
(2003) 10 RAJ CK 0043
In the Rajasthan High Court
Case No : IT Ref. No. 30 of 1988

Commissioner of Income Tax

APPELLANT

Vs

Hiranand

RESPONDENT

Date of Decision : 17-10-2003

Acts Referred:

Income Tax Act, 1961 — Section 28, 69

Citation : (2004) 187 CTR 32 : (2005) 272 ITR 626

Hon'ble Judges : S.K. Keshote, J;K.S. Rathore, J

Bench : Division Bench

Advocate : Parnitoo Jain, for the Appellant; P.K. Kasliwal, for the Respondent

Judgement

S.K. Keshote, J.—The Tribunal, Jaipur Bench, Jaipur (for short, "the Tribunal"), has referred, u/s 256 of the IT Act, 1961 (hereinafter shall be referred to as "the Act, 1961"), at the instance of the Revenue, following questions of law to this Court for decision:

(i) Whether, on the facts and in the circumstances of the case, the decision of Tribunal is perverse inasmuch as the relevant material was not properly evaluated and wrong conclusions were drawn?

(ii) Whether, on the facts and in the circumstances of the case, the Tribunal had any material to the conclusion that the assessee was carrying on the illegal business of smuggling of gold?

(iii) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the loss arising to the assessee due to confiscation of gold by customs authorities is to be deducted from the amount included in his income as unexplained investment?"

2. The Central Excise Department, Jaipur, on 24th of Jan., 1979, seized foreign gold weighing 1,469 gms. worth Rs. 1,32,500 from the assessee at Jaipur u/s 110 of the Customs Act, 1962 (for short, "the Act, 1962"), for contravention of

the restrictions/prohibitions imposed vide notification issued u/s 11 of the Act, 1962, r/w Section 13(1) of the Foreign Exchange Regulations Act, 1973 (for short, "the Act,"1973").

3. In consequence of the information and material available with the Central Excise Department, the proceedings were initiated by the Revenue against the assessee and a notice was issued u/s 139 of the Act, 1961. In response to that notice the assessee filed his return of income on 30th of June, 1979.

4. Since the case was completed without making necessary enquiries u/s 143(1) of the Act, 1961, on 26th of Nov., 1980, necessary approval under the provisions of Section 143(1) thereof was obtained from the IAC, Ajmer Range, Ajmer, so as to complete the assessee's case u/s 143(1) after making necessary enquiries. On the basis of this approval received from that authority, notices under Sections 143(1) and 142(1) of the Act, 1961, were issued and served upon the assessee requiring him to file the details called for. After hearing the case the draft of the proposed order of assessment of the year 1979-80 was forwarded to assessee on 23rd of March, 1982, as the amount of variation to be proposed which was prejudice to the assessee exceeded Rs. one lakh in view of the provisions contained u/s 143(1) of the Act, 1961.

5. The assessee filed his objection to the proposed assessment order vide letter dt. 29th of March, 1982. The copy of the draft assessment order and the objections against the same of the assessee were forwarded by the AO to the IAC, Ajmer Range, Ajmer, for directions u/s 144B, of the Act, 1961, to enable him to complete the assessment. The JAC, Ajmer Range, Ajmer, after hearing the assessee has issued directions vide his letter dt. 21st of Aug., 1982, to the AO for finalising the assessment.

6. The gold was confiscated by the customs authorities. Before the customs authorities the assessee admitted that he had carried the gold on behalf of others, namely, Kanhiya Lal, Padam Chand and Dharam Chand. The plea of the assessee before the Department was that the gold never belonged to him and that the customs authorities have forcibly recorded his statement and got it signed.

7. The AO, after considering all these, was of the view that the amount of Rs, 1,32,500 is treated the income of the assessee from undisclosed sources. Before the AO the assessee did claim deduction of this amount as business loss and placed reliance on the decision of Hon"ble Supreme Court in Commissioner of Income Tax, Patiala Vs. Piara Singh, . The AO did not allow the claim on the ground that the assessee never admitted of carrying on any business of gold smuggling.

8. The matter was taken by the assessee to the CIT(A), Rajasthan-I, Jaipur, who also rejected the claim of the assessee on the ground that it was never the case of the assessee of having carried of any such business and that there was no basis for allowing the seizure of gold as business loss as what was proposed to

be added was the unaccounted money which was utilised for acquiring of gold.

