
(1983) 10 PAT CK 0008
In the Patna High Court
Case No : Taxation Case No. 144 of 1972

Additional Commissioner of Income Tax	APPELLANT
Vs	
Mohan Engineering Co.	RESPONDENT

Date of Decision : 11-10-1983

Acts Referred:

Income Tax Act, 1961 — Section 68

Citation : (1984) 41 CTR 291 : (1985) 151 ITR 571 : (1984) 17 TAXMAN 6

Hon'ble Judges : S.K. Jha, J; Ashwini Kumar Sinha, J

Bench : Division Bench

Advocate : B.P. Rajgarhia, S.K. Sharan and Samrendra Pratap Singh, for the Appellant; K.N. Jain and Rameshwar Prasad II, for the Respondent

Judgement

Ashwini Kumar Sinha, J.—In pursuance of this court's order dated September 19, 1973, the Income Tax Appellate Tribunal, Patna Bench "A" (hereinafter to be referred to as "the Tribunal"), has stated the case and referred the following question of law for the opinion of this court:

"Whether, on the facts and in the circumstances of the case, the order of the Appellate Tribunal deleting from the assessee's income the amount of Rs. 28,000 found credited in the name of Durga Pd. Sureka in the account book of the assessee was correct in law and in accordance with the provisions contained in section 68 of the Income Tax Act, 1961 ?"

The assessee is an unregistered firm and derives income from oil milling, cement and wire nails. The assessment year in question is 1964-65. The ITO found a cash credit of Rs. 28,000 in the name of Shri Durga Prasad Sureka of Calcutta and Rs. 1,600 in the name of one Jit Ram. The assessee was called upon to explain the nature and source of the deposits. The assessee filed a confirmatory letter from Durga Prasad Sureka of Calcutta, but he was asked to produce him for verification. The assessee did not produce the creditor and for Jit Ram, it was stated that he was a pretty old man and he deposited Rs. 1,600 out of his past savings. The ITO did not accept the explanation. He observed that the assessee

had been depositing his own income from undisclosed sources in different names. The ITO, with regard to the deposit in the name of Durga Pd. Sureka to the extent of Rs. 28,000, made a reference to his counterpart in Calcutta who reported that the deposits were not verifiable and he, accordingly, required the assessee to produce Durga Prasad Sureka along with the books of account, if any, but the assessee expressed his inability to do so. As the genuineness of the deposit, according to the ITO, had not been proved, it was treated as the assessee's income from undisclosed sources. The ITO, therefore, treated this amount as the assessee's income from undisclosed sources.

2. Regarding the deposit of Rs. 1,600 in the name of Jit Ram, it was stated on behalf of the assessee, that he was an old man and was unable to move about. According to the ITO, the deposit in his name also remained unproved and he treated this amount as the assessee's income from undisclosed sources. The order of the ITO has been marked as annexure-A to the statement of the case.

3. The assessee went up in appeal before the AAC. The assessee submitted that he had filed a confirmatory letter from the creditor (Durga Prasad Sureka) and, if the ITO was not satisfied, he could have summoned the creditor and examined him. According to him, he had discharged the initial onus. The AAC found that the ITO had already made enquiries in another case and had found that the loans given by this party were not genuine. According to the AAC, a confirmatory letter filed by the assessee did not prove the genuineness of the transaction. He also mentioned that enquiries made at Calcutta showed that Shri Durga Prasad Sureka was freely lending his name to unscrupulous assesseees as a cover to introduce their own secreted funds. The AAC also referred to the various discrepancies in the books of account where the credits were made and came to the conclusion that the entries in the name of Shri Durga Prasad Sureka had been interpolated. He, therefore, held that the addition made by the ITO was justified.

