

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

INCOME TAX APPEAL No. 58 of 2005

C I T-I JODHPUR
V/S
MOTILAL KHATRI

Mr. K K BISSA, for the appellant

Mr. ANJAY KOTHARI, for the respondent

Date of Order : 23.4.2008

HON'BLE SHRI N P GUPTA, J.
HON'BLE SHRI KISHAN SWAROOP CHAUDHARI, J.

JUDGMENT

BY THE COURT (PER HON'BLE GUPTA, J.):

This appeal has been filed by the Revenue, against the judgment of the learned Tribunal dated 20.2.2004, deciding two cross appeals; dismissing the appeal of the Revenue, while allowing the appeal of the assessee. These appeals were filed against the order of the learned Commissioner of Income Tax (Appeals), who in turn had partly allowed the appeal of the assessee, and deleted the addition of Rs. 224600/-, made under Section 40A(3), while upholding the addition made in the sum of Rs. 3,88,000/-, under Section 69 of the Income Tax Act.

The appeal was admitted vide order dt. 26.7.2005, by framing the following two substantial questions of law:-

1. Whether in the facts and circumstances of the case, the Tribunal was justified in deleting the addition of Rs. 3,88,000/- equivalent to purchase of gold on behalf of the assessee by his son Lalit Kumar?
2. Whether on the facts and in the circumstances of the case, the learned ITAT was legally justified in dismissing the appeal filed by the department in respect of additions made by the A.O. within the meaning of Sec. 40A(3) of the Act, which were deleted by the learned CIT (A)?

The facts, in brief are, that the assessee submitted return of his income, which was processed under Section 143(1)(a). However, since survey proceedings were conducted under Section 133A, therefore, the case was taken up in the scrutiny, and a notice was issued under Section 143(2). Then, for the present purposes it would suffice to say, that on 2.6.1998 the custom authorities conducted a personal

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search of the assessee's son Lalit Kumar, while he was on his way from Ahmedabad to Jodhpur, and in that search, the custom authorities found 15 foreign made gold bar biscuits valuing Rs. 7,35,000/-, total weighing 1759.750 gms., which were confiscated. Likewise, a bill no. 2666 dated 14/19.5.1998, for 8 gold bar biscuits, valuing Rs. 3,88,000/- total weighing 933.120 gms., was also found in the personal search. Since the controversy relates to these two items only, we have referred the facts regarding these items only.

The assessing authority found, that on examination of Kachhi and Pakki cash books, it revealed that amount of Rs. 7,35,000/- was drawn from the cash book, and was given to Lalit Kumar, to bring gold bar biscuits from Ahmedabad. In the cash book an entry was recorded with the narration, that Rs. 7,35,000/- send Lalit Kumar to Ahmedabad to bring gold after taking the cheques. However, it was found, that contrary to the narration, the assessee himself admitted, that alleged 15 gold bar biscuits valuing Rs. 7,35,000/- had been purchased, otherwise than cheque/crafts, and the assessee claimed, that sufficient cash was available with him on the date of passing of such entry in the books of account. Therefore, the assessee was told, that the provisions

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of Section 40A(3) are attracted to this transaction, which was contested, on the ground, that Section 40A (3) applies only to those payments of cash payments of cash purchase, which has been taken in the books of account, as stock in trade i.e. purchase of goods entered in the regular accounts books, and it does not apply in respect of expenditure, which is not claimed as deduction under Section 32 to 37, and regarding bill of Rs. 3,88,000/-, it was contended, that the bill was not in the name of firm, but was in the name of minor son Lalit Kumar. These contentions were negatived by the assessing officer, by considering that the balance sheet of the firm has been examined, and the gold value of 15 bars of Rs. 7,35,000/-, has been shown in the asset side of the balance sheet. The assessee was thus found to be taking inconsistent stand, i.e. on the one hand contending, that alleged purchase has been made out of cash balance available, while on the other hand contending, that the same has not been included in the books. Thus, an addition under Section 40A(3), to the extent of 20% of this amount was made. Then, regarding the amount of Rs. 3,88,000/-, it has been found by the assessing officer, that the statement of Lalit Kumar was recorded by the custom authorities, which was confirmed from the sellers viz. Bhupat Bhai, Govind Bhai of Ahmedabad, who deposed to have sold 8 gold bar

