(2003) 01 CAL CK 0003

Calcutta High Court

Case No: Income Tax Reference No. 41 of 1994 30/31 January 2003

Bimal Kumar Damani		APPELLANT
	Vs	
Commissioner of Income Tax		RESPONDENT

Date of Decision: Jan. 31, 2003

Acts Referred:

- Income Tax Act, 1961 - Section 69A

Citation: (2003) 128 TAXMAN 723

Hon'ble Judges: R.N. Sinha, J; D.K. Seth, J

Bench: Full Bench

Advocate: J.P. Khaltan, for the Assessee Pradesh Mallick, Dipak Deband Jaideb Saha, for the Revenue, for the Appellant;

Judgement

D.K Seth, J.

In the present case, the question referred to is as follows:

"Whether on the facts and in the circumstances of the case, the Tribunal was right in upholding the addition of Rs. 5,14,170 as income of the assessee from undisclosed sources u/s 69A of the Income Tax Act, 196l?"

2. Mr. Khaitan, learned counsel for the assessee, urges that the learned Tribunal was not justified in adding the amount at the hands of the assessee while computing the income of the assessee. In as much as, the seizure was made from two persons, namely, Bimal Kumar Damani, the assessee and Gopal Das Damani Separate seizure lists were issued. Therefore, according to him, the possession of the amount recovered belonged to two different persons, i.e., US $ 24,500 to the assessee and US $ 23,200 to Gopal Das Damani. Though the assessee had not specified any amount anywhere but still then when he addressed a letter referring to the amount seized from him, that cannot be treated to be an admission that the entire amount belongs to him. However, he points out from the paper book being 1997 ITR 39,

where a reference has been made that the return submitted by Sri Gopal Das Damani was accepted by the department. Therefore, according to him, if the amount recovered from Gopal Das is added while computing the income of the assessee, then it will hit the principle of double jeopardy and taxing the same amount at the hands of two persons. Therefore, addition of the whole amount, at least the amount recovered from Gopal Das, is perverse and is wholly unreasonable.

2.1 He secondly contends that even if the amount at the hands of either of these two persons is added as an income, then the assessee would be entitled to a deduction of the said amount as a loss occasioned in course of business. He points out that when a person carries on business, even if it is a single adventure, still then the same has to be treated as a business, despite it being an illegal one. He relied on the decision in Commissioner of Income Tax, Patiala Vs. Piara Singh, , to support his contention. He further contended that the question of possession gives rise to a presumption of ownership. The possession of the assessee and Gopal Das as evidenced from the seizure lists leads to a primary presumption that the assessee and Gopal Das are the respective owners of the respective amount seized. Therefore, it is for the department to prove that the ownership of the entire amount rests on the assessee. Unless contrary is proved, the presumption of possession has to be accepted. Therefore, the amount sought to be added as a whole, namely US $ 47,700 cannot be added to the income at the hands of the assessee. He had relied on the decisions in Commissioner of Income Tax Vs. Soorajmal Nagarmull, and Ashok Kumar Vs. Commissioner of Income Tax, , in support of his contention with regard to the presumption of possession and proof of ownership. He had also relied on the decision in Kishinchand Chellaram Vs. Commissioner of Income Tax, Bombay City II, Bombay, , in support of his contention that the burden of proof in such a case rests upon the department and not on the assessee. In support of his contention that even a single transaction is also a business, he relied on the decision in Commissioner of Income Tax Vs. Khairagarh Timber Traders, and in Commissioner of Income Tax (Delhi Central) Vs. Bharat Insurance Co. Ltd., .
2.2 Thirdly, he contends that even if the business was illegal, still then it is an income from business and the same being a loss, the assessee is entitled to a deduction of the amount as business loss on account of it being confiscated.