4. There was, however, an alternative argument before the AAC. It was contended that in the immediately preceding year a. sum of Rs. 62,500 found in the name of Raj Kumar Jain & Company was added to the income of the assessee and, as the deposits in question were made after the withdrawal made in the account of Raj Kumar Jain & Company, they should be treated as deposits coming out of the withdrawal of Raj Kumar Jain & Company and the addition should be deleted. It was contended that even if this sum (i.e., Rs. 28,000) was held to be the assessee's income, it could not be added because a sum of Rs. 62,500 was added as income from undisclosed sources in the earlier year and before the close of the earlier previous year, the sum had been withdrawn by the assessee which had been credited in the account of Raj Kumar Jain and Company in the immediately preceding year. Thus, the alternative claim of the assessee was that Rs. 28,000 credited in the account of Durga Prasad Sureka could have very well come out of the withdrawals made in the earlier year. The AAC did not accept this contention on the ground that the two credits

were in different accounts and it had not been admitted in writing that both the sums represented the assessee's own concealed income. It is desirable to state here that the appeal of the assessee against the addition of Rs. 62,500 in the immediately preceding year was under challenge before the Tribunal and was pending. The AAC found the alternative contention of the assessee to be contradictory to his main claim that both the credits represented genuine borrowings. According to the AAC, there was no alternative to the facts and there could be only an alternative argument in law. The AAC, therefore, rejected the alternative contention of the assessee and confirmed the addition of Rs. 28,000. The order of the AAC is marked as annexure-B to the statement of the case.

5. So far as the addition of Rs. 1,600 credited in the account of M/s. Jit Ram was concerned, the AAC upheld the addition made by the ITO.

6. The assessee, thereafter, went up in further appeal before the Tribunal. Before the Tribunal, the assessee advanced the same submissions as advanced before the AAC. The Tribunal, so far as the deposit of Rs. 1,600 found in the name of Jit Ram was concerned, held as follows : " ...the probability is that he would have saved that amount out of his past income and, therefore, the deposit may be taken as explained. Accordingly, the addition of Rs. 1,600 is deleted ". And, thus, the Tribunal accepted the assessee's contention so far as this amount of Rs. 1,600 standing in the name of Jit Ram was concerned and deleted the addition of this Rs. 1,600.

7. However, the Tribunal accepted the alternative contention made on behalf of the assessee. The Tribunal referred to the fact that the addition of Rs. 62,500 had been ultimately confirmed, on appeal, by the Tribunal. The Tribunal, as a matter of fact, found as follows: "The deposit of Rs. 62,500 was withdrawn between November 28, 1961, to February 6, 1963." The Tribunal further found that the credits in the assessment year in question had come after the withdrawals had been made of the amount of Rs. 62,500 in the preceding year. The Tribunal accepted the contention advanced on behalf of the assessee on the following grounds:

(i) The cash credit found in the name of Raj Kumar Jain and Company has been confirmed as income from undisclosed sources of the assessee.

(ii) The assessee, in the course of the argument, accepted that the money belonged to it.

(iii) The deposits made in the immediately preceding year are withdrawn and thus the availability of funds more than the deposit appearing in the name of Sureka was there.

(iv) The deposit in the name of Sureka came after the withdrawals made in the name of Raj Kumar Jain & Co. The Tribunal, ultimately, held as follows:

"The inference is that if the assessee had Rs. 62,500 in his possession and if it wanted to introduce the same in the business, it could have introduced out of the

fund which was readily available and, therefore, from the above proved facts, it could be said that the deposit came out of the fund withdrawn from the account of Raj Kumar Jain & Co. belonging to the assessee. As the deposit came out of the fund withdrawn in the immediately preceding year, it is accepted as genuine and the addition is deleted." (Lines have been underlined by me for emphasis).

Thus, the Tribunal having accepted the alternative contention advanced on behalf of the assessee, deleted the addition of Rs. 28,000. The order of the Tribunal is marked as annexure-C to the statement of the case.

8. Thereafter, the Revenue filed an application u/s 256(1) of the Act before the Tribunal for referring the matter to this court. The Tribunal by its order dated May 20, 1972, rejected the reference application. Thereafter, the Revenue filed an application u/s 256(2) of the Act before this court. As stated before, this court, by its order dated September 19, 1973, called upon the Income Tax Appellate Tribunal, Patna Bench, to state the case and refer the question of law, as quoted above, to this court for opinion.

