

(2016) 07 PAT CK 0020

In the Patna High Court

Case No : Miscellaneous Appeal No.356 of 2009

R.A. Himmatsinghka & Co.

APPELLANT

Vs

Assistant Comm. of Income Tax

RESPONDENT

Date of Decision : 01-07-2016

Acts Referred:

Income Tax Act, 1961 — Section 68

Citation : (2017) 392 ITR 587

Hon'ble Judges : Mr. Ramesh Kumar Datta and Mr. Sudhir Singh, JJ.

Bench : Division Bench

Advocate : Mr. Krishna Nandan Singh, Senior Advocate with Mr. Sriram Krishna, Mr. Kamla Deo Sharma and Mr. Abhimanyu Sharma, Advocates, for the Appellants; Mrs. Archana Sinha, Senior Standing Counsel with Mrs. Shalini Bihari and Mr. Alok Kumar, Advocates, for the Re

Final Decision : Dismissed

Judgement

Mr. Ramesh Kumar Datta, J. (Oral)—Heard learned counsel for the appellants and learned Senior Standing Counsel for the Income-tax Department.

2. Both the appeals had been admitted by the common order dated 06.04.2012 and the following substantial questions of law were framed while admitting them :-

"(i) Whether on account of alleged failure of one of the partners to satisfactorily explain the source for his capital contribution to the firm, the amount involved as capital contribution could be added as unexplained income of the firm with the help of Section 68 of the Income Tax Act ?"

(ii) Whether it had to be treated as income in the hands of the partners, especially in view of absence of any material to indicate that the amount was profit of the firm ?"

3. It is admitted by learned counsels for the parties that the facts involved in the two appeals, which relate to separate assessment years 2004-05 and 2005-06,

are broadly the same and the facts of M.A. No.49 of 2011 may be treated as representative.

4. The assessee is a partnership firm engaged in dealership of Tata Diesel vehicle, and servicing and dealership of Bharat Petroleum Corporation Ltd. For the assessment year 2004-05, it was selected for scrutiny under Section 143 (3) of the Income-Tax Act, 1961 (in short "the Act"). Statutory notices under Sections 143 (2) and 142 (1) of the Act were issued. On 10.09.2007, a questionnaire was issued fixing the date of compliance on 24.09.2007 and after several adjournments reply to the final show cause was furnished on 05.12.2007. Even then various documents sought for were not furnished including supporting documents for sale of land or other income by the assessee. With regard to the issue before us, the Assessing Officer found credit entries in cash in capital account of Mohan Himatsingka, partner of the firm of different amounts on different dates, i.e., from 05.08.2004 to 19.03.2005 totalling Rs.9,87,039/-. By the aforesaid questionnaire dated 10.9.2007, the assessee was asked to explain the source of capital introduction by partners in the firm with supporting document. The assessee only furnished the ledger account of Mohan Himatsingka in the assessee's books and no other documentary evidence, which was found to be a self serving document and not acceptable as explanation for cash credit by the Assessing Officer. The final show cause notice dated 20.11.2007 was issued asking the assessee to explain as to why the same should not be treated as undisclosed income of the firm.

5. The stand of the assessee was that as the amount had been brought by one of the partner, who had confirmed the same, it cannot be treated as undisclosed income of the firm. In support, confirmation of M/s. Mohan Himatsingka (HUF) was furnished. The Assessing Officer observed that it was Mohan Himatsingka, individual, who was referred as partner in the books of accounts of the firm as also in the reply filed on 03.12.2007. In the confirmation filed by M/s. Mohan Himatsingka, it was stated that the HUF had huge agricultural lands in and around Dumka and during the year under consideration it had opening cash balance of Rs.2,33,741/- besides cash agricultural income of Rs.1,12,945/- and there was also cash income of Rs.42,500/- from other miscellaneous sources; apart from the same, it had sold agricultural lands amounting to Rs.14,39,059/- and it had also various deposits in its capacity. The capital introduction was made out of these sources. The copy of its return and balance sheet for the assessment years 2004-05 and 2005-06 was filed in support of the explanation but no supporting document for sale of land or other income had been furnished.