3. Mr. Mallick, on behalf of the respondent, has pointed out that the court cannot travel beyond the scope of the reference as has been referred to the court. He has pointed out that the question that has been referred to is in respect of addition of the amount. The question of deduction is nowhere referred to this Court. Therefore, the court cannot go into such question. He relied on the decision in Commissioner of Income Tax, Gujarat Vs. M/s. Cellulose Products of India Ltd., , with reference to the scope of the jurisdiction of the court in respect of a question referred to the court u/s 256(1) of the Income Tax Act, 1961. In the said decision, it was held that the court is only concerned with the question referred to and not beyond.

3.1 However, the question of addition can be gone into having regard to the facts proved and the materials placed before the learned Tribunal. All the questions are to be confined within the scope of the materials that were presented before the learned Tribunal. It cannot look into any piece of material or evidence other than those laid before the learned Tribunal at the time when the order was passed. In case anything else is claimed, in that event, it was the burden of the assessee to prove that the apparent was not the real. From the materials placed before the learned Tribunal, it is apparent that the assessee had admitted the whole of the amount as his income and nowhere he has pointed out that he is owner of the particular income seized from him and there is no material before the learned Tribunal that Gopal Das had claimed the said amount. Notices were issued on both of them, but Copal Das had never appeared. Whereas the assessee, in his letter, did not claim that he is the owner of only US $ 24,500. Therefore, on materials, there is no perversity so as to enable this court to intervene in the matter.

3.2 He had also pointed out, referring to section 37 of the Income Tax Act, that it is only business expenditure, which is deductible, not an amount confiscated. Both the decisions in Haji Aziz and Abdul Shakoor Bros. Vs. The Commissioner of Income Tax, Bombay City II, and in Piara Singh''s case (supra) are by three Judges Bench. Relying on the judgment in Haji Aziz & Abdul Shakoor Bros''s case (supra), he points out that if the expenditure is unlawful, then it cannot be considered to be a business expense entitling the assessee to a deduction in law. In M.B. Abdulla Vs. Commissioner of Income Tax, Kerala, , by two Judges Bench, the decision in Piara Singh''s case (supra) was referred to and distinguished. Relying on these decisions, he attempted to point out that the decision in Piara Singh case (supra) will not be useful having regard to the facts and circumstances of the case. On the other hand, he relied on section 69A and contended that unless the assessee is able to satisfactorily explain the source of income, he is not entitled to any benefit as claimed. In this connection, he relied on the decision in Kantilal Chandulal and Co. Vs. Commissioner of Income Tax, . Therefore, section 37 has no manner of application in the present case, apart from the fact that this question has not been referred to.

4. Mr. Khaitan in reply had pointed out that the decision in Haji Aziz & Abdul Shakoor Bros. case (supra) relates to a penalty in the course of carrying on business. The said decision was considered and discussed in Piara Singh''s case (supra). The other decision M.B. Abdulia''s case (supra), cited by Mr. Mallick, is a decision by two Judges Bench. However, the same is distinguishable. The decision in Piara Singh''s case (supra) being the later judgment and identical on facts cannot be distinguished and is binding on this court.

4.1 He then points out that there is no question of presumption until it is shown by the department that the recovery was made from the assessee. Even if the material relating to the acceptance of return by Gopal Das is not brought before the

authority concerned, it is already on record in the penalty proceedings. Therefore, notice of such fact goes to show that the finding of the learned Tribunal is perverse on the face of the evidence relating to the recovery made.

4.2 In view of the question referred to and the statement explaining that the other questions are expansion of the question referred to, it is abundantly clear that all questions formulated in the said four points raised by the assessee are to be gone into and considered in this case. He further relied on the decision in Commissioner of Income Tax Vs. Nopany Education Trust, in support of his contention with regard to the scope of this reference which according to him, includes all the four questions in respect of which reference was sought for by the assessee were assimilated in one that has been referred to before this court and as such this court is free to look into all the four questions sought to be referred to by the assessee. According to him, in the order of reference, the learned Tribunal had pointed out that the ground that has been referred to is sufficient since the other questions which have not been referred to are expansion of the questions referred to before this court. Therefore, all the questions, which have since been argued by him can be gone into.

