

आयकर अपीलीय अधीकरण, न्यायपीठ – “A”, कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH- A, KOLKATA

[समक्ष श्री महावीर सिंह, न्यायीक सदस्य एवं श्री सी. डी. राव, लेखा सदस्य]
Before Shri Mahavir Singh, Judicial Member & Sri C.D. Rao, Accountant Member

आयकर अपील संख्या / ITA No. 01 (Kol) of 2011

निर्धारण वर्ष / Assessment Year 2005-06

Arijit Ghosh, Hooghly. (PAN-ADIPG1587B)	-वनाम- -Versus-	Asstt. Commissioner of I.T., Circle-1, Hooghly.
(अपीलार्थी/APELLANT)		(प्रत्यर्थी/RESPONDENT)

आयकर अपील संख्या / ITA No. 374 (Kol) of 2011

निर्धारण वर्ष / Assessment Year 2005-06

Asstt. Commissioner of I.T., Circle-1, Hooghly.	-वनाम- -Versus-	Arijit Ghosh, Hooghly. (PAN-ADIPG1587B)
(अपीलार्थी/APELLANT)		(प्रत्यर्थी/RESPONDENT)

For the Assessee : Sri Somnath Ghosh

For the Department : Sri S.K. Malakar

आदेश/ORDER

(सी. डी. राव), लेखा सदस्य (C.D. Rao), Accountant Member :

These two appeals, one filed by the assessee and other filed by the department, are directed against the order of Id. C.I.T.(A)-XXXVI, Kolkata dated 04/11/2010 for assessment year 2005-06. Identical issues are involved in both these appeals and, therefore, for the sake of convenience, these appeals are disposed of by this consolidated order.

2. At the outset we observe that the Revenue's appeal is barred by 36 days. Sri Sanjay Mallick, ACIT, Circle-1, Hooghly has filed an affidavit duly notarised, giving date-wise reasons for not filing the appeal within the specified date. After hearing the parties and considering the condonation petition, we are of the opinion that the

department was prevented by sufficient and reasonable cause for late filing of the appeal beyond the stipulated time. We, therefore, condone the said delay and admit the appeal for hearing, to which the learned counsel for the assessee has no objection.

3. The first ground in the assessee's appeal reads as under :-

"1. FOR THAT the Ld. Commissioner of Income Tax (Appeals) XXXVI, Kolkata erred in upholding the alleged estimated addition in the sum of Rs.48,000/- made on account of explained expenditure by the Ld. Income Tax Officer, Ward 1(1), Hooghly on an imaginary speculation and the alleged finding on that behalf is altogether arbitrary, unreasonable and perverse."

4. The A.O. found that the assessee although owned a motor car and a motor cycle, but had not debited any expenditure in his P/L Account during the assessment year under appeal on account of maintenance and upkeep expenses of these vehicles. The assessee's explained that the running expenses of these vehicles were included under the head 'conveyance expenses' duly debited in his P/L Account. However, the A.O. was not satisfied with this explanation of the assessee and he thus resorted to ad hoc estimate on account of maintenance and upkeep expenses for motor car of Rs.36,000/- and Rs.12,000/- for motor cycle and added the total amount of Rs.48,000/- to the total income of the assessee. Before the Id. C.I.T.(A), the assessee reiterated his submission that running expenses of these vehicles were included in the conveyance expenses debited in his P/L Account and the same was in commensurate with the activities of the assessee of the earlier years. The Id. C.I.T.(A) called for a remand report from the A.O. and directed him to probe into the drawings of the assessee. In the remand proceeding, the A.O. deputed an Inspector to verify the vehicle running expenses and taking into cognizance the meter reading of these vehicles estimated by the Inspector, he justified his earlier action in this regard. In counter reply of the remand report, the assessee submitted that the Inspector's report was not made available to him and as such no reliance should be given on such report based on estimate. The Id. C.I.T.(A), however, calculated the probable running of these two vehicles and consumption of petrol/diesel during the year under consideration and found the estimated addition of Rs.48,000/- made by the A.O. to be logical and reasonable. He, therefore, upheld the addition of Rs.48,000/- in this regard.

