
(2008) 04 RAJ CK 0140
In the Rajasthan High Court

Labh Chand Bohra

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 28-04-2008

Acts Referred:

Income Tax Act, 1961 — Section 143, 68, 69A

Citation : (2008) 219 CTR 571 : (2010) 189 TAXMAN 141

Hon'ble Judges : N.P. Gupta, J;Kishan Swaroop Chaudhari, J

Bench : Division Bench

Final Decision : Allowed

Judgement

N.P. Gupta, J.—This appeal by assessee, is against the judgment of the Tribunal dt. 24th Sept., 2004, affirming the order of learned CIT(A), who in his turn had added a sum of Rs. 1 lac (Rs. 50,000 + Rs. 50,000), in respect of cash credits, in the name of Dharm Sudhir and Vijay Kumar. The appeal was admitted on 17th Oct., 2005, by framing the following substantial questions of law:

1. Whether in view of the findings of the Tribunal, that identity of the creditors Dharm Sudhir and Vijay Kumar is established; that their confirmation has come; that they have also confirmed the credit by making statements on oath and that transactions took place through bank accounts and through cheques, the impugned finding about non-genuineness of the credit is wholly perverse and stands completely vitiated?
2. Whether the onus to prove source of credit i.e. the origin of the origin was upon the assessee and whether the same can be used against the assessee?
3. Whether the finding of the Tribunal that credits in question were non-genuine stands vitiated being based on mere whims, assumption, conjectures and surmises and not on any relevant or cogent evidence or material?
2. Necessary facts are, that AO issued notice u/s 143(2). In response thereto, cash book and ledger were produced, which were examined on test check basis.

So far as present controversy is concerned, it was found, that various amounts were credited in the books of account, in the names of various persons. On dates of hearing, assessee was asked to produce doubtful creditors. The assessee produced most of them, whose statements were recorded on oath. Two lady creditors, being Geeta Bai and Smt. Khama Bai were not produced, but their affidavits were filed, then they were also required to be produced. The learned AO held, that 10 entries totalling to Rs. 2,40,000, being principal amount, and Rs. 7,781 being interest, were required to be added, and were accordingly added to the income of the assessee, invoking the provisions of Section 68 of the IT Act. The assessee filed an appeal to the CIT(A), and the learned CIT(A) considered various judgments cited before him, including those in Commissioner of Income Tax (Central), Calcutta Vs. Daulat Ram Rawatmull, , Commissioner of Income Tax Vs. R.Y. Durlabhji, Commissioner of Income Tax, Orissa Vs. Orissa Corporation (P) Ltd., , Deputy Commissioner of Income Tax Vs. Rohini Builders, and Sarogi Credit Corporation Vs. Commissioner of Income Tax, , out of which, the judgments in Daulat Ram (supra) and Orissa Corporation's case (supra) are the judgments of Hon"ble Supreme Court, while the judgment in R.Y. Durlabhji (supra) is of this Court, and the later two judgments are of Gujarat and Patna High Courts, respectively. The learned CIT(A) affirmed the additions, with respect to the amounts of Dharm Sudhir and Vijay Kumar, so also entries in the name of Jyoti Devi and Kamla Devi. Rest of the additions were set aside.

3. Aggrieved of this, assessee filed an appeal before the learned Tribunal, and the learned Tribunal deleted the additions made with respect to Jyoti Devi and Kamla Devi, however, affirmed the additions, with respect to the entries relating to Dharm Sudhir and Vijay Kumar, though with regard to the entries of Jyoti Devi and Kamla Devi, it was found, that these two ladies confirmed the payment. Jyoti Devi could not be produced before the AO, and her husband was produced, who had accepted the amount having been deposited, and it was found, that it all depends on peculiar facts of particular case, and therefore the addition was deleted. Regarding Kamla Devi, it was found that the reason for addition, being her capacity to advance, was not found to be justified, and that was also deleted. However, with respect to the entries in respect of Dharm Sudhir and Vijay Kumar, it was found, that their identity is established, their confirmation has come, and they have also confirmed the credit by making a statement on oath, apart from the fact, that the transaction took place through bank, by account payee cheques. Notwithstanding all this, the Tribunal proceeded to consider other circumstances, about the sequence of dates of depositing the amounts in bank, and issuance of cheques, and found that these persons have very meagre income, as discussed in the assessment order, and the order of CIT(A), and that, issuance of cheques on the very day of opening of the bank account, without there being ample amount, available in the account, in itself is a proof of ingenuity of the transactions in questions, therefore, the additions were confirmed.

