IN THE HIGH COURT OF JAMMU & KASHMIR AT JAMMU
ITA No. 01 OF 2008
H. S. Raina
Petitioner
Income Tax Officer
Respondent
!Mr. M. M. Gupta, Advocate
^Mr. D. S. Thakur, Advocate

Hon'ble Mr. Justice Barin Ghosh, Chief Justice
Hon'ble Mr. Justice Nirmal Singh, Judge

DATE : 03/03/2009
:J U D G M E N T :
Per Barin Ghosh, CJ:

This is an appeal by the Assessee under Section 260 A of the Income Tax Act, 1961 from the order of the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar.

In the year 1991 assessee constructed a house property. The Assessee, who was a partner of six partnership Firms carrying on finance business, had not filed his income tax returns for the earlier four to five years contending that his income was not taxable. A notice under Section 148 dated 18th February, 2000 was served on the

2

assessee on 7th March, 2000, whereupon on 11th February, 2002 assessee filed a return of income declaring income of Rs.21,175/-. Assessee's case was referred to the Valuation Cell, whereupon the Valuation Cell reported that the house was constructed in the year 1991 at a cost of Rs. 17.00 lacs.
Assessee did not dispute the valuation. He contended that the cost of construction was financed by the compensation amount of Rs. 17,85,395/- received by his mother in a land acquisition case.
A sum of Rs. 17, 85,395.70 received by a cheque dated 8th April, 1991 issued by the Collector was deposited in the Savings Bank Account No, 1968 of the mother of the assessee maintained with the J&K Bank, Nanak Nagar, Jammu. Assessee contended that moneys withdrawn from the said account were utilized for construction of the house. Though the assessee did not make any effort to produce any material to suggest utilization of the amounts so withdrawn for

construction of the house, but some of such withdrawals were accepted to have been utilized for the construction purpose. It was accepted that the assessee has been able to establish source of Rs. 11,25,000/- for incurring expenses for construction of the said house but failed to account for the source of incurring expenditure amounting to Rs. 5, 75,000/-.

3

There is no dispute that a certain amount of money was paid to the Principal of a School from the said account. The assessee did not contend that the money so paid was used for construction purpose. In addition to that, certain amounts of money were paid to four Finance Companies and certain amounts of money were paid to certain individuals from the said account. The assessee contended that the payments made to the Finance Companies were for repayment of loans taken from them for construction purpose. Assessee contended that payments to those individuals were on account of purchase of materials. **Assessee furnished the names and particulars of those Finance Companies as well as of those individuals. Notices sent to them were returned un-served**. Partners of those Firms appeared before the Assessing Tax Officer at the instance of the assessee, but individuals did not. Partners of those Firms stated that loans were given to the assessee by the Firms represented by them and those were paid by the assessee through the subject cheques. They stated that the Firms were income tax assesses at the relevant time. They also stated that the loans did not bear any interest. They also stated that the Firms represented by them have closed their business in view of the directions of the Reserve Bank of India.

4

The amounts paid to the Firms and the amounts paid to those individuals from the said account were not accepted as amounts spent for construction of the house. That appears to be the principal dispute raised by the assessee before the Commissioner of Income Tax Appeal and having lost before him went before the Tribunal and again having lost before the Tribunal has come up before this Court. **The principal contention of the appellant is that whatever was within his command he did, i.e., furnishing of particulars of the persons, who granted loans to the assessee and supplied materials; and there is no just reason not to accept repayment of such loans and payments made for purchase of materials.**
There is no dispute that certain payments were made to certain

Firms carrying on finance business. However, neither the assessee, nor the partners of the subject firms could bring on record any thing to suggest that such payments were on account of repayment of loans received by the assessee at an earlier point of time. There was no evidence at all, except statements made by four individuals and assertions of the assessee, that loans were received by the assessee from those Firms at any point of time earlier than the dates of payment of the subject amounts from the said account. Similarly, there was no material, except assertions by the assessee, that building materials were procured by the assessee from those individuals, who
5
were paid certain amounts from the said account. *A payment can be accepted as repayment or on account of purchase when it is established that an earlier payment was received or a purchase was made. Neither an earlier payment, nor any purchase said to have been made was established*. In the circumstances, non-acceptance of payments made to the said Firms as repayment of loans and nonacceptance of payments made to those individuals on account of purchase of materials cannot be said to be an act so capricious and unjust that the same can be called in question as a substantial question of law. Certain payments made to certain other individuals were accepted as payments made for construction purpose, but without there being anything to suggest that the payments so made were utilized for construction. In the circumstances non-acceptance of payments made to the concerned individuals as payments made on account of purchase of materials cannot be said to be question of law in as much as the comparable payments cannot with certainty be taken as payments made for the construction.

