

Assistant Commissioner of Vs. Vasantlal C. Mehta

Assistant Commissioner of Vs. Vasantlal C. Mehta

SooperKanoon Citation : sooperkanoon.com/70949

Court : Income Tax Appellate Tribunal ITAT Rajkot

Decided On : Feb-29-2000

Reported in : (2001)77ITD76(Rajkot.)

Judge : B Lal, Accountant, S K Yadav, S

Appellant : Assistant Commissioner of

Respondent : Vasantlal C. Mehta

Judgement :

1. The above appeals and the Cross Objections have been filed against the order of the CIT (Appeals)-III, Ahmedabad dated 29-6-1992 for the assessment years 1986-87 to 1989-90. ITA Nos. 3294 to 3297/Ahd/92 have been filed by the department and C.O. Nos. 3568 to 3570/RJT/99 have been filed by the assessee against the abovesaid order of the CIT (Appeals).

2. The only common ground taken up by the department for the above-said assessment years reads as follows : "The learned CIT (Appeals) has erred in law and on fact in deleting the addition made on account of unexplained investment in gold ornament and difference of interest charged in money lending business." The department, however, has not taken up the ground "difference of interest charged on money lending business" for the assessment year 1989-90. In the Cross Objections for the assessment years 1986-87 to 1988-89, the assessee has taken up the following ground of appeal: "The CIT (Appeals) erred on facts as also in law in alleging that at least 1/4th of the funds must have been deployed at the highest rate giving an average of 18% and thereby directing the Assessing Officer to work out the relief accordingly. Considering the facts of the case, additions of Rs. 33,834, Rs. 31,600 and Rs. 34,000 for the assessment years 1986-87 to 1988-89 respectively made by the Assessing Officer as extra interest incomes are required to be deleted." 3. Since common and identical issues are involved, these appeals and Cross Objections are taken up together and disposed of by the common order for the sake of convenience.

4. The assesscc is an individual. He is engaged in the business of pawn-broking and lends money to various persons against securities of gold/ silver ornaments. He is also doing the business in Gold ornaments and also earns job work charges from manufacture of gold ornaments. As per the Assessing Officer, the assessee has maintained regular books of account in the form of cash book and ledgers in which the money lent by the assessee to various debtors have been recorded from lime to time and the quantity of gold ornaments by way of security is also recorded.

The assessee is also maintaining register prescribed under the money lending regulation and Gold Control Act. The register maintained by the assesscc is signed by the assessee and the debtors also. The rate of interest charged by the assessee has been shown at 16% in the books of account for the period ending on 22-10-1987.

5. The first issue involved in appeals filed by the department is regarding the addition made on account of unexplained investment in gold ornaments. There was a search and seizure action in the business and

residential premises of the assessee on 29-12-1987 and 30-12-1987.

The details of the ornaments found and seized during the course of search are as under:-- Out of the abovestated gold ornaments valued at Rs. 15,37,424 weightment of which was 5038.100 grams, the Assessing Officer treated the gold ornaments weighing 4850.900 grams valued at Rs. 15,03,299 as unexplained and after considering the disclosure of Rs. 6,99,200 made an addition of Rs. 8,04,099 in various assessment years as follows : In appeal, the learned CIT(Appeals) deleted the additions made by the Assessing Officer.

6. During the course of hearing, the learned Departmental Representative invited our attention to paras 2 & 3 of the assessment order for assessment year 1988-89. According to him, the disclosure made of Rs. 5,58,000 during the course of search is quite nominal as compared to the total capital of Rs. 11,15,000 employed in the business. The learned Departmental Representative especially relied on the findings of the Assessing Officer discussed in para-7 of assessment order for the assessment year 1988-89. The Assessing Officer has stated in para-7 that the books of account are always considered as preliminary evidence in income-tax proceedings. According to him, the assessee was making fictitious entries of names right from assessment year 1986-87 in his account books. In the case of fictitious names, the assessee was procuring the receipts in fictitious names and the original of it was never given to the owner because the real person was someone else. The Assessing Officer also rejected the affidavits which were filed by the assessee during the course of proceedings under section 132(5) and also before him during the course of regular assessment proceedings on the basis that the real evidence is the books of account where such fictitious names have been mentioned and not the affidavits filed during the course of assessment. The Departmental Representative vehemently argued that in view of the specific findings of the Assessing Officer in his order, the gold shown against fictitious names actually belongs to the assessee. He also contended that the affidavits were filed only during the course of proceedings under section 132(5) hence they cannot be considered as reliable evidence. He further argued that the gold ornaments seized were not having any particular label of any person, Therefore, he contended that the additions made by the Assessing Officer are fully justified and the learned CIT(A) has erroneously deleted such additions.