6. The Assessing Officer noted that the copy of acknowledgement of return of income for these years show that only computation of income was enclosed with the return which made it clear that the balance sheets were never filed with the Department and thus the balance sheets filed in the explanation at that stage were considered to be irrelevant and misleading. It was also found that the HUF had shown loss of Rs.15,000/- approx. in Assessment Year 2004-05 and income

of Rs.60717/-. For the said reason, it was also found that the same showed that the HUF did not have the capacity to introduce such huge capital in the firm. It was further found in the balance sheets produced in reply that the value of agricultural land was shown at Rs.35,000/- for both the years and thus as per the documents, there was no reduction in asset, despite it being sold off, which was incomprehensible and there was no sale of land, more so, when no document related to sale of land like, sale deed or even the name and address of purchasers, date of sale etc. was furnished and the receipt was entirely in cash. The Assessing Officer came to the conclusion that the explanation given by the HUF regarding its sources and creditworthiness was not substantiated with documentary evidences and its confirmation had no evidentiary value and the entire transaction being in cash, remained unverifiable and unsubstantiated. Thus, neither the creditworthiness of the creditor nor the genuineness of transaction was established and conclusion was drawn that the source of these cash credits in the books of the assessee was not satisfactorily explained. For the said reason, the amount of Rs.9,87,039/- was treated as undisclosed income of the firm and added to the income of the assessee. Other finding was also recorded on different issues, which are not relevant for the decision of the present matter.

7. Aggrieved by the said order dated 28.12.2007, an appeal was preferred before the Commissioner of Income-tax (Appeals)-II, Patna and the same was rejected by order dated 12.01.2009. Further, the appeal before the Tribunal was also rejected by the impugned order dated 30.09.2010.

8. In the order passed in the other case similarly for the assessment year 2004-05 by the impugned order dated 29.12.2006 cash credit of Rs.12,60,698/- in the capital account of M/s. Mohan Himatsingka was further added to the income of the firm and similar result followed before the CIT (Appeal) and before the Tribunal, which rejected the appeal by the impugned order dated 23.03.2009.

9. For the assessment year 2004-05, the Tribunal after considering the entire facts and circumstances found that no supporting evidence was furnished as to the existence of land or its sale in terms of the explanation furnished by the assessee. Further no affidavit of the partner was filed; no return of income of the partner was also filed showing such investment in the firm. There was no admission by the partner that he had paid the money to the firm and he owned the responsibility thereof and accordingly, the Tribunal held that the onus lying on the assessee firm cannot be said to be discharged.

10. The Tribunal also examined various decisions cited by the parties including two decisions of this Court and held that in the present matter there was no admission by the partner; the partner was not produced before the Assessing Officer; there was no evidence that the partner had introduced the money to the firm; the onus was not discharged and, therefore, the authorities have rightly taxed it in the hands of the firm.

11. For the assessment year 2005-06, the Tribunal after quoting the order of the CIT (Appeal) at length and the fact that the CIT (Appeal) has relied upon the order of the Tribunal passed for the assessment year 2004-05, agreeing with the reasoning given by the CIT (Appeal) while confirming the similar addition, held that the issue under appeal was also covered by the order of the Tribunal for the assessment year 2004-05. The findings recorded by the CIT (Appeal), which have been affirmed, by the Tribunal were that in spite of specific requisitions made and ample opportunities provided to the assessee, it failed to furnish any supporting documents for sale of agricultural lands or other income in respect of Mohan Himatsingka (HUF) from where the credit entries in cash in capital account of Mohan Himatsingka, partner in the firm, was claimed to be sourced, as no document relating to sale of land such as sale deed, etc. was furnished and further since the purported receipt was entirely in cash, the same remained unverifiable and therefore, unsubstantiated. The CIT (Appeal), therefore, held that the assessing officer was fully justified in adding the same to the total income of the assessee by invoking the provisions of Section 68 of the Act which, according to him, was also supported by the decision of this Court.

12. Before us, learned counsel for the appellant has sought to argue that under Section 68 of the Income-tax Act, the onus of the assessee is merely to offer a proper explanation of the source of the credit entry and in the present case the explanation offered was such which ought to have been accepted by the Assessing Officer and the appellate authorities.

