

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Sr. No. 205

ITA-286-2014

Decided on : 15.09.2016

The Commissioner of Income Tax-II, Amritsar

..... Appellant

VERSUS

M/s Ajay Electronic, Pathankot

..... Respondent

CORAM: HON'BLE MR. JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE
 HON'BLE MR. JUSTICE DEEPAK SIBAL

Present: Mr.Denesh Goyal, Advocate, for the appellant.

Mr.Pankaj Jain, Senior Advocate, with
Mr.Divya Suri, Advocate, and
Mr.Sachin Bhardwaj, Advocate, for the respondent.

DEEPAK SIBAL J.

The present appeal under Section 260A of the Income Tax Act, 1961 (for short the 'Act') has been preferred by the revenue to challenge therein order dated 28.02.2014, passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (for short the 'Tribunal').

The appeal pertains to the assessment year 2003-04.

According to the appellant, the present appeal raises the following substantial questions of law: -

“1. Whether the Hon'ble ITAT Bench, Amritsar was right in facts and circumstances and in law that the variation in the copies of Capital Account of Sh. Ajay Kumar partner as produced in the court and copies of account filed with the Income-tax Department is immaterial?

2. Whether the Hon'ble ITAT Bench, Amritsar was right in facts and circumstances and in law in confirming the action of

the Ld. CIT (A) in deleting the addition made by the A.O. on the ground that the assessee had failed to produce books of accounts and relevant pass books of M/s Ajay Electronics, Finance Division to substantiate his claim that sum of Rs.1,40,00,000- was actually given to Sh Ajay Kumar?

3. Whether the Hon'ble ITAT Bench, Amritsar was right in facts and circumstances and in law in not appreciating the case law of **Hari Chand Virender Paul vs. Commissioner of Income tax reported at 140 ITR P&H** vide which it has been held that "Credits in the name of third parties-Assessee must prove identity of credits, capacity of creditor to advance money and genuineness of transaction-then only burden shifts to the Department?"

The relevant facts which need to be noticed for adjudicating upon the present appeal are that on 01.12.2003, the assessee filed its return declaring therein an income of Rs.11,77,772/-. The same was processed under Section 143(1) of the Act. Thereafter the assessee was issued a notice under Section 148 of the Act as to why it may not be re-assessed. The re-assessment proceedings were initiated on the basis of a complaint dated 18.05.2009 which had been received in the office of the assessing officer wherein it had been asserted that one Ajay Kumar, a partner of the assessee-firm, had filed documentary evidence in the court of Additional Civil Judge, Gurdaspur, wherein a suit for specific performance between the complainants and the said Ajay Kumar was pending, showing through the above documents that on 30.12.2002 he had withdrawn Rs.1,70,00,000/- in cash from the assessee-firm and for this purpose Ajay Kumar had also filed a copy of the capital account in the court showing therein a withdrawal of Rs.1,70,00,000/- in cash on 30.12.2012. The assessing officer perused the

capital account attached with the return of the assessee but did not find any such entry therein. When Ajay Kumar was confronted with this fact, he replied that he had received cash of Rs.1,70,00,000/- from the assessee under the imprest account and, therefore, this entry had not been reflected in the capital account of the assessee filed with the return but he could not explain how the entry of withdrawal of Rs.1,70,00,000/- appeared in the copy of the capital account as filed by him in the court. Documentary evidence was produced to show availability of the afore-referred cash. A perusal of the cash book by the assessing officer for the period 01.12.2002 to 31.12.2002 of the assessee revealed receipt of cash of Rs.20,000/- or less from a large number of people. The assessee had also shown receipt of cash amounting to Rs.1,40,00,000/- from Ajay Electronics Finance Division which according to the assessee was its branch.

The assessee explained that in the year 1997-98 it had opened a branch office under the name and style of Ajay Electronics Finance Division. Through this division money was borrowed from the public during the year ending 31.03.1998 which was used by the assessee. Separate books of accounts were maintained for the above-said borrowings and interest on this account was charged in the profit and loss account of the assessee. In the year 2002, Ajay Kumar, a partner of the assessee-firm was in need of Rs.1,70,00,000/- for purchase of land and the assessee-firm arranged this money through Ajay Electronics Finance Division which in turn had borrowed the money from the public. The money was paid to Ajay Kumar but since the deal did not mature this money was returned by him. Since the above transaction was through the imprest account of Ajay Kumar and the money was returned within five days of its receipt, the same was not

reflected in the capital account. On return of the money by Ajay Kumar the same was then returned to the public by Ajay Electronics Finance Division.

