



* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 1st December, 2010

+ ITA No. 421/2009

THE COMMISSIONER OF INCOME TAX Appellant
Through: Ms Rashmi Chopra with
Mr.Chandramani Bhardwaj,
Advocates.

versus

INDAIR CARRIERS PVT. LTD. Respondent
Through: Mr.Anoop Sharma with
Mr.Manu K,Giri, Advocates

CORAM:

HON'BLE MR. JUSTICE A.K.SIKRI

HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?YES
2. To be referred to the Reporter or not?YES
3. Whether the judgment should be reported in the Digest? YES

SURESH KAIT, J. (ORAL)

1. The Revenue has preferred the present appeal against the order of the Income Tax Appellate Tribunal, Delhi Bench, New Delhi of dated 30.04.2008 wherein the ITAT has remanded the case back to the Assessing Officer for deciding the issue afresh after giving an opportunity to the assessee.

The brief facts of the case are as under:-



2. The search and seizure operation was conducted in the office premises of M/s Indair Carriers Pvt. Ltd. on 17.01.2002 and at the residential premises of its Directors, Substantial Shareholders and Employees. During the course of search following group of premises were covered under Section 132 of the Income Tax Act, as under:-

- “1. Plot No.9-A, Road No.4, NH-8 Mahipalpur Extension, New Delhi
2. LG-13, Somdutt Chamber-II, Bhikaji Cama Place, R.K.Puram, New Delhi
3. Marry Villa, Andhri(E), Opp. Sahara Air Complex, Sutarwa, Mumabi-99
4. J-7, NDSE Part-I, New Delhi
5. Farm House of Shri Virender Khosla at Sonia Farm Opp. BSF Center, 54/22, Chawwla, Bijwasan, Delhi
6. G-42, Mansarover Gardens, New Delhi
7. 68, Ring Road, Lajpat Nagar, New Delhi”

3. Notice under Section 158BC of the Income Tax Act, 1961 was issued on 07.11.2002. The assessee had filed the return of income for the block assessment. In Form no. 2B the assessee had declared undisclosed income of ₹12 lacs. Accordingly, the notice under Section 143(2) and 142(1) along with questionnaire were issued on 10.10.2003. The same was duly served upon the assessee. The assessee had filed the written submission and other details during the course of



hearing. During the course of search cash of ₹2,07,300/- was found at the business premises of the assessee at Plot No.9-A, NH-8, Mahipalpur Extension, New Delhi. The business of the assessee company was an IATA approved rate and forwarding agent, however they are mainly engaged in the business of booking of export cargo through various Airlines. The assessee company used to accept the exports cargo for its clients, get its custom cleared and hand it over to the respective Airlines. The assessee company on receipt of cargo issues Airways Bills (AWB) for various Airlines with which it was dealing, i.e. Lufthansa, Air France, Swiss Air, Saudia and Japan Airlines etc. The main income of the assessee was IATA commission and incentives received from various Airlines.

4. The fortnightly statement known as cargo sales report (CSR) were prepared according to the business done with each Airlines and the commission due to the assessee was reflected in those CSRs. The commission due to the assessee was retained while making payments of rate to various Airlines. In addition to this, the assessee company used to receive incentives on the basis of business done with such Airlines.



5. The explanation to the un-explained cash of ₹ 62,273/- which was found at the business premises of the assessee company located at Mahipalpur Extension, was that there was cash balance of ₹.1,45,027/- was available as per the cash book of M/s Indair Carriers Pvt. Ltd.. These facts were cross examined from the cash book and found correct. For the balance amount of ₹62,273/-, the assessee explained that this cash belonged to Mr. V.K.Khosla, Director of the Company. In the absence of any proof, this amount remains unexplained and, therefore, included in the undisclosed income of the assessee.

6. The Assessing Officer has discussed about Annexure-A-59 which is table diary in which apart from other business appointments contains cash transactions amount to ₹35,75,110/-. The transactions recorded in the table diary are reproduced below:-

Page No.	Date	Receipt	Payment	Income	Remarks
4	10-Jan-01		50000	50000	Paid to Mr.Gupta
4	10-Jan-01		20000	20000	Outstanding to Mr.Gupta
5	15-Jan-01	600000		600000	Received
5	15-Jan-01		450000		Paid Chachaji
5	15-Jan-01		150000		Paid to Katyal



