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**(2005) 08 GAU CK 0062**

**In the Gauhati High Court**

**Case No :** IT Ref. No. 52 of 1994 29 August, 2005

D.M. Engineering

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

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**Date of Decision :** 29-08-2005

**Acts Referred:**

Income Tax Act, 1961 — Section 132, 143, 147, 256, 68

**Citation :** (2006) 199 CTR 545

**Hon'ble Judges :** Ms. H.N. Devani, J;H.N. Devani, J;D.A. Mehta, J

**Bench :** Full Bench

**Advocate :** J.P. Shah with Manish J. Shah, T.U. Bhatt, for the Appellant;

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## **Judgement**

D.A. MEHTA, J.

The Tribunal, Ahmedabad Bench "C" has referred the following questions u/s 256(1) of the Income Tax Act, 1961 (the Act), both at the instance of the revenue and the assessee :

At the instance of the revenue :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in deleting the addition in respect of first two cheques for Rs. 50,000 and Rs. 1,50,000, respectively ?"

At the instance of revenue (sic-Assessee) :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in confirming the addition in respect of last two cheques for Rs. 1,50,000 and Rs. 1,25,000, respectively ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in rejecting the assessee's contention that the amount could be taxed if at all only in assessment year 1975-76 on financial year basis as unexplained investment u/s 69 of the Act ?"

2. The assessment year is 1976-77 and the relevant accounting period is Samvat Year 2031. The assessing officer framed an assessment u/s 147 read with section 143(3) of the Act on 31st March, 1980 making addition of Rs. 4,75,000 as unexplained cash credit u/s 68 of the Act. The addition of Rs. 4,75,000 is in respect of four amounts credited in the books of the assessee on four different dates from 28-11-1974 to 3-3-1975 for cash stated to have been received from Syndicate Bank against four bearer cheques drawn by the assessee-firm. The firm comprised of two partners, both having equal shares in the profits and losses. It is an undisputed fact that both the partners were whole-time employees of one group, popularly known as Vora Group of Rajkot. A concern named Economic Traders is the main entity of group with allied concerns like Economic Traders (Gujarat) (P) Ltd., Delta Engineering, Cima Industries, Ferrous Engineers, etc. Both the partners of the assessee-firm contributed capital of Rs. 5,000 each and traded in spare parts of diesel engines. The purchases were made from various parties of Rajkot, but all the sales were effected to the concerns of Vora Group.

The assessee-firm had no shop or business premises and the business was conducted only from the residence of the partners.

3. Original assessment was framed u/s 143(3) of the Act on 17-11-1977 assessing the assessee on a total income of Rs. 22,000. On 16-3-1975, search and seizure proceedings took place u/s 132 of the Act. It appears that inquiries made with various parties from whom the assessee has shown purchases, revealed that the purchases were bogus and hence, the sales also were treated as bogus. However, because the assessee had shown income from business at Rs. 22,000 and was so assessed in the original proceedings, in reassessment proceedings also, the assessing officer added the said amount of Rs. 22,000 as income from undisclosed sources. The assessing officer, after calling upon the assessee to explain the credits made in the cash books, came to the conclusion that the said credits were not explained to his satisfaction and accordingly, made addition of Rs. 4,75,000 which comprised of following four amounts relatable to four cheques :

Sr. No.

Date

Amount

Source as explained in the books

(1)

28-11-1974

50,000

Encashment of cheque No. 443101

(2)

16-12-1974

1,50,000

Encashment of cheque No. 443103

(3)

17-2-1975

1,50,000

Encashment of cheque No. 443106

(4)

3-3-1975

1,25,000

Encashment of cheque No. 443107

4. The assessee carried the matter in appeal before the Commissioner (Appeals), who confirmed the addition in question. A further appeal was filed by the assessee before the Tribunal. After hearing both the sides as well as appreciating the evidence on record, the Tribunal accepted the explanation of the assessee in respect of the first two cheques, namely, of Rs. 50,000 and Rs. 1,50,000, totalling to Rs. 2,00,000 and deleted the addition to that extent. The addition in respect of remaining two cheques totalling to Rs. 2,75,000 (Rs. 1,50,000 and Rs. 1,25,000) was confirmed. The revenue is in reference against deletion of addition to the tune of Rs. 2,00,000, while the assessee is in reference in respect of addition amounting to Rs. 2,75,000 relatable to other two cheques.

