

inspecting Assistant Vs. Indian Art Emporium

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Jun-10-1994

Reported in : (1994)50ITD21(Mum.)

Judge : G Krishnamurthy, M Ajinkya, L Aggarwal

Appellant : inspecting Assistant

Respondent : Indian Art Emporium

Judgement :

1. These are two appeals filed by the Revenue against the orders of the Commissioner of Income-tax (Appeals) for the assessment years 1983-84 and 1984-85. Since the grounds of appeal are common, they are disposed of by a single consolidated order. The following grounds have been taken in the respective appeals : (1) The Commissioner of Income-tax (Appeals) erred in allowing relief to the extent of Rs. 6,990 under the head "Sales promotion".

(2) The Commissioner of Income-tax (Appeals) erred in deleting the addition of Rs. 90,000 made under Section 68 of the Act in respect of credits of Rs. 45,000 each appearing in the name of Shri Ranbir Mehra and Sudhir Mehra (Hindu undivided families).

(3) The Commissioner of Income-tax (Appeals) erred in directing that the value to closing stock should be arrived at by allowing deduction of 55 per cent, as profit and bargain margin as against deduction of 45 per cent, given by the Inspecting

Assistant Commissioner (Assessment).

(1) The Commissioner of Income-tax (Appeals) erred in allowing relief to the extent of Rs. 10,220 under the head "Sales promotion".

(2) The Commissioner of Income-tax (Appeals) erred in allowing interest of Rs. 10,125 on the alleged loans from Sudhir Mehra, Hindu undivided family, and Ranbhir Mehra, Hindu undivided family.

(3) The Commissioner of Income-tax (Appeals) erred in directing that the assessee should be allowed deduction of 55 per cent, as profit and bargain margin as against deduction of 45 per cent, given by the Inspecting Assistant Commissioner (Assessment).

In this appeal, the first ground is regarding the relief granted by the learned Commissioner of Income-tax (Appeals) to the extent of Rs. 6,990 under the head "Sales promotion". The amount represented commission paid on the spot to various persons for bringing customers. The Inspecting Assistant Commissioner found that all these payments made in cash were unverifiable and hence disallowed the claim. The learned Commissioner of Income-tax (Appeals) although held that the payments were not verifiable, yet considering the past records of the assessee, the nature of the business and the argument advanced by learned counsel for the assessee, the disallowance was restricted to Rs. 5,000 and the relief of Rs. 6,990 was allowed. The Revenue being aggrieved has come up in appeal before the Tribunal.

5. The learned Departmental representative has very vehemently stressed that when the payments were not verifiable, the entire disallowance made by the Inspecting Assistant Commissioner should have been confirmed by the Commissioner of Income-tax (Appeals), and now the deletion of Rs. 6,990 be restored. On the other hand, learned counsel for the assessee has relied on the order of the Commissioner of Income-tax (Appeals).

6. After hearing the parties at length, we are of the opinion that the order passed by the learned Commissioner of Income-tax (Appeals) does not call for any

interference. It is admitted that in the past too, the assessee had been making such payments and in the last year, such payment amounted to Rs. 24,835 when the turnover was Rs. 8,62,558.

While this year, the payment was only Rs. 11,990 and the turnover was a little over Rs. 8,33,000. This fact cannot be denied that the customers who visit such shops are the tourists and they are generally accompanied by guides and unless guides are given some allurements incentive, they are bound to take the tourists to other shops. Hence some attraction has to be created for the guides to bring the tourists to the shop. Under these circumstances, an ad hoc allowance of Rs. 6,990 in the face of the turnover of Rs. 8,33,000, we feel, is not on the higher side. We, therefore, confirm the order of the Commissioner of Income-tax (Appeals) on that issue.

7. The next ground is that the learned Commissioner of Income-tax (Appeals) has erred in deleting the addition of Rs. 90,000 made under Section 68 of the Act in respect of the credits of Rs. 45,000 each appearing in the name of Sri Ranbhir Mehra and Sudhir Mehra (Hindu undivided families). The brief facts are that the Inspecting .Assistant Commissioner during the scrutiny of the accounts found that the assessee had shown two credits of Rs. 45,000 each from the abovesaid Hindu undivided family. He examined the kartas of the said Hindu undivided families and being not satisfied with their explanation, treated the loans advanced by them as undisclosed income of the assessee. The learned Commissioner of Income-tax (Appeals) while discussing this issue in detail, deleted the addition of the said amounts. The Revenue being aggrieved, has come up in appeal before the Tribunal.

