

*** THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN**

AND

THE HON'BLE SRI JUSTICE N. TUKARAMJI

+ I.T.T.A.No.205 of 2006

% 01.02.2023

Between:

M/s. Sree Trading Corporation,
Rep. by its Managing Partner Sri K.Taher Mahi,
S/o. Sri K.Mahipathi Rao,
having its office at 1-2-288/23/1,
Domalguda, Hyderabad.

Appellant

VERSUS

Income Tax Officer,
Ward 41, Hyderabad.

Respondent

! Counsel for Appellant : Ms. I.Maamu Vani

^ Counsel for respondent : Mr. J.V.Prasad

<GIST:

> HEAD NOTE:

? Cases referred

¹ 1980 (Supp) Supreme Court Cases 660

² (2016) 15 SCC 785

THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN**AND****THE HON'BLE SRI JUSTICE N. TUKARAMJI****I.T.T.A.No.205 of 2006****JUDGMENT:** *(Per the Hon'ble the Chief Justice Ujjal Bhuyan)*

Heard Ms. I.Maamu Vani, learned counsel for the appellant and Mr. J.V.Prasad, learned Standing Counsel, Income Tax Department for the respondent.

2. This appeal has been preferred by the assessee under Section 260A of the Income Tax Act, 1961 (briefly referred to hereinafter as 'the Act') against the order dated 05.10.2005 passed by the Income Tax Appellate Tribunal, Hyderabad Bench 'A', Hyderabad (briefly referred to hereinafter as 'the Tribunal') in ITA No.1098/Hyd/2004 for the assessment year 2001-2002.

3. Though the appeal was admitted on 27.04.2006 with an interim stay, we find from the docket proceedings that no substantial question of law was framed. However, in

the memo of appeal, appellant has proposed six questions of law for consideration.

4. In the hearing today, learned counsel for the appellant submits that the following question is a substantial question of law arising out of the order of the Tribunal which would correctly reflect the dispute between the parties. It is as under:

“Whether the Tribunal could ignore and discredit the documentary evidence i.e. the TDS certificate and annual return of deduction of tax filed in Form No.26 (c) by the assessee and rely upon the oral evidence of the sundry creditors given behind the back of the assessee?”

5. Appellant is an assessee under the Act carrying on the business of commission agent for M/s. Parle Products, Mumbai which includes transportation of its products all over the country. For the assessment year 2001-2002, appellant filed return of income disclosing taxable income of Rs.2,51,398.00. Assessment case of the appellant was selected for scrutiny. Following scrutiny, assessing officer passed the assessment order dated

29.03.2004 under Section 143(3) of the Act. Amongst other disallowances, assessing officer disallowed an amount of Rs.11,71,893.00 shown by the appellant as receipts from trade creditors. Consequently taxable income of the appellant was assessed at Rs.15,86,408.00.

6. Appellant preferred appeal before the Commissioner of Income Tax (Appeals)-V, Hyderabad (briefly referred to hereinafter as 'CIT(A)'). By the appellate order dated 06.08.2004, CIT(A) upheld the order of the assessing officer and held that credits amounting to Rs.11,71,893.00 was not established beyond doubt by the appellant. Accordingly, addition made by the assessing officer was confirmed.

7. Appellant preferred further appeal before the Tribunal. By the order dated 05.10.2005, Tribunal upheld the addition of Rs.11,71,893.00. The aforesaid ground of the appellant was accordingly rejected. It was thereafter that the present appeal came to be filed.

8. Learned counsel for the appellant has painstakingly taken us to the order of assessment, order passed by the first appellate authority as well as order of the Tribunal. She submits that revenue had relied upon sworn statement of Mr. Kuldip Vasta, proprietor of M/s. Trans India Express dated 16.02.2004, one of the creditors of the appellant. In the said statement, Mr. Kuldip Vasta denied that M/s. Trans India Express had received Rs.7,83,986.00 from the appellant. Not only that, he also denied giving any such confirmation letter. Copy of the above signed statement was not furnished to the appellant. That apart, request of the appellant to cross-examine the creditors was not granted by the revenue at any stage. Had such an opportunity been granted, the truthfulness or otherwise of the statements of the creditors would have been established.

9. In support of her contention, learned counsel for the appellant has relied upon a decision of the Supreme Court in **M/s. Kishinchand Chellaram v. Commissioner of**

Income Tax, Bombay City II, Bombay¹ and contends therefrom that non-furnishing of documents relied upon by the revenue and not offering an opportunity to cross-examine the creditors were material irregularities which strikes at the root of the assessment order as affirmed by the Tribunal. She has also placed reliance on a decision of the Supreme Court in **Andaman Timber Industries v. Commissioner of Central Exercise, Kolkata-II**² to contend that failure of the Tribunal to afford an opportunity to the appellant to cross-examine the creditors has vitiated the impugned order of the Tribunal which has been rendered unsustainable in law.

