

(1957) 09 MP CK 0013

In the Madhya Pradesh High Court

Case No : Miscellaneous C.C. No. 42 of 1955

Kalekhan

APPELLANT

Vs

Commissioner Income Tax

RESPONDENT

Date of Decision : 03-09-1957

Acts Referred:

Income Tax Act, 1961 — Section 66(2)

Citation : (1958) JLI 29

Hon'ble Judges : Hidayatullah, C.J.; Choudhari, J

Bench : Division Bench

Advocate : B.L. Seth with A.L. Halve, for the Appellant; M. Adhikari, Advocate General, for the Respondent

Judgement

1. The order in this case will also govern M.C C. No. 43 of 1955.
2. These are two references made under Sec. 66 (2) of the Indian income tax Act by the Appellate Tribunal, Bombay, in reply to the orders passed by this Court calling upon the Tribunal to state a case. Since the assessee is common and the facts of these two cases are very similar it is convenient to dispose of them by a common order, as was done by the Appellate Tribunal when the appeal was initially before it. M C.C 42 of 1955 refers to the assessment year 1945-46, while M.C.C. 43 of 1955 refers to the assessment year 1947-48. Originally, the assessee was assessed by the income tax Officer on 24-6-1946 in the former case and on 10-1-1948 in the latter. It appears that the income tax Officer having found certain cash credits said to be on account of deposits made by other persons and the sale of gold issued a notice under Sec. 34 (1) (b) of the Act with the previous concurrence of the Commissioner. It was in answer to the notice that the assessment case was reopened and some further items said to be income from an undisclosed source in the hands of the assessee were assessed. The question which mainly arises in these assessment cases is whether the income tax Officer had sufficient material on which to hold that the cash credits represented income from an undisclosed source. The matter, however, has been

split into many questions, which we shall give after we have narrated the facts of the two cases separately.

3. M.C C. 42 of 1955: In that assessment year the income tax Officer found the following cash credits in the account books of the assessee, who carries on the business of Bidi making and manihari;

Rs. 33,000

Ghar account.

Rs. 10,000

Deposit in the name of Mohammad Islam.

Rs. 11,000

Deposit in the name of Muslimbi.

Rs. 41,300

From sale of gold.

The income tax Officer held that all these represented income from an undisclosed source, and he therefore added these sums to the income already assessed in the original order and levied tax on them as well. The appellate Tribunal in appeal finally deleted two items, viz. Rs. 33,000 (Ghar account) and Rs. 10,000 (deposit in the name of Mohammad Islam). It, however, held that the remaining two items viz Rs. 11,000 of Muslimbi and Rs. 41,300 acquired from the sale of gold were rightly held to be income from an undisclosed source and therefore liable to be added to the assessed income.

M.C C. 43 of 1955: In the year of assessment 1947-48 the income tax Officer found Rs. 19,576-2-0 as proceeds of sale of gold and a deposit of Rs. 20,000 in the name of one Yaqub Manihar. Both these items were held to be income from an undisclosed source and were added to the income already assessed in the original order. The appeals of the assessee in respect of these two items failed right up to the Appellate Tribunal at Bombay. The questions therefore which have been framed and which reflect truly the controversy between the parties are as follows: --

M.C C. 42 of 1955:

(1) Whether the notice issued by the income tax Officer under Sec. 34 (1) (b) of the income tax Act which was not in force during the relevant assessment year was valid ?

(2) Whether there was any material on which the Tribunal could hold that the income tax Officer issued the notice under Sec. 34 (1) (b) in consequence of information in his possession which led him to believe that income profits or gains chargeable to income tax had escaped assessment for the relevant year ?

(3) Whether in any event in view of the fact that the report of the income tax Officer to the Commissioner related to the gold ornaments only, the income tax Officer could be said to have information in his possession whereby he discovered that income in connection with the cash credits had escaped assessment and whether the income tax Officer could reopen the assessment in connection with the cash credits ?

(4) Whether the burden of proving the source of the cash credits is on the assessee ?

(5) If so, then whether in the absence of satisfactory proof as to the source of the credits the inference of the Tribunal that these credits are the assessee's income from some undisclosed sources is an inference of fact or an inference of law ?

(6) Whether having regard to the fact that the income tax Officer has assessed the income on a percentage basis, he was justified in treating the said sums of Rs. 41,300 and Rs. 11,000 as profits from an undisclosed source ?