7	3-Feb-01	750000		750000	Received
7	3-Feb-01		500000		Paid to Katyal
8	8-Feb-01	450000		450000	Received
9	14-Feb-01		30000		Cash paid to Mr.Gupta
12	5-Mar-01		550000		Paid for marble
13	13-Mar-01		114000		Paid to Directors
24	28-May-01	15000		15000	Mr.Gupta
24	28-May-01	65000		65000	Received from inderveer
24	29-May-01	177000		177000	Received from Mr.Wadhwa
24	1-June-01	375000		375000	Anil
24	1-June-01	13000		13000	V.K.
24	1-June-01	35000		35000	Wadhwa
25	8-June-01	5000		5000	Received
26	12-June-01	6160		6160	Received from gardner
27	20-June-01			65000	Paid to Murli Kakkar
32	27-June-01	31250		31250	Wadhwa
33	30-Aug-01	10000		10000	M.Singh
39	11-Sep-01		130000		Mr.Gupta
41	24-Sep-01		50000		Mr.K.



41	24-Sep-01		2000		Paid to Doctor
42	5-Oct-01		200000		Paid to Mr.magu
51	5-Dec-01	165000		165000	Received from Katyal
51	5-Dec-01	100000		100000	Satprakash
61	7-Nov-01	650000		650000	To be received from V.M.
61		57700		57700	Received

Total undisclosed income as per annexure A-59	35,75,110/-
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7. In response to these transactions recorded in the seized documents marked as A-59, the assessee submitted that this table diary was maintained by Mr.V.K.Khosla in his own hand writing which contains details of business transactions relating to M/s Indair Carriers P.Ltd. and also his own personal transactions. The assessee further submitted that during the course of day to day belongings of the business, he had to record various details with regard to the business of the assessee company such as his appointments with various airlines, customers, tonnage done with various airlines, special rates given by the airlines, and also details with regard to business transactions. Collection of cheques i.e. from the parties including post dated cheques which were received from the clients who were in arrears and details of such like nature.



8. The assessee after scrutinizing the said diary submitted that the details of business transactions pertaining to the assessee company are as under:-

Page No.	Date	Receipt	Payment	Income	Remarks
5	15-Jan-01	600000		600000	Received
5	15-Jan-01		450000		Paid Chachaji
5	15-Jan-01		150000		Paid to Katyal
7	3-Feb-01	750000		750000	Received
7	3-Feb-01		500000		Paid to Katyal
8	8-Feb-01	450000		450000	Received
9	14-Feb-01		30000		Cash paid to Mr.Gupta
12	5-Mar-01		550000		Paid for marble
13	13-Mar-01		103000		Paid to Directors
24	1-June-01	375000		375000	Anil
41	24-Sep-01		50000		Mr.K.
42	5-Oct-01		200000		Paid to Mr.Magu

9. The assessee had further explained the aforesaid transactions recorded in the diary pertains to normal business transactions of the assessee company which had been duly accounted for in the books of the assessee company. On this explanation, observation of the Assessing Officer is as below:-



“The books of accounts of the assessee company was verified and found that not a single transaction recorded in annexure A-59 has been accounted for in the books of accounts for the period mentioned in the Annexure A-59.”

10. The Assessing Officer came to the conclusion that the diary inventoried as A-59 was found from the premises of the assessee and all the transactions mentioned therein are business transactions of the assessee unless otherwise route. Though the assessee had admitted that the transactions amounting to ₹ 21,75,000/- as per the details mentioned in above table were business transactions of the company. Therefore, in regard to the balance transactions of ₹14,00,110/-, the assessee had failed to controvert the presumption of law that these transactions do not pertain to the assessee's business. In view of the above discussion and after considering the facts that the transactions of ₹35,75,110/- has not been recorded in the books of accounts of the assessee company, although, the assessee admitted that these were its business transactions. Therefore, all such transactions were undisclosed income of the assessee company and the same was included in total undisclosed income of the assessee as under:-

“Undisclosed income ₹21,75,000/-(included on substantive basis)



Undisclosed income ₹14,00,000/-(included on protective basis)

Total: ₹ 35,75,110/-“

11. Annexure A-5 of the seizure documents reveals that cash payment of ₹20,000/- and ₹10,000/- were made to Mr.Malhotra and Mr.Ranjeet respectively. The assessee while replying to the show cause notice submitted that these two persons were employees of the customers of the assessee company, who had requested Mr. Ravinder Katyal to give them some amount as they had to urgently get some cargo cleared at the customs and they were short of the payment. Since the employees who had demanded the money were serving with our reputed customers, Mr. Ravinder Katyal. Keeping in view the business prudence and business relations with the customers, the amount paid them ₹20,000/- and ₹10,000/-respectively on the instructions of the customers against IOU signed by them and left with the cashier who then cancelled the IOU slips.