5. Mr. J.P. Shah, the learned advocate appearing on behalf of the assessee, submitted that section 68 of the Act was only in relation to the credit entry. In other words, the submission was that section 68 could not be invoked on the basis of how the amount represented by the credit entry is utilized by an assessee. According to him, the facts went to show that the amounts were withdrawn from the bank by four bearer cheques drawn on assessee's own account maintained with the bank. That in these circumstances, according to him, the assessee had discharged onus of showing the source of the credit. That the amount having come from the bank account of the assessee, there would be no occasion to doubt the genuineness of the transaction or the identity of the person, and that was not even the case of the revenue. He, therefore, submitted that section 68 was not applicable in light of the facts and evidence on record. Alternatively, it was submitted that the said provision was not applicable in light of the affidavit tendered by Shri Mahendra Turakhia on 26-2-1980. A further alternative contention was that addition, if any, could be made only u/s 69 of the Act and not section 68 of the Act; and for applicability of section 69 of the Act,

this was not the correct assessment year. He invited attention to certain questions and answers of the bank official as reproduced in the submissions of the assessee, to emphasize the fact that the evidence on record went to show that the assessee had discharged the burden which lay on assessee by explaining the nature and source of the cash credit.

6. Mr. T.U. Bhatt, the learned standing counsel appearing on behalf of the revenue, submitted that all the authorities had come to a conclusion that the transaction was not a genuine transaction. That in fact though the books reflected receipt of cash from bank, in fact, no amount had actually come. In other words, the amount withdrawn by the bearer cheques had been utilized for obtaining demand drafts in favour of Jayant Turakhia and Mahendra Turakhia and no amount had in fact come from the bank to the assessee physically. Inviting attention to the phraseography employed by section 68 of the Act, it was submitted that the section required that a sum is found credited in the books of an assessee. That there cannot be a fictitious entry without any sum being available to back the said entry. He, therefore, urged that the Tribunal had rightly confirmed the addition to the extent of Rs. 2,75,000.

7. Insofar as the amount of Rs. 2,00,000, which was deleted by the Tribunal, the contentions made by the learned counsel for respective parties were on the lines of contentions raised by the other side in relation to the earlier addition sustained by the Tribunal.

8. The basic case put up by the revenue as appearing from the assessment order is that the four amounts withdrawn from Syndicate Bank through four different cheques drawn on the bank account of the assessee are shown to have been credited in the cash book of the assessee, but in fact, have been actually utilized for obtaining bank drafts in the names of two persons, namely, Shri Mahendra Turakhia and Shri Jayant Turakhia. There is no dispute that four bearer cheques were drawn as per details mentioned hereinbefore. There is also no dispute as to the fact that, on the respective dates, the amount shown against each one of the four cheques was appropriately shown credited in the cash book with corresponding entry appearing in the bank book. The Tribunal, while dealing with the basic issue, has posed for itself a question as to whether the assessee-firm may be regarded as having actually obtained cash from Syndicate Bank on four different dates against the bearer cheques drawn and presented to the bank; or whether the department is correct in contending that the four cheques were not utilized by the assessee-firm for obtaining cash, but were utilized for purchasing drafts in the names of two Turakhia brothers, of the amounts represented by the cheques or higher amounts.