M.C.C. 43 of 1955:

The questions are the same as in M.C C. 42 of 1955 except that in question No. (6) Rs. 41,300 and Rs. 11,000 are replaced by Rs. 19,576 and Rs. 20,000.

5. As regards questions (1) and (2) we may say that these questions were not debated before us, because the assessee admitted that the action taken cannot now be questioned. We therefore do not consider it necessary to give any answers to those questions Thus there are only four questions which need to be answered.

6. These questions readily divide themselves into two categories. In category one is the sale of gold worth Rs. 41,300 in the assessment year 1945-46 and sale of gold worth Rs. 19,576-2-0 in the assessment year 1947-48, In the second category are two deposits made by Muslimbi amounting to Rs. 11,000 in the assessment year 1945-46 and Rs. 20,000 by Yaqub Manihar in the assessment year 1947-48.

7. The case of the assessee is that the power to tax by virtue of Sec. 34 belongs to the Department only if the circumstances detailed in that section are fulfilled. In view of the fact that the notice was issued u/s 34 (1) (b) the income tax Officer was of the opinion that the income was under assessed. According to the assessee, the Tribunal had already held that the income tax Officer had these items before him but had not appreciated them in the way succeeding officers had, According to the assessee this amounts to a revision of the assessment and is not a fresh discovery of income which had escaped assessment because the Department did know of its existence. As against this, Shri Adhikari who appeared for the Department pointed out that in the agreed statement of the case the Tribunal had stated that the previous income tax Officer who had passed the original order of assessment did not know of the existence of these items. It

has been ruled on more than one occasion that mere production of account-books does not fasten knowledge upon the Department as to the existence of any cash credits therein. Indeed, the Explanation to Section 34 lays this down in clear terms. That the account-books were produced before the income tax Officer and contained these entries is an irrelevant fact for determining whether any income had escaped assessment or not. No answer to this contention of the learned Advocate-General was furnished by the assessee, as it could not be. In our opinion, the Department was not stopped from making discovery of an item which had escaped notice on the previous occasion, and Section 34 covers such a case.

8. Thus we are of opinion that the income tax Officer was competent to look into the account-books, find out the existence of any cash credits which had been overlooked in the previous assessment order and call upon the assessee to prove that they were not income in his hands.

9. This is thus not a case of change of opinion with regard to these cash credits but assessment of income which was not realized by the previous assessing Officer to have been made by the assessee. In this view of the fact the cases which were cited by the assessee, viz. *D R. Dhanwatey vs. income tax Commissioner A.I R. 1956 Nag 120 R.B N.J, (1956) 29 ITR 194* ; *Lajwanti Sial vs. Commissioner of income tax 30 ITR 225* and *Mehta Parikh and Co. Vs. Commissioner of Income Tax, Bombay, ,* stand distinguished. Those were cases on their own facts and cannot therefore be made applicable in the present context of facts.

10. The next argument of the assessee is that he had given a reasonable explanation about the sale of gold and that in the absence of any proof by the Department that the explanation was untrue, the case of the assessee ought to have been accepted by the Department. This leads us to the consideration of the burden of proof in these cases. The learned counsel for the assessee contends that in an original assessment case the burden of proving every item of case credits as not being income is upon the assessee, but that in a case arising under Sec. 34, the Department must show by some evidence that the cash credits represented income from an undisclosed source contrary to what the assessee alleges it to be. In our opinion, the question of burden has not been properly understood by the assessee. The assessee is always in a better position to know whence the income or the cash deposits came. Of course, the assessee always gives an explanation, and that explanation may be true or it may be false. The Department is under no bounden duty to accept the explanation of the assessee in every case. The income tax Department can put the assessee to proof of his explanation, and if the assessee fails to tender evidence or burkes an enquiry, then the income tax Officer is justified in rejecting the explanation and holding that the income is from an undisclosed source. The income tax Officer is not required to specify or prove what that source is, which from the nature of the case must be known only to the assessee. In most cases the assessee does give

some evidence. Where the assessee has given evidence in support of his contentions and that evidence is reasonable, the assessee must be deemed to have proved his case, unless the income tax Officer can show from some other material on the record that that evidence should not be believed. But where the assessee gives no evidence, does not enter the witness-box, and declines to produce the vouchers or to state fully and satisfactorily how the cash credits came to be in his books, the income tax Officer is entitled to reject his explanation and then hold that the income is from an undisclosed source. There is no question of suspicion or conjecture. The income tax Officer can only act on the evidence which is tendered before him; and where the evidence tendered is worthless or not tendered all that remains is the fact of a cash credit for which no explanation exists. In such circumstances, the income tax Officer would be justified in taking the evidence of the books showing the cash deposits as conclusive of the fact that some income was made and related to an undisclosed source. The very term "undisclosed source" shows that the disclosure which the assessee ought to have made has not been made.