8. The learned Departmental representative has very vehemently stressed that this deletion was not proper as the statements recorded of the kartas of the Hindu undivided families clearly showed that they did not possess the amounts which stand to the credit in the account of the assessee. He has further pointed that no regular accounts of the Hindu undivided family were produced and the fact that the amounts in the bank accounts were deposited within a short span of a week and thereafter transferred to the account of the assessee through bank drafts, itself

suggests that the very transaction was fishy and should not be believed. He has further pointed that the filing of the returns by the Hindu undivided families was also after the raid conducted on the premises of the assessee and was just to create an evidence to support the credit entries in their accounts. He has relied on the order of the Inspecting Assistant Commissioner which he has discussed in paragraph 3 of his order. On the other hand, learned counsel for the assessee has relied on the order of the learned Commissioner of Income-tax (Appeals).

9. We have heard the parties at length and have also carefully perused the entire facts on record. The assessee, in this case, has filed pass books of the respective Hindu undivided families in which the amounts stood deposited, and the amounts were transferred to the assessee through bank drafts. It is also not in dispute that the respective Hindu undivided families owned 22 acres of land which were fully irrigated. The assessee had also filed the evidence in support of agricultural income mentioned below before the Revenue authorities :-- (13) Patwari record book from 1981-82 to 1984-85 which shows the complete record of product grown areawise and cess paid to authorities as per record.

10. From these papers, it stands verbally proved that the Hindu undivided families in whose names the credit entries stood, did carry out agricultural operations on the land and they owned about 22 acres of land irrigated. It is not very difficult or unreasonable to accept an earning of Rs. 32 to 35,000 from a holding of 22 acres of land. No doubt the assessee has not filed any evidence regarding sale of his agricultural produce which otherwise could have completely clinched the issue, yet the very fact that the assessee owns 22 acres of land and had been cultivating the same and depositing the earnings in the bank and had also filed returns although late is sufficient to prove the credibility of the Hindu undivided families, the identity of the creditor and the transfer of the amounts through the bank also goes to prove the genuineness of the transactions. In view of these circumstances, the only thing which can be challenged is as to whether the Hindu undivided family had really earned that much income or not.

That fact could be ascertained and verified only in the case of Hindu undivided families who had otherwise filed the returns, but as far as the assessee is

concerned, in our opinion, he has proved all the three factors, i.e., identity of the creditor, credibility and the genuineness of the transfer of the amount through the bank account of the assessee. Taking all these facts into consideration we are of the opinion that the order passed by the learned Commissioner of Income-tax (Appeals) does not call for any interference and if at all the Revenue has to challenge, then it should challenge the amounts in the hands of the Hindu undivided families, who have confirmed to have paid the said amounts to the assessee and who are also being regularly paid the interest on the said amount through cheques. The issue is therefore decided accordingly.

11. The last ground is that the Commissioner of Income-tax (Appeals) has erred in directing that the value of closing stock should be arrived at by allowing deduction of 55 per cent, as profit and bargain margin as against deduction of 45 per cent. given by the Inspecting Assistant Commissioner.

12. At the time of scrutiny of the accounts, the Inspecting Assistant Commissioner found that the value of the stock calculated and the tag price attached to the item was valued at Rs. 23,56,685. The assessee alleged that the tag price represented the bargaining margin at 35 per cent, and further alleged that thereafter his margin of profit on the sale was about 30 to 40 per cent. During the course of assessment, the statement of the assessee was also recorded in which he has admitted that by reducing 45 per cent, of the price returned in the stock, his cost price can be ascertained. On the basis of the said statement, after reducing the tag value by 45 per cent, and by further allowing a reduction of an amount of about Rs. 3 lakhs as cost of goods received on approval basis, treated the balance as stock-in-trade and added back the amount which exceeded the stock-in-trade shown in the books, as suppressed stock. In appeal, the learned Commissioner of Income-tax (Appeals) directed to reduce 55 per cent, from the tag price and thereby treating the balance which exceeded the value shown in the stock as suppressed stock and thereby an income from undisclosed sources. The Revenue being aggrieved against the said order of the learned Commissioner of Income-tax (Appeals) has come up in appeal before the Tribunal.

13. The learned Departmental Representative has very vehemently argued that when the very assessee in his statement had admitted that his cost price can be arrived at by reducing 45 per cent., from the value of the stock, then the order of the learned Commissioner of Income-tax (Appeals) directing to reduce it by 55 per cent, is not proper and thereby should be quashed and the order of the Inspecting Assistant Commissioner be restored. He has also relied on the arguments advanced by the learned Inspecting Assistant Commissioner. On the other hand, learned counsel for the respondent has relied on the order of the learned Commissioner of Income-tax (Appeals) who had discussed the whole issue in detail.