9. Learned senior standing counsel for the Department, firstly, submitted that Section 68 of the Act places the onus upon the assessee to prove the source of money introduced in the accounts to the satisfaction of the ITO and, to discharge this onus u/s 68 of the Act, the assessee had to adduce positive evidence required for the purpose which was lacking in the instant case. Secondly, the learned senior standing counsel for the Department submitted that the initial plea taken by the assessee before the ITO having been found to be incorrect, the assessee, in law, could not take an alternative plea to explain the source of money introduced in his accounts and, lastly, it was submitted that, even if the assessee could take an alternative plea in order to prove the source of the money, there was no positive evidence on the part of the assessee to explain the source of money and the link required was missing.

10. On the other hand, learned counsel appearing for the assessee submitted that the inferences of the Tribunal that:

"if the assessee had Rs. 62,500 in its possession and if it wanted to introduce the same in the business, it could have introduced out of the fund which was readily available and, therefore, from the above proved fact, it could be said that the deposit came out of the fund withdrawn from the account of Raj Kumar Jain and Company belonging to the assessee. As the deposit came out of the fund withdrawn in the immediately preceding year, it is accepted as genuine and the addition is deleted."

are findings of fact and no question of law arises therefrom. The learned counsel for the assessee further submitted that there was no bar for the assessee in taking an alternative plea in order to prove the source of money and even the Tribunal, in deciding the appeal, could allow the assessee to take even a ground/plea not set forth in the memorandum of appeal and the Tribunal was not precluded from adjusting tax liabilities of the assessee in the light of its findings,

merely because the findings are inconsistent with the initial plea taken by the assessee. The learned counsel for the assessee further submitted that the assessee, in the instant case, having come with a statement in order to prove the source of money and the Tribunal having believed the assessee's statement, there was an end of the matter in so far as that fact was concerned and, if the finding was based upon a statement which was good material on which it could be based, no question of law really arose.

11. It is well settled that where there is an unexplained credit, it is open to the ITO to hold that it is the income of the assessee and no further burden lies on the ITO to show that that income is from any particular source. It is for the assessee to prove that, even if the cash credit represents income, it is the income from a source which has already been taxed. It is also well established that the onus of proving the source of a sum of money found to have been received by the assessee is on him. If he disputes the liability for the tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provisions of the I.T. Act. In the absence of such proof, the ITO is entitled to treat it as taxable income. These are well established propositions of law and, if reference is needed, they are KALE KHAN MOHAMMAD HANIF Vs. COMMISSIONER OF Income Tax, MADHYA PRADESH AND BHOPAL., and Commissioner of Income Tax, Uttar Pradesh Vs. Devi Prasad Vishwanath Prasad, .

12. The main question in the instant case is whether the assessee having failed to establish his initial plea can fall back on an alternative plea.

13. In the instant case, the initial plea, as referred to above, in order to explain the cash credit of Rs. 28,000 in the name of Durga Prasad Sureka of Calcutta, was not accepted by the Revenue authorities. However, the assessee before the AAC took an alternative plea, as already referred to above.

14. Learned senior standing counsel for the Revenue, in order to support his submissions, as referred to above, relied upon the case of Commissioner of Income Tax Vs. Banarsilal Dhawan, and Commissioner of Income Tax Vs. Daluram Pannalal Modi, . It is desirable to quote from the case of Commissioner of Income Tax Vs. Banarsilal Dhawan, for looking as to what was the matter to be considered in that case (p. 366):

"In the present case, there was no question of any advances made in the name of the assessee or in the name of other close relations of the assessee over whom the assessee had control. Secondly, in the present case, it was one of the credit entries finding a place in the books of accounts of the assessee in the names of third parties. Thirdly, the assessee admittedly was not able to explain or verify those credits with reference to the persons in whose names they stood in his accounts. Under such circumstances, the question for consideration is whether it was open to the assessee to contend that he was entitled to claim that the unexplained credit of Rs. 31,000 must be deemed to have come out of the

additions made in the previous three years" assessments amounting to Rs. 53,359.