11. Judging from this point of view it is clear that in relation to the gold, the assessee did nothing to substantiate his contentions. His explanation was that this was gold from the family and had been in it for several decades. According to him, the price of gold when it was purchased was very small and even though the assessee and his father were not men of wealth they were sufficiently well off to accumulate this quantity of gold. As against this, the income tax Officer found that the circumstances of the family did not justify the accumulation of so much gold, even over a length of time. The income tax Officers and the Appellate Tribunal came to the conclusion that it was gold acquired from some undisclosed source on the ground that the same had taken place in far off places like Delhi and Bombay through the agency of third parties and no vouchers of the acquisition or of the sale of gold had been produced before the Department. Indeed, the very conduct of the assessee in selling gold at Delhi and Bombay through third parties would put any person on enquiry as to how this gold came to be acquired. No explanation beyond this that the acquisition was made by the family in the part was given. No vouchers were produced either of the purchase or of the sale of gold, and in view of this the explanation of the assessee was rejected and reliance was placed on his own account books to show that there was a cash entry of the receipt of this sum, which was said to be from an undisclosed source.

12. We have already said that the Department was not bound to show categorically what that source was. Indeed, from the nature of things it would be impossible for the Department to find out how much of the income had been obtained from the disclosed business of the assessee and how much of the income from undisclosed sources had gone to build up this nucleus. In our opinion, there was thus material on which the income tax Officer as well as the Appellate Tribunal could reach the conclusion that this was income from undisclosed sources. It bears repetition that this income was actually overlooked

when the original assessment order was passed. Sec. 34 of the income tax Act is designed to meet such cases, and therefore the re-assessment of the assessee including this income was proper.

13. The learned counsel for the assessee next contended that the Department having already assessed the assessee on a percentage basis, the cash credits regarding gold should be taken as part of that income, and that assessing him on this amount afresh amounts to double taxation. The rulings on this point are not uniform, and naturally they cannot be, because there is such a variety of circumstances in which such income is found to exist in the books. In *MESSRS. SRINIVAS RAMKUMAR Vs. COMMISSIONER OF Income Tax.*, it was held that even if the income tax authorities applied flat rates to cover suppressed income in the first instance, they were entitled to include a sum which may be discovered as secreted profits of the firm. The reason given was that the addition of the sum did not amount to double taxation inasmuch as it was brought into account not as a profit of the trading transaction but as an undisclosed profit from an undisclosed source. The very fact that there was some undisclosed source which was outside the normal business transactions of the assessee postulates that the income which was assessed on the normal working cannot be held to include the profits from undisclosed sources. The books of account show the in-come made from the normal business of the assessee. That income may be suppressed or minimized by the addition of expenses etc. and reduced to a lesser figure. The cash credits do not show that the income which is in the hands of the assessee is from the self-same source. It may be from another source. If the assessee does not disclose that source and the existence of such hidden source is deducible from the proceedings and the account books, then the Department is not required to deduct the amount from the income which has been deduced at an enhanced flat rate on the ordinary business of the assessee. We therefore follow *Shriniwas Ram-kumar's* case, which has been cited above, and we therefore hold that the authorities were justified in treating the amount as the assessee's income over the above income which they had assessed at an enhanced flat rate on the normal working of the disclosed business of the assessee.

14. We are therefore of opinion that the income which has been added under the head "gold" in the two assessment years above mentioned was properly so included.