14. We have heard the parties at length and perused the entire facts on record. In this case, the main point in dispute is as to how to arrive at the correct price of the stock. No doubt, the assessee in his statement on August 8, 1983, had admitted that his method for valuing the closing stock is the sale price (market price less the profit margin) which is approximately 45 per cent, for taking the value of the stock. Whatever price is shown on the tag attached to the items is the selling price. If we reduce the same by 45 per cent, that will be the closing stock. Despite this statement, Sri Sudhir Mehra, in his subsequent statement, has clarified that in his earlier statement he had only given out the profit margin and the tag price was not a selling price. He indirectly meant that the selling price meant, minus bargaining margin. The assessee had examined Mr. Masood Ahmed Zaroo who was also a dealer who has stated that though there is no fixed margin of bargain, but it may be in the vicinity of 40 to 45 per cent. The assessee has also filed an extract of a travel survival kit at page 9 of his compilation in which it is mentioned that the cardinal rule of purchasing handicrafts is to bargain and bargain hard. In fact the Inspecting Assistant Commissioner too in his order has mentioned that Sri Shyamchand Roy had deposed before him that this business was similar to that of the assessee and the tag price was 3 to 3 1/2 times of the cost price while profit was 20 to 50 per cent. He had also deposed that the bargain was very heavy and it ranged from 30 to 40 per cent. In fact, all these facts clearly go to suggest that in such type of shops and the business bargaining is positively heavy. Even the Inspecting Assistant Commissioner has allowed a margin of 45 per cent, which includes the bargaining margin and the margin of profit. All these facts taken

together, we are of the opinion that the bargaining margin estimated by the learned Commissioner of Income-tax (Appeals) at 35 per cent, was not on the higher side.

15. The next point is regarding the margin of profit. The assessee himself has been showing his margin of profit from the year 1977 as follows : 16. From the perusal of the above details, it is clear that the margin of profit had been ordinarily more than 30 per cent. The statements recorded by the Department of the co-dealers at the instance of the assessee also show that the margin of profit on such sales at such places was to the tune of 30 per cent, to 40 per cent. The learned Commissioner of Income-tax (Appeals) taking all these circumstances has made an estimate of profit on such sales to the extent of 20 per cent, (on the remaining 65 per cent. sale price of the item (100-35 per cent, bargaining margin), which approximately comes to a little more than 30 per cent.) which, in our opinion, is not on the higher side. We therefore hold that the order passed by the learned Commissioner of Income-tax (Appeals) was not unjustified and does not call for any interference. The issue is decided accordingly.

Ground No. (1) in this appeal is the same as in the earlier appeal regarding allowing relief to the extent of Rs. 10,220 under the head "sales promotion". In this year, too, the entire amount claimed was Rs. 18,720 paid to various persons who had brought the customers as commission and the learned Commissioner of Income-tax (Appeals) had restricted the disallowance to Rs. 8,500 and had allowed an estimated relief of Rs. 10,220. In our opinion, as discussed in the appeal for the assessment year 1983-84, some commission had to be allowed and the relief granted by the learned Commissioner of Income-tax (Appeals) in our opinion was not on the higher side. The issue is therefore decided accordingly.

18. The next ground is that the learned Commissioner of Income-tax (Appeals) has erred in allowing interest of Rs. 10,125 on the alleged loans from Sudhir Mehra and Ranbhir Mehra, Hindu undivided families.

This interest was paid in respect of the credit entries of Rs. 45,000 each in the name of the respective Hindu undivided families. As we have already held while deciding the appeal for the assessment year 1983-84, that the cash credit entries

were genuine and the loans were also genuine ; in view of the finding of the loans, the payment of interest has to be allowed and we therefore hold that the order passed by the learned Commissioner of Income-tax (Appeals) allowing the said interest does not call for interference. The issue is decided accordingly.

19. The last ground is that the learned Commissioner of Income-tax (Appeals) has erred in directing that the assessee should be allowed deduction of 55 per cent, as profit and bargain margin as against deduction of 45 per cent, given by the Inspecting Assistant Commissioner (Assessment). This issue is the same as in the abovesaid appeal for the assessment year 1983-84, as in the said appeal we have held that the order allowing 55 per cent, by the learned Commissioner of Income-tax (Appeals) was perfectly correct and justified. This issue is also decided accordingly.

