

**THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.**

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. N. K. CHOUDHRY, JUDICIAL MEMBER

I. T. A. No. 363/(Asr)/2011

Assessment Year: 2007-08

Income Tax Officer,
Ward-4(2), Amritsar

(Appellant)

Vs. Jagjit Singh s/o Amrik Singh
Gali Gujran, Jandiala Guru,
Amritsar
[PAN: AWNPS 5528A]

(Respondent)

Appellant by : Sh. Gautam Deb (D.R.)

Respondent by: Sh. P. N. Arora (Adv.)

Date of Hearing: 08.08.2018

Date of Pronouncement: 31.10.2018

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals), Amritsar ('CIT (A)' for short) dated 05.04.2011, partly allowing the assessee's appeal contesting his assessment u/s. 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) dated 30.12.2009 for Assessment Year (AY) 2007-08.

2. The issue arising in the instant appeal is the sustainability in law, and in the facts and circumstances of the case, of the addition in the sum Rs. 80 lacs made by the Assessing Officer (AO) in the hands of the assessee.

3. The brief facts of the case are that the assessee-individual returned his income for the year at, besides agricultural income of Rs.90,000, Rs.93,800/-, comprising, in the main, salary income (at Rs.96,000) from M/s. Amritsar Gas Service, Putlighar, Amritsar (AGS), on 27/03/2008. The list of the employees of AGS (as on 31/03/2007) obtained by the Assessing Officer (AO) during the assessment proceedings, however, did not mention the name of the assessee, so that, apparently, the salary certificate from AGS as furnished by the assessee was false. The assessee being unable to explain the same, the returned taxable income was assessed as business income. The assessee had further received Rs.80 lacs during the year. The same was explained to be on the sale of the business of AGS to Sh. Sada Singh s/o Lt. Sh. Budha Singh (half share) and S/Sh. Nirmaljeet Singh and Sawinder Pal Singh, sons of Sh. Balbir Singh (half share) on the basis of a general power of attorney (GPOA) dated 24/07/2006, issued in the assessee's favour by one, Sh. Paramdeep Singh, the owner of AGS (at PB pgs. 1/1A, 2 to 2C). The assessee had, it was explained, in pursuance of the GPOA, entered into an agreement to sell dated 29/08/2006 with the 'payers' for the transfer of the gas agency for a consideration of Rs.80 lacs, and the amount received – which was both in cash (Rs. 46.30 lacs) and per cheques (Rs. 33.70 lacs), in respect of the said sale, duly paid over to AGS. The same did not find favour with the AO. Why would Sh. Paramdeep Singh give POA to the assessee, a layman, who had no relation with him, i.e., without any consideration. Then, the payment of the amount (Rs.80 lacs) to Paramdeep Singh was not evidenced. Sh. Paramdeep Singh was required to be produced by the AO, but could not be during the assessment proceedings. The assessee had, without doubt, received the money. The only inference that, therefore, in his view, arises is that the assessee first purchased the gas agency (from Sh. Paramdeep Singh), i.e., at a cost, and then transferred it to another through an agreement (again, at a consideration). The purchase cost, in the

absence of any definite information in its' respect, was inferred to be the same as the amount at which the agency was sold, i.e., Rs.80 lacs, which sum was accordingly deemed as the assessee's income by way of unexplained money/investment toward acquisition cost of AGA through GPOA.

In appeal, it was explained that the assessee is a man of no means. The non-production of Sh. Paramdeep Singh in the assessment proceedings was on account of his being abroad (USA) at the relevant time. The non-production of any corroborative evidence toward the same, viz, passport, etc., was for the reason that the same was not 'insisted upon' by the AO. In fact, the GPOA in the assessee's favour was subsequently revoked by another, also registered, GPOA dated 17/11/2006 in favour of one, Sh. Haldalbir Singh s/o Sh. Sada Singh, an employee of AGS. The Id. CIT(A), who understood the Revenue's case as of the cost of the agency in the assessee's hands at nil, was of the opinion that the AO had been swayed by doubts, misconceptions, and arrived at half baked conclusions, without bringing any positive material on record to establish his conclusion/s. *She could have verified the genuineness of the said agreement by recording the statements of the vendees, to confirm if they had the capacity to pay the sum, as well as the genuineness of the transaction/s. Then, again, the AO ought to have examined the books of account of AGA to verify the fact of the repayment of Rs.80 lacs by the assessee thereto.* The AO had clearly failed to make out a sound case in favour of the Revenue (refer para 7, pgs. 7-9, of the impugned order). The addition of Rs.80 lacs was, accordingly, deleted, while confirming the assessment of Rs.93,800/- as business income. Aggrieved, the Revenue is in appeal, raising the following grounds:

'1. On the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeal), Amritsar is not justified in deleting the addition of Rs. 80 lacs made by the Assessing Officer, without appreciating the facts that the assessee has transferred the Amritsar Gas Service after obtaining the power of attorney from the original Allottee.

