

Court No. - 34

Case :- INCOME TAX APPEAL No. - 81 of 2007

Appellant :- Commissioner Of Income Tax (Central) Kanpur

Respondent :- M/S Sharraf Trading Co.

Counsel for Appellant :- A.N. Mahajan

Counsel for Respondent :- Ashish Bansal,S.K. Garg

Alongwith

(1) Case :- INCOME TAX APPEAL No. - 160 of 2012

Appellant :- Comm. Income Tax. Central Circle Kanpur& Another

Respondent :- Saraf Trading Co. Gandhinagar

Counsel for Appellant :- A.N.Mahajan,Bharatji Agarwal

Counsel for Respondent :- Ashish Bansal,S.K. Garg

(2) Case :- INCOME TAX APPEAL No. - 87 of 2007

Appellant :- Commissioner Income Tax

Respondent :- Sarraf Trading Company

Counsel for Appellant :- S.C. (I.T. Department),A.N. Mahajan,S.Chopra

Counsel for Respondent :- Ashish Bansal,S.K. Garg

(3) Case :- INCOME TAX APPEAL No. - 333 of 2011

Appellant :- Commissioner Income Tax

Respondent :- M/S Fertilizer Traders

Counsel for Appellant :- A.N.Mahajan

Counsel for Respondent :- Ashish Bansal,S.K.Garg

(4) Case :- INCOME TAX APPEAL No. - 332 of 2011

Appellant :- Commissioner Income Tax

Respondent :- M/S Fertilizer Traders

Counsel for Appellant :- A.N.Mahajan

Counsel for Respondent :- Ashish Bansal,S.K.Garg

(5) Case :- INCOME TAX APPEAL No. - 96 of 2003

Appellant :- Comm. Income Tax

Respondent :- M/S Fertilizers Traders Gandhi Nagar Golghar

Counsel for Appellant :- A.N.Mahajan,Ashok Kumar,Bharatji

Agarwal,C.S.C.,D. Awasthi,G.Krishna,R.K. Upadhaya,S Chopra

Counsel for Respondent :- S.K. Garg,A. Bansal

Hon'ble Sudhir Agarwal,J.

Hon'ble Shashi Kant,J.

1. Heard Sri Shambhu Chopra, learned counsel for appellant for admission. None is present on behalf of respondent.
2. These appeals have come up for admission under sub Section 2(A)

of Section 260A of Income Tax Act, 1961 (hereinafter referred to as 'Act, 1961).

3. These appeals have arisen at the instance of Revenue, aggrieved by order dated 13th July, 2006, passed by Income Tax Appellate Tribunal, Allahabad Bench, Allahabad in Income Tax Appeal No. 558/Alld/05 and Income Tax Appeal No. 617/Alld/05, dismissing the same. Block assessment period in all the aforesaid appeals is same i.e. 01.04.1986 to 12.02.1997.

4. Appellant in Income Tax Appeal No. 81 of 2007, has formulated following five questions, contending that same constitute substantial questions of law arising from order impugned in this appeal passed by Tribunal :

“1. Whether the Hon'ble Income Tax Appellate Tribunal has erred in law in holding that the peak of unexplained debit of Rs.35,81,988/- in A.Y. 1995-96 would be subsumed in the higher debit of Rs.48,01,158/- in the A.Y. 1996-97 and in thereby deleting addition on account of the unexplained peak credit of Rs.35,81,988/- for A.Y. 1995-96, without appreciating the ratio of the decision of the Hon'ble Madras High Court in the case of CIT Vs. K. Palaniappan reported in 242 ITR 719 in which the Hon'ble High Court has held that the concealed income detected in an earlier year can not be a source of any credit entry for the subsequent year as otherwise the purpose of provisions of section 68 of the I.T. Act would be defeated?

2. Whether the Hon'ble Income Tax Appellate Tribunal has erred in law in allowing the peak credit of A.Y. 1995-96 to be set off against the peak credit of A.Y. 1996-97 without appreciating that the Hon'ble ITAT in its order dated 13.02.2004 had never directed that

the benefit of inter – year peak credits should be allowed to the assessee?