13. It is submitted that the land in question being agricultural land, and there was no requirement to furnish the details with regard to the sale, etc. in the Income-tax return of the HUF in question but since the said explanation had been given, the onus of the assessee had been discharged and thereafter it was for the assessing officer, if he was of the view that the partner did not have such source of income, who was also assessee and for whom he was the assessing officer, to have proceeded against the partner and not treated the amounts in question as the income of the firm. It is also submitted that it was not open to the assessing officer and the appellate authority to have gone into the source of income.

14. In support of the aforesaid stand, learned counsel for the appellant relies upon a decision of this Court in the case of Commissioner of Income-tax v. Md. Perwez Ahmad and others (2004) 268 ITR 381, in which a very short order in the following terms has been passed :-

"The Tribunal after having considered the materials on record has found that section 68 of the Income-tax Act, 1961, is not attracted in the case for the reason that in this case credit in the books of account of the assessee-firm is on account of introduction of capital by the partners and the firm has failed to prove the amount credited in the books of account and as such it would be assessed in the hands of the partners as unexplained investment.

In view of the aforesaid finding, in our view, no substantial question of law arises in this case warranting interference. Accordingly, this appeal is dismissed."

15. Learned counsel also relies upon the decision of the Madhya Pradesh High Court in the case of Commissioner of Income-tax v. Metachem Industries: (2000) 245 ITR 160, at page 162 of which it has been held as follows :-

"So far as the responsibility of the assessee is concerned, it is satisfactorily discharged. Whether that person is an income-tax payer or not or from where he has brought this money is not the responsibility of the firm. The moment the firm gives a satisfactory explanation and produces the person who has deposited the amount, then the burden of the firm is discharged and in that case that credit entry cannot be treated to be the income of the firm for the purposes of income-tax. It is open to the Assessing Officer to take appropriate action under Section 69 of the Act, against the person who has not been able to explain the investment. In the present case, there is the concurrent finding of both the Commissioner of Income-tax (Appeals) as well as of the Tribunal that the firm has satisfactorily explained the aforesaid entries.

We are, therefore, of the opinion that the view taken by the Tribunal is correct and the aforesaid question is answered against the Revenue and in favour of the assessee."

16. Learned counsel for the appellant further relies upon a decision of the Allahabad High Court in the case of India Rice Mills v. Commissioner of Income-tax: (1996) 218 ITR 508, at page 510-511 of which it has been held as follows :-

"On the facts and in the circumstances of this case, we are of the considered view that the Tribunal has fallen into serious error. The Tribunal should have taken note of the fact that all the deposits aggregating to Rs.1,43,000 represented the capital contribution of the partners in the firm and they were made before the firm started its business. It was for the partners to explain the source of the deposits and if they failed to discharge the onus, then such deposits could be added in the hands of the partners only. The Tribunal erroneously came to the conclusion that the deposits represented the undisclosed income of the assessee-firm. The approach of the Commissioner of Income-tax (Appeals) in this case seems to be correct who clearly held that unexplained deposits in no case, could be the income of the assessee-firm because the firm started its business only after the credits had been made in its books.

Reliance on Kapur Brother's case (1979) 118 ITR 741 (All) is misplaced, inasmuch as in that case deposits were entered in the books of the firm when it was already carrying on its business. The firm was called upon to explain the source of the deposits. The explanation of the firm was that the deposits represented the sale proceeds of certain assets belonging to the partners. When no evidence was adduced to substantiate that explanation, the assessing authority added the amount as income of the partnership-firm. These facts are

materially different from the fact of the instant case. Most striking feature of the case on hand is that all the deposits came to be made during the accounting year in the books of the assessee-firm before it started its business. Therefore, the onus was on the partners to explain the source in the case on hand and if they failed, the amount could have been added in their hands only and not in the hands of the assessee-firm."

17. On the other hand, learned Senior Standing Counsel for the Income-tax Department submits that under the provisions of Section 68 of the Income-tax Act, it is for the assessee to offer an explanation and such explanation in the opinion of the assessing officer must be satisfactory, otherwise the credit entries are liable to be charged to income-tax as the income of the assessee for that previous year.