7. The learned counsel, however, contended that the Assessing Officer was not justified in making additions of Rs. 41,300, Rs. 76,540, Rs. 4,71,586 and Rs. 2,14,673 for the assessment years 1986-87 to 1989-90 respectively by totally ignoring the evidences produced before him from time to time, such as assessee's statement during the course of proceedings under sections 132(5) and 132(12) of the Act.

The learned counsel stated that the assessee had even during the course of search admitted that in about 91 cases, names of borrowers were not mentioned correctly in records and similarly amount advanced was entered to the extent of 20 per cent of the total advances. The names of real borrowers were furnished subsequently and according to him the Assessing Officer could not find any discrepancy in such list. It is also contended that the borrower will take loan only to the extent of his requirement irrespective of the market value of the pawned ornaments. The learned counsel argued that the allegation of the Assessing Officer about unrecorded evidence of 80% has no relevance with the quantity of ornaments. The assessee admitted the unrecorded advances and subsequently paid the taxes on the disclosed income. The learned counsel invited our attention especially to No. 17 of the statement of the assessee which was recording under section 132(4) of the Act during the course of search on 30-12-1997 wherein the assessee had given correct names and addresses of real borrowers who had taken loans on security of gold ornaments and he also furnished such details during the course of proceedings under section 132(5) of the Act. The learned counsel also argued that the names of real persons to whom advances were made and actual amount of advances together with details of gold ornaments kept as security as appearing in the annexure forming part of the assessment order as stated above tally with actual packets found during the course of search and description given by such real persons in their respective affidavits and also with the applications under section 132(11) of respective persons. The learned counsel also invited our attention to the observations made by the CIT in his order under section 132(12) of the Act which reads as follows :-- "It is stated that the real owners have filed affidavits regarding their claim before the ITO. This will of course be examined in detail by the ITO in the

course of regular assessment." The learned counsel thus contended that if the Assessing Officer failed to examine in detail the real owners of Gold ornaments as per the directions of the learned CIT during the course of regular assessment, the assessee should not be made to suffer. If fact, few of such persons who were examined by the Assessing Officer had also confirmed the same facts.

8. The learned counsel referred to the decision of the Hon'ble Supreme Court in the case of Mehta Parikh & Co. v. CIT [1956] 30 ITR 181 wherein it has been held that "Evidence may be tendered on an affidavit before the Assessing Officer. Such evidence is legal and can be acted upon by the assessing/appellate authorities, if the Assessing Officer or the Dy. CIT (Appeals) or the Appellate Tribunal regarded the same as non-sufficient proof of the contents thereof, they should cross examine the deponent and if dissatisfied, call upon the assessee to produce documentary evidence in support of the contents of the affidavits. If no such thing is done, the affidavit by itself should be regarded as sufficient proof".

The learned counsel also relied on the case of Dilip Kumar Roy v. CIT [1974] 94 ITR 1 (Bom.). The learned counsel stated that the assessee filed affidavits of 41 persons in support of his claim out of which 29 persons were summoned by the Assessing Officer for cross examination.

The Assessing Officer, however, examined only 6 persons and all of them had supported their claim. Thus, the learned counsel contended that the Assessing Officer was bound to accept the contents of affidavits as true and correct of others as he neither called/cross examined them.

9. It was also vehemently argued by the learned counsel that right from the date of search, the assessee has clarified that in books and records, the names of real borrowers who had taken loans were different and the amount of loan was stated at 20% of actual loan. This statement of the assessee was supported by affidavits of real owners and the statements recorded by such real owners. The assessee gave names of all real owners with particulars of gold ornaments, loan taken, date of loan etc. As such particulars tally with the affidavits, applications under section 132(11) and statements recorded by the Assessing Officer.