biscuits valuing Rs. 3,88,000/- on cash payments to Lalit Kumar, and it was found, that in the cash book of the assessee there was no withdrawal recorded, regarding this amount, and the explanation of assessee was asked, as to why this amount be not added as unexplained investment, and added to his total income, coupled with the addition, as warranted by the provisions of Section 40A(3), and the assessee replied on 7.3.2002, contending that son was minor at the time of statement. However, gold biscuits have been assumed to have been purchased on his behalf, and no entry having been passed in the books of accounts, and thus both, the purchase, and sale, are out of books, therefore, profits on the transaction be added as per gross profit rate according to the books. This reply was not accepted, and it was considered, that the assessee has admitted that the transactions took place on his behalf and, that there was sufficient cash balance available with the assessee in his books of accounts, then from out of that withdrawal of this amount of Rs. 3,88,000/- is not recorded, and thus it was found to be unexplained investment, made by the assessee, for purchase of 8 gold biscuits. According to Section 69 it was deemed to be the income of the assessee for the financial year relevant to the assessment year in question, and since the transaction of the so called unrecorded purchase has been made on

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behalf of the assessee by way of cash payment, for which purchase bill has been issued, by invoking provisions of section 40A(3), the 20% amount has further been added in the declared income.

This assessment order was challenged in appeal before the learned Commissioner, and the learned Commissioner, dealing with the addition of Rs. 3,88,000/-, found that in view of the provisions of Section 69, the assessing officer was justified in making the addition of Rs. 3,88,000/-, because the assessee could not prove that the investment was made out of cash balance shown in the cash book. It was found, that mere availability of cash balance in the cash book does not mean, that the assessee made the investment in unrecorded purchase of 8 gold bar biscuits, out of the cash available as per the cash book. Had the appellant used the cash balance shown in the cash book, he should have passed necessary entry of withdrawal, for using the same for purchasing gold bars. Thus, the addition of Rs. 3,88,000/-, made by the assessing officer was confirmed. Then, considering the addition of Rs. 1,47,000 and Rs. 77,600/-, under Section 40A(3), it was found, that assessee has not debited the purchase in his trading account, as the material has not reached to his place, and at the same time, he has not claimed loss, on account of seized

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goods, and the mere fact, that the assessee has passed a book entry showing in balance sheet, that gold worth Rs. 7,35,000/-, seized by custom department is shown in assets, the assessing officer has wrongly held, that the assessee has taken inconsistent stand, and that, had the assessee shown as purchase in the trading account simultaneously, he has to claim loss, on account of confiscation of material. As this has not been done, therefore, no expenditure/purchase of material has been claimed as expenditure, therefore, provision of Section 40A(3) is not applicable. Then, regarding addition of Rs. 77,600/- also it was found, that the assessing officer has erred in applying Section 40A(3) on the transaction, as the assessee has explained, that the purchase is not in the name of the assessee, and on the basis of the statement of Lalit Kumar, the case becomes of unrecorded purchases and sales, and under such circumstances, looking to the nature of the transaction, gross profit rate was required to be applied, and since addition has already been made of Rs. 3,88,000/-, making further addition of Rs. 77,600/- under Section 40A(3), is nothing but a double taxation of income. Thus, the addition of both the amounts, made under Section 40A(3), being Rs. 1,47,000/- and Rs. 77,600/-, had been set aside.

Aggrieved of this order, both the parties,

being the assessee, and the Revenue, filed appeals before the learned Tribunal. The assessee challenged the addition of Rs. 3,88,000/- to his income, while the Revenue challenged the deletion of the addition, made under Section 40A(3).