3. Whether the Hon'ble Income Tax Appellate Tribunal has erred in law in not appreciating that from the accounts prepared in pursuance of the aforesaid order of the Hon'ble ITAT, it was never established that the peak credit of A.Y. 1995-96 was available for induction in A.Y. 96-97?

4. Whether the Hon'ble Income Tax Appellate Tribunal has erred in law in holding that the peak of the unexplained debits in A.Y. 1996-97 will explain the peak of unexplained credits in the subsequent A.Y. 1997-98 without giving any finding that the amount representing the peak debits of A.Y. 1996-97 were available with the assessee in A.Y. 1997-98 and without appreciating the ratio of the decision of the Hon'ble Madras High Court reported in 242 ITR 719 referred to above?

5. Whether the Hon'ble Income Tax Appellate Tribunal has erred in law in not appreciating that consequent to its order the total income of the assessee has become less than the undisclosed income shown by the assessee in the block return which is in violation of the provisions of section 156BC expressly debarring the assessee from revising the block return?"

5. In Income Tax Appeal No. 332 of 2012 – C.I.T. Vs. M/S Fertilizers Traders Gandhi Nagar Golghar, questions formulated are same as above.

6. In Income Tax Appeal No. 160 of 2012 – C.I.T. Vs. M/s Sarraf Trading Co. Ltd., the questions formulated are as under :

“1. Whether admittedly neither any ground having been raised regarding non-issuance of notice u/s 143(2) of Income Tax Act, 1961 before the Assessing Officer or before CIT(A) nor there being

any decision against the assessee on the effect of non-issuance of notice u/s 143(2), the Tribunal was not justified in permitting the additional ground of the assessment order being illegal on account of non issuance of notice u/s 143(2) of Act, 1961?

2. Whether ITAT was right in law in allowing the assessee to admit the additional ground of appeal, especially when assessee has filed only cross objection and was not in appeal?

3. Whether in view of the facts and in the circumstances of the case, the Hon'ble ITAT was right in law in allowing the assessee to raise Additional Grounds of Appeal, which does not arise from the order of the CIT (Appeals), when it has filed only Cross Objections?

4. Whether ITAT was right in following Rule 11 and 22 of Appellate Tribunal Rules, 1963, to allow the additional ground of appeal, which is contrary to the express provisions of Section 253(4) of I.T. Act, 1963?

5. Whether in view of the facts and in the circumstances of the case, the Hon'ble ITAT was right in law in admitting Additional Ground of Appeal, especially when the assessee is not in appeal, after a period of one and a half year, without passing any order on the issue of condonation of delay?"

7. In Income Tax Appeal No. 96 of 2003 – C.I.T. Vs. M/s Fertilizer Traders, questions formulated are same as in Income Tax Appeal No. 160 of 2012.

8. Question formulated in Income Tax Appeal No. 87 of 2007 – C.I.T. Vs. M/s Sarraf Trading Co. and Income Tax Appeal No. 333 of 2012 – C.I.T. Vs. Fertilizer Traders, is common and is reproduced below :

“Whether the ITAT has erred in law in quashing the order of Assessing Officer U/s 158BC/154/251 dated 12.9.2003, relying on

their earlier order dated 13.02.2004, without appreciating that the order of ITAT dated 13.2.2004 has not been accepted by the department and appeal u/s 260A has been filed which is subjudice?”

9. Brief facts necessary to understand the dispute may be stated as under :

10. The assessee M/s Sarraf Trading Co., Gandhi Nagar, Gorakhpur (*hereinafter referred to as 'M/s Sarraf Trading Co.'*), deals in fertilizers and is a partnership firm. Search and seizure operation was conducted on 12.02.1997, under Section 132(1) of Income Tax Act, 1961 (*hereinafter referred to as 'Act, 1961'*). Several documents alongwith computer print outs were found and ceased during course of search and ceasure operation. Similar search and seizure operation on the same day was conducted at the business premises of sister concern of assessee i.e. M/s Fertilizers Traders, which also deals in fertilizers. Original block assessment was completed on 24 February, 1999, under Section 158BC(c) of Act, 1961 for both firms i.e. assessee and its sister concern together and bifurcated at Rs.66,71,000/- and 1,14,39,192/-, between M/s Fertilizers Traders and assessee, respectively, against undisclosed return income of Rs.45,47,560/- and Rs.78,09,940/-.