It was also pointed out by the learned counsel that the assessee was required to give to some of the real owners the ornaments belonging to his family members in place of seized ornaments. The learned counsel produced before us the list of such persons to whom ornaments of family members were given together with written agreements/receipts. Thus, according to the learned counsel the details of ornaments received as security were correctly entered in the books.

10. According to the contention of the Assessing Officer that the entry in the books of account should be taken as correct, the learned counsel stated that when it was shown that real persons who were given loans were different than those entered in the books and when such claim is fully supported, there was no reason to disbelieve the same. In this regard, the learned counsel invited our attention to the decision of the Hon'ble Supreme Court in the case of Pullangode Rubber Produce Co.

Ltd v. State of Kerala [1973] 91 ITR 18 wherein it is held that "Entries made by the assessee in the account books treating a portion of the general expenditure as expenses towards immature plants and capitalisation of such portion amount to an admission that the amount in question was laid out or expended for the cultivation, upkeep or maintenance of immature plants from which no agricultural income was derived during the previous year for the purpose of Explanation 2 to section 5 of the Kerala Agricultural Income-tax Act, 1950. Such admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It is open to the assessee who made admission to show that it is incorrect and the assessee should be given a proper opportunity to show that the books of account do not disclose the correct state of facts," 11. The learned counsel further argued that the Assessing Officer has accepted that the assessee had made advances to various persons. He has also accepted the figure of advances stated in the list attached with [the assessment order for the assessment year 1988-89. If he accepted these facts, then according to the learned counsel, he should have also accepted that a pawn-broker, shall never advance money to anybody without adequate security. He further stated that the Assessing Officer has not accepted the assessee's contention

that such ornaments belonged to the customers, however, he has accepted that ornaments were received during different years though he had rejected the books of account.

According to the learned counsel, it is quite logical that the value of: entire alleged unexplained ornaments should have been added in the year of the findings. Thus, the approach of the Assessing Officer is not consistent in view of the above facts. It has also been pointed out by the learned counsel that after the release of gold ornaments, the assessee had returned the same to the respective owners and before doing so, he had intimated the Assessing Officer about the time and date of return and further required him to be present at the time of returning of gold ornaments so as to satisfy himself about the assessee's claim and owners of gold ornaments. Thus, the learned counsel contended that the decision of the learned CIT(A) is fully justified as the same is based on the appreciation of facts and material on record.

12. We have heard the rival parties. The main point for consideration is whether the gold ornaments found in the names of 91 fictitious parties as per the books of account were actually received by the assessee from some genuine parties as a security for advancing them the loans or such gold ornaments had actually been acquired by the assessee by investing him unaccounted funds. The Assessing Officer concluded in his assessment order for the assessment year 1988-89 that such ornaments actually belonged to the assessee and the same had been acquired by him by investing his unaccounted funds. He has, thus, made the additions in the assessment years 1986-87 to 1989-90; on the basis of the entries made in the books of account. The learned CIT(A) however, came to the conclusion after discussing in depth the various aspects of this case and the documents produced before him that the acquisition of ornaments found during the course of search had been satisfactorily explained by the assessee, therefore, he deleted the additions made by the Assessing Officer. In this case, there was a search action in the business and the residential premises of the assessee. Some gold ornaments were found and seized as has been stated above. During the course of search, the statement of the assessee was recorded under the provisions of section 132(4) of the Act. In his statement the assessee explained that one of his business was pawn-broking and lending money (to various persons against securities of gold/silver ornaments. He also stated that in about 91 cases, names of borrowers were not mentioned correctly in records. In reply to No. 17 of his statement he also clarified that he was able to give correct names and addresses of real borrowers who had taken loans on security of gold ornaments and later on during the course of proceedings under section 132(5) of the Act, he had furnished such details and even he produced the affidavits from the real owners of gold ornaments.

