

Kantilal and Bros. Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Pune

Decided On : Nov-07-1994

Reported in : (1995)52ITD412(Pune.)

Judge : M Chaturvedi, C Singh

Appellant : Kantilal and Bros.

Respondent : Assistant Commissioner of

Judgement :

1. This appeal by the assessee is directed against the order of the Commissioner of Income-tax (Appeals)-I, Pune, and pertains to the assessment year 1989-90.

2. Briefly the facts : There was a search action under Section 132 of the Income-tax Act, 1961 (hereinafter called the 'Act'), at the premises of Kant Electronics, a sister concern of the assessee-firm, Among other things, a 'piece of paper' was found. It contained the name of 32 persons. Different amounts were mentioned, against the name of those persons. Shri Jayantilal, a partner of the assessee-firm, was questioned about this paper. In reply, he admitted that the said paper was written by him, and it comprised the amounts brought in cash on interest from different persons named therein. Some amounts were taken by cheque and these were reflected in the books of account. The amounts which were not found in the books were brought in 'No. 2'. It was submitted that the amounts shown in the paper represent only borrowings. Under most of the items listed in the paper, an amount with + sign was written which, according to the assessee, represented

interest payable. Entry No. 17 contained a note that two months' interest is to be reduced. At the end of the list, amounts of Rs. 1,42,000 and Rs. 1,61,000 were reflected under the letters J & X respectively. The words J & K were stated to be used for the partners, namely, Shri Jayantilal and Shri Kantilal. The assessee contended that the entire amount reflected on paper represents borrowings (including capital). These borrowings were utilised for the purpose of investment found in various assets during the search operation. In respect of the entries made in the assessee's books, confirmations were said to have been filed.

3. The contention of the assessee was not accepted by the Assessing Officer. In the order passed under Section 132(5) of the Act, the amounts were treated as advances due. After considering the repayment of Rs. 87,000, an amount of Rs. 32,69,745 was proposed for addition in that year. In view of the categorical statement made by the assessee that some of the amounts were collected out of the books. Assessing Officer held that the assessee had undisclosed income. In making the addition, the Assessing Officer did not consider the following deductions claimed by the assessee from the total of all the amounts, Le., Rs. 33,56,000 : (A) Amounts recorded in the books (confirmation filed) : (i) Amount belonging to Trust Rs. 3,00,000 (ii) Mohanlal Saraf Rs. 15,800 (iii) Kalpana Saraf Rs. 9,450 (iv) V.B. Kulkarni Rs. 5,000 (v) Jitendra Oswal Rs. 50,000 (vi) Dharmachand Oswal Rs. 50,000 ----- (i) Amounts returned Rs. 2,55,000 (ii) Amounts recorded in books (as noted above) Rs. 4,28,000 + (correct amount Rs. 4,30,250) (iii) Capital of two partners Rs. 3,03,000 (iv) Cash shortage in books Rs. 43,880 ----- In regard to the amount belonging to trust, it was held by the Assessing Officer that this pertains to educational trust. In the list it was in the name of Baba Trainer. In the books the trust was shown as a creditor. The Assessing Officer further held that other claims are also not correct. All these persons are creditors in the books while the list is of advances given. Further the last two entries of Rs. 50,000 + Rs. 50,000 are in different names. The major portion of the list was treated as income of the assessee.

Coming to the deductions in respect of amount returned, the Assessing Officer noted that the amount of Rs. 2,55,000 is total of all amounts noted below the main amount with + sign. This, according to the Assessing Officer, represented interest

to self. Against some of the items, a remark, is given "fnys". The word "fnys" is Marathi word and its English equivalent was said to be "given". In actual calculation, such items with this remark were deducted.

The A.O. allowed deduction for the capital of the partners. He also allowed set off for cash shortage. The amount of Rs. 30,53,640 was worked out as under: TOTAL CREDITS ...

Rs. 33,56,000 Less : Amounts marked with added set off.

----- Rs. 26,660 The assessee made a declaration of Rs. 15 lakhs. The A.O. allowed deduction of Rs. 15 lakhs from Rs. 30,53,640 and brought to tax Rs. 15,53,640. This addition was confirmed by the CIT(A).