4. Assailing the impugned judgment, it is contended by the learned Counsel for

the assessee, that once the assessee furnishes explanation, and establishes identity of a person in whose name entry stands, and even when that person is examined, who owns that entry, and confirms the advance, at that the matter ends, and it is not contemplated by Section 68, that assessee should still further satisfy the creditworthiness of the lender i.e. to establish, source of the source, much less to prove in negative about want of genuineness, and since the learned Tribunal has confirmed the additions, only because, in view of the Tribunal, the assessee has failed to establish source of the source, the order proceeds on basically a wrong approach, and is vitiated. Reliance has been placed on the judgment of this Court, in Late Mangilal Agarwal through LRs v. Asstt. CIT (2007) 208 CTR (Raj) 159 and Mehta Parikh & Co. v. CIT (1956) 30 ITR 181 and also placed reliance on another judgment of Hon'ble Supreme Court in Omar Salay Mohamed Sait Vs. Commissioner of Income Tax, Madras, apart from reiterating reliance on the judgments in Daulat Ram's case (supra), Credit Corporation's case (supra), Orissa Corporation's case (supra), and Rohini Builder's case (supra). On the other hand, learned Counsel for Revenue relied upon the judgment of this Court in COMMISSIONER OF Income Tax Vs. R. S. RATHORE., and CIT v. Kishorilal Santoshilal (199b) 129 CTR (Raj) 450 : (1995) 216 ITR 9 and submitted, that in order to determine whether any addition is to be made u/s 68 or not, six conditions are required to be considered, as mentioned in Kishorilal's case (supra), which include, that if the explanation is not supported by any documentary or other evidence, then the deeming fiction created by Section 68 can be invoked.

5. We have heard Counsel, and have gone through the judgments cited at Bar.

6. In Mangilal's case (supra), this Court was considering the provisions of Section 69A, where some gold was seized by the customs authorities, and addition about the value thereof was sought to be made in the income of the assessee. The precise facts were that a search was conducted at the premises of the assessee by customs authorities, and 11 pieces of primary gold and gold ornaments were recovered, which were seized by the customs authorities. The proceedings for confiscating the primary gold were initiated, however, the adjudicating authority did not find the assessee in possession of the gold ornaments in breach of Gold Control Act, or the Customs Act, and therefore the same were released. The explanation given by the assessee was, that he received primary gold from three different goldsmiths, from whom ornaments were brought by Bhopal Singh, Om Prakash Gupta and Gauri Shanker Singhal respectively, for the purpose of making new ornaments, and since making of new ornaments required dye cutting of primary gold, which came into existence by melting gold, for the purpose of making new ornaments, were delivered to the assessee, for getting the primary gold dye cut, through some registered goldsmiths, having the facility of dye cut. This explanation was not accepted by the adjudicating authority, about gold being not belonging to him, except to the extent of 6.800 grams, and it is on these facts, when the matter was taken up by the IT authorities, and the value of the gold was sought to be added in the

income of the assessee for the asst. yr. 1988-89, it was found, that so far as finding that money and valuables owned by the assessee are concerned, the burden is clearly on the Revenue, because it is only on reaching such finding, the opinion can be given about the source of its acquisition. Then, regarding explanation, it was considered, that the logic adopted by the authorities below, that the ornaments are not proved by the three persons as belonging to them, though it was admitted by each of them, that the attributed gold ornaments and primary gold, derived from such ornaments, belonged to them respectively, which belonged to the assessee, was found to be suffering from legal lacuna. It was held, that the finding cannot be considered to be a finding of fact, as it was found to be vitiated, not only by a wrong view of burden, in appreciating the evidence, but having no nexus between the finding about failure of the three persons to prove the ownership of the gold ornaments, which they admitted to have delivered to the respective goldsmiths through the assessee, for the purposes of making new ornaments. Then Daulat Ram's case (supra) was also considered, and it was held, that on the parity or reasonings, which prevailed in Daulat Ram's case (supra) it can well be said, that merely because the explanation furnished by three persons Bhopal Singh, Om Prakash and Gauri Shanker, about the purpose for which the gold ornaments were delivered, was found to be not acceptable, could not have provided any nexus between the facts and conclusions reached, by drawing inference therefrom, that the gold ornaments belonged to the assessee.

