BOMBAY HIGH COURT

Bhogilal Virchand

Vs

Commissioner of Income-Tax

(M Chandurkar and Sawant, JJ.)

14.04.1980

JUDGMENT

M. Chandurkar, J.

1. The question, which has been referred at the instance of the assessee under s. 256(1) of the I.T. Act, 1961, is as follows :

> "Whether, on the facts and in the circumstances of the case, the amount of Rs. 9,000 was assessable for the assessment year 1960-61 ?"

2. The answer to this question turns on the proper construction of the provision of s. 68 of the I.T. Act, 1961 (hereinafter referred to as "the Act").

3. The assessee, who is the proprietor of a Kirani Stores, was assessed to income-tax on a total income of Rs. 21,347 for the assessment year 1960-61, for which the relevant previous year was Sanvad 2015, i.e., from November 13, 1958, to October 12, 1959. On the assessment proceeding for the assessment year 1962-63, that there were cash credits of the amount of Rs. 9,000 in the books of the assessee in the name of one Smt. Gajibai Maganlal in the month of March, 1960, the ITO reopened the assessment of the assessee for the assessment for the assessment year 1960-61. In reply to the notice under s. 148 of the act the assessee filed a return declaring the same quantum of income, as he had done originally. His explanation with regard to the sum of Rs. 9,000 was that it belonged to the son Gajibai. This explanation was rejected by the ITO and holding that the money really belonged to the assessee the sum of Rs. 9,000 was included as the assessee's income from undisclosed sources by an order dated March 30, 1966.

4. The AAC, however, took the view that the amounted of Rs. 9,000 could not be taxed for the assessment year 1960-61, in view of the provisions of s. 68 of the Act, holding that the amount was found credited during the accounting Sanvad year 2016 relevant to the assessment year 1961-62. The AAC deleted the addition of the amounted of Rs. 9,000 for the assessment year

1960-61.

5. The revenue appealed against the order of the AAC. The Tribunal took the view that Rs. 9,000 were assessable for the accounting period for which the relevant assessment year was 1960-61. The Tribunal, on a constructions of the provision of s. 297(2)(d)(ii) of the Act, took the view that the words "all the provisions of this Act shall apply accordingly" referred to the procedural provisions and that in respect of the assessment year 1960-61, the provisions of s. 68 of the Act would not be attracted. The correctness of this view is put in the question referred.

6. Mr. Pandit, appearing on behalf of the assessee, has contended that s. 68 of the Act merely gave recognition to the legal position relating to the conclusion of cash credits in the taxable income of the assessee, if the assessee fails to give a proper explanation in respect of the cash credits. According to the learned counsel, the position with regard to unexplained cash credit under the Act is the same as under the provisions of the Indian I.T. Act, 1922, under which the unexplained cash credits were includes as income from undisclosed sources for the precious year, which was the final year. Thus, according to the learned counsel, s. 68 having merely given recognition to the prevalent legal position could not be treated as a substantive provision of law and s. 68 was, therefore, merely a procedural provision of which the assessee was entitled to take benefit. In support of the contention that in the instant case the cash credits could be included as his income only in respect of the assessment year 1961-62, the learned counsel has relied on a construction, which has been placed by this court on the provisions of s. 69A of the Act in *J. S. Parkar v. V. B. Palekar*[1] of the I.T. Act, 1961, reads as follows :

> "Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Income-tax Officer, satisfactory, the sum so credited may be to income-tax as the income of the assessee of that previous year."

7. The question which arises for decision is whether this provision is attracted in the case of an assessment, in respect of the year prior to the coming into force of the I.T. Act, 1961, when it was reopened and dealt with by virtue of the saving provisions in s. 297(2)(d)(ii) of the Act. Under cl. (d) of s. 297(2) it is open to the ITO to reopen an assessment in respect of any assessment year after the year ending on the March 31, 1940, if any income chargeable to tax had escaped assessment within the meaning of s. 147 and no proceeding under s. 34 of the commencement of the I.T. Act 1961. The ITO is then entitled to issue a notice under s. 148, subject to the provisions contained in s. 149 or s. 150, in respect of that assessment year and sub-cl. (ii) further provides that ".... all the provisions of this Act shall apply accordingly".

8. According to the learned counsel for the assessee, s. 68 being one of the provisions of the 1961 Act, it would also apply to the reassessment proceedings in view of the provisions of s. 297(2)(d)(ii) of the Act. It can no longer be in dispute in view of the decision of the Supreme Court in *Govinddas v. ITO*[2] that the words "all the provisions of this Act shall apply accordingly" in cl. (ii) of s. 297(2)(d) of the I.T. Act, 1961, refer only to the machinery provided in the new Act for the assessment of escaped income. They do not import any substantive provisions of the new Act which create rights or liabilities. The Supreme Court has in that case pointed out that the word "accordingly", in the context means, nothing more than "for the purpose of assessment" and it clearly suggests that the provisions of the new Act which are made applicable are those relating to the machinery of assessment. The Supreme Court in that decision has also pointed out that the substantive law to be applied for determining the liability to tax must necessarily law to be the law under the Indian I.T. Act, 1922, for that is the law which is applicable during the relevant assessment years in respect of which the assessment has been reopened and it is that law which must govern the liabilities of the parties.

