
(2014) 09 RAJ CK 0106

In the Rajasthan High Court

Case No : DB Income Tax Reference Application No. 34/1994

Commissioner of Income Tax

APPELLANT

Vs

Sobhrajmal

RESPONDENT

Date of Decision : 17-09-2014

Acts Referred:

Income Tax Act, 1961 — Section 256(1), 256(2)

Citation : (2015) 228 TAXMAN 308

Hon'ble Judges : J.K. Ranka, J;Ajay Rastogi, J

Bench : Division Bench

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

Judgement

J.K. Ranka, J.—This reference application u/s. 256(2) of the Income Tax Act (for short, "IT Act") is directed against the order of the Income Tax Appellate Tribunal (for short, "ITAT") dt. 21/05/1993 by which the reference application of the revenue u/s. 256(1) of the IT Act was dismissed by the ITAT and it relates to the assessment year 1986-87.

2. The revenue has proposed following questions for the opinion of the High Court arising out of RA No. 17/JP/1993:-

"1. Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of Rs. 12,381/-made on the basis of seized document, marked Annex. A-1 notwithstanding the fact that this addition made in the hands of the firm on substantive basis, has been deleted by the Tribunal?

2. Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of Rs. 88,000/-made on account of unexplained advances as per seized pronotes notwithstanding the fact that additions of Rs. 77,000/- in the asstt. year 1986-87 and Rs. 11,000/- in the asstt. year 1985-86 respectively made on substantive basis in the case of the

firm have been deleted?

3. Whatever on the facts and in the circumstances of the case, the Tribunal was justified in deleting the addition of Rs. 8600/- on account of entries in diary marked as Annexure A-4 made on protective basis in the case of the assessee notwithstanding the fact that this addition has been deleted from the hands of the firm made on substantive basis?

4. Whether on the facts and circumstances of the case and in law, the Tribunal was justified in deleting the addition of Rs. 2500/- made on the basis of three pronotes as per Annexure A-1 on account of interest on advances of Rs. 17,000/- notwithstanding the fact that the said addition made on substantive basis in the hands of the firm has been deleted by the Tribunal?

3. The brief facts, which can be noticed on perusal of the order passed u/s. 256(1) and the order passed by the ITAT while deciding the matter, are that a search and seizure operation was carried out in the case of partnership firm M/s. Ghindmal Kauromal on 05/09/1985 and the respondent-assessee happened to be the partner of firm M/s. Ghindmal Kauromal and was also subjected to search, the other partners were also subjected to search. During the course of search, certain books of accounts, documents and other incriminating documents/material were found and seized. During the course of assessment proceedings, the Assessing Officer (for short, "AO") scrutinized the said documents and had made additions on account of some of the documents and it was claimed that these documents pertained to the assessee. The AO also made additions on account of some papers/documents in the case of firm M/s. Ghindmal Kauromal on substantive basis but since the assessee being a partner and the documents having been found in the possession and custody and at the residence of the assessee, therefore, on protective basis, the addition was also made in the hands of the assessee as well.

4. The matter was carried in appeal before the CIT(A) and before the CIT(A) it was pleaded that the additions are made on protective basis and the main substantive addition stands made in the case of firm and same addition based on same documents cannot be made in the case of the assessee as well as the partnership firm. The CIT(A) vide its order dt. 12/04/1990 has observed that the (i) addition of Rs. 12,381/- on account of Annexure-1; (ii) addition of Rs. 88,000/- as per documents No. 5, 6, 7, 8 and 9 of Annexure-A-1; (iii) addition of Rs. 8,600/- on account of Annexure-A-4 and (iv) addition of Rs. 2,500/- on account of three pro-notes as per Annexure-1 had already been confirmed in the case of firm and therefore, all the additions were deleted in the case of the assessee.

5. The revenue carried the matter in appeal before the ITAT and the ITAT vide order dt. 29/10/1992, after appreciation of evidence on record and on account of factual finding, (i) in so far as the addition of Rs. 12,381/- is concerned, came to the conclusion that in the case of the firm, the said amount was held to be

relatable to one Nanak Ram (a mental sick person) through his wife Smt. Dropadi Devi and the said document had been recovered from the room and in possession of Smt. Dropadi Devi and therefore, by following the order of the ITAT in the case of the firm, the addition was deleted; (ii) in so far as the addition of Rs. 88,000/- is concerned, the ITAT observed that since the addition out of this addition comprised of two figures, one of Rs. 11,000/- relating to assessment year 1985-86 which was made in the case of firm but the same was deleted in the case of firm by the ITAT but was confirmed in the case of one Roop Chand for the assessment year 1985-86 (ITA 757/JP/89) and another addition of Rs. 77,000/- has been made in the assessment year 1986-87 on the basis of same pro-note and thus when the addition has already been made on account of the same pro-notes in the case of Roop Chand for the assessment year 1986-87 then the ITAT deleted the addition on these terms; (iii) in so far as the addition of Rs. 8,600/- is concerned, this addition although was deleted in the case of the firm but was sustained in the case of one Roop Chand (ITA) 456/JP/89 and 771/JP/89) and in view of this factual finding, when the addition had already been made, the same was deleted in the case of assessee; (iv) in so far as the addition of Rs. 2,500/- is concerned, the ITAT has observed that the addition though in the case of the firm was deleted (ITA 456/JP/89) but stands confirmed in the case of Roop Chand (ITA 771/JP/89) thus deleted the addition in the present case.