In the first place, we are of the opinion that once the assessee has originally shown the credits as having emanated from certain named individuals and when he failed to establish the same, it was not open to him to fall back on a claim that these unexplained credits must be taken to have come out of the additions made in the earlier years. Even if it was open to him to put forward such a case, it was for him to prove positively that though the credits stood in the names of third parties, still it was his money which was brought into account in the names of third parties and the money itself came from the additions made to his assessments in the previous years. Incidentally, this will involve his explaining why he brought his own money into the accounts in the names of third parties. The assessee in the present case has not proved any such thing. It is exactly this position which the Income Tax Officer in his order pointed out while making the additions. The Tribunal without considering any of these facts proceeded as if the decision of this court in *S. Kuppaswami Mudaliar Vs. Commissioner of Income Tax, Madras*, laid down a universal proposition of law that whenever an assessee failed to explain the credits found in his books of account, it was open to him to claim a set-off of those credits as against the additions made to his income in the previous years" assessments. As we pointed out already, no such proposition has been laid down by this court in the decision referred to above. As a matter of fact apart from removing the misconception arising from the inaccurate and misleading use of the expression "intangible additions", this court did not lay down any such general proposition of law, as if the additions made to the income returned by an assessee, by the department, constitute his last refuge whenever he finds himself in a tight corner not being able to explain the credits found in his accounts. The truth is that such additions are as real an income, at any rate as far as the department is concerned, as the income returned by the assessee, and one can as much as the other constitute the source to explain the credits in the accounts in the subsequent years. Therefore, the decision of this court does not invest such additions with any special significance as a source to explain the credits in the subsequent years. In any case, it will be a question of fact whether there was evidence to find that such additions were the source of the subsequent credits and in this behalf there is no difference between this source and any other source, apart from the position that with regard to the income assessed in the earlier years, its existence as a possible source of the credits will be a matter of record with the department while with regard to other sources, their existence may be a matter to be proved."

15. In this case, apart from what has been quoted above, their Lordships also considered the case of *Commissioner of Income Tax Vs. Ram Sanahi Gian Chand*, , as the assessee relied upon this case. In the case of *Commissioner of Income Tax Vs. Ram Sanahi Gian Chand*, , the Tribunal had allowed the alternative plea as it held that the contentions sought to be raised by the assessee were legal in nature and the Tribunal allowed the assessee to raise the

alternative plea and set aside the order of the AAC and directed him to consider the assessee's case on the basis of the new contention raised before the Tribunal. The Tribunal's conclusion was challenged in the form of a reference to the High Court and the High Court stated (p. 729):

"It is true that before the Income Tax Officer and the Appellate Assistant Commissioner this plea was not taken. It may be that the assessee was not aware of the legal position, that is, that it was entitled to take advantage of the intangible additions made in the previous years and it is quite evident from the facts of this case that this point was urged before the Tribunal by the learned counsel for the assessee. Since this was a point of law, the assessee was not supposed to know it and it will be wholly unfair not to allow him to raise that plea simply because he did not urge it before the Income Tax Officer or the Appellate Assistant Commissioner. On the intangible additions made in the previous years, the assessee had paid the Income Tax and possibly penalty for not disclosing it, and if the law permits the assessee to take advantage of those intangible additions for explaining the capital in the subsequent assessment years, the opportunity should be allowed to it in the interest of equity and fair play.

Nothing has been said by the learned counsel for the petitioner as to why it was not open to the Tribunal to allow the assessee to raise the plea and substantiate it. There is no question of investigation on facts because the intangible additions made in that year or in the previous years were on the record of the Income Tax Officer and only a reference had to be made to the previous assessment orders. No new fact had to be investigated or proved."

Their Lordships of the Madras High Court in the case of Commissioner of Income Tax Vs. Banarsilal Dhawan, disagreed with the view taken in the case of Commissioner of Income Tax Vs. Ram Sanahi Gian Chand, and observed as below (pp. 368-9):

"there was no question of there being any legal position or any point of law, because it was simply a question of fact by way of explaining as to where the sum of Rs. 20,004.35 came from."