13. The power to interrogate on oath conferred by section 132(4) is not for the purpose of general investigation of the assets but for the limited purpose of seeking an explanation or information in respect of the documents, articles or things found during the search. Thus, the authorised officer has a limited power to make enquiries on oath in respect of his findings from the search and he is not authorised to put question in general. This has been laid down by the Hon'ble Bombay High Court in the case of R. R. Gavit v. Smt. Sherbanoo Hasan Daya [1986] 161 ITR 793'. In the present case, the assessee explained during the course of search when his statement was recorded under section 132(4) that the names of 91 borrowers were not correctly recorded in the books of account and he further stated that he was able to give correct names and addresses of real borrowers who had taken loans on security of gold ornaments. Thus, he explained the nature of such entries in his books of account and that was the only purpose of recording his statement during the course of search. It was not necessary for the assessee to give the names of real debtors during the course of search. He explained the nature of the documents and he also stated that the necessary evidence can be produced later on and that is what he has actually done. During the course of proceedings under section 132(5), he produced the names of real owners alongwith their affidavits. The Assessing Officer has mainly made the addition by presuming that the gold ornaments shown against 91 persons actually belong to the assessee.

14. In the case of Pradip Chandulal Paltel v. P.G. Karode [1992] 197 ITR 385 (Guj.), the Hon'ble High Court has laid down that "since in section 132(4A) the words "may be presumed" have been employed, it is clear that the making of the presumption in such cases depends upon the particular facts of the case and the Officer or the

authority cannot be justified to make such presumption in all cases without judicious application of mind to the facts of the particular case. Even if such a presumption is made the same is rebuttable and the person is free to lead evidence to rebut such "presumption. The authority and the Court has to consider the evidence and the facts judicially. Since section 132(4A) raises a rebuttable presumption, it would be open to the Assessing Officer to record a finding that the contents of the books of account etc. are not true". In the present case, the assessee explained during the course of search that in 91 cases, names of borrowers were not mentioned correctly in records. He also stated that he was able to give correct names and addresses of real borrowers who had taken loans on security of Gold ornaments. In support of his contention during the course of search, he furnished all details regarding the real borrowers alongwith their addresses during the course of proceedings under section 132(5). He further produced the affidavits from the real owners. In order to support his case, the assessee filed before the Assessing Officer the copies of the applications made under section 132(11) of the Act by the real owners and even the assessee gave to some real owners the ornaments belonging to his family members in place of seized ornaments. The list of such real owners to whom the ornaments belonging to his family members were given was also produced before the Assessing Officer. The assessee filed affidavits of 41 persons in support of his claim out of which 29 persons were summoned for cross examination. But, the Assessing Officer examined only 6 persons who appeared before him in compliance to his summons. All the six persons supported the claim of the assessee. The Assessing Officer did not cross examine the remaining persons. It was also brought to the notice of the Assessing Officer that the assessee had returned the seized gold ornaments to the respective owners after the release of such ornaments by the Department. In view of the above facts, the Assessing Officer was not justified to make such a presumption. He has done so without applying his mind to the facts of this case. Moreover, the assessee produced sufficient evidence to rebut the presumptions made by the Assessing Officer. The Hon'ble Gujarat High Court in the case of Pradip Chandulal Patel (supra) has laid down that the authority and the Court has to consider the evidence and the facts judicially but in the present case, the Assessing Officer has made the additions on the basis of presumption and without judicious application of mind.

15. In pawn-broking business, the loan is advanced against the security of gold or silver ornaments which is quite peculiar in its nature. This business is very common in India. In this business, the income is earned out of heavy interest which the businessman charges on the loan advanced to various persons. But the loans are advanced without taking any risk of the recovery of the loan because the borrower has to deposit his valuables such as Gold/Silver ornaments etc., equivalent to the amount of the loan taken or more as security. Therefore, there is hardly any risk involved in this business. All other Financial Institutions including the Banks are advancing loans to various persons without any security, therefore, they have to keep record of the whereabouts of the borrowers. Generally such institution advances loans on the basis of the financial status of the person. Therefore, they have to maintain proper records of the movable and immovable properties. Sometimes, they advance loans against the mortgage of various assets such as building, machinery and stock etc. Therefore, such financial institutions are bound to keep complete record of the borrowers and even sometime they ask for. Sureties from other known persons to the borrowers who are financially sound so that in case of default, the money is recovered from such sureties. In other words, maintaining the complete records regarding the identity of the borrowers in the case of financial institutions is absolutely necessary for recovering the loans advanced to them. But in the case of a person who is carrying on the business of pawn-broking, it is not important for him to know the complete identity of the person because the loans advanced by him are quite secured because the borrowers have taken the loans against the deposits of their Gold/silver ornaments. In other words, the person who is carrying on the pawn-broking business, may advance the loan without knowing the exact name and other particulars of a person, but the fact remains that he has advanced loan to a person who is known to him against the deposits of ornaments. In the present case, the assessee is carrying on the business of pawn-broking on large scale and lends money to persons against securities of gold ornaments.