4. Shri K.A. Sathe, learned counsel for the assessee, appeared before us. Relevant documents and papers were filed. At the outset, it was submitted that addition of Rs. 15,53,640 should not be made separately and total of all additions may be taken at Rs. 19,25,025 in place of Rs. 40,63,522 as made by the A.O. and as against Rs. 18,00,000 declared by the assessee. In support of the claim, the learned counsel stated that there is no evidence to show that the amounts mentioned on the piece of paper represented 'advances due' to the assessee and not borrowings. According to the learned counsel, there is overwhelming evidence to support that the list contains the borrowings and not the amount of 'advance due' : (i) Statement of Jayantilal who was examined at the time of raid is relevant in this connection. He admitted that the amounts represented borrowings, some of which were recorded in books and some of which were not recorded. It was also mentioned that the rate of interest was 1 per cent per month (page ,30 - Answer to question 3).

(ii) The capital of the partners is mentioned below the list. This goes to show that the list is of borrowings.

(iii) Those amounts which appear in books are appearing as creditors and not as debtors. These are as follows : in the List) Rs. 8,00,000(ii) Kalpana V. Sarda in the List) Rs. 8,000(iii) Jitendra R. Oswal 50,000 & Dharmachand Oswal 50,000 Rs.

1,00,000 (pp. 74 & 75 of paper book & Item 11 in the list) Rs. 5,000(v) Mohanlal Saraf If these items represent creditors, it could also be inferred that the other unrecorded items also represented creditors only.

(iv) Against some entries an amount is mentioned with a remark "RHI" which means given. This suggests payments and not receipt. These are-V.M. Kulkarni (Item 21 of the list) Rs. 26,000A-1 Trading (Item 24 of the list) Rs. 24,700Prakash Kavedia (Item 25 of the list) Rs. 18,000 ----- In view of the above, it is obvious that the list was in respect of the assessee's borrowings and not in respect of the 'amounts due'.

5. Shri K.A. Sathe, further contended that the borrowings of the assessee were utilised for acquiring assets found during the search operation. In the eventuality of these borrowings being proved, the acquisition of the assets could also have been proved. But since it was apprehended that in respect of some credits, the parties might not turn up, the source of the acquisition of the assets could not be explained.

For this reason only additional income was declared.

Shri Sathe argued that the amounts shown in the list cannot be considered to be cash credits. Therefore, these fall beyond the ken of Section 68 of the Act. As per the prescription of the section, it is sine qua nan, that an entry must appear in the books. Here, the addition was made simply on the basis of a paper. A 'piece of paper' cannot be construed to be a 'book' within the meaning of Section 68.

6. The list on the basis of which the addition was made was found during the search operation. The assessee was not asked to explain the nature and source of various assets. The list was not meant to be produced for income-tax purposes. Considering the circumstances of the case and normal course of events, but for independent confirmation, one could give credence to the fact that the amount in the list could be really borrowings of the assessee. This gives rise to a question whether any addition can be made in respect of borrowings which, on the basis of circumstantial evidence, appears to be borrowings but for which the assessee cannot produce any confirmatory letter or evidence.

In order to make such addition, Section 68 cannot be applied because these are not credits in the books of account. Sections 69, 69A and 69C also do not apply because these are not investments and also do not represent any valuable asset. No addition on this count is, therefore, justified if the list is accepted to be that of borrowings.

7. Shri Sathe submitted that assuming without conceding that addition of the borrowings is to be made because there is no confirmation of the loan, the question arises as to what happened to the cash represented by these borrowings. Thus, If the addition is to be made of the amount of Rs. 33,56,000 what happened to the said amount. It was vehemently contended that revenue conducted intensive search operation, but no assets other than those referred in the assessment order were found. It would, therefore, be reasonable, logical and in consonance with the fine norms of justice that these borrowings should be linked with the assets found. Therefore, there should be only one addition. Assessee must not be vexed twice for the same cause. For acquiring the assets, no doubt, borrowings could be used. The assets found cannot be added as unexplained investments or as unexplained valuable articles as per the provisions of Section 69, 69A or 69B of the Act.

8. Shri Sathe made an attempt to reconcile the figure with reference to the various assets. Apropos, the difference in name in respect of the amount of Rs. 3,00,000 from Angelo Da Fonseca Education Trust, Shri Sathe pointed out that this amount was arranged by one Baba Trainer who was known to the partners. This name appears in the letter dated 29-3-1989, from the said educational trust. A copy of the said letter is given on page 72 of the paper book. Since the person concerned was Shri Trainer, his name appears in the list, whereas the name of the Trust appears in the books. Thus, credit of Rs. 3,00,000 should have been accepted as proved. Similarly, other names also should have been accepted.

9. In regard to the deduction of Rs. 2,55,000, it was pointed out that the way in which the entry of each item was made with + sign, it could reasonably be inferred that this represented interest. The list was made to record the borrowings, the amount of Rs. 2,55,000 representing interest can only be the amount of interest

due. The principal amount represents an amount borrowed. Hence it will be for money received and one could expect it to represent an asset. The interest payable, on the other hand, does not represent any asset as such. Since the principal amount is being considered for addition on the ground that it is not confirmed, the liability for interest cannot be allowed as deduction, but at the same time, it cannot represent any addition of asset also.