The learned Tribunal, while dealing with the contention about deletion of Rs. 3,88,000/- has found, that so far as the first limb of the argument of the assessee, that the addition cannot be made in the hands of the assessee, because the bill relates to Lalit Kumar, the son of the assessee, and the statement made by Lalit Kumar can not be relied, because he was minor at the time of making the statement, and in such circumstances, the statement taken, cannot be said to be free from ambiguity. It was found, that it is true that Lalit Kumart was minor at the time when he made statement, wherein he admitted, that certain amount of gold biscuits were purchased, and the same were sold further on behalf of his father. It is also true, that this addition has been made, only on the basis of statement of Lalit Kumar, and also the bills found from his pocket, which was in his own name, but then the statement is to be read in toto, and this amount can be considered for addition in the hands of the assessee because the bill supports the statement of Lalit Kumar. Then, it was

found, that had it been the case of addition being made only on the basis of the statement of Lalit Kumar, the result would have been entirely different, but there is a bill which supports the case of the department, that the gold was purchased in the name of Lalit Kumar, but on behalf of the assessee, and therefore, this first limb of argument was negatived. Then, the second limb of argument was considered, that only the profit from the purchase and sale of these gold biscuits should have been added in the hands of the assessee, and not total amount of the purchase of the gold. In this regard it was found, that of course the sale and purchase is not recorded in the books of accounts, but then it is also true, that on the date of the purchase of these gold biscuits, there was enough cash balance in the hands of the assessee, which is supported by the photocopies of the cash book, which is placed at page 86 to 87 of the paper book, and that cash balance has been reproduced in the order of the Tribunal. With this, the learned Tribunal has held, that it is convinced, that the Department has solely relied on the statement and bill, taken from Lalit Kumar, and has not made any further investigation in this regard. The explanation tendered by the assessee has not been considered properly by the assessing officer, and that, the second limb of the argument of the assessee is sound. It was found,

that there was sufficient cash balance at the time of purchase of gold, which is evident from the chart, and that, when the cash balance was lying in the chest, the source of investment in purchase of gold should not be totally disbelieved, on the basis of suspicion. Then it was noticed, that in Section 69, earlier the word "shall" was used for this definition, while the provisions of Section 69 now contain the word "may", and then it was found, that undoubtedly as a deeming provision, meaning thereby, that although the investment may not be the income of the assessee, but it can be added, in case the source of investment is not explained by the assessee. To explain, that the investments are not out of undisclosed income, the assessee can adduce evidence, and in this case one more significant fact is that his statement was never recorded by the Department, but the statement was recorded only by the customs department. The assessing officer has not made any investigation, and thus there is no evidence to support the suppressed sale. Then, it was assumed, that the assessee never admitted that these gold biscuits were purchased by him, and the department has not tried to link the bill in a proper perspective with the assessee, and the assessment has been done on the basis of presumptions. Then, it was considered, that for making this addition under Section 69, which is evident from the letter dated

18.2.2002, which was written by the ITO to the assessee, wherein it was proposed to make this addition, as unexplained investment in stock in trade. According to which, it appears, only the profit ventured out to this transaction has to be added, and not the entire amount of purchase, which has been added in this case. Then it was found, that sufficient cash balance was available with the assessee, but he did not record the withdrawal of this amount, while the assessee is required to explain the investment, as per provisions of Section 69, but this explanation, or the proof, is not as stringent as an assessee is required to prove under the provision of Section 68 of the Act, in regard to cash credits. Under Section 69 a primary onus is cast upon the assessee, to make plausible explanation, and in case it is not accepted, the onus shifts on the department to disprove the explanation of the assessee, by further material evidence on record, while the stand taken by the department is very weak. It was considered, that during search operations carried out in the premises of the assessee, no stock of gold or cash was found, and that, on the relevant day, when the purchase of gold bars was made, the assessee had enough cash balance, and the only factor regarding withdrawals of the amount for the purchase of gold bars, and the receipt from the sale of such bars is not recorded in

the books, the same cannot be considered enough to prove the case of the assessee, as incorrect. Rather they speak in favour of the assessee. Thus, the addition of the amount of Rs. 3,88,000/- was ordered to be deleted, and it was directed, that addition of income, by applying a gross profit rate can be added, from the books, by considering this transaction as unrecorded transaction.