12. The Assessing Officer observed that the assessee had failed to produce any evidence as to how and when the amount was paid back by these two persons. Even after verification of the books of account no such entry/transactions was found recorded. Therefore,



₹30,000/- is assessee's undisclosed income and accordingly included in total undisclosed income.

13. As per the Assessing Officer, the total undisclosed income computed is as under:-

A) Undisclosed cash	₹62,273/-
B) Undisclosed transaction as per Annexure A-59	₹35,75,110/-
C) Undisclosed income as per Annexure A-5	₹ 30,000/-
Total Undisclosed income	₹ 36,67,380/-

14. Accordingly, penalty proceedings under Section 158BFA (20) have been initiated separately as total undisclosed income determined ₹36,67,380/- against income disclosed in block return of ₹12,00,000/-

15. The assessment order was challenged by the assessee before the CIT(A) and preferred an appeal on various grounds. Since the assessee had not pressed the other grounds, therefore, the appeal was dismissed by the CIT(A) and ground No.3 was taken into consideration which is reproduced below:-

“This ground is that the A.O. erred in making addition of ₹35,75,110/- as undisclosed income of the assessee for the block period; out of which addition of Rs.41,75,000/- was made on ‘substantive basis’ and



addition of Rs.14,00,100/- was made on 'protective basis'"

16. During the course of search and seizure operations Annexure A-59 was seized from the business premises of the assessee company, certain transactions amounting to ₹35,75,110/- were found recorded. The assessee submitted before the Assessing Officer that the table diary was maintained by Mr. V.K.Khosla, Director of the company, in his own hand writing which contains details of business transactions relating to the assessee company but the Assessing Officer has not accepted the contention of the assessee. The Assessing Officer has observed in the assessment order that books of accounts of the assessee company were verified and found that not a single transaction recorded in AnnexureA-59 had been accounted for in the books of accounts for the period mentioned in the annexure A-59. The Assessing Officer has also mentioned the details of the transaction claimed to be pertaining to the business of the assessee company which is reproduced below:-

Page No.	Date	Receipt	Payment	Income	Remarks
5	15-Jan-01	600000		600000	Received
5	15-Jan-01		450000		Paid Chachaji
5	15-Jan-01		150000		Paid to Katyal
7	3-Feb-01	750000		750000	Received



7	3-Feb-01		500000		Paid to Katyal
8	8-Feb-01	450000		450000	Received
9	14-Feb-01		30000		Cash paid to Mr.Gupta
12	5-Mar-01		550000		Paid for marble
13	13-Mar-01		103000		Paid to Directors
24	1-June-01	375000		375000	Anil
41	24-Sep-01		50000		Mr.K.
42	5-Oct-01		200000		Paid to Mr.Magu
			Total	21,75,000	

17. The Assessing Officer noted that the diary inventoried as annexure A-59 was found in the business premises of the assessee and, therefore, all the transactions recorded in the said diary were business transactions of the assessee unless otherwise proved.

18. The fact remain that the Authorized Representative (in short AR) submitted in regard to the computation of undisclosed income on protective basis of ₹14,00,100/- that the entries pertaining to transactions of ₹14,00,100/- belongs to Mr. V.K.Khsola who also had owned the same in assessment proceedings before the Assessing Officer. He further submitted that no material has been brought on record by the Assessing Officer that the transactions of entries aggregating to ₹14,00,100/- belongs to the assessee company and not



to Mr. V.K.Khosla in whose hand writing the diary was written and who has admitted that these transactions belongs to him in personal capacity. The AR has also furnished a copy of the block assessment order of Mr. V.K.Khosla and pointed out that the Assessing Officer has treated the transactions of ₹14,00,100/- as belonging to Mr. V.K.Khosla, The Assessing Officer has allowed him to set off to the extent of ₹1,31,000/- out of undisclosed income as was disclosed in the block assessment maintained by his firm and made an addition of ₹13,30,110/- in the hand of Mr. V.K.Khsola on substantive basis. The Airways also allowed credit to the extent of ₹1,31,000/- being cash available with him out of income disclosed in the said two firms. Therefore, it was argued that there was no justification to make addition of ₹14,00,100/- in the case of the assessee on 'protective basis'.