11. Assessee preferred appeal before Commissioner of Income Tax (Appeals), Varanasi (*hereinafter referred to as 'CIT(A)'*), who vide order dated 18th May, 1999, granted partial relief to both the firms to the tune of Rs.34,94,203/-, which included reduction in peak of Rs.17957409/- by Rs.31,89,238/-.

12. Assessing Officer noticed arithmetical error in calculating peak credit of Rs.1,79,57,411/- as on 31st March, 1996. He rectified block assessment order under Section 154 of Act, 1961, vide order dated 04.10.2000, working out peak at Rs.39071218/-. After deduction of relief

allowed by CIT(A), vide order dated 18.05.1999, assessing officer revised bifurcated income at Rs.1,23,96,279/- as against Rs.46,26,198/. In case of M/s Fertilizers Traders, revised income in respect to assessee came to be Rs.2,12,88,936/- as against Rs.79,44,989/-.

13. Again, assessee preferred appeal against order dated 04.10.2000, passed by assessing officer under Section 154 of Act, 1961, being Appeal No. 263/CC/GKP, before CIT(A), contending that original block assessment order has merged with appellate order, leaving no authority or jurisdiction to the assessing authority to make any modification with respect to income already been assessed. Alternatively, it was contended that revised block peak has been calculated erroneously. The issue of merger of assessment order in the appellate order was answered by CIT(A), against assessee vide its order dated 14th August, 2002, but, on the point of working of peak, he remanded the matter to assessing officer with certain directions.

14. Assessing Officer, allegedly, complied with appellate order dated 14.08.2002, vide his order dated 12.09.2003, reiterated his determination of income as was done vide order dated 04.10.2000.

15. In the meantime, department filed appeals before Tribunal against CIT(A)'s order dated 28.05.1999, i.e. Income Tax Appeal No. 762(AIld)/1999 and 763(AIld)/1999.

16. The assessee as well as its sister concern filed cross objections. Two more appeals were filed by assessee and its sister concern, assailing CIT(A)'s order dated 14.08.2002, i.e. Appeal No. 304(AIld)/2002 and 305(AIld)/2002.

17. All these appeals have been decided by Tribunal by common order dated 13.02.2004.

18. Tribunal while deciding department's appeal, restored the issue

relating to computation of part of undisclosed income with certain directions. Two appeals preferred by assessee and its sister concern were allowed and order dated 04.10.2000, passed by assessing officer and 14.08.2002, passed by CIT(A) were quashed.

19. Directions given by Tribunal for computation part of undisclosed income, to be considered by assessing officer are as under :-

“(i) Each credit/debit appearing in the computer print outs for financial years 1994-95 and 1995-96 and computer print outs for financial year 1996-97 (as segregated by the A.O. Himself at the original stage of computation of undisclosed income) shall be arranged chronologically and date-wise.

(ii) From the aforesaid figure the day to day cash book should be prepared (as is shown by the assessee) so as to find out the negative cash balance as on different dates.

(iii) Thereafter in order to work out the computation of the undisclosed income, the receipts as well as the payments as would be appearing in the cash shall be arranged date-wise chronologically.

(iv) While making such arrangements the A.O. So far as financial year 1996-97 is concerned, shall exclude the amounts, which had already been segregated by him in the copies of computer print outs as had been available to the assessee on the grounds that segregated items were verifiable from manual account.