9. In relation to the first cheque dated 28-11-1974 for a sum of Rs. 50,000, it has been found by the Tribunal that a draft for a sum of Rs. 2,50,000 was obtained from that very bank on the same day, i.e., 28-11-1974 in the name of Shri Jayant Turakhia. For purchase of the said draft, a cheque for a sum of Rs. 2,00,060 was issued by M/s. Economic Traders (Gujarat) (P) Ltd. The

consideration for the total amount of the draft issued by the bank, thus, came by way of a cheque from M/s. Economic Traders (Gujarat) (P) Ltd. to the extent of Rs. 2,00,000, and by way of cheque from the assessee-firm to the extent of Rs. 50,000. The bank commission for issuance of draft was paid by M/s. Economic Traders (Gujarat) (P) Ltd., by including the sum of Rs. 60 in the cheque issued by the said party. It has been found that, on the reverse of the cheque issued by the assessee-firm and the other party, there is a noting to the effect "DD on Bombay".

10. On the other hand, the Tribunal has also found that, on the cheque issued by the assessee-firm, a rubber stamp bearing endorsement "pay cash" as well as "Token No. 12" is mentioned on the reverse of the cheque.

11. Therefore, the Tribunal has appreciated the aforesaid evidence to come to the conclusion that there is one set favouring the assessee, namely, endorsement of "pay cash" and mentioning of "Token No. 12", while the other set of evidence that goes against the assessee is the mentioning on reverse of the cheque "DD on Bombay".

12. The Tribunal, therefore, called upon the assessee to produce a copy of the bank account, but it has been recorded by the Tribunal in paragraph No. 21 of its order that the analysis of the bank account does not lead to a firm conclusion either way. The Tribunal has also taken into consideration the statements of the bank officials and thereafter, stated that the statements when read as a whole do not precisely indicate as to whether the case put up by one or the other side can be said to be established. It is further found by the Tribunal that none of the officials, whose statements were recorded, was working in the branch at which the transaction took place in 1974-75, and, therefore, the statements at best can merely reflect their opinions or theories on the possibility based on normal banking practice., The Tribunal has further found that the affidavit of Shri Jayant Turakhia dated 25-2-1980 was never forwarded to the assessing officer and hence, cannot be taken into consideration. Therefore, the Tribunal has ultimately come to the conclusion that, in respect of the first cheque to the extent of Rs. 50,000 issued by the assessee, the explanation tendered by the assessee appears to be satisfactory, and the addition was deleted.

13. In relation to the second cheque dated 17-12-1974 for a sum of Rs. 1,50,000, there are similar findings recorded by the Tribunal, except for the fact that the token number is different, and that the draft was for a sum of Rs. 2,00,000. The balance amount of consideration for purchase of draft, namely, Rs. 50,000 has come from some other source. Therefore, applying the same analogy as in case of the first cheque, the Tribunal has deleted this addition.

14. In relation to the third cheque dated 17-2-1975 for a sum of Rs. 1,50,000, it is found by the Tribunal that a draft of exactly the same amount, i.e., Rs. 1,50,000 was obtained favouring Shri Mahendra Turakhia payable at Bombay. It is further found by the Tribunal that, on the reverse of the cheque, there is a

noting to the effect that "DD on Bombay" and the noting is initialled by the manager/officer of the bank. It has further been recorded that the draft application form mentions the cheque number, i.e., 443106, which is the cheque issued by the assessee, and also assessee's account number, i.e., Current Account No. 170. That the said draft application form also bears a rubber stamp mentioning "transfer". Furthermore, on the counterfoil of the cheque, one of the partners of the assessee-firm, Shri J.B. Mehta has made a noting in pencil as "(M. Turakhia)". The said counterfoil of the cheque had been seized from the residence of the other partner of the assessee-firm, namely, Shri Suresh Dave. It is further found that, from the ledger of the bank reflecting the transactions of the account, against the aforesaid cheque and the entry relating thereto on the relevant date, the word "transfer" has been mentioned; that a copy of the said account was forwarded by the bank to the account-holder, i.e., the assessee-firm and the assessee had not intimated any objection that the said noting was incorrect in any manner whatsoever. The Tribunal has, therefore, on the basis of the aforesaid facts, appreciated evidence to infer and conclude that proceeds of this cheque had not been received by the assessee in cash, but were diverted at the bank counter itself for purchase of the draft. The Tribunal has laid emphasis on the fact that the amount mentioned in the cheque and the amount for which the draft was purchased are the same figures and there is no discrepancy as in case of the earlier two cheques.

