
(2010) 08 P&H CK 0482

High Court Of Punjab And Haryana At Chandigarh

Case No: Income Tax R. No"s. 185 and 186 of 1999

Commissioner of
Income Tax

APPELLANT

Vs

Jagdish Chand Gupta

RESPONDENT

Date of Decision: Aug. 6, 2010

Acts Referred:

- Income Tax Act, 1961 - Section 132(4), 132(5), 263, 37, 68

Citation: (2010) 329 ITR 583

Hon'ble Judges: Ajay Kumar Mittal, J; Adarsh Kumar Goel, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Adarsh Kumar Goel, J.

The Income Tax Appellate Tribunal,. Chandigarh Bench (in short "the Tribunal") has referred the following questions of law for opinion of this Court arising out of its order dated January 26, 1997 in RA Nos. 56 and 57/Chandi/96 in I.T.A. Nos. 31/Chandi/93 and 34/ Chandi/94 for the assessment year 1989-90:

RA No. 56/Chandi/96

1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that assumption of jurisdiction u/s 263 by the Commissioner of Income Tax without giving a specific finding as to whether the amount of Rs. 48 lakhs was assessable u/s 68 or 69 is unjustified, particularly when Section 68 had no application ?

2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that if the Assessing Officer had all the information at the time of completion of assessment in relation to a certain amount remedial powers u/s 263 cannot be exercised even when the available information has not been utilised in

accordance with law?

RA No. 57/Chandi/96

1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that no addition can be made on the basis of confessional statements of the Assessee made under duress ?

2. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in deleting the addition of Rs. 48 lakhs made on account of unexplained expenditure by way of payment to one Shri J.M. Paul, when the recipient had denied its receipt and the Department had not taken any action to assess it in his hands ?

2. The Assessee is an individual and a director of M/s. Jagdish Chand Construction Pvt. Ltd. and derived income from property and from plying of truck apart from other sources like interest. For the assessment year in question, the income of the Assessee was assessed at Rs. 42,110 on March 27, 1991. The Commissioner exercised jurisdiction u/s 263 of the Act, vide order dated October 30, 1992, and directed fresh assessment having regard to the facts and circumstances on record. The Assessee was apprehended by the officials of the Enforcement Directorate on May 14, 1989 at Delhi and a cash amount of Rs. 21.10 lakhs was seized from him. His statement was recorded which was to the effect that he had already paid a sum of Rs. 48 lakhs to one Shri J.M. Paul as illegal gratification for securing Maruti car agency. The amount seized was intended to be paid as further payment to the said Shri J.M. Paul for the same purpose. The statement of his son-in-law Dr. Arun Gupta who accompanied him was also recorded on the same date corroborating the version given by the Assessee. Thereafter, on May 16, 1989, the Assessee surrendered the amount of Rs. 48 lakhs claimed to have been paid to Shri J.M. Paul as additional taxable income. Later, the Assessee resiled from the statement on the ground that he had made statement to avoid harassment and to go ahead with Shagan ceremony on the eve of marriage of his son. Accordingly, fresh assessment was made on April 29, 1993, and the amount of Rs. 48 lakhs was added as income for the period from August 1988 to January 1989 u/s 69. The assessment was upheld by the Commissioner of Income Tax (Appeals). On further appeal to the Tribunal, the addition was deleted. It was held that the Assessee had retracted his earlier statement and in these circumstances exercise of jurisdiction u/s 263 was not justified. Reliance was placed on the judgment of this Court in [Commissioner of Income Tax Vs. Kanda Rice Mills](#), . It was further observed that the Assessee was entitled to show that his admission made previously was not correct as held in [Shri Krishnan Vs. The Kurukshetra University, Kurukshetra](#), and in [Krishan Lal Shiv Chand Rai Vs. Commissioner of Income Tax](#), . The explanation of the Assessee that he made the statement to avoid harassment at the time of ceremony relating to marriage of his son should have been accepted. It was further observed that the Commissioner had not recorded any finding on the question whether addition should have been made u/s 68 or 69.