In reconciling the total amount of Rs. 33,56,000, which includes amount of interest also with reference to various assets, it would be reasonable to exclude the amount of interest. According to Shri Sathe, the correct amount is not Rs. 2,55,000 but it is Rs. 2,19,375.

10. During the search another diary was found referred to in the order as IBICO diary. In this diary, there was an entry of Rs. 16,000 in the name of Vimla Rathod. This name appears respectively at S. No. 29 and No. 8 in the list. Since the borrowings in the list are separately being considered, these two credits of Rs. 21,000 are required to be deleted from the amount of Rs. 46,000. The addition to be made in respect of IBICO diary will then be confined to Rs. 25,000 of Tajraj Mangilal and other loans of Rs. 49,171.

11. The A.C. allowed a deduction of Rs. 68,700 in respect of the amounts which appear in the list with the description 'given'. These are Rs. 26,000 in the name of V.K. Kulkarni, Rs. 24,700 in the name of A-1 Trading and Rs. 18,000 in the name of Prakash Kavedia. These amounts were returned, therefore, these cannot be considered for reconciliation of assets. In any case, if the borrowings are to be added as assessee's own money, the money returned will be to the assessee himself and it will have to be ignored.

12. Finally, Shri-Sathe gave the following working to indicate how much amount could be considered against the addition of assets:(A) Total credits Rs. 33,56,000Less : Amounts returned (as see para 11 above Rs. 68,700 -----
(as allowed by AC) Rs. 2,07,000 ----- Mohanlal Saraf 15,000 Rs. 4,28,000
----- above) Rs. 2,19,375 -----(B) As against the above amount of Rs. 24,32,925 following additions could be considered:(1) Peak of cheques Rs. 2,36,664(2) Squared up accounts (agreed before AC) Rs.

3,32,100(3) Outstanding orders (agreed before AC) Rs. 2,16,315(4) Interest on above Rs. 40,000(5) Investment in Indira V.P. Rs. 18,000(6) IBICO diary- -Loans 49,171 Rs. 74,171(7) Mahavir diary Rs. 3,82,375(8) Gold stock Rs. 6,24,400 ----- Addition in firm Rs. 19,25,025(C) Additions in partners' cases- K.C. Solanki Bhishi (Chit Fund) Rs. 3,00,000 J.C. Solanki Bhis 3,00,000 shares, F.D. and house 50,000 Rs. 3,50,000 ----- 13. Shri Sathe submitted that the amount covered by borrowings shown in the list amounted to Rs. 24,32,925. This amount is less than the addition on account of assets, etc. Hence addition of Rs. 25,75,025 may be retained out of which Rs. 19,25,025 may be retained in the firm's case, Rs. 3,00,000 and Rs. 3,50,000 already added in the partners' cases as per their declaration in respect of their contribution in Bhishi (Chit fund). The assessee gave details vide his declaration as per letter dated 16-3-1992 of Rs. 18,00,000. A copy of the said letter is appended at page 56 of the paper book. Shri Sathe further submitted that there is no difference in value of the items given above. Where difference lies, those items are given as under :cassets 60,000 not covered and also not consider- Thus, as per letter, the assessee had consented for addition of Rs. 18,00,416 in the firm. In view of the above now in firm addition of Rs. 19,25,025 is acceptable to the assessee. In partners' case, the A.O.had already added Rs. 3,00,000 and Rs. 3,50,000 respectively.

Thus, according to Shri Sathe, addition of Rs. 19,25,025 should only be sustained. It was further proposed that addition on account of gold shortage and gold excess found in IBICO diary should be telescoped because it would be inconsistent to add on account of excess gold and shortage of gold simultaneously. It was also argued that for making addition on account of excess, the rate of gold was wrongly taken at Rs. 3,202 instead of Rs. 3,000 per ten grams. Thus, for 481.950 grams of gold 'difference to be deducted' comes to Rs. 16,750. The addition on this count is to be sustained as under:Less : rate difference 16,750 2,52,842 ----- A net addition of Rs. 14,863 was proposed to be added to Rs. 19,25,025, Le., total addition to be sustained in the firm was Rs. 19,39,888 as against Rs. 40,63,622.