10. Mr. Prasad, learned Standing Counsel however submits that due opportunity of hearing was granted to the appellant by the assessing officer during the assessment proceedings. Substance of the statements made by the creditors were also made available to the appellant. Appellant did not raise any ground before the first appellate authority that it had insisted for cross-examination of the

¹ 1980 (Supp) Supreme Court Cases 660

² (2016) 15 SCC 785

creditors which was denied by the assessing officer and for which it could not properly defend itself in the assessment proceedings. Mr. Prasad submits that issue raised in this appeal is factual which has been gone into not only by the primary authority i.e., the assessing officer but also by two lower appellate authorities. Therefore, in an appeal under Section 260A of the Act, such a finding of fact may not be reopened. He therefore seeks dismissal of the appeal.

11. Submissions made by learned counsel for the parties have received the due consideration of the Court.

12. To appreciate the rival submissions in the context of the substantial question of law which we have framed today, let us examine the orders passed by the revenue authorities.

13. Before the assessing officer, appellant submitted that certain amounts were outstanding to be paid to four creditors whose vehicles were utilized by the appellant in the

course of its business during the assessment year. The outstanding figures were as under:

M/s Trans India Express, Gosha Mahal, Hyderabad	Rs. 7,83,970/-
M/s Life Transport Agency, Santosh Nagar, Hyderabad	Rs. 1,22,684/-
M/s New Royal Express Road Ways, Gosha Mahal, Hyderabad	Rs. 1,84,739/-
M/s Amar Lorry Suppliers, Hiyth Nagar, Hyderabad	Rs. 80,500/-

14. In support of the above claim, appellant had furnished confirmation letters from the four transporters. In order to verify correctness of the confirmation letters, assessing officer issued notice to the transporters under Section 133(6) of the Act. All the four transporters (creditors) denied that the above outstanding credits were receivable by them from the appellant. In addition to that, Mr. Kuldip Vasta, proprietor of M/s. Trans India Express recorded a statement under Section 131(1)(b) of the Act on 16.02.2004. In the said statement, he denied that appellant was required to pay M/s. Trans India Express a sum of Rs.7,83,970.00. He also denied issuing any confirmation letter as produced by the appellant. According to the assessing officer, when this aspect was brought to the notice

of the appellant *vide* letters dated 20.02.2004 and 21.01.2004, appellant reiterated its stand that it had availed transport services from the above transporters for which the aforesaid amounts outstanding as on 31.03.2001 were liable to be paid. In addition, it had produced some vouchers and Tax Deduction at Source (TDS) certificates made in respect of M/s. Trans India Express. Assessing officer noticed certain variations in the signatures of the vouchers and observed that mere deposit of TDS would not render a transaction genuine. Therefore, assessing officer took the view that amounts shown as outstanding to the four creditors were not genuine. Accordingly, those amounts were added to the total income of the appellant.

15. We find from the paper book a copy of letter dated 20.02.2004 issued by the assessing officer to the appellant. By way of the said letter, appellant was informed about the next date of hearing. It was brought to the notice of the appellant that in respect of the credit claim of Rs.7,83,970.00 *qua* M/s. Trans India Express, for which

confirmation letter was submitted, it was pointed out that no such letter was issued by M/s. Kuldip Vasta, proprietor of M/s. Trans India Express who had stated that he had received only commission brokerage from the appellant to the tune of Rs.8,000.00. According to him, no amount was receivable from the appellant as on 31.03.2001. Similarly it was brought to the notice of the appellant that another transporter namely M/s. New Royal Express Road Ways had also denied that amount of Rs.1,84,739.00 was receivable from the appellant as on 31.03.2001. Appellant was also informed that the information furnished regarding outstanding dues to be paid to M/s. Life Transport Agency and M/s. Amar Lorry Suppliers was not acceptable in absence of supporting evidence.

16. From a perusal of the above, what is discernible is that the assessing officer did not inform the appellant that Mr. Kuldip Vasta had made a sworn statement under Section 131 of the Act denying any outstanding dues from the appellant. On the contrary, assessing officer informed the

appellant that outstanding credits to M/s. Trans India Express and M/s. New Royal Express Road Ways could not be accepted as the said creditors had denied any such outstanding dues. Similarly claim of the appellant in respect of the other two transporters were stated to be not acceptable in the absence of supporting evidence.

17. Reverting back to the assessment order, we find that appellant had not only filed confirmation letters from the transporters but had also produced vouchers and TDS certificates in support of such credits. While confirmation letters and vouchers can be said to be disputed, there can be no dispute as to deposit of TDS. In fact this is accepted by the assessing officer but he went on to add that mere making of TDS would not make a transaction genuine; that apart, appellant did not file any TDS return. Question here is not of the appellant taking the benefit of making deposit of TDS by filing TDS return. The question here is that TDS certificate was filed to *prima facie* show credit of the appellant towards the four transporters.