6. In view of this factual backdrop, the ITAT, while rejecting the reference application, was of the view that the above findings do not lead to involving of any question of law and thus are essentially findings of fact and accordingly rejected the reference application.

7. Ld. counsel for the revenue vehemently contended that substantial questions of law arise out of the order of the ITAT. She contended that all these incriminating documents were found in the custody, control and possession and at the residence of the assessee and thus the revenue authorities were correct and justified in treating and making addition of the amount in the hands of the assessee. She contended that the assessee was unable to prove as to how these documents came in the possession of the assessee and since these were documents in his possession, it was primary duty of the assessee to explain the nature of the transactions. She contended that the assessee merely conveyed that these pertained to either firm or if not pertaining to the firm, then to Nanak Ram & Roop Chand. She contended that no evidence was led by the assessee by placing evidence or material on record to justify shifting of the burden which lay heavily on the assessee and since it was not discharged by the assessee, therefore, she contended that addition was rightly to be made in the case of assessee and questions of law arise for consideration of the court.

8. Ld. counsel for the respondent-assessee, on the other hand, contended that when these very additions have been made in other cases and even the AO in the assessment order himself held that the additions are being made on

protective basis, then when additions have already been made in other hands, the addition cannot be made in the case of the assessee again. He further contended that the order of ITAT is based essentially on finding of fact and does not lead to any question of law.

9. We have considered the arguments advanced by counsel for the parties and perused the order passed by the ITAT in reference application so also the order dated 29/10/1992 where the additions have been considered by the ITAT. In our view, when all these very additions were considered by the ITAT and have been confirmed or considered in the case of firm M/s. Ghindmal Kauromal or/and in the case of Roop Chand or/and in the case of Nanak Ram (Dropadi Devi), then in our view, the addition cannot be made again in the hands of the assessee. Though the documents were found in the custody and control of the assessee but when the assessee conveyed that either it pertains to firm or to other persons namely Nanak Ram or Roop Chand, and when both CIT (A) and ITAT have accepted this plea then we feel that initial burden was discharged. When these very documents have already been considered by the ITAT in the aforesaid cases, then certainly double addition, one in the hand of the person in whose custody the documents are found and secondly in the case of the other person where substantive addition is made, is not permitted under the IT Act, It is an admitted fact that even the AO had considered all these documents and the addition, if any, was made on protective basis merely because the documents were found in the custody and control of the assessee but once the addition has been sustained in the hands of the persons to whom the documents related/belonged, in our view, the addition again cannot be made on the same documents/loose papers in the hands of the assessee and the ITAT rightly came to the aforesaid conclusion. Same addition on the basis of same document cannot be made in the hands of two persons. 10. Under the Income Tax Act though there is no such word as substantive addition/assessment or protective addition/assessment, however, the courts have held that in case where it appears to the income tax authorities that certain income has been received during the relevant year or for that matter documents/loose papers have been found and it is not clear to whom it pertains or it is not clear who has received that income and prima-facie it appears that the income or/and documents/loose papers pertains to either A or B or by both together and thus it will be open to the relevant income tax authority to determine the said question by taking appropriate proceedings both against A and B.

11. Under the law, it is open for the department to make assessments on two person of the same income where there is some ambiguity as to the liability to charge or to make an addition on the basis of incriminating documents or loose papers or other material or other income in respect whereof A says, it pertains to B and B says it pertains to A but in that case, to safeguard the interest of the revenue, the Assessing Officer has liberty to pass order on protective basis or on substantive basis in one hand and vise-versa.

12. It is only to protect the interest of the revenue as, if the action is not taken in the case of A who says that it pertains to B and addition is made in the case of B and later on, on the basis of evidence it is found that it pertained to A and if no action is taken in the case of A, then possibly the assessment or the proceedings may get time barred. Therefore, to avoid such eventualities, the revenue has authority and right to make protective assessment as well as substantive assessment in another case, however, with the rider that ultimately and finally, the income/transaction/addition, if at all would be in the hands of A or B but it cannot be sustained in both the hands.

13. When we peruse the facts in the present reference application, then it is an admitted fact and the revenue also does not deny that protective addition was made in the case of assessee whereas substantive addition was either made in the case of M/s. Ghindmal Kauromal or/and in the case of Roop Chand or/and in the case of Nanak Ram (Dropadi Devi) and when the above additions have finally been sustained, as observed by the ITAT in the case of M/s. Ghindmal Kauromal or/and in the case of Roop Chand or/and Nanak Ram (Dropadi Devi), then it is a finding of fact and no question of law can be said to arise with the facts found by the ITAT. When ultimately, the addition of these very documents had been sustained in some other case relating to the search or other partners or in the case of M/s. Ghindmal Kauromal or/and in the case of Roop Chand or/and Nanak Ram (Dropadi Devi), then the ITAT had rightly deleted the addition as the same cannot be or could not have been made in two hands. The revenue should not have been aggrieved as the additions on the basis of loose papers/documents has ultimately been made/sustained in other cases of the group.

14. We are also in conformity with the view of the ITAT that the ITAT, while passing the order dt. 29/10/1992, decided the case on the basis of appreciation of relevant facts and evidence on record and thus are essentially finding of fact and in our view, the ITAT rightly rejected the reference application as it does not give rise to any question of law fit for reference to this Court. It is also a finding of fact that the ITAT has also observed that the case of firm M/s. Ghindmal Kauromal or the other cases have become final as the revenue did not even sought any reference in the main case.

15. In view of what we have observed herein above, the reference application does not involve any question of law and accordingly the same stands rejected. No costs.