

“I. Whether on the facts and in the circumstances of the case, the findings of facts and the appraisal of evidence by the tribunal leading to the deletion of the addition of Rs.3,25,37,586/- and Rs.17,29,25,670/- as referred to in paragraph 4(i) and (ii) of the stay petition were perverse?

II. Whether on the ground the order of the tribunal with respect to the said issue should be set aside?”

Thereafter paperbooks were filed and the appeal became ready for hearing.

On 15th September, 2023, when this appeal was called on for hearing, Mr. J. P. Khaitan learned Senior Advocate appearing for the respondent pointed out to this court that apparently there was a mistake on the part of the learned advocate for the appellant Commissioner of Income Tax to invite the court to admit the appeal on 30th September, 2019 because several years earlier on 26th August, 2008, the appeal had already been admitted on the following questions of law:-

“whether on the facts and in the circumstances of the case Tribunal was justified and the conclusion arrived by it in deleting addition of Rs.17,29,25,670/- as undisclosed profit made on the basis of seized documents and in view of presumption under Section 132(4A) of the Income Tax Act, 1961, is perverse?”

On a reading of the said order dated 26th August, 2008, it was discovered that the deletion of the addition of Rs.3,25,37,586/- was not included therein.

In the circumstances, on 15th September, 2023 this court passed an order directing the order dated 26th August, 2008 to be included in the supplementary affidavit to be filed by the appellant by 25th September, 2023. The order made on 30th September, 2019 is to be considered as one allowing an additional ground - the deletion of the addition of Rs.3,25,37,586/-.

Now, I briefly narrate the facts of this case.

On 19th December, 1998 a search and seizure operation was carried out at Flat No. 8B/1 Satyam Towers, 3, Alipore Road, Kolkata – 700 027 where the respondent assessee resided with his wife Smt. Prema Poddar and the

family members of Shri Raj Kumar Poddar. During this search and seizure a sizable quantity of jewellery and ornaments, silver, gold jewellery and cash was seized from the property. Search was also carried out in the office of the respondent assessee in his bank locker maintained at the Oriental Bank of Commerce, Bowbazar Branch, Calcutta. In this locker also gold and silver were found and seized. The block assessment was for the assessment years 1st April, 1988 to 19th December, 1998.

The assessing officer recorded the statement of the assessee that his undisclosed income for the subject period was Rs.2.25 cores. It has been recorded by the assessing officer that the respondent assessee in his letter dated 15th December, 1999 admitted that the jewellery and ornaments were purchased in during the financial year 1998-99 out of his undisclosed income.

Now, I come to the most important point. During the course of search books of account, loose papers and documents were also seized. These documents reflected some undisclosed transactions. These loose papers were examined and compared with the regular books of accounts. It was found that the respondent assessee did not consider page Nos.4 to 14 of the loose bunch PP/37 and page Nos.19 to 21 of the loose bunch No.PP/38 in those books of account. The assessing officer recorded that in spite of diverse opportunities the respondent assessee did not come forward to explain those documents. Before the assessing officer the assessee denied that he had anything to do with the loose papers. The assessing officer did not accept the assessee's computation of undisclosed income.

The next issue relates to trial balance allegedly reflected by eleven pages of seized papers marked as PP 37. Apparently in his statement dated 9th March, 2019 the respondent assessee had stated that those pages denoted the trial balance for the period of 01.04.1997 to 31.03.1998 and that it summarized his entire business operation for 1997-98. Subsequently he retracted from the statement by his letter dated 20th March, 2021 stating

that it was a “test trial balance of imaginary figures”. His explanation was that he was in the process of digitalizing his accounts, was provided a software by a manufacturer for this purpose and that imaginary figures were entered in that software to create the account. The assessing officer disbelieved that explanation stating that the code numbers in the digital version matched the code numbers in the books of account. On the basis of these documents the assessing officer computed the undisclosed income of the assessee at Rs.3,25,37,586/-. Other loose sheets detected the undisclosed income of the assessee and his wife in the years ending 31st March, 1995, 31st March, 1996 and 31st March, 1997, page 19 relating to the undisclosed business income of the assessee’s wife Smt. Prema Poddar.