15. This brings us to the cash deposits in the name of Muslimbi and Yaqub Manihar. In relation to the deposit of Muslimbi no body was examined. It was said that Muslimbi and her husband were dead and therefore could not be examined. The very existence of these persons is a matter of some doubt and conjecture, The income tax authorities took into account the explanation together with the evidence such as it was and found it most unsatisfactory. It was contended on the authority of *R B.N.J. Nalda vs. Commissioner of income tax* 29 I.T R. 196, that the explanation given by the assessee should be accepted when the Department had no other evidence of its own. In that case the

assessee had stated that the deposit in the name of his wife arose from moneys which the wife had managed to save from her monthly allowances. The amount there was small, and the passbook of the husband showing that he had been paying certain sums of money to the wife as well as the pass-book of the lady showing that she had deposited this money in her own name were brought before the Department. It was in these circumstances that this Court held that the explanation of the assessee should have been accepted when there was nothing else to put in support of the Department's suspicions.

16. The present case is not on a par with the previous case. The existence of Muslimbi is itself a very problematical factor. No doubt, an affidavit sworn by a person has been filed, and the assessee has himself stated that he was holding the money on behalf of Muslimbi and that she and her husband were dead; but the fact remains that there is nothing besides to prove this. If the assessee had put the deponent of the affidavit into the witness-box and allowed him to be cross-examined, or if the assessee had produced some documents showing how this deposit came in his hands, or if he had produced the persons to whom this money was eventually returned, something could be said. Even the (sic) of the assessee was frank enough to say that he did not know anything about Muslimbi and her husband. The assessee not having produced the kind of evidence which could carry conviction we think the Department was justified in holding that this cash deposited in the name of Muslimbi was not proved to have belonged to Muslimbi, and the natural conclusion would therefore be that it belonged to the assessee and was income from an undisclosed source.

17. With regard to the deposit standing in the name of Yaqub Manihar, the case of the assessee is that Yaqub Manihar was a real person and that it was not impossible that he would have this sum. The Tribunal had stated that Yaqub Manihar did not have a sufficiently big business to justify putting in deposit such a large sum of money with the assessee. The assessee admitted that the total stock-in-trade of Yaqub Manmar, who was doing business, did not amount to more than five to seven hundred rupees. The department was therefore justified in holding that a man of such worth was not expected to have a sum of Rs. 20,000 which he could put away in deposit with others. The learned counsel for the assessee produced before us a certified copy of the Tribunal's subsequent order in which a deposit of Yaqub Manihar was accepted. What we have to see is not what the Tribunal decided subsequently but what was the material on which the Department had to reach its conclusions in the assessment year. It may be that by the time the other case came before the Tribunal some other material which might have been brought in this case was brought before them. The Department has to decide cases from year to year, and it can only do so on the material placed before it and is not expected to anticipate material that will be brought before it in future. For these reasons we think that the orders passed were therefore correct and the questions naturally get answered.

18. It was contended that the report of the income tax Officer for obtaining the

sanction of the Commissioner related only to gold and not to the cash deposits which subsequently found in the name of third persons. We think that once the case is reopened under Sec. 34 of the income tax Act, the income tax Officer is not limited to the information which he had received and on the strength of which he had asked for a reopening and reassessment of the assessee. If he were to discover other cash credits, he is entitled to take them into account in the income of the assessee and to assess such income if it had escaped assessment earlier.

19. It was argued on the strength of a Patna case that cash credits in the name of the assessee are on a footing different from that in which cash credit stand when in the names of third parties. It was contended that cash credits in the names of Muslimbi and Mohammad Yaqub must therefore be accepted, unless the Department was in a position to show that these names were fictitiously put into the account-books. In our opinion this is precisely that the Department has established in the case. We have shown that Muslimbi's existence was itself in doubt and her being in a position to make the cash credits was still more so. We have also shown that the Department established that Yaqub Manihar was not of sufficient wealth to make a deposit of Rs. 20,000 with the assessee and that therefore the amount was taken to be that of the assessee and not of Muslimbi and Yaqub Manihar respectively. We think that this contention is without substance, at least in the state of facts that exist in the present cases.

20. Our answers to questions (3), (4) and (6) are accordingly in the affirmative. Our answer to question (5) is that in the absence of satisfactory proof as to the source of the credits the inference of the Tribunal that these credits are the assessee's income from some undisclosed sources is an inference of fact.

21. The costs of the proceedings in both the cases shall be borne by the applicant Seth Kalekhan Mahomed Hanif, Bidi Merchant, Sagar. Counsel's fee Rs. 150/- in both cases together.