After going through the audit report of the assessee attached with the return of income pertaining to the assessment year in question, the assessing officer found no reference to any branch office by the name of Ajay Electronics Finance Division. No cash in hand was also found in the account of the abovesaid Finance Division. In fact, Ajay Electronics Finance Division was shown in the list of sundry creditors whereas if it was a branch as projected by the assessee, it should have figured in the capital head. The assessing officer further found that the profit and loss account of Ajay Electronics Finance Division was not attached with the return of income and that if Ajay Kumar as a partner had withdrawn money from the assessee for personal use, the same should have been shown in the capital account. Finding the explanation of the assessee to be not genuine, the income of the assessee was re-assessed. As a result thereof, addition of Rs.1,70,00,000/- was made in the hand of Ajay Kumar and on a protective basis in the hand of the assessee.

The assessee challenged the re-assessment order by way of an appeal before the Commissioner of Income Tax (Appeals) (for short the 'Commissioner'). The Commissioner ordered deletion of the amount of Rs.1,70,00,000/- from the income of the assessee as ordered by the assessing officer. He held that the finance division of the assessee had borrowed the above-said amount from members of the public, some of whom, on a test check basis, had been summoned by the assessing officer. After going through their statements, the Commissioner was of the view that the transactions between the lenders and the assessee had “more or less

been unequivocally confirmed". The order of the Commissioner to this effect, reads as under: -

"Perusal of assessment record reveals that on test check basis, the A.O. has issued summons u/s.131 and also recorded statements u/s.131 through his inspector in respect of the following person/creditors: -

(S/Sh/Smt.)

1) Harish Kumar, s/o Sh. Dharam Pal, V. Kahnuwan, Tehsil Gurdaspur who has not categorically denied the transaction.

2) Sher Singh, s/o Sh. Bishan Dass, r/o Pathankot (confirmation made vide answers to qa. Nos. 7 & 8).

3) Kuldeep Singh, s/o Sh. Onkar Singh, Tehsil Pathankot (confirmation vide answers to Q. No.4 & 5).

4) Dinesh Kumar, s/o Sh. Onkar Singh, Tehsil Pathankot (confirmed vide answers to Q.No. 6 & 7).

5) Ramesh Kumar, s/o Sh. Hira Lal, r/o Mater Colony, Dina Nagar (confirmation made vide answer to Q.No.5 stating to the effect that total purchases made from above firm are about Rs. 3 lacs and mode of payment was cash.

6) Kapil Kumar, S/o Sh. Prem Mahajan, R/o Gurdaspur (confirmation) vide replies to queries No.5 & 6 STATING THAT TOTAL PURCHASE WERE MADE ABOUT Rs.4,00,000/- from M/s. Ajay Electronics, Dhangu Road, Pathankot and payments were made in cash sometimes on weekly or fortnightly basis.

7) Naresh Kumar, S/o Sh. Sat Pal, Pathankot (In reply to question No.5. Please state the sale made during the period i.e. F.Y. 02.03 and also purchase from M/s. Ajay Electronics, Pathankot. **At present, I do not remember that sale for the FY 02.03** but during the year 09-10 total sales of the firm is more than Rs.40 lacs and accounts are duly audited by the C.A.

8) Rakesh Kumar, S/o Sh. Tara Chand, R/o Pathankot.

Q.6: Please state the total purchases made during the FY 02.03 from M/s. Ajay Electronics Pathankot?

A. I have made the purchases during the FY 02.03 about Rs.2 lacs to Rs.3 lacs.

Q.No.7. As per cash book of M/s. Ajay Electronics, you have made the payments of Rs.20,000/- on the dates 24.12.02, 25.12.02, 26.12.02 & 27.12.02. Please confirm the above payments?

A : Sir, I have made the payments on above dates to M/s. Ajay Electronics & Co. in cash.

9) Rakesh Kumar, S/o Sh. Ram Nath, V. Budha Ngr., Pathankot (Confirmation made about cash payments made to the appellant firm on 2nd, 3rd, 27th and 29th Dec., 2002 vide reply to Q.No.6 and further vide reply to Q.No.7, the deponent averred that my total sales during the above period i.e.2002-03 about Rs.3-4 lacs.

10) Gurmeet Singh, S/o Channa Singh, R/o. Master Colony, Dinanagar (confirmation made about cash payments made on 7th, 8th and 9th Dec., 2002 in reply to Q.No.6 and further in answer to Q. No.7, it is deposed that I have made about Rs.2-3 lacs purchases during the same FY 2002-03.

11) Ashok Kumar, S/o. Kishan Chand, R/o Main Mkt. Jugial (in reply to Q.No.11, the deponent averred that I have not made continuously payment of Rs.20000 cash during the period 2-12-02 to

15-12-02, mostly the payments are made on weekly basis.