4.3 That apart the addition can be made only if the amount is not deductible. As soon the question of addition arises, it includes the question of deduction. On this ground, he contends that the questions referred to should be answered in the negative in favour of the assessee.

5. We may first take up the question as to the scope of reference u/s 256(1) of Income Tax Act vis-a-vis the question referred to. It is already an accepted proposition of law that the court cannot travel beyong the question referred to Mr. Mallick had relied on Cellulose Products of India Ltd.''s case (supra) for the purpose of contending that the scope of reference is limited to the question referred to. This is not the appellate jurisdiction nor a revisional one. This is a settled proposition of law with which there cannot be any doubt. But such question has to be examined on the basis of the question referred to in the context of the statement of the case by which such reference is made. In Nopany Education Trust''s case (supra), it was held that it is not the only question, which had been referred to the court is to be gone into. It is the questions sought for reference are to be looked into if by implication, the statement of case includes the formulation of the said question, unless specifically rejected. In the present case, those questions have not been rejected. On the other hand, the other questions have not been referred on the ground that those are expansion of the question referred to this court. In the context of the present case, we are to examine the question referred to in the light of the three other questions, which were held to be expansion of the present question. Therefore, we are supposed to look into the point raised in the light of the other three questions. We are required to examine the submission made by Mr. Khaitan as to what extent it comes within the scope and ambit of the question referred to together with the other three questions being expansion of the question referred.

6. We may now take up the questions as to the justifiability of the addition of the amount at the hands of the assessee as a whole when on facts, it appears that only US $ 24,500 were recovered from the assessee and the balance US $ 23,200 were recovered from Gopal Das. This is, admittedly, the case of the Customs Department on the basis whereof the present assessment had proceeded to be made. From the seizure list, it appears that US $ 24,500 was found in the possession of the assessee and was seized and confiscated.

6.1 The question of presumption of possession is confined to the amount recovered from a particular person. Possession of another cannot be presumed to be the possession of the assessee. If the ownership is disputed, the burden of proving, that his possession was not the possession of the owner and the ownership is of someone else, is on the assessee. If the department wants to assert that the assessee is the owner of the amount recovered from someone else, then the burden lies on the department to prove the ownership of the assessee. Therefore, the US $ 23,200 recovered from Gopal Das cannot be attributed to the assessee without any proof adduced by the department. Even if Gopal Das does not come or disown still then the same would not be a factor to discharge the burden on the department and shift the same on the assessee when the said US $ 23,200 was not found to be in possession of the assessee.

6.2 In Kishinchand Chellaram case (supra), it was held that when ownership is sought to be attributed to a person other than one in possession, in that event, the burden of proving such fact lies on the department. Section 110 of the Evidence Act might help if the possession is with the person on whom the ownership is attributed. In the present case, the recovery having been made from the possession of Gopal Dass the ownership is to be attributed to Gopal Das. If it is to be attributed to the assessee, in that event, it is for the department to prove that the assessee was the owner of the same. The presumption of possession would stare on the face of the department in attributing ownership to the assessee when the amount was recovered from Gopal Das. The decision in Soorajmall Nagarmull''s case (supra) would be relevant to the extent of recovery made from the assessee. it cannot include the amount recovered from Gopal Das at the hands of the assessee. The decision in Ashok Kumar''s case (supra) also supports the view taken by the Calcutta High Court with regard to the presumption of ownership having regard to the possession. In Kantilal Chandulal & Co. case (supra), this court had held that possession gives rise to a legal presumption u/s 110 of the Evidence Act for a prima facie proof of ownership. In Maqbool Hussain Vs. The State of Bombay, , it was held that the burden of proving that a person in possession was not the owner lies on the person who disclaims the same. Therefore, the possession of Gopal Das would not lead to the conclusion that the amount confiscated from Gopal Das also belongs to the assessee since the latter was not in possession thereof.