2. The Ld. Commissioner of Income Tax (Appeal) is not justified in deleting the addition ignoring the facts that the Gas Agency is not saleable by the Original Allottee without the permission of Principal Authority.

3. On the facts and in the circumstances of the case the Commissioner of Income Tax (Appeal) has ignored the facts that the assessee failed to produce the documentary evidence of money transferred to the Original Allottee.

4. On the facts and in the circumstances of the case the Commissioner of Income Tax (Appeal) has ignored the facts that in the absence of original allottee who received the money transferred by the assessee.'

4. Before us, the thrust of the Revenue's case, relying on the assessment order, was that there was nothing to show that the payment of Rs.80 lacs had been made to Sh. Paramdeep Singh, which was, in any case, not substantiated. There being no basis for the grant of GPOA in favour of the assessee, an outsider, the inference that the assessee owned the gas agency prior to its sale to third parties, i.e., through the GPOA, was the only logical inference to be drawn under the circumstances. The ld. counsel, Sh. P. N. Arora, Advocate, would, on the other hand, take us through the assessee's bank account with Oriental Bank of Commerce (OBC) to show that the payments received by the assessee stand transferred to AGS. Sh. Paramdeep Singh had since revoked the GPOA, so that a direct confirmation from him by the assessee was, under the circumstances, not possible. The impugned order needs to be, under the circumstances, upheld.

5. We have heard the parties, and perused the material on record.

5.1 Our first observation in the matter is that this is the second round before the Tribunal, a fact which unfortunately was not brought to our notice by either side during hearing. This, equally valid for both the parties, is particularly so for the assessee, at whose instance the Tribunal recalled its' earlier order (dated 11/9/2012) allowing the Revenue's appeal (vide order dated 16/6/2016, in MA No. 04 /Asr/2013). The tribunal had found it strange that the ld. CIT(A), without there

being anything on record to show that Sh. Paramdeep Singh had received the sale consideration (Rs.80 lacs), as in the form of his confirmation or affidavit or his income tax return declaring the receipt, had accepted the assessee's contention and deleted the addition by making some allegations, such as that the AO should have questioned the bank (in which the payment of Rs. 80 lacs had been received); examined the Vendees, and passed on the information to the AO of Sh. Paramdeep Singh and the three vendees (for verification or necessary action). In rectification proceedings, it was contended that the basic fact that Sh. Paramdeep Singh was the owner of the gas agency transferred, and that the agreement to sell, *which was registered*, was entered into by the assessee only for and on behalf of the owner, acting as an attorney holder, was not discussed or considered by the tribunal, which amounted to a mistake apparent from record (refer para 4 of the order u/s. 254(2)). The tribunal, noting the same, recalled its' order. It was thus incumbent on the assessee to, in the instant proceedings, show the document (or the fact exhibited thereby) not considered earlier, i.e., the non-consideration of which rendered the tribunal's order as mistaken. The tribunal's stating in its order under section 254(1) (dated 11.9.2012) that there was nothing on record to exhibit that Sh. Paramdeep Singh (the owner) had received the entire sale consideration is premised on the fact that the assessee is statedly not the owner but the POA, having received the amount only as an agent for and on behalf of the said principal, which is even otherwise apparent from the discussion of the facts at para 7.1 of its' order u/s. 254(1), which precedes it's findings/conclusions and, in fact, stands reproduced by the tribunal (at para 3, pgs. 3-4) of its' order under section 254(2) dated 16.6.2016. Again, there was no reference before us to any of the pages of the 38 page paper-book (PB), filed earlier, which were stated to have been omitted to be considered by the tribunal while passing its', since recalled, order. Also, the agreement to sell dated 29/8/2006 (at PB pgs. 3-5, 5A-5B), *as also confirmed by Sh. Arora during hearing*,

is not a registered document, as the tribunal was given to understand in the rectification proceedings. Be that as it may, the relevance of the foregoing is only to emphasize the conduct of the assessee, as well as the preparation/representation by the Revenue before us, both deplorable. We, accordingly, proceed to adjudicate the matter afresh.