5. At the time of hearing before us, the learned counsel submitted that expenses on fuel, mobil etc. were already included under the head 'conveyance expenses'. He submitted that the Inspector deputed by the A.O. verified the drawings of the assessee to match the expenditure, although such report was not given to the assessee. He further submitted that the authorities below failed to consider the individual drawing of the assessee of Rs.58,371/- to maintain a family having two dependent members. Further, the wife of the assessee is also separately assessed to tax, who has also shown drawings in her own account. That the A.O. could not bring on record any evidence of expenditure which the assessee had not declared and made from undisclosed sources. Therefore, the presumption of expenditure out of undisclosed source u/s. 69 of the Act is misconceived. He relied on the decision in the case of J.S. Parker vs. V.B. Palekar [94 ITR 616 (Bom)]. Referring to the decision in the case of CIT vs. Bhagwati Developers (P) Ltd. [261 ITR 658 (Cal)], the learned counsel submitted that the addition attracts on the failure of the assessee to explain the source of expenditure, but at the same time it cannot be negated simply because the expenditure was actually incurred.

6. The Id. Departmental Representative, on the other hand, relied on the orders of the authorities below.

7. We have heard the parties and perused the material placed on record. It is the case of the department that the assessee did not debit the expenditure on maintenance & upkeep of one motor car and one motor cycle in his P/L Account. According to the assessee, the expenditure on fuel, mobil etc. are incorporated under the head 'conveyance expenses'. We further observe that the personal drawings of the assessee and his wife, who is also assessed to tax, and size of the family have not been disputed by the department. Considering all these facts we are of the considered opinion that it cannot be said that the entire expenditure on these two vehicles have been incurred out of assessee's undisclosed sources. At the same time, it is also fact that no separate head for such expenditure is provided in the P/L Account. The Id. C.I.T.(A) while upholding the disallowance, has arrived at an estimate basis the extent of fuel consumption vis-à-vis probable running of the vehicles. Considering all these facts and

submissions of the assessee, we deem it proper to restrict the ad hoc addition to the extent of 50% out of the total addition of Rs.48,000/-. The addition under this head is, therefore, sustained on ad hoc basis at Rs.24,000/- and the ground of appeal of the assessee on this issue is partly allowed.

8. The next two grounds, i.e. grounds No. 2 & 3 of the assessee's appeal pertain to addition of Rs.1,01,928/-, which read as under :-

"2. FOR THAT the Ld. Commissioner of Income Tax (Appeals) XXXVI, Kolkata was entirely in error in upholding the addition to the extent of Rs.1,01,928/- made on account of alleged undisclosed investment by the Ld. Income Tax Officer, Ward 1(1), Hooghly upon a spectrum of surmise and the purposed action on that behalf is wholly arbitrary, unwarranted and perverse.

3. FOR THAT on the facts and in the circumstances of the instant case, the Ld. Commissioner of Income Tax (Appeals) XXXVI, Kolkata gravely erred in upholding the addition to the extent of Rs.1,01,928/- made by the Ld. Income Tax Officer, Ward 1(1), Hooghly invoking the provision of s. 69 of the Income Tax Act, 1961 without considering the immaculate evidence adduced on record and his impugned findings on that behalf are entirely capricious, unwarranted and perverse."

9. The department has also filed its appeal raising the following ground :-

"1. That on the facts and circumstances of the case, the CIT. (Appeals) had erred in restricting the unexplained cash credit addition of Rs.21,34,383/- to a purported peak balance of Rs.1,01,928/-. All the cash deposits made are from independent parties (according to assessee's own admission) and the cash withdrawn was never deposited back but was given to some other party. The facts clearly indicate that according to the department as well as according to the assessee, the cash withdrawn from the bank account were not ploughed back into the bank account for any of the subsequent cash deposits."

10. In course of assessment proceedings, the assessee stated that he maintained an account jointly with his friend Sri Subir Pal with UTI Bank, Konnagar Branch, which was not provided in his balance sheet filed along with his return of income. The A.O. obtained statement of account from UTI Bank and found that the said account was only in the name of the assessee. He further found that on various dates between 01/4/2004 to 26/7/2004 there were cash deposits totalling to Rs.21,34,383/-. When confronted, the assessee filed a copy of bank statement showing joint names of the assessee and Sri Subir Pal for the period from 01/1/2005 to 31/3/2005, reflecting nil balance as on 01/1/2005. However, the A.O. was not satisfied with such evidence

furnished by the assessee as the same was not endorsed by the Bank under its seal & signature. On the above facts, the A.O. held that the assessee did not disclose the said bank account in his return of income for the assessment year under consideration and thus added the entire amount of deposits in the sum of Rs.21,34,383/- to the total income of the assessee as his unexplained cash credit derived from undisclosed sources.