19. After going through all the records, the CIT(A) had observed that Mr. Khosla, had taken this ground in the appeal filed by him against the block assessment order. In his case, has taken the ground that the Assessing Officer had not appreciated the fact of cash availability with the assessee out of undisclosed income of his firm while determining ₹13,30,110/- and undisclosed income for the block



period. Thus, even in the ground of appeal taken before CIT(A), Mr. Khosla had not contested the fact that the entries of ₹14,00,100/- pertains to his personal transactions. The Assessing Officer has not brought out any material on record to established that the transactions entered in this table diary amounting to ₹14,00,100/- does not belong to personal transactions of Mr. V.K.Khsola. Moreover, in the block assessment order undisclosed income cannot be determined on protective basis.

20. Therefore, keeping in view the facts and circumstances of the case the CIT(A) was of the view that the Assessing Officer was not justified in determining ₹14,00,100/- as undisclosed income for the block period of the assessee company on protective basis. Hence, addition of ₹14,00,100/- made in the undisclosed income on protective basis was deleted by the CIT(A).

21. With regard to the undisclosed income of ₹21,75,000/-, the AR reiterated the arguments which were taken before the Assessing Officer that the noting jotted in this diary primarily pertains to collection of actual cheques, whether received by the company currently or at times as post dated cheques received from the parties who were in arrears and handing over of these cheques to other



directors of the company so that as promised by the parties the cheques can be encashed on due dates or pressure be built up on them for the encashment of the same. He further submitted that the assessee company was always under heavy pressure to make the payments to the airlines which, irrespective of the fact that whether the corresponding recoveries were made from the customer or not, had to be paid to the airlines, in order to remain as an approved IATA agent. Many a times it also happens that when the parties are contacted and asked to make payment, they reply that certain cheque have already been paid by them against their dues to the other directors of the company which Mr. V.K.Khosla notes entries in his diary for the purposes of the confirmation from the Accounts Department. Therefore, the transactions which belongs to the assessee company aggregating to ₹.21,75,000/- had been duly accounted for in the books of the assessee company. He has vehemently argued that in the diary none of his transactions the word 'cash' was mentioned and all the entries pertained to receipt and payments were of cheques and were duly recorded in the account books. Thus, it was contended that all the transactions were made by cheque and no cash transaction was recorded in the table diary. (annexure A-59).



22. The AR has also furnished explanation of each entry of page-5 of the diary dated 15.01.2001 that amount of ₹6 lacs received out of that ₹4.50 lacs was paid to *chachaji* and Rs.1.50 lacs was paid to Mr. Katyal and other entries have also been explained.

23. After going through the submission and record, the CIT(A) found that the submission of the AR that the transaction recorded in this table diary had been duly accounted for in the books of account of the assessee company, is not tenable. The assessee company had picked up certain transactions recorded in the bank book on a particular day in order to match the quantum. For example, on page No.5 of the table diary dated 15.01.2001, receipt of ₹6 lacs and payment of ₹4.50 lacs to *chacahji* and ₹1.5 lacs to Mr. Katyal had been recorded. The assessee had tried to explained that the receipt of ₹6 lacs pertains to the receipts of two cheques; one from M/s Mals Cargo Pvt. Ltd. of Rs.4 lacs and from M/s Sheriff Travel & Cargo of ₹2 lacs. The CIT(A) has also noticed from the bank book of the assessee that many other cheques from various parties on that date had been recorded in the bank book , such as cheque of ₹5,08,045/- from M/s HTL Logestick India Pvt. Ltd., ₹1 lac from Continental Cargo Movers etc. It is worth mentioning that in the table diary it had been noted



that out of ₹.6 lacs were paid to *chachaji* and ₹1.5 lacs to Mr. Katyal. However, in the bank book, no such entry regarding payments of ₹4.5 lacs and ₹1.5 lacs were found recorded. The assessee unsuccessfully tried to explain that these entries were recorded as M/s Mals Cargo Pvt. Ltd. that they would pay a cheque of ₹4.5 lacs and M/s Sheriff Travel & Cargo would pay a cheque of ₹1.5 lacs but no such actual payments were made to *chachaji* and to Mr. Katyal. As noted by the CIT(A) that on an another date i.e. 03.02.2001 in table diary on page-7, it is recorded that a payment of ₹5 lacs was made to Mr. Katyal and the assessee tried to explain that the entry represents payment of ₹5 lacs by cheques to M/s. Kuber Co. Sales(P) Ltd.