3. We have heard learned Counsel for the parties and perused the record.

4. Learned Counsel for the Revenue submitted that the view taken by the Tribunal was erroneous. It was wrongly presumed that finding was not recorded by the Commissioner as to under which section the amount was assessable. He further submitted that having regard to the nature of order, it would not be held that there was no application of mind by the Commissioner to the correctness of the view taken by the Assessing Officer. It was held by the Commissioner that the amount surrendered by the Assessee himself should have been included in the taxable income and, thus, the order of the Assessing Officer was erroneous. This being the position, requirements of Section 263 of the Act, i.e., order sought to be revised being erroneous and against the interest of the Revenue were fully met. The said order could not be held to be illegal only on the ground that taxability of the amount was not specified u/s 68 or 69. He further submitted that the Tribunal erred in observing that power u/s 263 of the Act could not be exercised by the Commissioner since information was available with the Assessing Officer at the time of completion of assessment which had not been utilized by the Assessing Officer. He submitted that the very purpose of Section 263 of the Act is to remedy the error in the order of the Assessing Officer which adversely affects the Revenue and the mere fact that in spite of having available information the Assessing Officer did not make necessary addition to the income, cannot be a ground to set aside the order of the Commissioner.

5. Learned Counsel for the Assessee submitted that in subsequent assessment year, i.e., 1990-91, order u/s 132(5) was passed and in such a situation, addition of the said amount in the assessment year 1989-90 was not justified. He further submitted that the amount having been paid as a bribe was business loss and even if the statement of the Assessee was to be accepted, there was no taxable income after deducting the amount paid as illegal gratification which was to be treated as loss. Reliance has been placed on the judgment of the hon'ble Supreme Court in [Dr. T.A. Quereshi Vs. Commissioner of Income Tax, Bhopal](#), wherein the earlier judgment in [Commissioner of Income Tax, Patiala Vs. Piara Singh](#), has been followed. He also submitted that Shri J.M. Paul denied having received the money and, thus, the statement of the Assessee that the amount was paid to Shri J.M. Paul was not justified.

6. We have considered the rival submissions and are of the view that the questions referred have to be answered in favour of the Revenue.

7. The questions of law raised in these references require answer to the following issues:

(i) Whether the Commissioner of Income Tax had invoked the provisions of Section 263 of the Act in accordance with law ?

(ii) Whether the Income Tax Appellate Tribunal was justified in deleting the addition of Rs. 48 lakhs ?

(iii) Whether the Assessee was entitled to deduction of Rs. 48 lakhs as business loss from the undisclosed income ?

Reg:(i)

8. Section 263 of the Act empowers the Commissioner of Income Tax to revise an order passed by the Assessing Officer which is erroneous in so far as it is prejudicial to the interest of the Revenue. The sine qua non for exercise of jurisdiction under this section is that there should be an error which must be "prejudicial to the Revenue." The Assessing Officer, in the present case, had failed to tax the additional income disclosed in the statement of the Assessee recorded on May 16, 1989, surrendering Rs. 48 lakhs which was paid as illegal gratification to Shri J.M. Paul for the purpose of obtaining the Maruti car dealership which was unrecorded in the regular books of account of the Assessee. It is, thus, patent that the Commissioner rightly invoked Section 263 of the Act as the order of the Assessing Officer was erroneous and prejudicial to the interest of the Revenue.

9. In the absence of any specific discussion relating to surrender of Rs. 48 lakhs in the assessment order dated March 27, 1991, the Tribunal was not justified in presuming that it was adjudicated not to include the aforesaid amount in the taxable income after consideration merely because the confessional statement and its retraction were on the record.