21. I have carefully gone through the order prepared by the learned Judicial Member. I find myself unable to agree with the finding given by him confirming the deletion by the Commissioner of Income-tax (Appeals) of Rs. 90,000 which was added under Section 68 of the Act. In my opinion, the source of this amount has not been properly explained and the order of the Commissioner of Income-tax (Appeals) cannot be sustained. I will proceed to state my reasons and, for that purpose, state a few facts.

22. The assessee, which is a registered firm, had shown two credits of Rs, 45,000 each from Ranbir Mehra (Hindu undivided family) and Sudhir Mehra (Hindu undivided family). In the course of assessment proceedings, the assessee filed confirmations from the kartas of these Hindu undivided families and such confirmations indicated that the Hindu undivided families concerned were assessed to tax by the Income-tax Officer, Special Survey Circle, Aurangabad. When the Income-tax Officer assessing the firm wrote to the Income-tax Officer, Special Survey Circle, Aurangabad, that Income-tax Officer informed the Bombay Income-tax Officer that the Hindu undivided families were not assessed by him. When confronted with these facts, the assessee filed before the Income-tax Officer acknowledgments of the Hindu undivided families having filed their returns on July 4, 1985, with the Income-tax Officer, Aurangabad. As pointed out by the Income-

tax Officer in his assessment orders, these returns were filed only on July 4, 1985, i.e., after the Income-tax Officer, Aurangabad, had communicated to the Assessing Officer that such Hindu undivided families were not assessed by him to tax. The Income-tax Officer has made certain observations about figures of income returned by the Hindu undivided families for the assessment years 1982-83, 1983-84 and 1984-85. In the course of hearing before us, we specifically asked the assessee's counsel, Shri Trivedi, to file copies of acknowledgments in support of having filed these returns. The papers filed in response to such enquiry show the position as under. Shri Sudhir Shadilal Mehra, karta of the smaller Hindu undivided family, had filed returns for the assessment years 1982-83, 1983-84 and 1984-85 showing agricultural income of Rs. 35,000 for the assessment years 1982-83 and 1983-84 and Rs. 30,000 for the assessment year 1984-85. No taxable income has been shown in any of these three returns. All such returns were apparently filed on one day, i.e., July 4, 1985. On the same day, Ranbir Shadilal Mehra, karta of the smaller Hindu undivided family, had filed identical returns for the assessment years 1982-83 to 1984-85 showing agricultural income of Rs. 35,000 for the assessment years 1982-83 and 1983-84 and Rs. 30,000 for the assessment year 1984-85. If these assessees had no taxable income, there was no need to file voluntary returns of income. It is not known why these returns were filed for and from the assessment years 1982-83 to 1984-85 in these two cases showing substantial agricultural income only for these years. Copies of the bank accounts of Sudhir Mehra and Sons and Ranbir Mehra and Sons with the Bank of India, Aurangabad Branch, have also been filed at our instance. These bank accounts show cash credits of identical amounts on the same date, i.e., Rs. 20,000 was credited on November 17, 1982, Rs. 25,000 was credited on November 23, 1982, and Rs. 25,000 was credited on December 9, 1982, in each of the accounts. The amount so credited was immediately withdrawn from each of these accounts and transferred to the books of the firm. The explanation of the cash credits by the Hindu undivided families before the Income-tax Officer was that this was agricultural income from 22 acres of land. These lands were allegedly purchased in 1980 and 1983.

It was stated that the lands were being used for growing sugarcane, wheat, grapes, corn and cotton and that the annual income from such lands in the vicinity

was about Rs. 60,000 to Rs. 70,000. Both the individuals deposed that two persons were employed to look after the farm and one of them, namely, one Shiva, kept with him the proceeds received on sale of the farm produce. The Income-tax Officer pointed out to the deponents that the amounts were deposited in the bank account only in November, 1982, to which the explanation was that earlier no bank account was maintained and that the money was kept with Shiva. Shri Ranbir Mehra, in a statement dated August 26, 1985, stated that they had received various gifts from relatives for the purchase of the lands. The Income-tax Officer noted the fact that both these persons were partners in the firm in their individual capacity and the third partner was their father. In the face of the above facts, which indicated that self-serving statements were made and evidence in the form of returns created to support the story of earning of agricultural income, it was necessary to put the assessee's version about receipt of so much agricultural income to the severest test. The Commissioner of Income-tax (Appeals) in his order has referred to 15 different documents and bills, octroi slips, etc., record books of the patwari, etc., which were produced before him. No part of this evidence was ever produced before the Tribunal. In any case, nothing has been produced before us to support the stand of the assessee that the Hindu undivided families of Sudhir Mehra and Ranbir Mehra earned substantial agricultural income from agricultural produce. The Commissioner of Income-tax (Appeals) has made the following observations after recording the alleged evidence produced before him : . "These returns, however, as has been brought out in the assessment order, have been filed after the raid and search and seizure operations in the case of the appellant-firm and have thus been considered to be an afterthought by the Inspecting Assistant Commissioner (Assessment). However, as the Hindu undivided families were not having taxable income, it was not necessary to submit returns. Be that as it may, the other evidence produced in the assessment proceedings relating to ownership of these lands, earning of income from these lands by the Hindu undivided families and the amount having been drawn from their respective bank accounts, is sufficient to come to the conclusion that these Hindu undivided families could have earned the income and could have been in a position to accumulate such income deposited by them in, their respective bank accounts and to that extent, therefore, these Hindu undivided families could be