From the order of the assessing officer an appeal was preferred by the Commissioner before the Commission of Income Tax (Appeals). The assertion of the respondent assessee was that the seized documents did not belong to him, nor prepared by him and that the department failed to disprove this assertion of the assessee. According to the appellate authority the assessee’s assertion that the document was not in his own writing could not disproved. The opinion of a hand writing expert was not taken. Furthermore, the adjudicating authority opined that if such was the disclosed income it was not reflected by acquisition of some assets or creation of fund by the respondent assessee. None could be found.

The next finding is most interesting. The presumption under Section 132 (4A) read with Section 292C had been wrongly made in the case of the respondent assessee. At any rate the assessee had been able to rebut the presumption. The assessment of the assessing officer on the above two points was reversed by the said appellate authority.

From the order of the appellate authority, the Revenue preferred an appeal before the Income Tax Appellate Tribunal (the Tribunal). This appeal was confined to two grounds only; namely the deletion of the addition of Rs.3,25,37,586/- and Rs.17,29,25,670/-. The tribunal after discussion of

the facts opined that the handwriting in the loose sheets had not been verified, that the respondent assessee had earned the income indicated in the loose sheets had not been proved. The tribunal felt that the search and seizure did not result in the identification of any movable or immovable property for the acquisition of which the undisclosed income may have been applied. It said that no “matching assets” were found. The tribunal also observed that the assessing officer had laid too much emphasis on the presumption under Section 132(4A) of the said Act. The assessee had also preferred an appeal before the tribunal on some grounds. The appeal of the department was dismissed and that of the assessee was partly allowed.

To decide this appeal, consideration of Section 132(4A) of which so much reliance has been placed by the adjudicating authorities becomes very germane. It may be pointed out that this section was inserted into the statute book by the Taxation Laws (Amendment) Act, 1975 with effect from 1st October, 1975.

Mr. Khaitan showed us Section 292C of the Act which was inserted under the Miscellaneous Chapter XXIII of the Act by the Finance Act, 2007 with effect from 1st October, 1975.

Now, the text of Section 292C substantially includes Section 132(4A) with some addition. We shall refer to Section 292C which is set out below:-

“292C. Presumption as to assets, books of account, etc.- [(1)] *Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of search under section 132 or survey under section 133A, it may, in any proceeding under this Act, be presumed –*

- (i) *that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;*

- (ii) *that the contents of such books of account and other documents are true; and*
- (iii) *that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.*

[(2) Where any books of account, other documents or assets have been delivered to the requisitioning officer in accordance with the provisions of section 132A, then, the provisions of sub-section (1) shall apply as if such books of account, other documents or assets which had been taken into custody from the person referred to in clause (a) or clause (b) or clause (c), as the case may be, of sub-section (1) of section 132A, had been found in the possession or control of that person in the course of a search under section 132.]

Mr. Khaitan urged before us that this section by using the words “may presume” and not using the words “shall presume” or by not stipulating that the seized documents would be conclusive proof gave an option to the adjudicator to presume that they belonged to the assessee. He placed a passage from **P.R. Metrani vs. Commissioner of Income Tax, Bangalore** reported in **(2006) 287 ITR 209/157 Taxman 325** where the Supreme Court dealing with “may presume” in Section 132(4A) laid down the following dictum:-

“A presumption is an inference of fact drawn from other known or proved facts. It is a rule of law under which courts are authorized to draw a particular inference from a particular fact. It is of three types, (i) “may

presume”, (ii) “shall presume” and (iii) “conclusive proof”. “May presume” leaves it to the discretion of the court to make the presumption according to the circumstances of the case. “Shall presume” leaves no option with the court not to make the presumption. The court is bound to take the fact as proved until evidence is given to disprove it. In this sense such presumption is also rebuttable. “Conclusive proof” gives an artificial probative effect by the law to certain facts. No evidence is allowed to be produced with a view to combating that effect. In this sense, this is irrebuttable presumption.