10. The Commissioner of Income Tax in para 5 of its order dated November 19, 1992, had recorded as under:

5. In view of the above, it is held that the Income Tax Officer had failed to make enquiries while completing the assessment w.r.t. nature and source of Rs. 48 lakhs. Therefore, the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of Revenue. The assessment is, therefore, set aside with the directions to the Income Tax Officer to complete the assessment afresh, after allowing the Assessee reasonable opportunity of being heard and to consider the taxability and inclusion of this amount of Rs. 48 lakhs u/s 68/69 of the Income Tax Act, 1961.

11. In the existing facts and circumstances, the Commissioner had in no uncertain terms recorded the failure of the Assessing Officer to advert to exigibility of Rs. 48 lakhs to tax in the hands of the Assessee which has resulted in erroneous and prejudicial assessment order dated March 27, 1991, being passed. The Commissioner had further directed the Assessing Officer to complete the assessment afresh after considering the taxability of Rs. 48 lakhs as unexplained cash credit or unexplained investment. The Tribunal was, thus, not justified in annulling the order of the Commissioner especially when, as noticed earlier, the essential requirements of Section 263 of the Act had been complied with.

Reg: (ii)

12. The next issue relates to exigibility of Rs. 48 lakhs to Income Tax. The Assessing Officer and the Commissioner of Income Tax (Appeals) on the basis of the confessional statement and surrender made by the Assessee which was corroborated by his son-in-law made the addition of Rs. 48 lakhs which, however, was deleted by the Tribunal by ignoring the surrender and the confessional statement merely on the ground that the Assessee had retracted from his earlier statement on September 11, 1989.

13. It is an admitted fact that on May 14, 1989, the Assessee had made a statement before the Enforcement Directorate of the FERA authorities which was corroborated by his son-in-law Dr. Arun Gupta. The Assessee had reiterated the said statement on May 16, 1989, during the course of search operation when the statement u/s 132(4) of the Act was recorded, wherein he surrendered Rs. 48 lakhs on account of payment made to Shri J.M. Paul as illegal gratification for procuring Maruti Car dealership which was not reflected in the books of account of the Assessee. The Assessee had sought to retract from his statement on September 11, 1989 after about 4 months. The confessional statement made by a person would be very material and relevant consideration in recording a finding as the facts are in the personal knowledge of the person who makes the statement. However, an admission wrongly made can be withdrawn in a given situation but when the statement made was corroborated by circumstances and was not shown to be erroneous, the retraction thereof would not deviate from its correctness. No doubt, the statement made by the Assessee was withdrawn, mere withdrawal of such a statement could not be taken to be conclusive. No explanation much less plausible explanation had been furnished by the Assessee as to why he could not retract from his statement made on May 14, 1989 and again on May 16, 1989 at the earliest occasion and what prevented him from approaching the authorities raising his grievance in this regard. The silence on the part of the Assessee till September 11, 1989 remains unexplained and the retraction from the earlier statement would be an afterthought. The Tribunal was, thus, not justified in reversing the findings recorded by the Assessing Officer and the Commissioner of Income Tax (Appeals). The sum of Rs. 48 lakhs represented undisclosed income of the Assessee.

Reg: (iii)

14. Lastly, the Assessing Officer as also the Commissioner of Income Tax (Appeals) had concurrently recorded that the Assessee had not returned any income from illegal business nor his so-called business of Maruti car dealership ever came into existence. It was also observed that the amount of Rs. 48 lakhs could not be said to be loss in the course of business under any head of income. The Assessee an individual had not incurred any loss from any business on account of which he could claim set off under the Act. The dictum laid down in [Dr. T.A. Quereshi Vs. Commissioner of Income Tax, Bhopal](#), does not come to the rescue of the Assessee being distinguishable on the facts. Moreover, it is also well settled that an illegal payment made which may be an offence cannot be permissible expenditure u/s 37 of the Act. In [Haji Aziz and Abdul Shakoor Bros. Vs. The Commissioner of Income Tax, Bombay City II](#), it was held by a Bench of three

hon"ble judges that if a sum was paid by the Assessee that may render him liable to penal action, the same could not be allowed as deductible expense.

15. Accordingly, we answer the questions in favour of the Revenue and against the Assessee.