24. In regard to entry No.5, the assessee submitted that the notings '₹4.50 lacs paid to *chachaji* and ₹1.50 lacs paid to Mr. Katyal' only represents promise to pay by two parties and no actual payments were made to these persons, whereas, regarding noting on page-7 of table diary '₹5 lacs paid to Mr. Katyal', the assessee tried to explain that this entry represents actual payment to M/s Kuber Co. Sales (P) Ltd.. Thus there was no inconsistency in the explanation given by the assessee. Moreover, in the books of accounts the entries of page 5 of the table diary were stated to be recorded on 16.01.2001 and not on



the date on which these were noted in the diary i.e. 15.01.2001. Similar is the situation on the other dates where the assessee had just taken some of the entries from bank book recorded on a particular day, the total of which works out at a figure which has been noted in the table diary on that day and unsuccessfully tried to explain that the transactions noted in the table diary were accounted for in the regular books of account. On some of the dates even the date of entry in the diary does not match with the date of entry in the books of accounts.

25. As regard the entry on page 8 of the table diary dated 08.202.2001, receipt of ₹4.5 lacs had been recorded. The assessee tried to explain that this receipt of ₹4.5 lacs represents receipts of cheques from two parties i.e. from Valentinus Garments of ₹4 lacs and from M/s Sheriff Travel & Cargo of ₹0.58 lacs. As noted by the CIT(A) that the total of these cheques received from these two parties as stated by the assessee worked out at ₹4.58 lacs and not ₹4.50 lacs as noted in the table diary (annexure A-59).

26. After considering the submission of the assessee company, the CIT(A) came to the conclusion that the assessee had failed to prove that the cash payment of ₹20,000/- and ₹10,000/- were made out



disclosed source of income, therefore, the CIT(A) affirmed the addition of ₹30,000/-.

27. The ITAT had relied upon the order passed by the CIT(A) (as was observed by the CIT(A) that all the amounts in question were received through cheques from its customers and the same were duly explained and entered in the regular books of account on the dates mentioned in the explanation. Since on some of the occasions, the assessee was under the pressure for making payment to the airlines company, in order to collect payment from their customers, pressure was built on customers through telephonic talk and by sending the persons, and if on telephone the customers assure for making the payment, the same was noted in the name of customer, the same cannot be made the reasons for alleging that assessee was not in receipt of the cheque. Whenever, any notings regarding receipt of cheque is found, the department has all the powers to verify the cheques either from the bank account of the assessee or from the bank account of issuing parties, and if any discrepancy is found or the other party refuses for making any such payment or assessee could not explain the source of such cheque, definitely addition can be made, but merely on the plea that cheques were found entered in the



diary, which was actually not received or recorded in regular book on subsequent date, cannot be made the basis for making the addition, unless some contrary material is found by the department.

28. The ITAT had also observed that each cheque number, date of clearing and the name of the party from whom cheque was received was noted in the diary were duly found to be entered in regular books. Merely because there was some difference in the date of actual realization of cheques or actual sending cheques by the customers as compared to the date on which customers have assured for sending such payment, cannot be made the reason for treating the same as unaccounted income of the assessee. We are of the considered opinion that the ITAT has rightly remanded back to Assessing Officer for deciding the issue afresh after giving due opportunity to the assessee. Facts remain that the assessee was engaged in the business of cargo and while doing so, he used to get commission and there was no other business. Therefore, the addition made by the Assessing Officer of ₹21.75 lacs in respect of the noting of the seized Annexure A-59 was not confirmed by the ITAT.

29. The ITAT after considering the rival contentions came to the conclusion that with regard to the temporary advances of ₹20,000/-



to Mr. Malhotra and ₹10,000/- to Mr. Ranjeet who were representatives of the customers, the advance so given was a temporary accommodation to help the customers for enabling them to make payment on account of custom duty and other expenses. The ITAT has also observed that without recording the statement of Mr. Malhotra and Mr. Ranjeet or without bringing any contrary material on record, there was no good reason for adding the same in the income of the assessee.

30. Therefore, we are not inclined to interfere with the order passed by the Tribunal, accordingly, we confirm the same.

31. No substantial question of law arises for consideration.

32. Dismissed.

33. No order as to costs.

SURESH KAIT, J

A.K. SIKRI, J.

DECEMBER 01, 2010

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