Then, dealing with the appeal of the Revenue, it was found, that the assessee had not taken both the transactions in trading, and/or profit and loss account, therefore, the CIT(A) deleted the disallowance under Section 40A(3), and has given a finding, that the officer was not justified in making this addition. The ground taken by Department, being that the Commissioner has deleted this addition in violation of Section 40A(3), was negatived by observing, that it is clear from the above finding of the Commissioner Income Tax (Appeals), that the provision of Section 40A(3) are not attracted, and therefore, the findings were affirmed.

We have heard learned counsel for the parties, and have gone through the impugned orders.

We first of all take up the question no. 2,

and for appreciating the question we may gainfully quote the provisions of Section 40A(3) which reads as under:-

"(3) Where the assessee incurs any expenditure in respect of which payment is made, after such date (not being later than the 31st day of March, 1969) as may be specified in this behalf by the Central Government by notification in the Official Gazette, in a sum exceeding [[twenty] thousand] rupees otherwise than by [an account payee cheque drawn on a bank or account payee bank draft], [twenty per cent of such expenditure shall not be allowed as a deduction]:

Provided that where an allowance has been made in the assessment for any year not being an assessment year commencing prior to the 1st day of April, 1969, in respect of any liability incurred by the assessee for any expenditure and subsequently during any previous year the assessee makes any payment in respect thereof in a sum exceeding [[twenty] thousand] rupees otherwise than by [an account payee cheque drawn on a bank or account payee bank draft], the allowance originally made shall be deemed to have been wrongly made and the [Assessing] officer may recompute the total income of the assessee for the previous year in which such liability was incurred and make the necessary amendment, and the provisions of section 154 shall, so far as may be, apply thereto, the period of four years specified in sub-section (7) of that section being reckoned from the end of the assessment year next following the previous year in which the payment was so made:

Provided further that no disallowance under this sub-section shall be made where any payment in a sum exceeding [[twenty] thousand] rupees is made otherwise than by [an account payee cheque drawn on a bank or account payee bank draft], in such cases and under such circumstances as may be prescribed, having regard to the nature and

extent of banking facilities available, considerations of business expediency and other relevant factors.]”

Various provisions appended to this sub-section are not relevant, and therefore they have not been quoted. In our view, a bare reading of the language of this sub-section is enough to show, that in the circumstances of the case, provisions of Section 40A(3) are not attracted, with respect to either of the transactions; obviously because, it only prohibits allowing of deduction, as expenditure. Expenditure obviously means, expenditure admissible to be deducted, from out of the income, which may include the expenditure on purchase, and the like, and the sub-section provide, that if any such expenditure is incurred after specified date, in a specified manner, then 20% of such expenditure shall not be allowed as a deduction. In the present case the assessee has not claimed any deduction of any expenditure of Rs. 3,88,000/- or Rs. 7,35,000/-, and therefore, there is no question of not allowing any part of that expenditure, as deduction. Thus, the finding arrived at in this regard, by the learned Commissioner, and the learned Tribunal, cannot be said to be wrong. Question no. 2 is accordingly answered in favour of the assessee, and against the Revenue.

Then, we take up the question no.1, with respect to addition made by the learned assessing officer, and the learned Commissioner, invoking provisions of Section 69, which addition has been deleted by the Tribunal. We may gainfully quote the provisions of Section 69, which reads as under:-

"Unexplained Investments.