The words in sub-section (4) are “may be presumed”. The presumption under sub-section (4-A), therefore, is a rebuttable presumption. The finding recorded by the High Court in the impugned judgment that the presumption under sub-section (4-A) is a irrebuttable presumption in so far as it relates to the passing of an order under sub-section (5) of Section 132 and rebuttable presumption for the purpose of framing a regular assessment is not correct. There is nothing either in Section 132 or any other provisions of the Act which could warrant such an inference or finding.”

This dictum was followed by a division bench of our court in **Principal Commissioner of Income-tax, Central-1, Kol. Vs. Ajanta Footcare (India) (P.) Ltd.** reported in **(2017) 84 taxmann.com 109 (Calcutta)**. Learned counsel said that on the basis of the above facts the assessing officer ought not to have made the presumption and that the CIT appeal and the tribunal were right in not drawing a presumption.

Our View:-

A presumption may be rebuttable or irrebuttable. If it is irrebuttable, it is conclusive proof of the fact. The court will not admit any evidence to disprove the presumption. Take for example, the common law presumption that a child under 7 years of age is incapable of committing a crime. It is an irrebuttable presumption. Or the fact that the sun rises in the east. When a fact may be presumed by the court or shall be presumed by the court makes the presumption rebuttable. The assertion of fact is taken to be true till it is disproved.

The question is who has the onus of disproving the presumed fact. One who challenges the presumption has the onus to disprove the fact.

Therefore, the adjudicating authority has two options, either not to presume that the papers and other documents seized during search and seizure belonged to the assessee, the contents are true and that the signatures appearing thereon are that of the assessee or not to presume so. In this case, the assessing officer has made the presumption and proceeded accordingly.

Now, the drawing of a presumption by the assessing officer in terms of Section 292C, in our opinion, is based on assessment of facts and discretionary and should not ordinarily be interfered with by an appellate authority.

Once this presumption had been made, the onus squarely shifted to the respondent assessee to disprove those facts.

The tribunal was enjoined with a duty to appreciate this law and to examine whether the assessee had been able to discharge the burden.

Now, look at the reasons given by the tribunal. It cast a duty on the Revenue to prove the handwriting of the assessee. It accepted the contention of the assessee that the documents did not belong to him instead of requiring him to prove it. It allowed the assessee to retract the admission made by him during the course of the proceedings, by a statement dated 9th March, 1999 that the trial balance for the period 1st April, 1997 to 31st March, 1998 “summarizes my entire business operation for 1997-1998”.

A division bench of the Rajasthan High Court in the case of **Bannalal Jat Constructions Pvt. Ltd. vs. Assistant Commissioner of Income-Tax** reported in **(2019) 418 ITR 291** remarked:-

“17.....The mere fact that the assessee retracted the statement could not make the statement unacceptable. The burden lay on the assessee to establish that the admission made in the statement at the time of survey was wrong and in fact there was no additional income.....”

Since Income Tax officers are not police officials, the view of the Supreme Court in **Surjeet Singh Chhabra vs. Union of India and Ors.** reported in **(1997) 1 SCC 508** that even if a confession was retracted it was to be taken as an admission and binding on the maker is very relevant in this case. The tribunal ought not to have disregarded the admission merely on the ground that later on the assessee had withdrawn the admission, without scrupulously examining whether there were any substantial grounds enabling the assessee to resile from such admission.

In those circumstances, the order of the tribunal with regard to the above issues is set aside. We remand the matter back to the tribunal with a direction upon it to reexamine the same on the basis of evidence on record by a detailed order within six months of communication of this order.

The appeal is disposed of accordingly.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(I. P. MUKERJI, J.)

BISWAROOP CHOWDHURY, J.:-

I have perused the judgment delivered by my Learned brother and have agreed with the grounds cited therein.

However I add the following grounds.

At the very outset it is to be considered on which questions of law the appeal was admitted.