Thus, in my opinion, the ratio decided in the case of Commissioner of Income Tax Vs. Banarsilal Dhawan, is that "in any case, it will be a question of fact whether there was evidence to find that such additions were the source of the subsequent credits.....may be a matter to be proved. " Thus, from the quotations as above, in my opinion, the ratio decided in Commissioner of Income Tax Vs. Banarsilal Dhawan, is not that once the assessee has originally shown the credits as having emanated from certain named individuals and when he failed to establish the same, it was not open to him to fall back upon an alternative plea, but the ratio is that an alternative plea can be taken by the assessee, but that being a question of fact, it has to be ascertained and established and further that with regard to the income assessed in the earlier years, its existence as a positive source of credit is a matter of record with the Department and it is only with

regard to other sources that their existence has to be proved. In my opinion, the decision in the case of Commissioner of Income Tax Vs. Banarsilal Dhawan, , referred to above, cannot be relied upon by the senior standing counsel for the Revenue in support of his submission. My reading of this judgment in Commissioner of Income Tax Vs. Banarsilal Dhawan, , is that the learned judges have not laid down that once the assessee fails to establish his original plea in order to prove the source of the amount, he cannot fall back upon an alternative plea. They have rather laid down that, in each case, it will be a question of fact to be ascertained and proved, But, if they have laid down as such (as just mentioned above), I, with great respect to the learned judges, am unable to agree with the above conclusion. The other case relied upon by the learned senior standing counsel for the Department is the case of Commissioner of Income Tax Vs. Daluram Pannalal Modi, . This case also, in my opinion, does not help the Revenue. In this case, the ITO held that the assessee had failed to satisfactorily explain the cash credit amounting to Rs. 15,300 appearing in the books of account of M/s. Daluram Pannalal Modi. The ITO, therefore, held that the sum of Rs. 15,300 was the assessee's income from undisclosed sources and the assessee was assessed accordingly. The assessee preferred an appeal before the AAC, who maintained the order of the ITO. The assessee preferred a second appeal before the Tribunal. Here, before the Tribunal, it was urged that the cash credits were covered by intangible additions made to the income of the assessee. The Tribunal upheld the contention of the assessee and directed deletion of Rs. 15,300 as income from undisclosed sources. The High Court, on an application u/s 256(2) of the Act, considered the matter and held as follows (p. 400):

"In the instant case, therefore, the assessee had to show, by adducing satisfactory evidence, that the cash credits were referable to the undisclosed income of the very known or disclosed source, namely, the business, whose income had already been estimated... The Tribunal seems to assume that once the business income is estimated, the unexplained cash credits would be covered by the income so estimated. This assumption is not warranted by law. Without setting aside the finding of the ITO that the cash credits represented income from undisclosed sources, the Tribunal was not justified in holding that the amount of Rs. 15,300, which was added as income from undisclosed sources, was covered by the intangible additions made to the income of the assessee."

Thus, from the quotation as above, it is clear that, as a question of fact, it is for the assessee to show by adducing satisfactory evidence that cash credits were referable to undisclosed income of the very known or disclosed source, namely, the business, whose income had already been estimated. This case only laid down that the Tribunal was not justified in holding that the amount of Rs. 15,300 which was added as income from undisclosed source was covered by intangible additions made to the income of the assessee, without setting aside the finding of the ITO that the cash credits represented income from undisclosed sources. In my opinion, the facts of that case are clearly distinguishable from the facts of the instant case and, in that view of the matter, in my opinion, the decision in the

case, CIT v. Daluram Pannalal Modi [1981] 121 ITR 398, also cannot be relied upon by the learned senior standing counsel for the Revenue in support of his submission.

16. Learned counsel for the assessee, in support of his submission, as already mentioned above, has placed reliance upon a decision of the Supreme Court in the case of Commissioner of Income Tax, Madras Vs. S. Nelliappan, . The relevant paragraph from the judgment, in this case, is quoted below (p. 724):

"At the hearing before the Tribunal pursuant to the order of the High Court, counsel for the assessee abandoned the contentions relating to the amount adjusted in the computation of profits under the heads of operating expenses and additions for low collections and urged that cash credit of Rs. 19,796 for the assessment year 1946-47 and Rs. 32,700 for the assessment year 1947-48 should be deleted. The members of the Tribunal held that they had examined the ledger accounts of the assessee and that the credits remaining outstanding till the end of the previous year relating to the assessment year 1947-48 and the explanation furnished by the assessee was unconvincing, and that the cash credits deserved to be treated as the income of the assessee in the respective years in which they had been brought into the books of the business in fictitious names. But, the Tribunal observed, since in each of the two years under appeal, additions to the book profits had been accepted in excess of the amounts of cash credits "additions of these credits had become redundant", and should be deleted, and the assessing officer should amend the assessments and adjust the tax liability."