11. Before the Id. C.I.T.(A), the assessee contended that the fact of maintaining joint account with UTI Bank and evidence thereof were intimated/furnished to the A.O. during the assessment proceedings vide letter dated 23/3/2007. The assessee also filed a written submission before him, which is reproduced as under :-

"It is an undisputed fact that the appellant had a joint bank account with his friend Sh. Subir Pal bearing no. 033010100196574 with U.T.I. Bank, Konnagar Branch. In course of the assessment proceeding the said fact was also brought on record by the appellant himself in his letter dated 23-03-2007 wherein he had mentioned the factual details of such bank account. It was stated that Sri Subir Paul is a close friend of the appellant and he was running a business of debt collection for Reliance Infocom Services, a division of Reliance Industries Ltd. under the trade name and style of M/s. Samrajya Telecom. As the appellant was acquainted with the Manager of the Bank and Sri Subir Pal is a close friend, who requested him to open a joint account giving his name as a first holder, he obliged without any hesitation since he did not make any transaction in the account himself. It was simply a matter of making an accommodation to a friend who was finding it difficult to carry large amounts of cash to Kolkata two or three times a week. The appellant also let Sri Subir Pal use the ATM card issued by the bank in his name. It is further not in dispute that the said bank account was duly disclosed in the balance sheet of Sri Subir Pal who had affirmed the transactions in this account. However, the Id. Assessing Officer made an addition of Rs.21,34,383/- as alleged unexplained cash credit on the tenuous premise the bank statement filed in compliance to his show cause notice was not certified by the banking authorities. In this regard, it is most respectfully submitted that it has been confirmed by Sri Subir Paul that the transactions shown in the bank statement were entirely made by him and the deposits included the commission he received from Reliance Infocom Services, a division of Reliance Industries Ltd. The appellant has confirmed this state of affairs that there is no connection between the deposits and withdrawals in the said account and his income-earning activities. As there was no proximate relationship between the appellant and the transactions which were undertaken in the account in question, the appellant is not entitled to disclose and accordingly had not included this bank account in his balance sheet. The matter admits of no confusion as Sri Subir Pal has manifestly disclosed all the facts in his balance sheet in this respect. It is therefore an undisputed fact that the deposits in the bank account did not represent income of the appellant and as s. 68 of the Income Tax Act, 1961 has no application in the circumstances and, the question of cash credit in this respect is simply out of court.

As the genesis of the addition is a matter of failing to appreciate the correct position as to the state of affairs, which have been clarified with evidence in the files both of the appellant as well as his friend, Sri Subir Paul, the addition made u/s. 68 of the Income Tax Act, 1961 is misconceived and is liable to be deleted."

The Id. C.I.T.(A) called for a remand report from the A.O. and in rejoinder to the remand report, the assessee submitted that the A.O. examined the said Sri Subir Pal u/s. 131 of the Act and did not find any evidence to contradict the facts placed before him. It was further submitted that all the transactions made with Reliance Infocom Ltd. were entered into by Sri Subir Pal and none of which indicated that the assessee had remotely any connection whatsoever. In spite of this fact, the A.O. refused to follow the sequence of evidence available on record and/or filed before him. It was, therefore, submitted that the addition made u/s. 68 of the Act in the hands of the assessee was misconceived and liable to be deleted. Reliance in this connection was placed on the decision in CIT vs. Roshan Lal Seth [178 ITR 660 (P&H)].

12. The Id. C.I.T.(A) after considering the evidence on record and submissions of the assessee took the peak balance of Rs.1,01,928/- as on 20/7/2004 as undisclosed income of the assessee and gave relief of Rs.20,32,455/- on this count, by observing as under :