During the above period, he advanced loans to 461 persons against the deposit of gold ornaments. Only in 91 cases, it was found that the entries were made against fictitious names but as has been discussed above, the

loans were advanced to real owners of the ornaments. In this business, it cannot be ruled out that some entries might have been made where the real names of the borrowers were not entered for reasons which were best known to the assessee and the borrowers. The assessee was not very particular about the real names because his money was fully secured against the deposit of Gold ornaments. The real names might have not been disclosed due to some social problems but the fact remains that the loans were advanced to real owners of the Gold ornaments as has been discussed above. The Assessing Officer has not applied his mind to the special features of this business and has made the additions by wrongly presuming that the Gold ornaments actually belong to the assessee.

16. The assessee is maintaining the regular books of account for his pawn-broking business. During this period, he has advanced loans to 461 parties. The assessee is charging interest at the rate of 16% from all the parties as per the books of account. The Assessing Officer has considered all the parties as genuine except 91 parties. It is not clear on what basis the remaining 370 parties have been considered as genuine. If according to the Assessing Officer, the entries made against 91 parties were bogus, he should have rejected the books of account and should have considered all the parties as bogus parties. It is quite amazing that the Assessing Officer has considered 370 transactions entered in the same books of account as genuine without causing any further enquiries whereas 91 transactions have been considered as bogus because the name of the real owners were not mentioned in the books of account. The assessee himself disclosed during the course of search that in 91 cases, the names mentioned were fictitious. The Assessing Officer relied on the statement of the assessee as far as the fictitious names are concerned but he rejected that part of the statement where the assessee stated that the transactions pertain to the real owners of ornaments and he would produce the relevant evidence. The statement recorded under section 132(4) has to be read as a whole. The Assessing Officer would not be justified to accept half of the statement which is in favour of the revenue and reject the remaining half which is in favour of the assessee. Similarly, in the books of account, the Assessing Officer cannot follow the policy of pick and choose method. The assessee has maintained the books of account for his business and the nature of all the transactions entered into such books of account is the same.

Therefore, the Assessing Officer would not be justified to consider some transactions as genuine and other non-genuine without causing enquiry into each and every transaction. It is also relevant to note that the evidence recorded in the books of account tally with the statement except that the different names have been mentioned against 91 cases which the assessee honestly has admitted in his above statement. Another important point for consideration is that the asscscc is charging interest from all the parties including 91 parties which have allegedly been considered as bogus. We are unable to understand, how the assessee would charge interest from himself because according to the Assessing Officer the loans have not been advanced to these parties and the gold ornaments belong to the assessee himself.

This is a search case and the department could not find any supporting evidence during the course of search that the gold ornaments actually belong to the assessee. No prudent businessman would mix up his own ornaments with those of the ornaments kept with him by the borrowers.

If the loans had been advanced to those 91 parties and the interest had also been charged from them, there cannot be any doubt regarding the genuineness of such parties. Tims, the circumstantial evidence is also strongly in favour of the assessee and the Gold ornaments pertaining to 91 parties cannot be considered as the ornaments acquired by the asscscc out of his unaccounted funds.

17. The real owners filed their affidavils regarding their claim before the Assessing Officer. They also filed such affidavits during the course of proceedings under section 132(5). The contents of these affidavits have also been proved factually true as these real owners also make the claims of their gold ornaments from the assessee and the assessee paid these gold ornaments out of their family members ornaments as their ornaments were seized by the department. These real owners also filed applications under section 132(11) for making the claim of their ornaments. When these ornaments were released by the department, they were handed over to their real owners. The assessee filed affidavits of 41 persons in support of his claim, out of

which 29 persons were summoned by the Assessing Officer for Cross Examination.