18. It is submitted that in the present matter explanations were called for from the assessee as to the sources of the person from which the cash has been received in the account of the firm and the only explanation offered was that the partner in its HUF had huge lands part of which has been sold and from the sale proceeds the cash investment has been made. It is further submitted that the sale deed was specifically asked for but could not be produced by the assessee and thus the explanation was rightly not accepted by the assessing officer and the appellate authorities. In the said circumstances, it is urged that the addition has rightly been made to the income of the assessee-firm in terms of Section 68 of the Income-tax Act.

19. In support of the aforesaid stand, learned counsel for the revenue relies upon three decisions of the Patna High Court. The first is the case of *Hardwamal Onkarmal v. Commissioner of Income-tax*: (1976) 102 ITR 779, at page 784 of which it has been laid down as follows :-

"If the assessee offers no explanation for the sum found credited in his books, the sum so credited has got to be added to the income of the assessee. To that extent there is no difficulty in saying that previously the law was exactly the same. But if an explanation is offered which, in the opinion of the Income-tax Officer, is not satisfactory then also section 68 provides that the cash credit can be added to the income of the assessee. In this regard also, if I may say so, a departure does not seem to have been made from the law laid down authoritatively by the Supreme Court in various decisions. The matter ultimately comes to the Tribunal. The question of law is said to be arising out of the order of the Tribunal and it has to be considered whether the explanation has been rejected as being unsatisfactory on materials or evidence or without there being any material or evidence to justify the rejection. It can also be examined as to whether the rejection is perverse. But in this case the findings of the Tribunal can be appreciated in the background of the findings recorded by the departmental authorities. In this background the Tribunal committed no error of law in saying that when the assessee was unable to explain satisfactorily, the addition was justified in view of Section 68 of the Act; the Income-tax Officer was justified in

adding the sums to the assessee's income under section 68 of the Act. In my opinion, judging the order of the Tribunal in the background of the facts recorded by the Income-tax Officer and the Appellate Assistant Commissioner, it is difficult to accept the argument put forward on behalf of the assessee that the decision of the Tribunal is perverse or is based upon no evidence or material. On the other hand, I am inclined to think that the decision is reasonable, correct and perfectly warranted by the facts and circumstances of this case. The assessee could not persuade the Tribunal to record a finding in its favour that the money found deposited in its account books was actually the money brought by the partners and deposited."

20. The second decision relied upon by learned counsel for the revenue is in the case of *Sarogi Credit Corporation v. Commissioner of Income-tax*: (1976) 103 ITR 344 (Pat), in paragraph No.4 of which it has been observed as follows :-

"4. Mr. N.P. Agrawala, learned counsel for the assessee, contended, and, in my view, rightly so, that the position under Section 68 of the 1961 Act is in no way different from that with regard to cash credit entries prior to the 1961 Act; and although there was no specific statutory provision in the 1922 Act, the principles which governed cases arising under the 1922 Act would also govern cases falling under Section 68 of the 1961 Act. Learned counsel further contended that there was absolutely no inconsistency in the various decisions of the various High Courts as also of the Supreme Court in so far as the question at issue is concerned. One line of cases lays down that, where an assessee shows that the entries regarding cash credits in third parties' accounts are genuine and the sums were, in fact, received from third parties as loans or deposits, the onus is discharged by the assessee. In that case it would be for the third parties to explain their sources of the money so advanced. In any event, such loans cannot be charged as the assessee's income, in the absence of any cogent material to indicate that they belonged to the assessee. The position in law, however, is different in so far as the degree of heaviness of the burden to prove varies where the credit entries in the assessee's books of account are in favour of, say, partners of the firm, of which the assessee is himself a member, in the assessee's own name in any different capacity, in the name of the assessee's wife or children, in the names of other near relatives of the assessee, in the names of employees of the assessee, or in the names of other such units as have got some financial interest common to the assessee. In my view, the law is too well-settled, and this I say not only on account of consensus of judicial opinion, but also for the additional reason that, stretching the doctrine of onus too far, in the case of entries in favour of third parties, who themselves come forth and admit that they had advanced the loans, the addition of such amounts as from undisclosed sources or secreted profits in the assessee's books of account, on rejection of such statements made by disinterested third parties, would lead to an absurd inconvenience, which the statute does not envisage. Decisions are numerous; to wit, a Bench decision of this court in *Radhakrishna Bihari Lal v. Commissioner of Income Tax* (1954) 26 ITR 344 (Pat), a Bench decision of the