5.2 The first thing that strikes one, as indeed it did the tribunal in the first round, is that there is no confirmation from the owner, Sh. Paramdeep Singh, of having received the sale consideration. The proof of the pudding, as the saying goes, lies in its eating. Rather, if he was in India, i.e., at the relevant time, as appears from the assertion of he having been paid cash by the assessee, without retention, i.e., as received from the three Vendees, where, one wonders, was the need for the assessee to accept the cash, being so only for and on behalf of the owner, i.e., inasmuch as the same could be received directly by the owner. Further, in any case, would be received, as well as tendered by the assessee – in discharge of his obligation as an attorney holder, *against duly issued receipts*, which are conspicuous by their absence. Why, the Vendees themselves would not pay cash without being issued receipt/s by the registered attorney holder. This is precisely why the Id. CIT(A) himself observes that the AO ought to have examined the Vendees or confirmed the payment from their tax returns, sharing the information with their AO/s. The transaction, in his view, ought to have been confirmed (by the AO) from the tax record of the owner, Sh. Paramdeep Singh, or otherwise, per his confirmation/affidavit. This is as this only would prove the transaction, i.e., when both the payers and the payee confirm the same. Not so doing by the AO, therefore, implies that the transaction cannot be regarded as proved or established. Appellate proceedings being only a continuation of the assessment proceedings, with the Id. CIT(A) enjoying co-terminus powers (with the assessing authority), he

should have himself completed, or caused to be completed, as by way of a remand, the said process of verification. In *Kapurchand Shrimal v. CIT* [1981] 131 ITR 451 (SC), the Apex Court clarified that an appellate authority has the jurisdiction as well as the duty to correct all errors in the proceedings under appeal and to issue, where necessary, appropriate directions to the authority (against whose decision the appeal is preferred) to dispose of the whole or any part of the matter afresh unless forbidden from doing so by the statute. This is particularly so in the present case as the AO had called upon the assessee to produce Sh. Paramdeep Singh, which was not, and without any explanation for the same before him, and which has been found as extremely relevant by all, the AO; the first appellate authority, as well as the second appellate authority – on both the occasions. It also needs to be appreciated that the AO could not anticipate things, and it may well have been that the owner deposed before him, either confirming or resiling the transaction, whose evidence, where adverse, would have to be confronted to the assessee, enabling proving or, as a case may be, disproving the transaction, arriving at, in either case, the truth of the matter. In appeal, it was submitted, without leading any evidence to that effect, that Sh. Paramdeep Singh could not be produced (before the AO) as he was away to California (USA) at the relevant time. Even so, being the assessee's witness, why, one wonders, could he be not produced in the appellate proceedings, deposing before the Id. CIT(A) himself or, in compliance with rule 46A, requiring his examination by the AO. That is, the consideration of the completion of the verification process ought to have been upper most in the mind of the Id. CIT(A), with the said examination being also an opportunity to clarify all the queries which the AO may have in the matter, and toward which supplementary evidence in the form of bank account/s; the copies of account of AGS; the tax return, etc., as also of the Vendees, could have been called for. Further, in case of any inconsistency, even the Vendees may have to be examined

and, in any case, could lead corroborative evidence/s. As such, to say that the transaction is proved without such positive material, the deficiency of which the Id. CIT(A) himself recognizes – in fact, an aspect of the matter on which he has our concurrence, as well as in fact of the tribunal in the first round, is wholly incorrect. The assessee being in receipt of money, the consequence of non-proving his claim would not lead to the inference of the transaction being proved, as inferred by the Id. CIT(A). The burden to prove his claims is on the assessee. It is this absence of primary material in the form of confirmation of the transaction and receipt by the owner, Sh. Paramdeep Singh, that led the tribunal (in the first round) to regard all other things, viz. GPOA; agreement to sell; etc., of which, as apparent, it was acutely aware, as secondary, and which weighed with it in allowing the Revenue's appeal.