6.3 In that view of the matter, US $ 23,200 recovered from Gopal Das by no stretch of imagination could be attributed to the assessee for the purpose of computing the income at the hands of the assessee.

7. Now Mr. Khaitan had pointed out that the amount that was recovered from the assessee was ultimately confiscated and as such it is a business loss and the assessee is entitled to deduction. Mr. Mallick pointed out from section 37 that deduction is allowed on business expenditure. An amount seized on a solitary occasion on account of some illegal activities is neither a business nor can be treated to be a business expenditure. Therefore, the same does not come within the scope and ambit of section 37. Having regard to the facts referred to, we find that any such question though not formulated but seems to be implicit within the scope of the three questions, which were sought for but not referred to. In as much as addition is permissible only if the amount is held taxable upon computation of the income u/s 28 of the Act. An income is computable in accordance with the provisions provided in the Act. Section 37 provides for deduction of business expenditure while computing the income. An income can be added if it is found to have accumulated in the hands of the assessee after it is computed. Computation includes consideration of the question of deduction. Therefore, question of deduction is implicit in the question of addition.

7.1 Having regard to the facts and circumstances of the case, we do not find any reason to answer the question of deduction in favour of the assessee for the reasons following.

7.2 u/s 69A of the said Act, a person is liable to taxation in respect of undisclosed or unexplained income. If such income is from a business, then the assessee will be entitled to the deduction of business expenditure available u/s 37 of the Act. Business expenditure includes business loss. The question of loss is dependent on the question as to whether it is a loss in course of business. If it is not a business, then the income is not a business income. If it is not a business income, then it would be an income from other sources. If it is an income from other sources, the loss on such income will neither be a loss in business nor a business expenditure deductible u/s 37. When considered in the light of the provisions contained in section 69A, the question acquires a different dimension and it has to be considered in the light of such a proposition whether it could be allowed or not even if it is a loss. In our view, this loss, not being a business loss, cannot attract the principle of section 37 for deduction permissible thereunder.

7.3 It is a settled proposition of law that whatever is carried on for gain is a business. In Piara Singhs case (supra), smuggling activities were held to be business.

Here the assessee was smuggling the seized US dollars. But that was only the solitary occasion. In ordinary parlance, business means series of activities not a single transaction. Solitary adventures are also held to be business adventure in

Khairagarh Timber Traders case (supra) and Bharat Insurance Co. Ltd.''s case (supra) in certain cases. The proposition laid down in those decisions is not an absolute proposition. Solitary transaction may be a business but not always. There has to be some element of business in the activities. It depends on the facts of each case. In the facts and circumstances of this case, we are of the view that there is nothing to indicate nor there is any admission by the assessee or even a claim that he had been carrying on business in smuggling activities and, therefore, it is part of his business. One solitary adventure may be a business when it is legally carried on. One solitary illegal activity unconnected with any business activity cannot be said to be a business adventure. Therefore, we are of the view that a smuggling activity on a solitary occasion cannot be considered to be a business. This proposition finds support from the decision in M.B. Abdullas case (supra) by two Judges Bench of the Supreme Court in which Piara Singh case (supra) was referred to and distinguished, with similar reasoning, we also distinguish the decision in Piara Singh''s case (supra) and hold that on facts, the said ratio cannot be applied to this case, which is more similar to the facts of the latter decision by two Judges Bench in M.B. Abdulla''s case (supra). In Piara Singh case (supra), there was a finding of fact that the assessee therein was carrying on the business of smuggling. But in the present case, there is no such finding.