(v) The undisclosed income so worked out in the aforesaid manner shall be allocated between the two firms in the same ratio as had been done earlier at the time of the block assessment vide order dated 24.02.1999”

20. Assessing officer completed assessment under Section

158BC/154/251/254 of Act, 1961, vide order dated 20.10.2004 for block period and assessed unexplained peak of debit and credit of assessee and its sister concern as under :-

<i>A.Y.</i>	<i>1995-96</i>	<i>Rs.35,81,988/-</i>
<i>A.Y.</i>	<i>1996-97</i>	<i>Rs.42,80,206/-</i>
<i>A.Y.</i>	<i>1997-98</i>	<i>Rs.31,94,789/-</i>
<i>A.Y.</i>	<i>1997-98</i>	<i>Rs.17,50,000/-</i>

Rs.1,28,06,983/-."

21. The aforesaid amount was divided in the ratio 63.2% and 36.8% between assessee and its sister concern i.e. at Rs.8094013/- and Rs.4712970/-, respectively.

22. Thereagainst, assessee preferred appeal before CIT(A), and vide order dated 20.09.2005, CIT(A) restricted addition of peak debit to Rs.4801158/- for assessment years 1995-96 and 1996-97. It confirmed peak credit of Rs.3194789/- for assessment year 1997-98 and deleted addition of Rs.17,50,000/- for assessment year 1997-98, which was included by assessing officer, first time, in order dated 20.10.2004, observing that aforesaid amount represented unexplained debit balance in the account of M/s Hari Prasad Gopi Kishan, noticed by assessing authority during assessment.

23. CIT (A) gave its reasons for making alteration in the peak debit for assessment year 1995-96 and 1996-97 and maintaining peak credit for assessment year 1997-98, observed as under :

"It may be recapitulated that first two years i.e. A.Y. 1995-96 & 1996-97, the receipts exceeds the payment meaning thereby that the undisclosed income takes care of the payments made by the assessee. However, in the last year i.e. A.Y. 1997-98 there is excess

of payment by Rs.31,94,289/- which means that in this year the undisclosed income of Rs.48,01,158/- was not sufficient to cover the payment made by the assessee and assessee made payments far in excess of his undisclosed income of the earlier two years and determined peak credit. In other words the amount of undisclosed Rs.48,01,158/- was exhausted and assessee further invested Rs.31,94,789/- which was to be added separately. We are engaged in computing the undisclosed income and unexplained credit appearing in the books of the assessee. If in all the three years, there was excess of receipts over payments then there would have been one common peak credit for all the years, but the computation even from the duplicate books reveals that there was unexplained investment in the third year, of different fashion which further merits addition. I am unable to agree with ld. Counsel that there should be one peak credit because the treatment of debit and credit entries in similar way would be against the principles of accountancy. Therefore A.O. is directed to restrict addition of peak credit of Rs.48,01,158/- and Rs.31,94,789/-.”

24. Department as well as assessee both preferred appeals which have been decided vide judgment dated 13.07.2006, impugned in this appeal.

25. It is contended that Tribunal has erred in law by observing that higher undisclosed income would take care of lower peak credit of previous year. It is not correct and contrary to what has been said by Madras High Court in **Commissioner of Income Tax Vs. K. Palaniappan [242 ITR 719]**.

26. Having gone through aforesaid judgment, we do not find that it has laid down such a proposition of law at all. Therein, assessee – K. Palaniappan, an individual, submitted declaration on 29th December,