5.3 Before us, it was emphasized that Rs. 27.64 lacs (out of Rs. 80 lacs) had been received directly in the assessee's saving bank account (with OBC), which stands transferred to AGS (PB pgs. 28,31). The question is: What about the balance Rs. 52.36 lacs? In fact, out of Rs. 27.64 lacs, only Rs. 18.70 lacs is per cheques, and the balance Rs.8.94 lacs is by way of deposit of cash, with the amount (Rs. 27.64 lacs) stated to be transferred to AGS being only cash withdrawals, stated to be paid over to AGS. Then, again, how has the amount transferred been accounted for? If the entire amount stands accounted for as a sale or transfer of business, nothing survives. Of course, this must be corroborated by the actual transfer of the gas agency which, as the Revenue points out per its Gd. 2 before us, is not, requiring permission – a fact which can be readily ascertained from the concerned company. Where the facts so found are not consistent with the assessee's claims, the matter would perhaps need to be examined/probed further or, in any case, the assessee required to substantiate his stand. As such, nothing much

turns on the Id. counsel, *who also confirmed before us that the agreement to sell is not a registered document*, stating, with reference to the assessee's bank account, of a part of the entire amount as having been received on behalf of, and paid to, AGS. An 'agreement to sell' is not the same as an 'agreement of sale', and only envisages an understanding to, subject to certain preconditions, viz., the permissions afore-referred, undertake sale, a matter subsequent. The Agency changing hands, the amount should have rather been transferred to the personal account of the ex-proprietor (Sh. Paramdeep Singh), and not to the account of AGS. It is this that led us to say that the treatment accorded to the receipt, assuming so, in accounts of AGS (or its' proprietor), is also relevant. The assessee before us would state (through the Id. counsel, Shri Arora) that the GPOA stands since revoked (on 17/11/2006) as the reason for the non-production of Sh. Paramdeep Singh. *How, we wonder, is the same relevant?* The revocation being subsequent to the transaction of sale (of business), i.e., assuming so, is of no consequence. Rather, the agency having been transferred, why, and for what purpose, we wonder, should Sh. Paramdeep Singh issue another GPOA?

The fact of the matter, and the point is, even as stated by the AO, the assessee is a lay man with no stated association/relation with Sh. Paramdeep Singh. There is, further, nothing to show of his experience or expertise in managing or running a gas agency, or in fact even a business. *Why would, then, an owner issue a general power of attorney in his favour?* The doubts expressed by the AO in this regard are valid, serious, and credible. In fact, a power of attorney is ordinarily given to manage the affairs of the business, while in the present case the attorney holder realizes the 'business', the capital asset, to manage which it is given, itself. It is in fact not even shown that the owner was at the relevant time, i.e., entering the agreement to sell and the receipt of payment there-against, not available. Valuation of businesses, itself a highly sensitive and expert job, also requires

balancing of interests of the opposing sides, and often the value agreed upon a result of a long process of negotiations. There is nothing to show that the assessee is in any way competent for the same, or undertook the exercise, being by own admission, a layman, doing paltry jobs, and a man of no means. *The whole narrative of the POA thus appears to be only a ruse.* The same, however, would only be with some purpose. The inference of the POA in assessee's favour as being not without consideration, as inferred by the AO for want of definite information, cannot, under the circumstances, be said to be without merit. It, yet, however, suffers from the non-consideration of a basic 'fact' that the assessee is a man of no means, with no assets, a fact sought to be emphasized before the Id. CIT(A) who, however, did not examine the same. This is though apparent from the fact that he does not appear to have any regular source of income, i.e., other than, perhaps, agriculture income; his bank balance, which after the transfer of funds received from the Vendees, is at a paltry sum of Rs. 1234/-. In fact, the assessment of the salary income as business income, given the fact that there is no finding as to what that business is, is perhaps also not appropriate, so that the same ought to have been, in the strict sense, assessed as income from other sources. At the same time, the demand raised upon assessment stands satisfied. *How could it be, if the assessee is indeed, as claimed, a man of no means?*

Though circumstantial evidence constitutes a good ground for inference as to ownership of an asset, i.e., of belonging to the assessee, or investment therein by him (*C.K. Sudhakaran v. CIT* [2005] 279 ITR 533 (Ker)), the other, overwhelming inference that arises is of the assessee being, on the contrary, a front man for others. The money, after all, could directly have exchanged hands between the owner and the Vendees. The amount disclosed as salary income could well be the commission income allowed to him for being an attorney, or for acting as a conduit of funds. The Revenue has not caused proper verification or an investigation into

the facts, with the Id. CIT(A), rather than completing the process initiated by the AO, merely proceeded by, as it were, blaming the AO, whose efforts were hampered by the lack of proper assistance by the assessee, constraining him to draw inferences on the basis of the material before/information available with him. *The matter, thus, whichever way one may look at it, is factually indeterminate.*