15. In relation to the fourth cheque dated 3-3-1975, the Tribunal has recorded similar findings of fact after appreciating the evidence on record, the only point of difference being the amount, namely, Rs. 1,25,000. The Tribunal has, therefore, *mutatis mutandis* drawn the same inference and conclusion that this amount had not been received by the assessee in cash and was diverted at the bank counter for purchasing draft in favour of Shri Mahendra Turakhia.

16. It is not submitted by either side that the aforesaid evidence has not been correctly read and reproduced by the Tribunal; the only submission is that the inference could be incorrect. However, even if one accepts that, on the aforesaid evidence, there is a possibility of drawing different inference or arriving at a different conclusion, that by itself would not make the order of the Tribunal incorrect so as to permit the High Court to intervene in a reference. It is not possible to state that the inference drawn and the conclusion arrived at by the Tribunal, after appreciating the facts and evidence on record, is such that no reasonable person would draw such an inference or arrive at such a conclusion. In the circumstances, there is no infirmity in the order of the Tribunal insofar as appreciation of evidence and recording of facts are concerned.

17. During the course of hearing, the learned advocate on behalf of the assessee invited attention to a decision of the Apex Court in the case of Commissioner of Income Tax, Ernakulam Vs. P.K. Noorjahan (Smt), to submit that it has been laid down by the Apex Court that when section uses the word "may", it clearly indicates that the intention of the Parliament was to confer a discretion on the

assessing officer in the matter of treating the cash credit which has not been satisfactorily explained as income of the assessee and the assessing officer is not obliged to treat the same as income in every case where the explanation offered by an assessee is found to be not satisfactory. There can be no dispute as to the proposition laid down by the Apex Court. The only question that would arise is as to whether the discretion has been rightly exercised in the factual matrix and the evidence on record. Once the authority is vested with a discretion, all that is required to be ascertained is as to whether the discretion has been exercised in a reasonable manner, i.e., not capriciously or unreasonably. The facts which have been noted hereinbefore, and which are more elaborately dealt with by the Tribunal, do not indicate that the exercise of discretion by the Tribunal can be termed to be either unreasonable or capricious in any manner whatsoever. To the contrary, it is apparent that where the Tribunal found existence of doubtful circumstances on the basis of factors partly favouring the assessee, it has exercised discretion in favour of the assessee by deleting the addition in part, against which the revenue is in reference. Therefore, on this count, the assessee cannot succeed.

18. Another contention raised on behalf of the assessee pertains to affidavit dated 25-2-1980 filed with the assessing officer under cover of letter dated 26-2-1980. On the basis of the same, it was contended, by inviting attention to the observations of this court made in case of Glass Lines Equipments Co. Ltd. Vs. Commissioner of Income Tax, that if the deponent of an affidavit is not cross-examined, the averments made in the affidavit have to be accepted in toto.

19. Once again, there can be no dispute as to the legal proposition. However, section 68 of the Act requires an assessee to tender explanation. A third party cannot come forth and tender an explanation on behalf of the assessee. As can be seen from letter dated 26-2-1980, Shri Mahendra Turakhia has himself addressed the said communication to the assessing officer. However, even if the same is treated as part and parcel of the assessee's explanation, on overall appreciation of evidence on record, the Tribunal has found that there is sufficient evidence on record to clinch the issue against the assessee in relation to cheques at serial Nos. 3 and 4 dated 17-2-1975 and 3-3-1975. In these circumstances, it cannot be stated that the deponent of the affidavit ought to have been examined. If, even after ignoring the said affidavit, the Tribunal was in a position to come to the conclusion partly in favour of the assessee and partly against the assessee, it cannot be stated that the order of the Tribunal suffers from a legal infirmity so as to set aside the entire order. Therefore, over and above the reasons assigned by the Tribunal for not considering the affidavit, as recorded in paragraph No. 23 of its order, it is not possible to accept the contention on behalf of the assessee that, non-consideration of the affidavit or non-examination of the deponent would result in miscarriage of justice.

