

(1991) 04 BOM CK 0088

**Bombay High Court****Case No:** Income-tax Reference No. 380 of 1977

Commissioner of Income Tax

APPELLANT

Vs

Dayaram Vasudeo

RESPONDENT

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**Date of Decision:** April 4, 1991**Acts Referred:**

- Income Tax Act, 1961 - Section 5

**Citation:** (1991) 95 CTR 17 : (1992) 193 ITR 602 : (1991) 57 TAXMAN 209**Hon'ble Judges:** T.D. Sugla, J; B.N. Srikrishna, J**Bench:** Division Bench**Advocate:** Dr. V. Balasubramanian, for the Appellant; S.N. Inamdar, for the Respondent

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**Judgement**

B.N. Srikrishna, J.

In this reference made by the Department, pertaining to the assessment year 1969-70 of the assessee, the following question is referred u/s 256(1) of the Income Tax Act, 1961, for the opinion of this court :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in deleting the entire addition of Rs. 13,177, when the assessee's representative agreed in writing before the Income Tax Officer to the addition of Rs. 10,000 ?"

2. The assessee is a registered firm which deals in burdan, sutali, etc. The Income Tax Officer, during the assessment proceedings, found that the sales were not supported by a quantitative tally and no day-to-day quantity stock account was being maintained. Consequently, he did not accept the books results. He also noticed that, from December 1, 1967, to December 29, 1967, no purchases had been made by the assessee, but the sales have been shown at Rs. 40,455. He worked out the cost of the sales of the goods at Rs. 37,947 and presumed that there were sales without stocks to the tune of Rs. 10,287. He was of the view that this amount was introduced by the assessee as its own cash through sales. When the brought this to

the notice of the representative of the assessee and asked him to explain, the representative agreed to the addition of Rs. 10,000 and made an endorsement to that effect in the order sheet. The Income Tax Officer, accordingly, added Rs. 10,000 in the assessment. He also noticed another credit of Rs. 3,177 through sale for the month ending June 24, 1968. Applying the same reasoning, he added this sum also. Thus, in all, an aggregate amount of Rs. 13,177 was added back during the assessment.

3. The assessee preferred an appeal before the Appellate Assistant Commissioner who called for a remand report from the Income Tax Officer. In the remand report submitted by the Income Tax Officer he pointed out that the assessee had agreed to the addition of Rs. 10,000 which fact was also confirmed before the Appellate Assistant Commissioner by the representative of the assessee who admitted that he had agreed to the addition of addition of Rs. 10,000 in writing. The Appellate Assistant Commissioner upheld the addition of Rs. 13,177. On appeal by the assessee to the Appellate Tribunal, by its order dated August 5, 1975, the Tribunal took the view that the assessee, having agreed to the addition of Rs. 10,000, was estopped from raking up that issue before the Appellate Assistant Commissioner by filling an appeal and observed :

"The Appellate Assistant Commissioner would have done well to dismiss the appeal straightaway on this point when he took seisin of the matter for the first time, instead of adopting the circuitous path of calling for a remand report."

4. In this view of the matter, the Appellate Tribunal rejected the contention of the assessee regarding the justifiability of the addition of Rs. 10,000. On the merits of the case, the Appellate Tribunal found that the assessee had possessed sufficient opening stock in the manufacturing account and in the "kaltan vyapar account". It noticed that the "kaltan vyapar account" did not reflect the position that the goods were in fact transferred to manufacturing account. The Tribunal, therefore, took the view that the absence of any entries, coupled with the absence of any evidence in the subsidiary registers maintained by the assessee to indicate that in fact the goods were transferred from "kaltan vyapar account" to the manufacturing account, the said fact remained unestablished, and this reasoning having appealed to the Appellate Assistant Commissioner, the Tribunal saw no reason to take a different view. The Tribunal, therefore, dismissed the appeal of the assessee.

5. The assessee, thereafter, filed a miscellaneous application seeking rectification of the Tribunal's order dated August 5, 1975, on the ground that there was a mistake apparent from the record. The assessee filed the affidavit of its chartered accountant who had appeared during the assessment proceedings in support. It was urged before the Tribunal, in the rectification proceedings, that though the chartered accountant had agreed to addition of Rs. 10,000, the Income Tax Officer had erred in adding Rs. 13,177 and as such there could be no estoppel against the assessee with regard to the addition. The assessee also pointed out the factual

aspects of the matter, namely, that he was a manufacturer of bardan and purchased kantan from various places and manufactured bardan for onion and that the purchases and sales of kantan were supported and the quantities of bags sold had been entered in the ledger in the sales account. It was pointed out that the difficulty had arisen because the assessee had maintained two accounts to record the purchase of kantan, one styled as "manufacturing account" and the other, as "kantan account". The kantan account was used to record purchases and sales of kantan bales. Sometimes, whenever needed, the kantan in stock in the latter account was used for manufacture of bags, but there was no special entry passed for the purchase. This was so done, because, according to the assessee, any transfer from one account to another would be reflected when actual stocks were taken. The factual position was supported by the sworn affidavit of the chartered accountant of the assessee wherein he gave the details of the manner in which the assessee's accounts were maintained.

6. By its order dated September 11, 1975, the Tribunal accepted the contents of the affidavit of the chartered accountant of the assessee overruling the contention of the Department that it was always easy to procure such affidavits and giving weightage to the professional standing of the chartered accountant. Having accepted the contents of the affidavit of the chartered accountant. Having accepted the contents of the affidavit of the chartered accountant of the assessee, the Tribunal recorded a finding that he had made an admission with regard to the addition of Rs. 10,000 under an erroneous impression and that it was not proper to hold the assessee to such an addition. The Tribunal then observed :

"... We are (sic) not correct in holding that there was any omissions, (sic) which bound the assessee irrevocably and as such, the appeal to the Appellate Assistant Commissioner did not lie."

7. Following this finding, the Tribunal rectified its earlier order and deleted the addition of Rs. 13,177 which had been made by the Income Tax Officer and sustained by the Appellate Assistant Commissioner.

8. We may straightway point out that there is no question referred to us as to the jurisdiction of the Tribunal to rectify its earlier order. Learned counsel for the Department, however strenuously contended that even if the Tribunal came to the conclusion that an appeal to the Appellate Assistant Commissioner lay, the Tribunal should have applied its mind to the facts on record and recorded its finding on the merits of the case as to the addition or deletion of the disputed amount. This, he submits, has not been done by the Tribunal and, therefore, the matter must go back to the Tribunal for this exercise. We are not impressed by this argument. Probably, the Tribunal could have done better by recording a clear finding on this aspect of the matter. However, considering the fact that the amount involved is a small amount and more than 14 years have already passed in litigation, we do not propose to remand the matter to the Tribunal for giving effect to our order on the

factual aspects of the merits, as we find that the affidavit of the chartered accountant of the assessee on record gives full details of the merits of the case and the contents thereof have been totally accepted by the Tribunal.

9. In the circumstances, we are of the view that the Tribunal was justified in making the deletion. We, therefore, answer the question in the affirmative and in favour of the assessee.

10. There would, however, be no order as to costs.