said to have the capacity and the capability to advance the aforesaid loans of Rs. 45,000 each, totalling Rs. 90,000, to the appellant-firm." 23. With great respect, I cannot persuade myself to sustain the above finding of the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals) accepts that the returns of income have been filed only after the raid and search and seizure operations were conducted in the case of the assessee-firm. He also observes that since the Hindu undivided families had no taxable income, it was not necessary to submit these returns but he does not question the assessee about why he found it necessary to file returns showing nil taxable income only at this late stage. Secondly, the Commissioner of Income-tax (Appeals) did not make any enquiry about the extent of agricultural income earned in subsequent years and earlier years. If these two families had such fertile lands as to fetch annual income of Rs. 70,000, it would have continued to earn such income in the subsequent years also. No information in this regard is forthcoming.

Further, we find that in the alleged evidence produced before the Commissioner of Income-tax (Appeals), there is no mention of the type of agricultural yield produced, the persons to whom such yield was sold and the price at which it was sold. If the assessee maintained such detailed records of its agricultural operations and if its agricultural income was of such magnitude, it would have certainly kept a record of the extent of the agricultural produce and the sale proceeds that it fetched and the records of the persons who purchased the agricultural produce of these Hindu undivided families. Such vital record has not been produced before the first appellate authority and has not been produced before the Tribunal at the time of hearing. The facts mentioned above have to be viewed in the light of the other fact that there was a search under Section 132 of the Act on the business premises and residential premises of the partners on August 6, 1983, and cash as well as unaccounted stock, etc., were found. Therefore, any explanation regarding cash credits in the books of the firm has, in my opinion, to be put to strict proof thereof. This has not been done by the first appellate authority. I would, therefore, agree with the finding of the Income-tax Officer that the money belonged to the firm and had been routed through the kartas of the two Hindu undivided families who were partners in the firm in their individual capacity. I agree with the conclusions reached by the learned Judicial Member on the other grounds of

appeal. I would, therefore, allow the second ground of the Revenue for the assessment year 1983-84. For the same reason, I would allow the second ground by the Revenue for the assessment year 1984-85 because, in my opinion, the losses shown in the name of Sudhir Mehra (Hindu undivided family) and Ranbir Mehra (Hindu undivided family) are not properly explained and the interest paid thereon cannot be allowed as a business expenditure.

25. Since there is a difference of opinion between the learned Judicial and the learned Accountant Member on the admissibility of ground No'.

(2) raised by the Department in the appeal against the order of the Commissioner of Income-tax (Appeals), we hereby frame the point of difference for the opinion of the President under Section 255(4) of the Act as under: "Whether there is adequate evidence on record to support the findings of the Commissioner of Income-tax (Appeals) that the source of the cash credits of Rs. 90,000 found in the books of the assessee-firm is adequately explained ?" 26. CH. G. KRISHNAMURTHY (President).-This appeal has been referred to me as-a Third Member for my opinion on the following point of difference of opinion that arose between the Members of Bombay Bench "D" who constituted the Bench at that relevant point of time : "Whether, there is adequate evidence on record to support the findings of the Commissioner of Income-tax (Appeals) that the source of the cash credits of Rs. 90,000 found in the books of the assessee-firm is adequately explained ?" 27. The assessee is a firm carrying on business in jewellery and curios at Bombay and Aurangabad. In the course of examination of the accounts, the Inspecting Assistant Commissioner (Assessment) noted that there were cash credits of Rs. 45,000 each in the accounts of two joint families, Ranbir Mehra and Sudhir Mehra. It appears the kartas of both those joint families are partners in the assessee-firm with a 50 per cent, share each. To prove the source and nature of these cash credits, the assessee obtained confirmation letters from those two Hindu undivided families and filed them before the Inspecting Assistant Commissioner (Assessment). These confirmation letters revealed that those Hindu undivided families were assessed by the Income-tax Officer, Special Survey Circle, Aurangabad. The Inspecting Assistant Commissioner (Assessment) addressed the Income-tax Officer, Special Survey Circle, to confirm those loans. In