20. Coming to the last contention regarding applicability of section 69 of the Act rather than section 68 of the Act, it has been found by the Tribunal that the

addition has been made in relation to the entries of credit for relevant amounts standing in the cash book. To meet with the assessee's explanation that the amounts were withdrawn by four bearer cheques, the revenue has pointed out that the relevant amounts were not received by the assessee in cash from the bank, but stood diverted and were used for purchase of drafts. Therefore, this aspect was merely an argument raised by the revenue in support of its stand that the entries reflecting cash credits appearing in the cash book remained unproved.

21. The contention on behalf of the assessee that, for purposes of invoking section 68 of the Act, only the credit side of the books had to be taken into consideration loses sight of the fact that, it is the starting point for inquiry. The section provides that where any sum is found credited in the books of an assessee and the assessee offers no explanation or the explanation offered as to nature and source of such credits is not found to be satisfactory, the sum so credited may be charged to tax as income of the assessee of the previous year. In the present case, on four different dates, the assessing officer found four different sums credited in the books. He, therefore, called upon the assessee to explain the nature and source of the said four credits. The assessee's basic explanation was that the "amounts were received in cash from the bank by virtue of four bearer cheques drawn by the assessee. It was in the process of verification of the said explanation that the officer came to the conclusion that the explanation was not satisfactory, and one of the reasons advanced for so holding, was that the amounts had been diverted in the bank itself for purchasing demand drafts; and if that be so, the said amounts could not have come by way of cash, as reflected by the entries in the cash book. Therefore, it was not a case of utilization of the funds withdrawn from the bank, but not accepting the explanation tendered by the assessee and giving reason for not accepting such an explanation. In this context, it is found by the Tribunal, as a matter of fact, that "Here is a case wherein the utilization for buying the drafts has not been shown. On the other hand, on the basis of attendant circumstances, it is held that the amounts have been used for buying the drafts while they have been shown in the account books as cash received from the bank. In a way, it is an attempt of showing utilization of the cash for one purpose (viz., availability in the cash book) while actually, cash was not available as it stood utilized for another purpose (in this case for buying of drafts)".

22. In the result, no interference is called for in any manner whatsoever so far as the Impugned order of Tribunal is concerned. Neither the assessee nor the revenue has been able to make out any case for disturbing the findings of the Tribunal which are respectively against each of them.

23. Insofar as a question at the instance of revenue is concerned, it is held that the Tribunal was right in deleting the addition in respect of first two cheques for Rs. 50,000 and Rs. 1,50,000, respectively. The question is accordingly answered in the affirmative, i.e., in favour of the assessee and against the revenue.



24. Insofar as the question No. 1 at the instance of assessee is concerned, it is held that the Tribunal was right in law in confirming the addition in respect of the last two cheques for Rs. 1,50,000 and Rs. 1,25,000, respectively. The said question is accordingly answered in the affirmative, i.e., in favour of the revenue and against the assessee.

25. In relation to question No. 2 at the instance of the assessee, it is held that the Tribunal was right in rejecting the assessee's contention that the amount could be taxed if at all only in assessment year 1975-76 on financial year basis as unexplained investment u/s 69 of the Act. Accordingly, this question is answered in the affirmative, i.e., in favour of the revenue and against the assessee.

26. The reference stands disposed of accordingly. There shall be no order as to costs.