"5.2. The submissions of the appellant have been considered carefully in the light of materials placed before me and the judgments referred to. The account No. 033010100196574 was opened on 08/03/2004 with UTI (now AXIS) bank, Chandannagar branch in the joint names of the Appellant and his friend Sri Subir Pal. It has been admitted by both parties that the said account was opened for the sole purpose of facilitating the business of Sri Subir Pal. In support of his claim, Sri Subir Pal submitted necessary details and also filed an affidavit. He was also interrogated by the AO, where he repeated his submission that the entire transactions in the said bank account were connected to his business and the appellant never used the said account for his personal purposes. However, the intriguing part of the whole issue is why the appellant had lent his name to open a bank account, that too as a first holder, which would be wholly and exclusively used by his friend. The plea taken by both appellant and Sri Subir Pal that the appellant was an existing account holder and Sri Pal was not, is not correct as from the copy of the accounting opening form it is seen that Sri Pal was also an existing customer of the said bank as on the date of opening of this particular account. On examination of the bank statement it is found that apart from one cheque clearings of Rs.70,000/- as on 31/03/2004, which also became the substantive part of opening balance of Rs.71,270/- for the relevant financial year in question, all other transactions were made in cash. To pin-point on the claim that the appellant was no way involved with those transactions, the AR of the appellant was asked to explain

the source of cheque deposit of Rs.70,000/- during appeal proceedings. He was also asked to submit a bank certificate, stating all ATM withdrawals were done in Kolkata, as claimed, The AR failed to furnish those details.

5.3. As per the banking norms, the first holder is the real owner of the account for all practical purposes. All correspondences, monthly statements etc. are sent at the address of the first holder. The same is the position for Income Tax also. Since the appellant could not proof conclusively that Sri Subir Pal had used the bank accounts exclusively as discussed above, the appellant, being the first account holder, is treated as the owner of the said account as per provisions of the Income Tax Act. Consequently, all the deposits and withdrawals in the said account will be considered in appellant's hands.

It is seen from the monthly statements of the said bank account that many deposits and withdrawals, all in cash, were made during the year in question. However, the entire cash deposits cannot be taken as unaccounted investment of the appellant. There are plethoras of judicial pronouncements suggesting pick balance is to be considered as income where both cash deposits and cash withdrawals were made. Accordingly, the pick balance of Rs.1,01,928/- as on 20/07/2004 is taken as undisclosed income of the assessee. Thus, the appellant gets relief of Rs.20,32,455/- on this count."

The assessee is thus in appeal for upholding the addition of the peak balance of Rs. 1,01,928/-, whereas the department is in appeal in giving relief of Rs.20,32,455/- to the assessee.

13. The learned counsel for the assessee reiterated the submissions made before the Id. C.I.T.(A). He further submitted that the main objection taken by the department was that the impugned bank account was not reflected in the balance sheet of the assessee. The assessee had made no transaction through this bank account and the joint account was opened at the request of his close friend Sri Subir Pal. He further submitted that Sri Subir Pal has corroborated this fact unequivocally by submitting an Affidavit and admitting therein on oath that all the transactions in the said account were undertaken by him only and the assessee not only did not make any transaction through this account but also has not utilized the ATM card issued by the Bank. He further submitted that the department did not dispute the fact that Sri Subir Pal had disclosed the impugned bank account in his financial statements accompanying the return of income for the assessment year under consideration, who is also assessed by the same A.O. having jurisdiction over the assessee. He submitted

that Sri Subir Pal appeared before the A.O. and also filed his reply in response to A.O. letter dated 27/6/2008 and categorically confirmed that since inception the impugned account has never been used by the assessee and the account was maintained solely for his own business purposes. The learned counsel, therefore, submitted that as the impugned bank account was meant for and owned by Sri Subir Pal, the assessee cannot be held to be the actual owner or user thereof and hence the addition made in this regard alleging cash credit in the hands of the assessee out of unexplained source without appreciating the facts and evidences in proper perspective, is arbitrary and unwarranted. Reliance in this connection was placed on CIT vs. Roshan Lal Seth (supra).

14. The Id. Departmental Representative, on the other hand, supported the order of the A.O. He submitted that as per bank statement, the first name of the joint account is that of the assessee. He further submitted that as per banking norms and I.T. Act, for all practical purposes, the first name is the real holder of the account. The assessee could not establish conclusively the factum of exclusive use of the bank account by Sri Subir Pal and, therefore, the A.O. has rightly treated the entire cash deposit in the impugned bank account amounting to Rs.21,34,383/- as unexplained cash credit from assessee's undisclosed sources and the Id. C.I.T.(A) was not justified in restricting such unexplained cash credit to the extent of peak credit of Rs.1,01,928/-.