7.4 Mr. Mallick had relied on the decision in Haji Aziz & Abdul Shakoor Bross case (supra) in order to support the finding of the learned Tribunal. In Haji Aziz & Abdul Shakoor Bross case (supra), the Apex Court had held that no expenditure which was paid by way of penalty for a breach of law even though it might involve no personal liability, could be said to be an amount wholly and exclusively spent for the purpose of the business of the assessee within the meaning of section 10(2)(xv) of the Income Tax Act, 1922 and a fine paid by the assessee was not liable to deduction under that section. This provision of section 10(2)(xv) of 1922 Act is pari materia identical with section 37 of the 1961 Act, which was referred to in Piara Singh case (supra) and was distinguished to that extent.

7.5 Relying on the decision in Khairagarh Timber Traders case (supra), Mr. Khaitan had contended that even a single transaction is a business. In that decision, a lease was obtained in respect of a forest, land which was let out to a contractor for exploitation of the produce. This act of leasing out of the forest land by the assessee was held to be a business. In this case, it was a business, which he was supposed to carry on but was let out to some other person who carried on the business in terms of the lease executed. The income derived from the granting of such lease is definitely a business in respect of lawful activities at the hands of the lessor assessee. Therefore, this decision is distinguishable having regard to the facts and circumstances of the present case. Similarly, the decision in Bharat Insurance Co. Ltd.''s case (supra) also does not help us, since in that case the learned Tribunal had found on facts that the assessee did carry on business. Here in this case, there is no such finding. In Bharat Insurance Co. Ltd''s case (supra), it was held that business is

a term of wide amplitude, which includes any trade, commerce, manufacture or any adventure or concern in the nature of trade, commerce or manufacture. Ordinary business implies continuous activity in carrying on a particular trade or vocation but it may also include an activity, which may be called quiescent.

8. That apart the illegal business of smuggling carried on by the assessee is in the nature of speculation. Smuggling activities always run with the risk of confiscation. Inasmuch as, if detected, it would be liable to confiscation. When confiscated, it would be a speculation loss. A speculation loss can only be set off against speculation gain or profit and not otherwise in view of section 73 of the Income Tax Act, 1961. Thus also the assessee cannot claim deduction of the confiscated amount as a business loss u/s 37 of the Act.

9. While considering the question of reference, admittedly, this court exercises advisory jurisdiction. It is not entitled to interfere with the finding of fact unless there is perversity. With regard to the question that the petitioner was not carrying on any business, we do not find any perversity in the finding of the learned Tribunal.

9.1 That apart the assessee had taken a stand (page 17 PB) that the amount seized did not belong to the assessee. Once he claims that it does not belong to him, he cannot put through a proposition that the loss of such amount would be a business loss attributable to him. One cannot lose an amount that does not belong to him. In fact he had taken an alternative stand and that too as a precautionary measure that if his explanation that the amount does not belong to him is not accepted then it should be treated as a loss incidental to the business. Once having asserted first that the amount does not belong to him, he cannot claim alternatively the same to be a business loss, particularly, when he is disowning that he was carrying on any business in smuggling activities. Unless he claims that he was carrying on business activity in smuggling, he could not claim the same to be a business expenditure or business loss.

9.2 If this amount is not an income from business, then it is surely an income from other sources and is liable to be added. Unless the smuggling can be said to be a business, or even if a business not in the nature of speculation, there is no scope for deduction on account of loss of any amount as a business loss or business expenditure in the facts and circumstances of the case. Therefore, we are unable to agree with the contention of Mr. Khaitan.

10. In the circumstances, it is only the amount that was recovered, i.e., US $ 24,500 and Rs. 1,500 from the assessee is to be computed at the hands of the assessee without any deduction u/s 37 and to that extent addition is permissible and justified in the facts and circumstances of the case. The order of the learned Tribunal is, therefore, modified to the extent above. We, therefore, answer the question referred to in the negative with the modification to the extent as indicated above, in favour of the assessee.

No costs.

All parties are to act on a signed xerox copy of the operative portion of this judgment and order on the usual and order on the usual undertaking.