reply, he stated that those Hindu undivided families were not assessed by him. When the assessee was confronted with this fact, he showed the acknowledgments of the filing of the returns by those two Hindu undivided families as on July 4, 1985, but unfortunately that date happened to be the date after the Income-tax Officer informed the Inspecting Assistant Commissioner (Assessment) assessing the assessee-firm as above. These returns filed by those Hindu undivided families showed agricultural income of three years, namely, assessment years 1982-83, 1983-84 and 1984-85. They declared identical incomes of Rs. 35,000 for these years respectively.

Further examination showed that both those Hindu undivided families maintained bank accounts with the Bank of India and in each of those accounts Rs, 20,000 and Rs. 25,000 were deposited on November 17, 1982, and November 23, 1982, respectively. Thereafter, those moneys were transferred from those Hindu undivided family accounts to the account of the assessee-firm. To verify the genuineness of the deposits, the Inspecting Assistant Commissioner (Assessment) required the assessee to produce the kartas of those joint families. They appeared before the Income-tax Officer and their statements were recorded. Shri Sudhir Mehra deposed that his Hindu undivided family purchased lands in 1980 and 1983 amounting to 22 acres and that the total cost was Rs. 23,000 of which half was borne by the Hindu undivided family and the other half by the Hindu undivided family of Ranbir Mehra. These lands were used for growing sugarcane, wheat, grapes and cotton, etc. After providing for irrigation facilities at a cost of Rs. 8,000, they were able to produce an annual income of Rs. 60,000 to Rs. 70,000 of which his half share came to about Rs. 35,000. It was ascertained that those joint families did not have any other income. Since agricultural income was not liable to tax, a question was asked as to why those joint families had to file returns at all. The reply was "just like that". In response to a specific question, he said that prior to the deposit of the money in the bank account of the Hindu undivided families on the abovementioned dates, that money was not kept in any bank account and it was kept with one Shiva an employee. Some vague reply was given that he was a trusted employee working with them for the last so many years.

28. In the statement of Shri Ranbir Mehra, he stated that for the purchase of the land they had received gifts from various relatives and that except for small amounts, the sale proceeds for agricultural produce was kept with him while Shri Sudhir Mehra stated that the money was lying with Shri Shiva, Ranbir Mehra stated that the money was lying with him. After referring to this contradiction and the other attendant circumstances, the Inspecting Assistant Commissioner (Assessment) drew the inference that the farm of 22 acres purchased between 1980 and 1983 could not have produced the income of Rs. 90,000 or so much of income as to enable the Hindu undivided families to accumulate so much of money. He, therefore, concluded that the advance of money by these Hindu undivided families was only a story concocted to create evidence for the cash credits and that the money really belonged to the assessee-firm in respect of which the provisions of Section 68 were clearly attracted. He, therefore, brought the sum of Rs. 90,000 to tax as unaccounted income of the assessee from undisclosed sources.

29. Against this detailed order, an appeal was filed before the Commissioner of Income-tax (Appeals), XI, Bombay, who deleted the addition. The Commissioner, of Income-tax noted that the moneys were received by cheques. The kartas of those Hindu undivided families deposed that they advanced the money. The ownership of agricultural lands by these Hindu undivided families was established beyond doubt.

Those agricultural lands were capable of producing so much of income as to enable those parties to deposit Rs. 90,000 with the assessee-firm.

Then he referred to 15 pieces of evidence produced before him which showed, according to him, that regular intensive and extensive agricultural operations were being carried on. From this evidence, the Commissioner of Income-tax concluded that those Hindu undivided families could be said to have "the capacity and the capability to advance the aforesaid loans of Rs. 45,000 each to the assessee." 30. It was against this order that a further appeal was filed by the Revenue before the Income-tax Appellate Tribunal. The learned Judicial Member who wrote the leading order agreed in toto with the conclusions reached by the Commissioner of