15. We have heard the rival contentions of the parties and perused the material placed before us. We have also carefully gone through the orders of the authorities below. In support of the claim of the assessee that Sri Subir Pal, one of the joint holders of bank account maintained with UTI Bank, was the actual user and owner of the said bank account and his business transactions were done through that bank account only the following evidence/documents have been filed in the paper book, which were also filed before the authorities below :

<u>Document</u>		<u>Page No.</u>
a) Copy of deposition made by Sri Subir Pal before the A.O.	-	12 & 13
b) Copy of letter written by Sri Subir Pal in response to A.O.'s letter dated 27/6/2008.	-	15 & 16
c) Copy of declaration under Notary Public by Sri Subir Pal	-	33 to 35

- d) Copy of return & final accounts of Sri Subir Pal for A.Y.2005-06 36 to 40
e) Copy of certificate & statement of UTI Bank. - 42 to 45

From the analysis of facts and circumstances as stated above, we find that the assessee was having an account with UTI bank jointly with one Sri Subir Pal. All along it was the claim of the assessee that as a mark of help and co-operation to a friend upon his approach, acknowledging the assessee's acquaintance with the Bank authorities, the assessee obliged to open a joint account in the Bank and the said account was actually owning by the said Sri Subir Pal for his business. During the assessment proceedings, Sri Subir Pal was confronted and his statement and reply in response to A.O.'s letter dated 27/6/2008 are on record. He has categorically denied having any connection of the assessee with the transactions/deposits made in the said bank account, which was jointly held with the assessee. We further observe that Sri Subir Pal is assessed to tax with the same A.O., under whom the assessee is also assessed. We also find that the assessee has filed certified copies of return & final accounts of Sri Subir Pal for A.Y. 2005-06 at pages 36 to 40 of the paper book, wherein the impugned bank account is duly reflected and accounted for. It is further observed that the A.O. has recorded the sworn statement of Sri Pal, which is placed at pages 12 & 13 of the paper book and the relevant information which appeared on page-13 is as under :-

"6. It is seen that you have deposits of Rs.22,16,031/- in the said bank account with UTI Bank whereas you have disclosed Rs.16,86,580/- in your P & L account. Kindly explain this.

Ans. Sir, the entire deposits of Rs.22,16,031/- in the said bank account is the collection made by me in cash from the customers of Reliance Infocomm Services, my principal. The amount shown by me in the P & L account of Rs.16,86,580/- is the commission received by me from Reliance Infocomm Services. The said amount was paid to me after deducting the tax at source. All such certificates are annexed with my return of income submitted to the Department.

7. Do you want to add or deduct any statement made hereinabove?

Ans. Yes Sir. Whatever I have averted hereinabove are the correct factual position. I would like to add that Dr. Arijit Ghosh was neither a party to the deposits made in the bank account nor have made any withdrawals from the same."

In view of above sworn statement before the A.O., in our considered opinion, without bringing on record any contradictory material against the above deposition of Sri Pal, the revenue authorities were not justified to consider the said bank account as belonging to the assessee, when once it is established beyond doubt that all transactions in the said bank account are reflected by Sri Pal. Therefore, we are of the view that the addition made by the A.O. and further sustained by the Id. C.I.T.(A) to the extent of peak credit are not in accordance with law and the same is deleted. Therefore, the grounds raised by the assessee in this respect are allowed and that of the department is dismissed.

16. In the result, the appeal of the assessee is partly allowed and that of the department is dismissed.

यह आदेश खुले न्यायालय में सुनाया गया है

This order is pronounced in the open Court on 26.8.2011.

Sd/-

(श्री महावीर सिंह) न्यायीक सदस्य
(Mahavir Singh) Judicial Member

Sd/-

(सी.डी.राव) लेखा सदस्य
(C.D. Rao), Accountant Member

(तारीख) Date: 26 -08-2011

आदेश की प्रतिलिपि अग्रेषित:-

Copy of the order forwarded to:

1. अपीलार्थी / The Appellant : A.C.I.T., Circle-1, Hooghly.
2. प्रत्यर्थी / The Respondent : Arijit Ghosh, Goswamighat, Chandannagore, Hooghly-712 102.
3. आयकर कमिशनर (अपील) : The CIT(A)-XXX Kolkata.
4. आयकर कमिशनर/The C.I.T., Kol -
5. वभागिय प्रतिनीधी / DR, ITAT, Kolkata Benches, Kolkata
6. Guard file.

सत्यापित प्रति/True Copy,

आदेशानुसार/ By order,

(dkp)

उप पंजीकार/Dy/Asstt. Registrar.