Nagpur High Court in Jainarayan Balabakas of Khamgaon v. Commissioner of Income Tax, a Bench decision of the Allahabad High Court in Ram Kishan Das Munnu Lal v. Commissioner of Income Tax (1961) 41 ITR 452 (All) and a Bench decision of the Bombay High Court in Orient Trading Co. Ltd. v. Commissioner of Income Tax (1963) 49 ITR 723 (Bom), may be referred to as authorities for the proposition that, if a credit entry stands in the name of the assessee himself, the burden is undoubtedly on him to prove satisfactorily the nature and source of that entry and to show that it does not constitute a part of his income liable to tax. If the credit entry stands in the names of the assessee's wife and children, or in the name of any other near relation, or an employee of the assessee, the burden lies on the assessee, though the entry is not in his own name, to explain satisfactorily the nature and source of that entry. But, if the entry stands not in the name of any such person having a close relation or connection with the assessee, but in the name of an independent party, the burden will still lie upon him to establish the identity of that party and to satisfy the Income Tax Officer that the entry is real and not fictitious. Once the identity of the third party is established before the Income Tax Officer and other such evidence are prima facie placed before him pointing to the fact that the entry is not fictitious, the initial burden lying on the assessee can be said to have been duly discharged by him. It will not, therefore, be for the assessee to explain further as to how or in what circumstances the third party obtained the money and how or why he came to make advance of the money as a loan to the assessee. Once such identity is established and the creditors, as in the instant case, have pledged their oath that they have advanced the amounts in question to the assessee, the burden immediately shifts on to the department to show as to why the assessee's case could not be accepted and as to why it must be held that the entry, though purporting to be in the name of a third party, still represented the income of the assessee from a suppressed source. And, in order to arrive at such a conclusion, even the department has to be in possession of sufficient and adequate materials, as I have already indicated above, the Income Tax Officer's rejection not of the explanation of the assessee, but of the explanation regarding the source of income of the depositors, cannot by itself lead to any inference regarding the non-genuine or fictitious character of the entries in the assessee's books of account. Nor, for that matter, is there any such finding recorded either by the Income Tax Officer or the Appellate Assistant Commissioner. On the contrary, the Appellate Assistant Commissioner, whose appellate order in favour of the assessee forms part of the statement of the case, marked "B", clearly points out that the findings recorded by the Income Tax Officer were no positive findings. The Appellate Assistant Commissioner, in my view, had rightly assessed the position in law by holding that, in order to rope in any amount as the income of the assessee from undisclosed sources, or as secreted profits, there must be some tangible materials."

21. The last decision relied upon by learned counsel for the revenue is in the case of Commissioner of Income-tax v. Anupam Udyog: (1983) 142 ITR 133, at

page 140-141 of which it has been held as follows :-

"From a perusal of para 4 of the appellate judgment of the Tribunal, it seems that what has weighed with the Tribunal is that :

"Here we are dealing with a case where the receipts in question appeared in the books on the first day of the existence of the business. The amounts have been brought in as capital by the partners. The partners have made statements showing that the amounts in question have been brought by them. In these circumstances it is not possible to hold that the amount in question represented the income of the firm."

But before coming to the above conclusion, the Tribunal has held in that very paragraph of the appellate order that:

"We have considered the facts of the case and the arguments of the learned representatives of both the sides. Before us the learned counsel for the assessee has merely reiterated that all the parties had agricultural income from which they had brought these credits. No definite evidence in support of that has been brought before us."

How anomalous ? On the one hand, the Tribunal does not seem to be satisfied with regard to the explanation given by the partners that they had invested the so-called capital from out of their agricultural income, and yet in the next breath, the Tribunal goes on to hold that since the partners had owned that these sums had been advanced by them as capital outlay for the formation of the firm, they entered them as cash credits in the previous year. The Tribunal has gone on rather more on the basis of surmises that this explanation may be true. Assuming, therefore, that it could be a discharge of onus only, yet, on the Tribunal's own showing, such an onus had not been discharged. All the same, it is for the firm to explain to the satisfaction of the ITO with regard to the nature and source of the cash credit entries in the books of account of the previous year. The question as to whether the partners' explanation is at all warranted or for that matter, the partners had explained the source of their capital, in our view, shall make little difference in law after the insertion of section 68 of the Act. But this is merely of academic interest as we have already pointed out above that even if the Tribunal has categorically held that the partners' agricultural income from which they had brought these cash credits was not supported by any evidence in support of that which had been brought before the Tribunal, that clinches the issue.