9. What Mr. Pandit, however, contends is that s. 68 is not a substantive provision of law and, as already pointed out, in view of the fact that it merely gave a statutory recognition to the prevalent of law that unexplained cash credits are to be prevalent position of law that unexplained cash credits are to be taxes as income of the assessee for the financial year relevant to the assessment year in question, it must for the financial year relevant to the assessment year in question, it must be considered as a procedural provision.

10. Now, in order to appreciate whether s. 68 is a substantive provision or can be characterised as a merely procedural provision, we must consider the effect of that provision. It is no doubt true that before the I.T. Act, 1961, came into force position under the Indian I.T. Act, 1922, in respect of income from undisclosed sources was that such income from an undisclosed source could be assessed or reassessed by making an assessment on the basis that the previous year for such an income would be that financial year. As pointed out by the Supreme Court in *Baladin Ram v. CIT*[3]*,* even under the provisions embodied in s. 68 of the I.T. Act, 1961, it is only when any amount is found credits in the books of the assessee for any previous year that s. 68 will apply and the amount so credited may be charged to tax as the income of that previous year, if the assessee offers no explanation or the explanation offered by him is not satisfactory. On the other hand, if the unclosed income was found to be from some unknown source of the amount represented some concealed income which is not credited in his books, the position would probably not be different from what was laid down when the 1922 Act was in force. It is, therefore, true that if the undisclosed income form unknown sources is not credited in the books of account of the assessee the position as it obtained under the 1922 Act is not changed because s. 68 deals merely with a sum which is found credited in the books of the assessee maintained for

any previous year. The question which is further required to be considered is whether merely because under the 1922 Act the undisclosed income was taxed in the financial year and the same position might continue in respect of such income even under the new Act, the provision of s. 68 of the Act can be called a machinery provision.

11. Now if we look to the provision of s. 68 it is obvious that the effect of the provision is that statutorily a sum which is found credited in the books of the assessee maintained for any previous year in respect of which either the assessee offers no explanation or the explanation offered by him is not accepted by the ITO, that sum is charged to income-tax as the income of the assessee of that sum that previous year. It is, therefore, clear that s. 68 is a charging provision in so far as the particular sum, which is a subject of legislation is concerned. It may be that the liability which originally existed of such sums being charged to income-tax prior to the coming into force of the I.T. Act, 1961, may have been given statutory recognition but that does not cases to make the provision of s. 68 a charging section. Indeed, it is by virtue of s. 68 alone that statutorily a liability is fastened on the assessee to pay income-tax on the said sum, which is to be treated as the income of the assessee. Section 68, therefore, is very much a substantive provision of law, which is in the nature of a charging provision inasmuch as it determines the character of unexplained cash credits and requires such amounts to be taxed as the income of the assessee.

12. It is no doubt true that in *Parkar's case*[4] a Division Bench of this court, while considering provisions of ss. 69 and 69A of the 1961 Act, has held that those sections are truly of evidence and as such would be applicable to any proceedings if they happen to be on the statute book "on the date when the trial takes place". It is difficult to see how this decision can give any assistance to the learned counsel for the assessee. The assessment in that case was for the year 1962-63. In the other words, the original assessment itself was under the provision of the 1961 Act. Indeed, the question whether the provisions of s. 69A, which came into force from April 1, 1964, are applicable to assessment proceedings pending on that date would be entirely different form the question as to whether the provisions of s. 68 would be attracted in the case of assessment proceeding which is substantially governed by the Indian I.T. Act, 1922, and in respect of which merely procedural provisions under the 1961 Act were made applicable. It appears that the question before the Division Bench was whether s. 69A applies to pending proceedings also; but those pending proceeding were under the same Act while the question before us in the reference is whether s. 68 can be attracted in the case of reassessment proceedings substantially governed by the Indian I.T. Act, 1922. If only the procedural provisions are attracted to the reassessment proceeding and that too via the sub-provisions of s. 297(2)(d)(ii) and since we have held that s. 68 is a substantive provision of law creating a statutory liability against the assessee, the fact that s. 69A has been held to be a rule of evidence and of the nature of an adjectival of law, will not affect the basic position that being a substantive provision of law, s. 68 will not be attracted in the

case of reassessment proceedings governed by the Indian I.T. Act, 1922.

13. We may also point out that the Calcutta High Court has also taken the view that s. 68 of the I.T. Act, 1961, is a substantive provision of law and not a procedural provision. In *Sikri & Co., P. Ltd. v. CIT*[5] a Division Bench of the Calcutta High Court has pointed out that s. 68 is a substantive section making any sum which was found credited in the assessee in respect of which the assessee offers no explanation or the explanation offered by him is not satisfactory, to be the income of the assessee.

14. In the view which we have taken the sum of Rs. 9,000 was clearly assessable for the assessable for the assessment year 1960-61 and not for the assessment year 1961-62 as contended on behalf of the assessee. The question referred to us is, therefore, answered in the affirmative and against the assessee. The assessee to pay costs to the revenue.

Cases Referred.

1[1974] 94 ITR 616. Section 68
2[1976] 103 ITR 123
3[1969] 71 ITR 427
4[1974] 94 ITR 616 (Bom)
5[1977] 106 ITR 682