The matter thereafter was referred to the High Court and the High Court held as follows (pp. 724-5):

"In hearing an appeal, the Tribunal may give leave to the assessee to urge grounds not set forth in the memorandum of appeal, and in deciding the appeal, the Tribunal is not restricted to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal. The Tribunal was, therefore, competent to allow the assessee to raise the contention relating to the cash credits which was not made the subject-matter of a ground in the memorandum of appeal. It cannot be said that in accepting the contention of the assessee that the cash credits represented income from business withheld from the books, the Tribunal made out a new case inconsistent with the assessee's own plea. In any event the Tribunal is not precluded from adjusting the tax liability of the assessee in the light of its findings merely because the findings are inconsistent with the case pleaded by the assessee."

The first question raised in the application for reference is a question of fact. It is true that there is no direct evidence of any connection between the cash credit entries and the income withheld from the books of account by the assessee. But if the Tribunal inferred that there was a connection between the profits withheld from the books and the cash credit entries, it cannot be said that the conclusion

is based upon speculation. The first question sought to be raised is, therefore, purely one of fact and could not be referred u/s 66."

Learned counsel for the assessee has also relied upon a decision of the Supreme Court in the case of Gouri Prasad Bagaria and Others Vs. Commissioner of Income Tax, West Bengal, and the Supreme Court, in this case, held as follows (p. 115):

"In our opinion, the Tribunal having believed the assessee's statement, there was an end of the matter in so far as that fact was concerned, and if the finding was based upon a statement which was good material on which it could be based, no question of law really arose."

In the present case, the Tribunal found, as a matter of fact, as follows:

"The deposit of Rs. 62,500 was withdrawn between November 28, 1961, to February 6, 1963. The deposits in the name of Mr. Sureka came between April 26, 1963, and September 2, 1963."

The Tribunal has further found that this amount of Rs. 62,500 found in the name of Raj Kumar Jain and Company was treated as undisclosed income of the assessee in the previous year and had belonged to the assessee. Thus, in my opinion, the assessee adduced satisfactory evidence fully linked with Rs. 62,500 belonging to the assessee which was treated as the undisclosed income of the assessee in the previous year and this being a matter of record with the Department, the Tribunal being satisfied with regard to the withdrawal and deposit between the dates as mentioned above, positively came to the finding that the deposit came out of the fund withdrawn in the immediately preceding year and the alternative plea of the assessee was, on verification of the records with the Department, held to be a genuine plea and the Tribunal deleted the addition. Thus, I hold that the assessee not only discharged the onus placed upon him u/s 68 of the Act in order to prove the source of money introduced in the account but also adduced positive evidence required for the purpose. I further hold that the assessee, in law, was not debarred from taking an alternative plea even though the assessee had failed to prove the plea initially taken by him and I further hold that, in the present case, there was positive evidence in support of the alternative plea taken by the assessee and no link is missing as submitted by the senior standing counsel for the Department.

17. In my opinion, the Tribunal having believed the assessee's alternative plea (which was a pure question of fact), there was an end of the matter in so far as that fact was concerned and the finding of the Tribunal being based upon a statement which was good material on which it could be based, no question of law really arose. Thus, in view of what I have held above, I hold that, on the facts and in the circumstances of this case, the order of the Appellate Tribunal deleting from the assessee's income the amount of Rs. 28,000 found credited in the name of the Durga Prasad Sureka in the account books of the assessee was correct in law and in accordance with the provisions u/s 68 of the 1961 Act and

the question referred for our opinion is answered in the affirmative, in favour of the assessee and against the Revenue. However, there shall be no order as to costs.

S.K. Jha, J.

18. I agree.