Thus, from the above, it can be inferred that the A.O. has carried out verification u/s.131 on test check basis about the veracity of the cash book adduced before him. From the above gist of statements of various trade creditors recorded before the A.O., it emerges that in all the cases, the transactions have more or less been unequivocally confirmed.”

The assessee explained that the source of Rs.1,70,00,000/- in cash were amounts of less than Rs.20,000/- from a large section of the people borrowed by its finance division. A list of those persons was supplied. Eleven of them, on a test check basis were summoned and examined by the assessing officer. Their statements were considered by the Commissioner and after analysing the same in the manner quoted above, he came to the conclusion that the source of Rs.1,70,00,000/- had been explained. Resultantly, he ordered the deletion of the said amount as ordered to be added in the income of the assessee by the assessing officer.

We have gone through the order of the Commissioner and find therein no proper analyses of the statements of the persons who were said to have loaned money to the assessee through its finance division.

One of the persons whose statement was considered by the Commissioner was Harish Kumar son of Dharam Pal, who is stated to have “not categorically denied the transaction”. How such a vague statement could support the defence set up by the assessee, is cause of wonder for us.

Sher Singh son of Bishan Dass, is stated to have confirmed answers to questions No.7 and 8. The Commissioner's order nowhere refers to questions No.7 and 8 and, therefore, it is impossible to conclude as to what was confirmed by Sher Singh.

Kuldip Singh son of Onkar Singh is said to have confirmed answers to questions No.4 and 5 and Dinesh Kumar son of Onkar Singh is

said to have confirmed questions No.6 and 7. In their cases also it has nowhere been discussed by the Commissioner as to what were the questions in their cases.

Ramesh Kumar is said to have confirmed question No.5. Again, what the question was, is nowhere to be found from the order of the Commissioner. Ramesh Kumar further goes on to depose that he had made purchases from the firm to the tune of Rs.3 lacs but as to when these purchases had been made and when payment for these purchases was made, which were crucial facts, find no consideration in the Commissioner's order.

Kapil Kumar son of Prem Kumar while replying to queries No.5 and 6 is stated to have made purchases of Rs.4 lacs from the assessee and payments for such purchases were stated to be made in cash sometimes on a weekly or fortnightly basis. We are at a loss to find out from the order of the Commissioner as to what was asked for in questions No.5 and 6. Further, the statement of Kapil Kumar does not reveal when the stated purchases and the payments for the same had been made.

As per the statements of above-said Kapil Kumar and Ramesh Kumar, they did not loan any money to the assessee or its finance division. This contradicts the assessee's stand that this fact has also been ignored by the Commissioner.

The statements of the other persons who allegedly had given loans to the assessee through its finance division have also not been considered the way they deserved to be.

It is thus clear that the order of the Commissioner lacks consideration of material and crucial facts.

The Commissioner further goes on to hold that the transactions

have “more or less been unequivocally confirmed.” This finding of his is not only self-contradictory but also against the record.

The order of the Tribunal does not clarify the matter either. No discussion is found therein with regard to the above-referred statements of the alleged creditors of the assessee-firm. It was observed that the imprest account “does not necessarily” form part of capital account. Reliance was placed on the statement of Surinder Mahajan, a partner of the assessee without comparing the same with the statements of the alleged creditors. After simply finding fault with the assessing officer for having not found the source of repayment of the said amount of Rs.1,70,00,000/- and having failed to find out about the finality of proceedings before the civil court, the Tribunal gave its stamp of approval to the order of the Commissioner without considering the matter in the correct perspective, by holding as under: -

“11..... We have perused the explanation given by the assessee, which are found to be convincing and accordingly, we concur with the views of the Id. CIT (A) at page 21 to 26 of his order that the assessee has explained in explicit manner & the source of the said investment of Rs.1,70,00,000/- pertaining to the previous year relevant to A. Y. 2003-04 and he is not further required to explain the source of source.”

“14. Accordingly, in the facts and circumstances of the case, we do not find any infirmity in the order of the Ld.CIT(A), who has rightly deleted the addition made by the A.O. Thus, all the grounds of the Revenue are dismissed.”

The Tribunal, which is the final fact finding authority, failed to properly analyse the evidence on record and without appropriate reasons confirmed the order of the Commissioner with regard to the deletion of Rs.1,70,00,000/- from the income of the assessee.

In view of the above, the order of the Tribunal is found to be perverse. The appeal is allowed. While setting aside the order of the

Tribunal, we remit the matter to the Tribunal for a fresh decision on merits.

The Tribunal would be at liberty to remand the matter further, if it so deems fit.

[S.J. VAZIFDAR]
CHIEF JUSTICE

15.09. 2016
shamsher

[DEEPAK SIBAL]
JUDGE

Whether reasoned/speaking : Yes / No

Whether reportable : Yes / No