On 26th August, 2008 the appeal was admitted on the following substantial questions of law.

‘Whether on the facts and in the circumstances of the case Tribunal was justified and the conclusion arrived by it in deleting addition of Rs. 17,29,25,670/- as undisclosed profit made on the basis of the seized documents and in view of presumption under Section 132(4A) of the Income Tax Act, 1961 is perverse?’

Subsequently on 30th September, 2019 when the matter appeared before this Court the earlier order of admission was not placed for which another order of admission was passed which is as follows:

- I. ‘Whether on the facts and in the circumstances of the case, the finding of facts and the appraisal of evidence by the Tribunal leading to the deleting of the addition of Rs.3,25,37,586/- and Rs.17,29,25,670/- as referred to in paragraph 4(i) and (ii) of the stay petition were perverse?’
- II. ‘Whether on that ground the order of the Tribunal with respect to the said issue should be set aside?’

On September 15, 2023 this Court passed the following order.

The Order dated 26th August 2008 is to be included in a supplementary affidavit to be filed by the appellant by 25th September 2023. The Order dated 30th September, 2019 is to be considered as allowing an additional ground, that is deletion of the addition of Rs 3,25,37,586/- to be also urged as a ground of appeal. The time taken to file the paper-books mentioned in the said order is to be taken as extension of time to do so. The bone of contention of the appellant is that the Learned Tribunal has accepted the CIT(A)’s version that there was no substantial seizure in the form of any investment in any movable or immovable property and as such the additions made by the assessing officer treating on the ground of there being undisclosed income of the assessee were not justified. While doing so

the Tribunal glossed over the facts that the CIT(A) had reached such a surprising finding after disbelieving the assessee's. Contentions as would be evident from pages 147 to 149 and page 154 of volume II of the paper book. It is further submitted that the Tribunal has failed to appreciate that there is no rebuttal evidence from the side of the assessee on this score at all. Learned Advocate also submits that when the Commissioner of Income Tax(A) had disbelieved the assessee's version completely there was no reason for the Commissioner of Income Tax(A) to discard the presumption drawn by the AO in terms of Section 132(4A) of the 4 Income Tax Act 1961.

Much is submitted on the admission made by respondent/assessee. Before placing any reliance on the admission of the assessee it would have been just and reasonable on the part of assessing officer to ascertain as to whether the admission made by assessee before DDIT on 09-03-1999 was voluntary or not. Secondly it should have ascertained as to the contents of the documents/account papers which are seized by the Authority, whether those are within knowledge of the respondent Although it is not the requirement of law but it is an act of prudence on the part of the Income Tax Authority and shows reasonableness and bona-fide. It is not unusual that when a raid takes place in an establishment or house of an assessee, the assessee out of confusion and stress may make many statements in haste in order to complete the interrogation process. However necessary verification should be made to ascertain the statements made by the assessee.

Now the question for consideration is whether the Income Tax Authority acted correctly in putting question to assessee with regard to Trial balance and other accounts papers seized from the establishment of assessee. It is a common practice that in a business establishment of a businessman business accounts are prepared by accountant or chartered accountant and the same are audited. The preparation of accounts requires special knowledge and skill. Thus it is the accountant or chartered accountant

having special knowledge are entrusted with the preparation of accounts which are audited. Hence it is the accountant or chartered accountant who are in a position to give statement regarding statement of accounts or Trial balance. The business man who has engaged accountant or chartered accountant cannot be said to have knowledge and cannot be expected to make statement on the preparation of accounts, which are prepared by Accountant or Chartered Accountant. A business man can admit his signature if it appears on any accounts or other documents and anything prepared in his own handwriting. Apart from his own handwriting he cannot admit any document prepared by others. Thus the Income Tax Authority ought to have interrogated the Accountant of the establishment regarding documents seized. Thus there was an error on the part of the Assessing Officer. This issue was not considered by the Learned Tribunal. Thus, this matter should be remitted to the Tribunal for reconsideration.

(BISWAROOP CHOWDHURY, J.)