1975, under Voluntary Disclosure of Income and Wealth Act, 1976, declaring an income of Rs.50,000/- in different years from 1968-69 to 1972-73 at Rs.10,000/- per year. Declaration was received in Office of Commissioner of Income Tax after cut-off date, therefore, it was not only accepted by department, but it also refunded tax deposited by assessee. Income Tax Officer, initiated assessment proceedings in assessment year 1976-77, requiring assessee to explain source of credit entry of Rs.50,000/-, made on 29th December, 1975. He ultimately included sum of Rs.50,000/- in income and order of assessing officer was confirmed by CIT(A). Tribunal however, reversed decision of assessing officer and CIT(A) and one of the ground was that assessment record of previous year gives an impression that there might be possibility of some income escaped assessment in those years. In appeal, Madras High Court referred to Section 68 of Act, 1961, whereunder onus lies upon assessee to offer explanation whether any sum is found credited in the books of account and if assessee has given no explanation or his explanation is not found satisfactory, same credit is liable to be treated to be under-taxed income of assessee of that previous year. High Court held that Tribunal has proceeded on assumption, conjectures and surmises, that there may have been some escaped income. This is nothing but a sheer possibility based on no material on record. The Court noticed that various courts have taken a view, where certain additions were made in the earlier years, that would constitute source for the credit entry in subsequent years. But, having said so, found that in the case which was up for consideration before Madras High Court, there was a concealed income which was neither disclosed in the assessment proceedings nor in any other ancillary proceedings for any earlier year and therefore, there can be no occasion to constitute it a source for subsequent credit entry. The

Court said that explanation of assessee that source credit entry of undisclosed income of earlier years is included then it will open doors of tax evasion and purpose behind the enactment of Section 68 will be easily defeated as it will be open to anyone to point out that the credit entry came from some undisclosed and unassessed income of prior year.

27. That is not the case hereat.

28. Block period in question is from 1st April, 1986 to 12th February, 1997. Entire summary chart was available before Tribunal. Therefore, in present case, Madras High Court's decision which distinguishes other decisions taking different view, has no application and view taken by other Courts as noticed by Madras High Court would be applicable in the case in hand. It reads as under :-

“That apart, the Courts have taken a view that where certain intangible additions were made in the earlier years, that would constitute the source for the credit entry in subsequent year, but, however, we are of the opinion that a concealed income which was neither disclosed in the assessment proceedings nor in any other ancillary proceeding for any earlier year can hardly constitute a source for a subsequent credit entry and if the explanation of the assessee that the source of the credit entry is the undisclosed income of the earlier years is accepted, it will open the doors of the tax evasion and the purpose behind the enactment of s. 68 will be easily defeated as it will be open to anyone to point out that the credit entry came from some undisclosed and unassessed income of prior year.”

29. Issue, therefore, raised therein has been decided in the facts of the case in hand.

30. We may also notice that against Tribunal's earlier order dated 13th

February, 2004, department filed appeal under Section 260A before this Court. We are informed that these appeals preferred by department have also been dismissed by this Court. These appeals i.e. ITA No. 179/2004 and other connected appeals have been dismissed by a Division Bench vide judgment dated 13th December, 2013. Therein the Court in paragraphs no. 14 and 15 has said :-

“14. Regarding the peak theory, it may be mentioned that the peak theory was defined in the Sampath Iyengar's Law of Income-tax, Vol. 3, 9th edition, page 3547. Accordingly, “Peak credit” theory – One of the commonest defects of an assessee, where a single credit or number of credits appear in the books in the account of any particular person side by side with a number of debits is that they should all be arranged in serial order, that a credit following a debit entry should be treated as referable to the latter to the extent possible and that, not the aggregate but only the “peak” of the credit should be treated as own explained. To give a simple example, suppose there are credits in the assessee's book in the account. As or Rs.5,000 each on 1st October, 1990 and again on 5th November, 1990 but there is a debit by way of repayment shown on 27th October, 1990, the explanation will be that the credit appearing on 5th November, 1981 has or could have come out of the withdrawal/repayment on 27th October, 1981. This plea is generally accepted as it is logical and acceptable (whether the creditor is a genuine party or not), provided there is nothing in the material on record to show that a particular withdrawal/repayment could not have been available on the date of the subsequent credit.

15. A refinement or extension of the plea occurs where the credits appear not in the same account but in the accounts of

different persons. Even then, if the genuineness of all the person is disbelieved and all the credits appearing in the different account are held to be the assessee's own moneys, the assessee will be entitled to set off and a determination of the peak credit after arranging all the credits in the chronological order.”

31. In view of discussion made and proposition of law referred, the questions aforesaid are answered against Revenue.
32. Appeals are hereby dismissed.

Order Date :- 24.2.2015

A. Verma