14. Shri Sunil Pathak, the learned Senior Departmental Representative appeared on behalf of the revenue. The relevant documents and papers were filed at the time of the hearing. It was contended that the A.O.has taken a correct view in the

matter. It was stated that the so-called borrowings in the list bears no nexus with the partners' investment of Rs. 6,00,000 in Bhishi contribution.

Shri Pathak stated that the case of the assessee clearly falls within the ken of Section 68. According to the learned departmental representative, the paper which was impounded at the time of search can be construed to be a book of the assessee for invoking the provision of Section 68. To support this proposition, reliance was placed on some English cases. A xerox copy from the paper of the Stround's Law Dictionary was placed before us to explain the meaning of the word 'book'. It was further stated that the A.O. decided the issue after taking into consideration the totality of facts. The mere fact that in the assessment order, the A.O. did not make addition under Section 68 does not create any infirmity.

15. Coming to the contention of the assessee that the list impounded at the time of search was not correctly interpreted, it was stated that at the time of search partner said that it is a list of creditors.

Therefore, it cannot be accepted to be a list of borrowings. Shri Pathak further contended that if any doubt persisted as regards to the nature of the amount recorded in the list, the appeal may be set aside and direction for fresh examination may be given so truth can come out.

Shri Pathak took us through various paras of the impugned order. He also read the various papers and documents including depositions as made by the assessee in order to demonstrate that additions as made by the revenue authorities were correct and the impugned order calls for no interference on this count. He further supported the orders of the revenue authorities for the reasonings given therein.

16. We have heard the rival submissions in the light of material placed before us and precedents relied upon. We have also perused the explanation submitted by the assessee. We have examined various documents and papers filed before us. It is a cardinal principle of law that no one should be twice harassed for the same cause. This principle is canonized in a well known legal dictum: The general conspectus of the main plank of Shri Sathe's argument was that the piece of paper impounded from the premises of Kant Electronics, reflected only the borrowings of

the assessee. These borrowings were utilised by the assessee for acquiring the assets found during the search. Unfortunately, most of the borrowings were not supported by proper confirmations. Apprehending the situation that the creditors would be reluctant to come forward, the assessee made a declaration to that effect. The purport of the declaration is described in the letter dated 16-3-1992 addressed to the A.O. The details of declaration made by the firm covers an amount of Rs. 18,00,416. Besides the two partners declared Rs. 6,50,000 on account of chit fund and unrecorded advances. After giving the complete details of the borrowings and reconciling the same with reference to other assets, Shri Sathe proposed that in the case of firm addition to the tune of Rs. 19,39,888 may be retained over and above the sum added in partners' cases as per their declaration in respect of their contribution in chit funds.

It would be contrary to the canons of law to tax twice the same amount, i.e., borrowings and cost of assets. Borrowings were utilised to acquire assets.

17. We have examined the amounts which appeared in the books as creditors and debtors. We have also noted the implication of the word fnos, i.e., given. There appears to be considerable force in the argument of Shri Sathe that the assessee came forward with the declaration as because creditors were reluctant to come forward. There may be various reasons for being not able to furnish the confirmations.

This aspect is beyond the scope of this appeal. It is, therefore, not necessary to discuss it here. Once the contention of assessee that the amount as reflected in the 'seized paper' represents borrowings of the assessee is accepted, it would be proper to presume that such amount was utilised for the acquisition of assets found at the time of search.

18. One cannot be permitted to blow hot and cold in the same stream.

'Head I win' and 'tail you loose', approach is alien to the principles of justice. The doctrine of 'approbate and reprobate' as borrowed in our jurisprudence from the Scotch Law gives strength to this basic rule. There cannot be approval and rejection in the same stream. To attempt to take advantage of one part and to

reject the rest is against the fine norms of jurisprudence. The fact of the present case goes to show that revenue made certain breach in regard to this tenet of law.

19. Coming to the aspect of onus probandi, we find that the fibre of our jurisprudence is borrowed from the Roman Law. The law as regards to onus is enunciated in the well-known Roman dictum: Underlying idea embodied in the dictum is that the burden lies upon one who alleges and not on one who denies the existence of the state of fact. Observes Lord Hansworth M.R. in *Stoney v. Eastbourne R.D. Council* [1927] 1 Ch. 367, 397 "there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficiently *prima facie* to establish the case of the party on whom the onus lies.

It is not merely a question of weighing feathers on the one side or the other, and on saying that it shift the onus. What is meant is, that in the first instance, the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence".

