it never shifts on the department. But in order to ascertain that prima facie onus has or has not been discharged, the assessing officer has a duty to enquire into the materials so disclosed. This is necessary in order to ascertain whether the same is sufficient to discharge prima facie onus that lay on the assessee or not. It cannot close its eyes and refuse to look into the materials disclosed. It has to examine the materials placed before it. While examining, it may not assist the assessee, but the assessee may seek assistance of section 131 of the Act for the purpose of proving its own case. Section 131 empowers the assessing officer to exercise the same power as vested in a civil court for compelling attendance of witnesses. But the rigours provided in order 16 CPC cannot be borrowed in a proceeding under this Act where the proceedings are not in the nature of an adversary system and particularly when the proceedings stand altogether on a different footing than a suit and the onus of proof in such a case is on the assessee against whom the allegation is made. Neither rule of evidence as provided for in the Evidence Act in its strict sense nor the normal procedure of the CPC can be attracted unless it is made specifically applicable by the statute or the rules in the process itself. Therefore, when an assessee seeks assistance even by way of a letter in the form of a request, even then it can be said to be a step taken for issuing of summons. It is the power not the procedure that has been borrowed u/s 131 of the Act. An opportunity in-built in section 68 of the Act has been given to the assessee to prove to the satisfaction of the assessing officer that the apparent is real and transaction was genuine. In the process of availing of such opportunity, the assessee may seek aid of section 131 of the Act. If in the process, in order to secure attendance of the subscriber a request is made by the assessee to the assessing officer for issuing of summons, it is incumbent on the assessing officer to issue such

summons in order to enable the assessee to avail of the opportunity provided by the statute, otherwise the assessing officer would be denying the opportunity provided to the assessee, in-built in section 68 of the Act.

7. Failure to issue summons u/s 131 of the Act on the request of the assessee in order to enable him to discharge his prima facie onus is vital to the proceedings. Without such request, there is no duty cast on the assessing officer to issue summons u/s 131, unless the assessing officer on its own deems it proper to do so. But as soon a request is made, it becomes incumbent on the assessing officer to issue such summons in order to enable the assessee to avail of such opportunity. After such issuance of summons, if those were not responded to or returned without service, the assessing officer is free to take his own decision as it may deem fit and proper.

8. In the facts and circumstances of this case, despite request made by the assessee, no summons u/s 131 of the Act was issued. This seems to be a denial of the assessee's right of opportunity in-built in section 68 of the Act available to it. This has vitiated the process. The question is required to be determined in the light of decision in Hindusthan Tea Trading Co. Ltd. v. CIT (IT Reference No. 20 of 1996, dated 11/12-3-2003) and CIT v. Ruby Traders & Exporters Ltd. (IT Reference No. 78 of 1995, dated 12-3-2003). In the light of the observations made in those two decisions having regard to the facts and circumstances of the case, we answer the question No. 1 in the negative in favour of the revenue; but, however, we remand the case before the learned Tribunal for deciding the same afresh, since in our opinion, there is no sufficient material to come to a definite conclusion. The learned Tribunal will remit the matter to the assessing officer for issuing summons u/s 131 of the Act on the said 21 shareholders and then record the evidence, if available, and return the same after giving opportunity to the assessee and recording it properly to the learned Tribunal. On the basis of such materials, the learned Tribunal shall decide the question in the light of the observation made in the aforesaid two decisions, namely, Hindusthan Tea Trading Co. Ltd.'s case (supra) and Ruby Traders & Exporters Ltd.'s case (supra) afresh. The assessing officer shall record the evidence within a period of three months and return the same to the learned Tribunal and the learned Tribunal shall decide the question within a period of six months from the date of communication of this order.

9. So far as the question No. 2 is concerned, we do not express any opinion at this stage. The same will be taken up by the learned Tribunal after the decision on the quantum proceeding in terms of this order. However, the question No. 2 is answered in the affirmative in favour of the revenue at this stage subject to the fresh decision that might be taken by the learned Tribunal on the basis of the result of the quantum proceeding.