9. The assessee has filed appeal before the Tribunal, Jaipur Bench, Jaipur, Before the learned Tribunal the plea of the assessee was that the decision in CIT v. Piara Singh's case (supra), fully applied in the present case. The learned Tribunal opined that since the entire facts go to indicate that the assessee had been carrying on the illegal business of smuggling, the loss thereon from deemed confiscation had to be deducted from the amount included as unexplained investment, The alternative contention raised before the learned Tribunal that the confiscation of the gold has to be termed as a short-term capital loss and, as such, be allowed u/s 71(3) of the Act, 1961, it is held that this contention is only consequential. The Revenue filed application u/s 256(2) of the Act, 1961, and prayed for reference of the aforesaid questions for adjudication and decision to this Court.

10. Ms. Parnitoo Jain, the learned counsel for the Revenue, contended that before the learned Tribunal there was no material to conclude that the assessee was carrying on illegal business of smuggling of gold. In her submission, in the facts and circumstances of the case, the learned Tribunal was not justified in holding that the loss arising to the assessee due to confiscation of the gold by the customs authorities is to be deducted from the amount included in the income of the assessee as unexplained investment.

11. It has next been contended that the decision of the apex Court in CIT v. Piara Singh's case (supra) is not of any help to the assessee. The learned Tribunal has wrongly placed reliance on that decision. Referring to the case of Madhya Pradesh High Court in Shri Vishnu Kumar Soni Vs. Commissioner of Income Tax, , Smt. Parnitoo Jain, the learned counsel for the Revenue, urged that the sine qua non for taking this benefit of deduction is that the assessee was carrying on illegal business of smuggling and that has not been established and thus he is not entitled for deduction of the amount of the cost of confiscation of the gold as business loss.

12. Shri P.K. Kasliwal, the learned counsel appearing for the assessee, per contra, submitted that the matter is squarely covered by the decision of the Hon'ble Supreme Court in CIT v. Piara Singh (supra).

13. In his submission the Revenue cannot have both head and tail. The Revenue can tax the profits only on a trade or business. That cannot be done without deducting the loss as a legitimate expenses of business. It is a clear case where the assessee was carrying on the business of smuggling, may be an illegal business and suffered loss as a consequence of confiscation of gold and it has rightly been allowed by the learned Tribunal as a loss in the business. The finding of fact has been recorded in favour of the assessee by the learned Tribunal that the assessee had been carrying on the illegal business of smuggling. After this finding of fact recorded the consequence thereof on the basis of admitted facts follows that the loss in the business due to confiscation of the gold and that has

to be deducted from the amount included as his unexplained investment.

14. We have given our thoughtful and anxious consideration to the rival contentions raised by the learned counsel for the parties.

15. It is undisputed fact that ITO, D Ward, Ajmer, while making the assessment of the income of the assessee for the asst. yr. 1979-80 added the value of seized gold of Rs. 1,32,500 and treated it to be income from other sources u/s 69 of the Act, 1961. It was taken to be the income from other sources on account of unexplained investment, not recorded in the books of accounts of assessee. The learned Tribunal has recorded a finding of fact that from various documents of the customs authorities it is established that the assessee was carrying on illegal business of smuggling of the gold. The gold was confiscated from him.

The Revenue added the value of the seized gold of Rs. 1,32,500 as income of the assessee u/s 69 of the Act, 1961 on account of unexplained investment for the purpose of charging tax but when the question arises for the claim made by the assessee of loss suffered in a business i.e., on account of confiscation of the gold the defence has been taken that the smuggling was not the business of the assessee. This approach of the Department, leaving apart that it is settled position of law on the point by their Lordships of the Hon'ble Supreme Court in CIT v. Piara Singh's case (supra), is unfair, unreasonable, unnatural and uncalled for. It is difficult to appreciate what to say to accept this approach of the Revenue Officers only to concern with the augmenting of the revenue by all means and seldom to bother the rightful claims made of the deduction from the gross income as a result of the business loss. The ITOs are first also the citizens of the country. They are equally concerned to see and look into that whatever legally permissible deductions available are to be given to the assessee. This one-side approach of the Revenue officers of the IT Department only concerns with the Revenue and not to bother for the assessee's legal rights, rightful deductions and other claims, is not befitting to their position. They are the officers of the welfare State and have duty and obligation to see that assessee's are being given their legal rightful and legitimate claims of deductions and other benefits. Whatever may be reason or ground it is not unknown that the assessee's have fear and are afraid of entering in the IT Department.

16. The facts of this case speak how one-sided approach was there of the assessing authority and the CIT(A), Rajasthan-I, Jaipur, in the matter. In the case of Vishnu Kumar Soni v. CIT (supra), (Court) held that the Tribunal found that the assessee was in possession of gold bars which were seized and confiscated by the customs authorities and that was the basis for observation of the Tribunal that it was not and improbable for the assessee to have indulged in the activities of dealing in smuggling gold. The Tribunal has also accepted the decision of the customs department that the assessee was caught in the process of smuggling. Therefore, confiscation of the gold was a loss incurred in the course of business and the Tribunal was not right in not allowing Rs. 40,000 loss in the business.