69. Where in the financial year immediately preceding the assessment year, the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year."

Thus, a look at this section shows, that where investment is made, which is not recorded in the books of accounts, if any, maintained by the assessee, for any source of income, and the assessee offers no explanation about the nature and source of the investment, or the explanation offered by him is not, in the opinion of the assessing officer, satisfactory, the value of the investment may be deemed to be the income of the assessee, of such financial year. Here, in the present case, with respect to this amount of Rs. 3,88,000/-, the assessee had taken varying stands, viz. that the bill is in the name of his son, when the

statement of Lalit Kumar was recorded, he was minor, obviously meaning thereby, as if he has nothing to do with the investment, and in the other breathe, it is contended, that it may be deemed to have been purchased on behalf of the assessee, and no entry having been passed in the books of accounts, then it is admitted, that purchase and sale both are out of books of accounts, and therefore, only profit of the transaction should be added. This obviously means, that the assessee admits the transaction to have been made on his behalf, and as is clear from the statement of Bhupati Bhai and Govind Bhai, that it was a cash transaction. That being the position, since the investment made of Rs. 3,88,000/-, in purchase of 8 gold bar biscuits, is not recorded in the books of accounts, and no explanation is coming forth from the assessee, about the source of investment, it can very well be added under Section 69, and if the discretion of making addition was exercised by the learned assessing officer, and confirmed by the learned Commissioner, there was no reason to take a different view. From a reading of the order of the learned Tribunal it is clear, that the whole thrust of the order is, that the assessee was having sufficient cash balance on the relevant dates, inasmuch as on 13.5.1998 the cash balance is Rs. 4,85,334, then on 14.5.98 the cash balance is Rs. 5,33,290, and then on

15.5.98 the cash balance is 5,78,545, and then from 15th to 19th it is static, at figure Rs. 5,78,545/-. This figure obviously accedes Rs. 3,88,000/-, but then, the million dollar circumstance, which has been considered by the learned assessing officer, and the learned Commissioner is, that if the existing cash balance has been used for purchasing gold bars, obviously the available cash balance would have decreased, while it has not so decreased, and thus the only possible conclusion is, that the gold bars were purchased worth Rs. 3,88,000/-, from the amounts available with the assessee, from undisclosed source, obviously beyond the amount shown in the cash book to be lying with the assessee. It is not the explanation of the assessee, that the purchase was made at Phalodi on that very day, and the same day was sold, with the result, that the opening and closing of the day's cash balance did not fluctuate, rather it is deposed, that the gold was purchased from Ahmedabad, and was purchased on cash, obviously the cash moved from Phalodi to Ahmedabad, and the cash that moved is not the cash, from out of one available in the books of accounts, shown to be lying in the chest. Obviously this is an additional amount, available from a undisclosed source, and therefore, it was rightly added, as income of the assessee in such financial year. The mere fact, that the assessee alleges that

the gold was sold, is not enough to refuse to make addition under section 69. So far as the allegation of the gold having been sold away is concerned, that can be an additional aspect, that the transaction is unrecorded transaction, but then thereby it cannot be said that the investment is shown to have been made from out of disclosed resources, available with the assessee.

The investment is clearly investment, on the face of it, made from out of the funds available with the assessee, from undisclosed sources, and is unexplained investment. What happened to the sale proceeds, where that money has gone etc., are all aspects, which are alien to the present controversy.

In that view of the matter, we have not been able to persuade ourselves, to concur with the finding of the learned Tribunal, on this question, rather the findings of the assessing officer, and the learned Commissioner, are the findings, in accordance with law.

Accordingly the question no. 1 is answered in favour of the Revenue, and against the assessee.

Consequently, the appeal is allowed in part. The judgment of the learned Tribunal is set aside, and

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that of the learned Commissioner is restored.

(KISHAN SWAROOP CHAUDHARI), J.
/sushil/

(N P GUPTA), J.