18. It is true that in appeal before the first appellate authority, appellant did not raise the ground relating to cross-examination and thus violation of the principles of natural justice. However, the first appellate authority extracted the statement made by Mr. Kuldip Vasta under Section 131 of the Act. But the first appellate authority did not furnish the same to the appellant to contest the stand taken by Mr. Kuldip Vasta. On the contrary, first appellate authority held that in a transaction involving two persons, genuineness of the same has to be concluded only after both the persons involved in the transaction confirm having entered into the same. If one denies, obviously the other person has to prove that the denial is out of any special reason including a reason of hostility. Further observing that no such reason was forthcoming and that there was no material on record to hold a view that Mr. Kuldip Vasta became hostile to the appellant, first appellate authority further took the view that appellant did not demand cross-examination of Mr. Kuldip Vasta before the assessing officer

in spite of the fact that statement made by Mr. Kuldip Vasta was communicated to the appellant. As we have already noticed, the statement made by Mr. Kuldip Vasta was not communicated or furnished to the appellant. The letter dated 20.02.2004 even did not disclose that Mr. Kuldip Vasta had made a statement under Section 131 of the Act adverse to the appellant and whether appellant would want to confront Mr. Kuldip Vasta.

19. Tribunal on the other hand adopted a strange approach. Learned counsel for the appellant had submitted before the Tribunal that opportunity for cross-examination was not given to the appellant. This was answered by the Tribunal by holding that cross-examination is not always necessary. However Tribunal once again relied upon the statement of Mr. Kuldip Vasta that he did not sign the confirmation letter.

20. From the above, it becomes quite clear that the revenue authorities had relied upon statements and evidence made by the creditors adverse to the appellant, which were

not furnished to the appellant. That apart, claim of the appellant to cross-examine the transporters who according to the appellants had issued confirmation letters about the outstanding credits but subsequently retracted was denied. Revenue had evidently relied upon the sworn statement of Mr. Kuldip Vasta recorded under Section 131(1)(b) of the Act which was adverse to the appellant. Therefore, the appellant should have been afforded an opportunity to rebut the same by cross-examining the deponent for extracting the truth. Failure to provide such an opportunity amounted to violation of the principles of natural justice which vitiated the order of the Tribunal.

21. In **M/s. Kishinchand Chellaram** (supra 1), the question for consideration was whether there was any material evidence to justify the finding that a sum of Rs.1,07,350.00 was remitted by the assessee from Madras to Bombay and that it represented the undisclosed income of the assessee. Supreme Court noted that the only evidence before the Tribunal was a letter dated 18.02.1955 addressed

by the banker to the income tax officer. Supreme Court held that such a letter could not have been relied upon by the Tribunal as a material piece of evidence because this letter was not disclosed to the assessee by the income tax officer. Like the present case, even though the first appellate authority had reproduced an extract of the letter in his order, he did not care to produce it before the assessee or give a copy of it to the assessee. On the above basis, Supreme Court held that even assuming that this letter was in fact addressed by the banker to the income tax officer, no reliance could be placed upon it since it was not shown to the assessee and no opportunity to cross-examine the banker was given to the assessee. Before the income tax authorities can rely upon such a document, it is their bounden duty to produce it before the assessee to enable the assessee to controvert the statements contained in it by asking for an opportunity to cross-examine the banker with reference to the statements made in the letter. In the facts and circumstances of that case, Supreme Court while

allowing the appeal had set aside the judgment of the High Court as well as that of the Tribunal.

22. Again in **Andaman Timber Industries** (supra 2), Supreme Court held that not allowing the assessee to cross-examine the witnesses by the adjudicating authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order a nullity in as much as it amounts to violation of the principles of natural justice. In the facts of that case, Supreme Court observed that order of the Commissioner was based on statements given by the two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, adjudicating authority did not grant this opportunity to the assessee. It was mentioned that adjudicating authority had referred to in the impugned order the request of the assessee for cross-examination, but such an opportunity was denied. Tribunal had simply stated that cross-examination of the two witnesses would not have brought about any material difference to the narrative of the

assessee. Disapproving the stand of the Tribunal, Supreme Court observed that it was not for the Tribunal to second guess as to for what purpose assessee wanted to cross-examine the witnesses and what extraction assessee wanted from them. In the facts of that case, Supreme Court while allowing the appeal, set aside the order passed by the Tribunal.

23. That being the position and following the decisions of the Supreme Court in **M/s. Kishinchand Chellaram** (supra 1) and **Andaman Timber Industries** (supra 2), we are of the considered opinion that findings rendered by the revenue authorities stood vitiated for failure on their part to afford an opportunity to the appellant to cross-examine the transporters and for disbelieving the evidence adduced such as TDS certificates.

24. Consequently, we answer the question framed supra in favour of the assessee and against the revenue.

25. Appeal is accordingly allowed. No costs.

26. As a sequel, miscellaneous applications pending, if any, in this Appeal, shall stand closed.

UJJAL BHUYAN, CJ

N.TUKARAMJI, J

Date: 01.02.2023
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Note:

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(B/o.)
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