5.4 The question that next arises is if any income could, in the facts and circumstances of the case, be assessed in the assessee's hands. The assessee's case is primarily based on the GPOA, so that the consideration (for the transfer of the gas Agency) received by him is not in his own right but only as an agent, for and on behalf of another, the owner. However, the assessee's claims of being a layman, with no means and, admittedly, no business experience, with the stated relationship of being an employee (of AGS) being found false, contradict his case of being a genuine power of attorney holder and, thus, the genuineness of the transaction. Be that as it may, if there indeed has been a transfer of the gas Agency during the relevant year, i.e., as per that stated, which could be verified from the registering authority, the truth of the assessee's assertion would stand borne out, and the genuineness of the transaction and, thus, the explanation furnished by the assessee, established. No income in such a case would be assessable in the assessee's hands, i.e., despite our observation as to the GPOA appearing to be a ruse; the assessee being a layman and, as stated, a man of no means with no business experience or association with the principal, absence of receipts/confirmation, etc. The assessee being in receipt of money could have been at best assessed on a protective basis, assessing the income substantively in the hands of the principal (owner). There is, it needs to be appreciated, no basis for the Revenue to hold that the assessee acquired the gas agency, i.e., prior to its' sale, and at a cost. Rather, this may also provide a basis for the income (Rs.96,000/-) allowed to the assessee by AGS, as

being by way of commission, and which stands returned by him as salary income there-from. If, however, on the other hand, the facts found are not consistent with that stated, i.e., the transfer of the agency from the stated owner to the stated vendees, the assessee would be required to be confronted therewith; his explanation being proved false or incorrect. The assessee shall, in that case, be required to state the truth; rather, substantiate it. It is in such an eventuality that the assessee's claim of being a man of no means, a contention raised for the first time before the Id. CIT(A) – who did not either examine or cause to examine the same and, besides, our observations of the arrangement appearing to be a ruse for some ulterior purpose; the assessee being a layman with no business experience, etc. shall assume significance. It could also be that there are some conditions attached on the transfer of a gas agency, hindering a free transfer thereof. The same, if so, should have been stated upfront. Further, even so, surely it is the vendees who, as the 'new owners', would be running the business, if only benami, which fact is also relevant. And which may perhaps also explain the second GPOA by the owner, i.e., even as the gas agency stands transferred. Clearly, therefore, some explaining in such a case would be required.

In short, the taxability of the impugned sum in the assessee's hands is dependent on the basic facts, including the transfer of the gas agency itself, yet unascertained, the primary onus to lead which is on the assessee. No fetters are placed on either side, even as the burden to prove his return, and the claims preferred thereby, is on the assessee, who in the present case is in receipt of money [*CIT v. Calcutta Agency Ltd.* [1951] 19 ITR 191 (SC); *CIT v. R. Venkata Swamy Naidu* [1956] 29 ITR 529 (SC)]. The AO shall adjudicate afresh, issuing definite findings of fact, in accordance with law, and after allowing the assessee proper opportunity to state his case. The matter, accordingly, setting aside the impugned order, is restored to the file of the AO for the purpose.

Before parting, we may clarify that our decision, in answering the issue arising, is guided primarily by, apart from the decision in the case of *Kapurchand Shrimal* (supra), with which judgment the impugned order is in conflict, the decision in *CIT v. Walchand & Co. Pvt. Ltd.* [1967] 65 ITR 381 (SC), clarifying that the tribunal is to deal with and determine all the questions which arise out of the subject matter of the appeal, in light of the evidence and consistently with the justice of the case (pg. 384). Tax proceedings, it may be noted, are not adversarial in nature.

5.5 We decide accordingly.

6. In the result, the Revenue's appeal is allowed for statistical purposes.

Order pronounced in the open court on October 31, 2018

Sd/-
(N. K. Choudhry)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Date: 31.10.2018

/GP/Sr. Ps.

Copy of the order forwarded to:

- (1) The Appellant: Income Tax Officer, Ward-4(2), Amritsar
- (2) The Respondent: Jagjit Singh S/o Amrik Singh Gali Gujran, Jandiala Guru, Amritsar
- (3) The CIT(Appeals), Amritsar
- (4) The CIT concerned
- (5) The Sr. DR, I.T.A.T.

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By Order