20. It is abundantly clear from records that the amounts alleged to be borrowings were offered for taxation as because the assessee was not in a position to discharge his onus vis-a-vis creditors'. On this count, he accepted and assented to the addition as per the offer made by declaration [supported by letter dated 16-3-1992]. Even if these additions are to be treated as intangible additions, as decided in catena of cases, due credit should be given to the assessee. We have examined the statement where the assessee reconciled the figure of Rs. 33,56,000 with reference to the various assets. We have also noted the cause of difference in regard to Angelo Da Fonseca Education Trust.

21. When an explanation is filed by the assessee, it is incumbent on the revenue to consider the said explanation judiciously. It is the duty of the A.O. to consider the explanation with reference to the surrounding circumstances and in the light of material gathered. A.O. should not act like Sherlock Holme. The bedrock or foundation of the addition must not be based on surmises and conjectures. Shri Jayantilal, partner of the firm, who was examined immediately after the search operation admitted that the amount represented borrowings some of which were recorded in books and some of which were not recorded.

The word fnos as appears on this paper denotes 'given' not receiving.

22. We now come to the question whether Section 68 can be invoked in the facts and circumstances of the present case. Section 68 essentially contains a deeming provision which applies when the assessee's explanation about cash credit found in his book is rejected. To invoke this section, it is, sine qua non, that the sum must be credited in the books of the assessee maintained for a previous year. It may be charged to Income-tax as the Income of the assessee of that previous year; if- (i) the assessee who offers no explanation about the nature and source of such sum, or (ii) the explanation offered by him is, in the opinion of the A.O. not satisfactory.

23. In that context, it would be necessary here to explain the meaning of the term 'book'. The word 'book' is not defined under the Income-tax Act. We, therefore, take the meaning of the word 'book' as is understood in the common parlance. As per Chambers 20th Century Dictionary (1983 Edition), 'book' is defined as under : A collection of sheets of paper etc., bound together or made into a roll either printed, written on, or blank.

As per Bouvior's Law Dictionary (Eighth Edition), Book is a general name given to every literary composition which is printed, but appropriately to a printed composition bound in a volume.

In view of the above, the 'piece of paper' impounded at the time of search cannot be construed to be a book. The definition of the book as given in the Strand's Judicial Dictionary and relied upon by the learned departmental representative, deals with its meaning in the context of the Copyright Act, 1842. There the book is defined as every volume, part or division of a volume, pamphlet, sheet of letter press, sheet of music, map, chart or plan separately published. This definition is not relevant for our purpose. For the purpose of explaining the meaning in the context of the Income-tax Act, in our opinion, the term 'book' is to be construed as it is understood in the common parlance. No special meaning can be assigned to that term. We are, therefore, of the opinion that the case of the assessee cannot be put within the ken of Section 68 of the Act.

24. Once the factum of borrowing is accepted, it could very well be presumed that partners BISHI contribution was made out of it. Adverting to paras 12 and 13, we hold that the working as done by the assessee as to how much amounts could be treated against addition of asset appears to be in consonance with the fine norms of reasonings. It would, therefore, not be correct to take any contrary view in the matter. On this factual backdrop, we decide the various grounds taken in this appeal.

25. In regard to the first ground concerning the addition of Rs. 2,67,205 on account of difference in gold stock, we agree with the assessee that addition on account of gold shortage and gold excess found in IBICO diary should be telescoped because it would be inconsistent to add on account of excess gold and shortage of gold simultaneously. We direct the A.O. to act accordingly. We further direct him to take correct price of gold into consideration. It may be verified with reference to the records that whether the current price was Rs. 3,000 per 10 grams or Rs. 3,202 as adopted in the assessment order.

26. Ground No. 2 was not pressed. We reject the same as not pressed. In regard to ground No. 3, we have noted that addition made in respect of Mahavir Diary was not pressed. In regard to addition made in respect of IBICO diary, we find that the assessee conceded in regard to the amount of Rs. 74,171. Balance amount stands covered by the explanation and declaration. We allow this ground pro tanto. In regard to ground No. 4, we find that the amount of Rs. 26,600 was added on account of cash shortage. In view of the aforesaid discussion and having regard to the fact that there was no material to draw adverse presumption against the assessee and in view of other additions and declarations made by the assessee, this addition is not justified. We direct the A.O. to delete the same. Ground No. 5 was not pressed. We dismiss the same as not pressed. In regard to ground No. 6 concerning the confirmation of addition of Rs. 15,53,640 we have discussed the facts and circumstances in detail in the preceding paras. We are inclined to agree with the arguments advanced on behalf of the assessee. We have seen the working.

We have already discussed that there cannot be double taxation.

Accordingly, we direct the A.O. to consider the computation as given in the preceding paras, Le., 12 & 13, in the light of the aforesaid discussion and to delete the addition on this count accordingly.

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