Income-tax for deleting the sums. The learned Judicial Member concluded from the evidence brought on record that the assessee had established identity of the creditor and the receipt of money through bank cheques on the genuineness of the transactions and, therefore, nothing more survived for the assessee to prove the genuineness of the loans. He further held that since the Hindu undivided families were on the record of the Income-tax Department if the Department had doubted the capability of those Hindu undivided families who advanced the money, their capability could have been verified and ascertained by the Income-tax Officer assessing the joint families but so far as the assessee was concerned, he established the three factors which were necessary to prove the genuineness of the loans, namely, the identity of the creditor, credibility and the genuineness of the transfer of the amount to the bank accounts. But the learned Accountant Member differed from this view. Relying very heavily upon the facts found by the Inspecting Assistant Commissioner (Assessment) he came to the conclusion that the assessee had not discharged the onus that lay upon it to prove the creditworthiness of the creditors. The learned Accountant Member did not place any reliance on the returns filed by those Hindu undivided families all because they returned only agricultural income which was not taxable at all and, there was no necessity to file the agricultural income returns and from the dates that the returns were filed, they were only an afterthought intended to create evidence for the cash credits. Significant is the factor that those two joint families filed returns for three assessment years 1982-83, 1983-84 and 1984-85 all on one day showing more or less identical incomes with minor differences. He also referred to the fact that the bank accounts of these two joint families showed cash deposits of identical amounts on the same dates in these two accounts and the amount credited was immediately withdrawn and transferred to the books of the assessee-firm. This showed a pattern of introducing the firm's money through the aid of Hindu undivided family accounts introducing the bank account and bank deposits as the citadel of proof. He further noted that when these lands were purchased in 1980 and 1983, they could not have yielded so much of income in the assessment year 1983-84 for which the relevant previous year started from April 1, 1982, and ended on March 31, 1983. He concluded that the statements given by the kartas of the Hindu undivided families were only self-serving statements.

Touching upon the evidence considered by the Commissioner of Income-tax as proof of accumulation of income, the learned Accountant Member observed that such evidence was not produced before the Tribunal and in particular he made a very significant observation that nothing was produced before the Tribunal to support the stand that the Hindu undivided families of Sudhir Mehra and Ranbir Mehra could earn substantial agricultural income from agricultural operations. For these reasons, the learned Accountant Member differed from the view taken by the learned Judicial Member and as a consequence the above difference of opinion was referred to me for my opinion.

31. I have heard the learned Departmental representative as well as learned counsel for the assessee. The main thrust of the argument of the Departmental representative was that there was a vital difference between the worth of a person and his capacity to hold the money. The Hindu undivided families in this case, who are the creditors might have the worth to advance moneys of Rs. 45,000 each but the question was did they have the cash, did they have the resources to produce so much of cash. The creditors have miserably failed to establish the availability of cash on the dates of deposit in the bank. The evidence produced by them before the Commissioner of Income-tax (Appeals) only went to prove that agricultural operations were being carried on but that was not sufficient to show that the agricultural produce so obtained was so much as to produce income which could enable the creditors to save Rs. 90,000. There was no proof of sale proceeds, nor the nature of the crops which was sold, for how much and that too to whom. The investment made in this agricultural land was admittedly too small. The period available to the creditors between the date of purchase of agricultural land and the carrying out agricultural operations was too small to allow even one decent agricultural crop to be raised and to yield sale proceeds of about Rs. 90,000. He, therefore, commended for acceptance the order passed by the learned Accountant Member which was consistent with the evidence collected by the Inspecting Assistant Commissioner (Assessment). But learned counsel for the assessee contended that there was a raid on the firm on August 6, 1983, when a huge tax liability was fastened on the assessee and an order passed under Section 132(5) and it was to enable the firm to pay the tax that those loans were taken.

As rightly mentioned by the learned Judicial Member, the assessee had proved the identity, the capability and creditworthiness of the creditors and, therefore, the Department was not justified even to canvas the opposite view.

32. Another important aspect that was mentioned on behalf of the assessee was it was only to the questions that were put by the Department that the creditors could give answers. Specific questions were not put to the creditors. The creditors could not be expected to give answers and subsequently the Department would not be justified in referring to those undeclared questions and then say that the assessee had not produced proof in regard to them. In this area falls the production of proof of sale proceeds. It was not the case of the Accountant Member that these assesseees did not have the capability. He went by surmise and suspicion and, therefore, his conclusions could not be said to be based upon material.