For the aforesaid reasons we are constrained to hold in favour of the Revenue and against the assessee and answer the question of law referred to us in the negative. We, accordingly, hold that on the facts and in the circumstances of the case, the Tribunal was not correct in deleting the above sum of Rs.16,700 from the assessment of the firm."

22. We have considered the submissions of learned counsels for the parties and

the materials on the record. It is evident from a consideration of Section 68 of the Act that the situation as the present one where any amount is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not satisfactory, in the opinion of the Assessing Officer, then the said amount may be charged to income-tax as the income of the assessee of that previous year.

23. We are concerned with the second part of Section 68 of the Act, because an explanation has been offered by the assessee in the present matter that the sum entered as cash entry to the credit of the account of the partner was derived from the sale of agricultural land by the HUF for the said partner. It is clear that a mere explanation is not sufficient to discharge the onus of the assessee under Section 68 of the Act. The explanation must also be supported by certain documents regarding its genuineness.

24. In the present matter, since the stand taken was that the amounts had been derived from the sale of agricultural land, the sale deed with regard to such sale was asked by the assessing officer and the assessee clearly failed to produce the sale deeds and no other cogent document or evidence could be produced by the assessee to satisfy the assessing officer that the partner of the assessee was in a position to contribute such an amount in cash to the assessee-firm.

25. In this regard the observations of the earlier Division Bench decision of this Court in Sarogi Credit Corporation's case (supra) would be relevant as to the degree of heaviness of the burden with respect to different types of credit entries in the assessee's books of account. It has clearly been laid down therein that if such credit entries are in favour of partners of the firm, of which the assessee is himself a member, in the assessee's own name in any different capacity, in the name of the assessee's wife or children, in the names of other near relatives of the assessee, in the names of employees of the assessee, or in the names of other such units as have got some financial interest common to the assessee then the onus to be discharged would be much heavier. It is only in the case of entries in favour of third parties who themselves come forth and admit that they had advanced the loans, that the burden is held to be discharged by the assessee and it is for the third party in whose name the credit stands to explain his source, and the burden shifts upon the Revenue and it is not open to it to make addition of such credit entries as the income liable to tax of the assessee. In such circumstances, the Income-tax department may proceed against the said third party.

26. The submission of learned counsel for the appellant that the assessing officer cannot look into the source of source can only apply to the case of such third party and not where the party is closely connected with the assessee as in the present case. All the earlier decisions of this Court relied upon by learned counsel for the Revenue clearly support the aforesaid proposition.

27. On the other hand, the reliance placed by learned counsel for the appellant on the decision of Madhya Pradesh High Court in Metachen Industries case (supra) can be of no avail taking into consideration the consistent view to the contrary of this Court. Further, the decision of the Allahabad High Court in India Rice Mills" case (supra) instead of supporting the case of the appellant, as a matter of fact goes against the appellant, as is evident from the part of the said judgment quoted above. In India Rice Mills" case (supra) the decision was rendered in favour of the assessee for the sole reason that the entire deposits were the capital contribution of the partners in the firm and the same were made before the firm started its business and for the said reason alone, it was stated that they could not be the income of the assessee firm. Reference in that regard was made by the earlier decision of that High Court in the case of Commissioner of Income-tax, Lucknow v. Kapur Brothers: (1979) 118 ITR 741 (All). In identical situation as in the present matter, the assessee firm was unable to adduce evidence to substantiate the explanation that the deposits made by the partner represented the sale proceeds of certain assets belonging to the partners and for the said reason the said entries were added to the income of the firm.

28. Thus, in the light of our aforesaid discussions, the substantial question of law No.(i) framed above is answered in the affirmative and, accordingly, the substantial question of law No. (ii) is answered in the negative, both the questions in favour of the Revenue and against the assessee.

29. Both the appeals are, accordingly, dismissed.