The learned counsel for the appellant cited the judgment of the Hon'ble Supreme Court rendered in the case of Lalchand Bhagat Ambica Ram v. Commissioner of Income-Tax, Bihar and Orissa, reported in 37 ITR 288, and contended that it is suspicion or conjecture or surmise on the part of the Tribunal, which has taken
6
place of evidence. He submitted that in addition to that the department has applied the rule of thumb. In other words, he contended that contentions of the appellant that he repaid loans supported by evidence of grant of loan by the partners of the Firms from whom the loans had been taken are material evidence, which could not be ignored either on the basis of rule of thumb or on suspicion or conjecture or surmise.

Section 69C of the Act provides that where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or

the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year. *Therefore, in terms of Section 69C of the Act, appellant was required to explain satisfactorily the source of the expenditure of Rs. 17.00 lacs, which he had incurred for construction of the house in question. The explanation as was put forward by the appellant was repayment of loans, which were used for the construction, and payments on account of purchase of materials. Receipt of loans, utilization thereof for construction and purchase of materials were, therefore, the essential ingredients to satisfy that the payments in question were made for*

7

repayment of loans and for discharging the debts incurred on account of purchase of materials. *Since there was nothing to suggest receipt of loans and utilization thereof for construction, except assertions, and at the same time there being nothing to suggest procurement of materials from those individuals, who were paid the amounts in question, nonacceptance of such assertions, to our mind, cannot be said to be based on suspicion, conjecture or surmise or by applying the rule of thumb.*

Learned counsel next contended by referring to the judgment of the Hon'ble Supreme Court of India in the case of Commissioner of Income Tax v. Orissa Corporation (P) Ltd., reported in 159 ITR 78, that since the assessee could not produce the two individuals, from whom materials were purchased, an adverse inference could not be drawn against the assertions made by the assessee. In the instant case, no adverse inference was drawn against the assessee. Apart from the failure on the part of the assessee in producing those individuals, he failed to bring on record anything to suggest purchase of materials from those individuals.

Learned counsel for the assessee contended, as notice by the ***Hon'ble Supreme Court of India in Commissioner of Income Tax v. Smt. P. K. Noorjahan, reported in 237 ITR 570,*** *that the word 'shall' was proposed to be inserted in Section 69C which was later on changed by the word 'may' and, accordingly, no sooner the*

8

explanation of the assessee is not satisfactory, the amounts cannot be deemed to be the income of the assessee. It is true, as pointed out by the Hon'ble Supreme Court in the case referred to above, a discretion has been given to the department in the matter of deeming the unexplained amount as income of the assessee, but such discretion is to be used judiciously for protecting the interest of the assessee as well as of the revenue. In that case, on facts, it was found that having regard to the age of the assessee and the circumstances in which she

was placed., she cannot be credited to make income of her own and in those circumstances, the Hon'ble Supreme Court upheld the view of the Tribunal in refusing to permit addition of the value of the subject investments to the income of the assessee. In the instant case, there is no material on record which would suggest that the appellant could not be credited with having made any income of his own having regard to his age and the circumstances in which he was placed. In the event, it is construed that all un-explained source of expenditure should not be deemed to be the income of the assessee and the discretion should be used always in favour of the assessee, the Section itself would become otioso.

Learned counsel also contended that before adding the amounts in question as income of the assessee, i.e., before using the discretion, the appellant ought to have had been noticed. The Section

9

does not require any such notice. In any view of the matter, from the day one the question was should or should not be such expenditure be deemed to be the income of the assessee and notice thereof was adequately given to the assessee. Learned counsel for the appellant contended that at the time of imposing penalty, a notice is required to be given and the same analogy should be applied while such addition is being made. The requirement of hearing the assessee and giving him reasonable opportunity of being heard before imposing penalty is a requirement of Section 274 of the Act. No such procedure has been prescribed for making additions under Section 69C of the Act. In any event, by virtue of Section 69C of the Act, it is obligatory on the part of the assessee to explain, to the satisfaction of the Assessing Officer, the source of expenditure made by him, with a rider that if the explanation is not satisfactory, the Assessing Officer may use his discretion against the assessee, which connotes an obligation to satisfy, apart from the explanation to be given by him, that there was existence of such circumstances in which the assessee was placed that ***he cannot be credited with having made such income of his own****. In the event, such obligation had been discharged but ignoring the same, Assessing Officer had added the expenditure as deemed income and thereby had used his discretion against the assessee, it would have been open to the assessee to call in question user of such discretion,*

10

but the assessee did not make any endeavor at any stage to assert that the circumstances in which he was then placed, he could not be credited for having made the subject income of his own.

The learned counsel for the appellant lastly submitted that according to the valuation report the property was constructed in the year 1991, which connotes calendar year 1991. He submitted that

calendar year 1991 had two financial years and as such the deemed income should be bifurcated. There is nothing on record to suggest when construction commenced. The drawings from the subject account were made from April, 1991. The facts of the case, therefore, did not make out a case for bifurcation.

In the circumstances, the appeal fails and the same is dismissed.

(Nirmal Singh) (Barin Ghosh)
Judge Chief Justice
Jammu,
03.03.2009
Tilak, Secy.