However, the Assessing Officer examined only 6 persons out of 29 who appeared before him in compliance of his summons. All the six persons had supported and confirmed their claim. As the Assessing Officer did not examine the other persons, he was, therefore, to accept the contents of the affidavits. Therefore, such affidavits should have been admitted by the Assessing Officer as an evidence in support of the contention of the assessee. The case of the assessee is fully covered by the decision of Hon'ble Supreme Court in the case of Mehta Parikh & Co. (supra) relied upon by the learned counsel for the assessee. Under the circumstances of this case and the facts on record, we are fully convinced that the additions made by the Assessing Officer were not justified. In view of the above, we do not find any infirmity with the findings of the learned CIT (Appeals) and the same are, therefore, upheld.¹⁸ The next issue is regarding the additions made on account of difference of interest charged in money-lending business. According to the Assessing Officer, the assessee was charging interest at the rate of 24% as disclosed by his son Sri Rashmi Mehta during the course of search. The Assessing Officer has also stated that Shri V.C. Mehta, the assessee, was also examined during the course of search and he admitted that the rate of interest varied from 16% to 24%. Thus, the Assessing Officer came to the conclusion that the books of account were defective as the rate of interest mentioned in the books is only 16%. Thus, he applied the provisions of section 145(2) of the Act and applied the rate of interest at 20% as a whole against the rate of 16%. The learned CIT (Appeals) agreed with the findings of the Assessing Officer.

However, keeping in view the facts of the case, he considered that the average rate of interest at 18% would be reasonable.

19. The learned counsel contended that, there was nothing on record which indicated that the assessee had received more interest. He also contended that the addition made amounted to double taxation as the assessee had already made a disclosure. He also argued that in the books of account, the assessee disclosed interest income at the rate of 16%, however, the assessee made a disclosure during the course of search that he was charging interest at 16% to 24%, depending upon the availability of funds and its demand. He further argued that all the persons whose affidavits were filed had confirmed in their respective petitions under section 132(11) of the Act to the CIT that the rate of interest was 16% only. In spite of the detailed inquiries, the Assessing Officer was not able to point out a single instance of the assessee having charged interest exceeding the rate of 16%. He stated that the assessee offered Rs. 1,05,145 for taxation as interest earned outside the books in assessment year 1989-90. The learned departmental representative fully relied on the orders of the authorities below.

20. We have heard both the parties. The assessee charged interest at the rate of 16% as reflected in his books of account. During the course of "search, he made a disclosure under section 132(4) that he was charging the interest at the rate which varied from 16% to 24%. The Assessing Officer has made the addition of interest at the rate of 20%.

On estimate basis, however, the CIT (Appeals) reduced it to 18%. This is a search case and addition if any can be made only on the basis of the evidence collected during the course of search or admitted by the assessee in his statement recorded under section 132(4) of the Act.

During the course of search, the Department could not lay hand on any document which indicated charging of interest at higher rate than 16%.

The assessee also admitted in his statement that he was charging interest at the rate which varied from 16% to 24%. In the books of account, he has shown charging of interest at 16%, therefore, the department cannot draw any adverse conclusion that the assessee was charging interest at higher rate than 16% without any documentary evidence. In our opinion, it would be highly unjustified if the department resorts to estimation of income even after taking search action against the assessee. The persons whose affidavits were filed have also confirmed in their respective petitions under section 132(11) to the CIT, that the rate of interest was only

16%. The assessee also made a disclosure of Rs. 5,58,400 during the course of search having his income earned outside the books. Keeping in view the above discussions, it would not be justified to make any further addition on the basis of unaccounted interest income by applying the rate of 20%.

Therefore, the additions made by the Assessing Officer of Rs. 33,834, Rs. 31,600 and Rs. 34,600 for the assessment years 1986-87, 1987-88 and 1988-89 respectively on account of unaccounted interest income are deleted.

21. In the result, appeals filed by the department are dismissed whereas the Cross Objections filed by the assessee are allowed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com