33. I have considered these arguments, perused the orders of all concerned and I am of the opinion that the Department was able to establish the uncreditworthiness of the depositors to deposit money in the bank. Analysing the order of the Commissioner of Income-tax and the learned Judicial Member, they seemed to lay emphasis on the fact that when these amounts were deposited first in the bank accounts and then received by the assessee by way of cheques, that proved that the creditors had enough of resources to produce so much of income and that the money belonged to the creditors. First and foremost it is not correct to contend that these Hindu undivided families were income-tax assesseees because no assessment was made upon them and in any case none was produced before me. Secondly, the Hindu undivided families did not have any income other than the agricultural income. There was no need for them to file the returns of income at all. Even after that if they filed the returns of income it would show that there was a purpose to be served behind it, namely, to establish that the income disclosed in those returns was available with them. I do not see any other purpose but it was certainly not in discharge of any statutory obligation. If it is under the Agricultural Income-tax Act then the assessments made by those authorities, if any, should have been produced. Mere disclosure of income in a return filed before the Department does not prove the existence of so much of income in cash either on the date the return was filed or at the end of the previous year or on the last day of

the previous year in respect of which that return was filed.

34. Those returns can provide only prima facie evidence but not conclusive evidence. Therefore, nothing can be read into the filing of the returns by the Hindu undivided families in favour of the assessee.

On the other hand, a motive to file the returns namely to provide evidence can be attributed to the assessee because the kartas of those two Hindu undivided families happened to be the partners here, the other partner being their father. On account of the intimate connection and the deep involvement brought about by the raid and the fastening of huge tax liability by order passed under Section 132(5), a need arose to bring money into the books to pay that tax and with a view to provide evidence for the money that was being brought into the books, the credits were introduced. This appears to be the sequence of events or the historical sequence of evidence that must have taken place.

Thirdly, the deposits came first into the bank account in November, 1982, and December, 1982, the lands were said to have been purchased between 1980 and 1983. No specific dates and the extent of land purchased was furnished. Assuming everything in favour of the assessee, the lands purchased in 1980 and brought under cultivation could only produce the income for introduction in 1982 and not the lands purchased in 1983. The lands purchased in 1983 could produce income only after 1983 and we are not concerned with that income. Again assuming everything in favour of the assessee, if a major portion of the lands were purchased in 1980, the first crop that would come for sugarcane can only be in 1982. For grapes and others the gestative period is more than one year. No income could have, therefore, yielded from any crop other than annual crops like sugarcane, paddy, etc. Even this can only be one crop. How can one crop on a portion of 22 acres of land produce income so as to cover Rs. 90,000. The fertility of the lands in the area where they were said to have been purchased was not furnished. The extent of the yield produced was not known. It is, therefore, not possible to accept that these lands in one crop could produce a gross income of more than Rs. 90,000. The income must have been produced before the amounts were deposited in banks that is by November, 1982.

Before November and December, 1982, I see little probabilities and possibility for sale proceeds of agricultural produce to cover the cash credits of Rs. 90,000. Having regard to these circumstances, I am of the opinion that while the assessee could establish the worth of the creditors, it has failed to prove the possession of cash on the crucial dates. I have seen myself the bank pass book. Subsequent to the dates of transfer of the money to the assessee-firm, there were further deposits of substantial amounts. Nobody had examined these deposits which were also followed by withdrawals as to where those deposits came from and where these withdrawals have gone. In any case that is not an issue before me. I do not, therefore, express any opinion on those entries, more so because they were not referred to either by the Income-tax Officer, the Commissioner of Income-tax or by my learned brothers. I am of the opinion that the filing of the returns and the possession of agricultural lands did not prove the possession of cash with the creditors on the respective dates. It is also to be noted that the evidence collected and relied upon by the Commissioner of Income-tax only showed that agricultural operations were carried on may be on an extensive scale. That would not lend credence to the view that the agricultural produce obtained was so huge as to yield an income of Rs. 90,000.

35. Another important factor which influenced my thinking is that if the agricultural lands were so fertile as to fetch annual income of Rs. 90,000, the same should have been the position subsequently also and no effort was made to find out the subsequent position and more so to relate the deposits in the bank account to this income. This is very pertinent to come to conclusion one way or the other about the capability of the creditors. I am also inclined to agree with the view expressed by the learned Accountant Member that the facts of- the present case viewed in the light of the other fact that there was a search under Section 132 of the Income-tax Act at the business premises and residential premises of the partners and cash sales of unaccounted stocks were found and, therefore, the credits in the books of the firm must be put to stricter proof. There is, therefore, every reason to believe that the money credited in the account of the creditors belong to the assessee-firm and not to the creditors notwithstanding the admission which can only be a self-serving statement on the facts of this case. I am, therefore, in agreement with the view expressed by the learned Accountant Member and hold that there is no

adequate evidence on record to support the findings of the Commissioner of Income-tax (Appeals) that the source of cash credits of Rs. 90,000 found in the books of the assessee-firm was adequately explained.

36. The matter will now go before the regular Bench for decision according to majority opinion.

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