17. Reference here may have to the decision of the apex Court in the case of Commissioner of Wealth-tax, Gujarat Vs. S.C. Kothari, . Their Lordships of the Hon"ble Supreme Court held that for the purpose of Section 10(1) of the IT Act, 1922, the losses which have actually been incurred in carrying on a particular illegal business must be deducted before the true figure relating to profits which have to be brought to tax can be computed or if the business in which the loss was sustained was the same as the business in which the profit was derived that loss should be taken into account while computing the profits of the business u/s 10(1) of the Act, 1922, even if the business was illegal.

18. Reference fruitfully may have to another decision of the Hon"ble apex Court in CIT v. Piara Singh (supra). Their Lordships of the Hon"ble Supreme Court held as under:

"In our judgment, the High Court is right. The IT authorities found that the assessee was carrying on the business of smuggling. They held that he was, therefore, liable to Income Tax on the income from that business. On the basis that such income was taxable, the question is whether the confiscation of the currency notes entitles the assessee to the deduction claimed. The currency notes carried by the assessee across the border constituted the means" for acquiring gold in Pakistan, which gold he subsequently sold in India at a profit. The currency notes were necessary for acquiring the gold. The carriage of currency notes across the border was an essential part of the smuggling operation. If the activity of smuggling can be regarded as a business, those who are carrying on that business must be deemed to be aware that a necessary incident involved in the business is detection by the customs authorities and the consequent confiscation of the currency notes. It is an incident as predictable in the course of carrying on the activity as any other feature of it. Having regard to the nature of the activity possible detection by the customs authorities constitutes a normal feature integrated into all that is implied and involved in it. The confiscation of the currency notes is a loss occasioned in pursuing the business; it is a loss in much the same way as if the currency notes had been stolen or dropped on the way while carrying on the business. It is a loss which springs directly from the carrying on of the business and is incidental to it. Applying the principle laid down by this Court in Badridas Daga Vs. The Commissioner of Income Tax, , the deduction must be allowed."

19. In CIT v. S.C. Kothari (supra), their Lordships of the Hon"ble Supreme Court held that for the purpose of Section 10(1) of the IT Act, 1922, a loss incurred in carrying on an illegal business must be deducted before the true figure of profits brought to tax can be computed. Hon"ble Court observed (p. 802):

"If the business is illegal, neither the profits earned nor the losses incurred would be enforceable in law. But, that does not take the profits out of the taxing statute. Similarly, the taint of illegality of the business cannot detract from the losses being taken into account for computation of the amount which can be subjected to tax as "profits" u/s 10(1) of the Act of 1922. The tax collector

cannot be heard to say that he will bring the gross receipts to tax. He can only tax profits of a trade or business. That cannot be done without deducting the loss and the legitimate expenses of the business."

20. We find that similar view has been taken by the Andhra Pradesh High Court in *Soni Hinduji Kushalji and Co. Vs. Commissioner of Income Tax*, .

21. We find from the statement of case that the Tribunal accepted that the Central Excise Department, Jaipur, on 24th of Jan., 1979, seized the gold weighing 1,479 gms. valued at Rs. 1,32,500 from the assessee. A finding of fact has also been recorded that the said gold was confiscated by the authorities. The assessee has admitted before the Central excise authorities that he had carried the gold though on behalf of other persons. It is true that before the Central Excise Department the plea of the assessee was that the gold never belonged to him and the customs authorities had forcibly recorded his statement and got it signed by him. The learned Tribunal has accepted as a fact that the assessee was under MISA and sentence was confirmed by this Court as well. On this fact the learned Tribunal held that the ITO has treated Rs. 1,32,500 as income of the assessee from undisclosed sources. Before the ITO the assessee did claim deduction of amount as business loss by placing reliance on the judgment of the Hon"ble Supreme Court in *CIT v. Piara Singh's case* (supra). The claim was rejected on the ground that assessee never admitted of having carried on any smuggling business activities. The Revenue cannot be heard to say that it will bring the loss to tax. It can only tax profits of a trade or business and that cannot be done without deducting the losses and the legitimate expenses of the business. The finding of fact recorded by the Tribunal is that the entire facts of the case go to show that the assessee had been carrying on illegal business of smuggling. The consequences of this finding recorded are inevitable. The confiscation of the gold of the assessee is a loss therefrom which has to be deducted from the amount included as unexplained investment.

22. As a result of the aforesaid discussion all the three questions referred to the Court for its opinion are returned answered against the Revenue and in favour of the assessee. There shall be no order as to costs.