7. Really speaking, the judgment in Daulat Ram's case (supra) is the authority, for the proposition, that assessee cannot be required to prove the source of the source. It was precisely held in Daulat Ram's case (supra), that the fact that lender has not been able to give satisfactory explanation regarding the source of the fund lent by him, would not be decisive, even of the matter, as to whether, the lender was the owner of that sum, even though the explanation furnished by him, regarding that source of money, is found to be not correct. From the simple fact, that the explanation regarding source of money, furnished by the lender, whose money is lying deposited, has been found to be false, it would be a remote and far-fetched conclusion to hold, that the money belongs to the assessee, and that, he would in such a case had any direct nexus between the facts and conclusions found therefrom. In our view, since Mangilal's case (supra) is the judgment of this Court, and proceeds on the basis of judgment of the Hon'ble Supreme Court, we need not multiply the other judgments, taking the same view, and thereby encumber the judgment. So far as the judgments cited by the learned Counsel for the Revenue are concerned, in R.S. Rathore's case (supra), as a matter of fact, it has been noticed, that the assessee had not produced all the creditors, in spite of opportunity being given to him, and a number of other factors were taken into consideration by the ITO, to come to the conclusion about the explanation offered by the assessee being not satisfactory. In that background, it was found, that the burden was to be discharged by the assessee, and all creditors were not produced, their addresses were not given,

therefore, the ITO made additions. The learned CIT(A) held the additions plausible and probable. In these circumstances, it was found, that if the Tribunal was of the opinion that the investment is not genuine, it should not have upheld the order of the CIT(A), and should have set it aside with the direction to allow such amounts, for which the assessee has been able to prove satisfactorily, by giving opportunity of explaining the investment. It was noticed, that the Tribunal itself doubted about the correctness of its own conclusions, thus, this judgment is no authority for the proposition, that source of the source is required to be established by the assessee. Then, so far as judgment in Kishorilal's case (supra) is concerned, six requirements noticed by this Court read as under:

- (i) that there is no distinction between the cash credit entry existing in the books of the firm where it is of a partner or of a third party.
- (ii) that the burden to prove the identity, capacity and genuineness has to be on the assessee.
- (iii) if the cash credit is not satisfactorily explained the ITO is Justified to treat it as income from "undisclosed sources".
- (iv) the firm has to establish that the amount was actually given by the lender.
- (v) the genuineness and regularity in the maintenance of the account have to be taken into consideration by the taxing authorities.
- (vi) if the explanation is not supported by any documentary or other evidence, then the deeming fiction created by Section 68 can be invoked.

8. Examining the present case even on these parameters, first requirement is not relevant. So far as second requirement is concerned, there is no doubt about initial burden being on the assessee. So far as third requirement is concerned, obviously if the explanation is not satisfactory, then it is added. Then fourth requirement is, that the firm has to establish that the amount was actually given by the lender. Fifth requirement is about genuineness and regularity in maintenance of the accounts, obviously of the assessee, and it is not the finding, that the accounts were not regularly maintained. Then sixth requirement is that if the explanation is not supported by any documentary or other evidence, then the deeming fiction created by Section 68 can be invoked. In the present case, so far as 6th requirement is concerned, it is very much there in existence, inasmuch as the amount has been advanced by account payee cheques, through bank, and is duly supported by documentary evidence, as well as the evidence of the two lenders, and that satisfies the 2nd requirement also, about the discharge of burden on the part of the assessee to prove identity and genuineness of the transaction. So far as capacity of the lender is concerned, in our view, on the face of the judgment of Hon"ble Supreme Court, in Daulat Ram's case (supra), and other judgments, capacity of the lender to advance money to the assessee, was not a matter which could be required of the assessee to be established, as that would amount to calling upon him to establish source of the source. In that

view of the matter, since this part of the judgment runs contrary to the Judgment of the Hon''ble Supreme Court, in Daulat Ram's case (supra), while this Court in a subsequent Judgment in Mangilal's case (supra) relying upon Daulat Ram's case (supra), has taken a contrary view, we stand better advised to follow the view, which has been taken in Mangilal's case (supra).

9. The net result is that all the three questions are answered in favour of the assessee and against the Revenue.

The appeal is accordingly allowed, and the additions with respect to the entries of Vijay Kumar and Dharm Singh, for the amounts of Rs. 50,000 each, respectively made in the income of assessee, are ordered to be deleted. Parties shall bear their own costs.