Reserved
AFR

In Chamber

Case :- INCOME TAX APPEAL No. - 17 of 2007

Appellant :- M/s Kesharwani Sheetalaya Sahsaon Allahabad
Respondent :- Commissioner of Income Tax Allahabad
Counsel for Appellant :- R.R. Agarwal (Senior Advocate) assisted by Umesh Chandra Kesarwani
Counsel for Respondent :- Manu Ghildyal

Hon'ble Biswanath Somadder,J.
Hon'ble Dr. Yogendra Kumar Srivastava,J.

(Per : Dr. Yogendra Kumar Srivastava,J.)

1. The present appeal has been filed under Section 260-A of the Income Tax Act, 1961 (in short 'the Act') against the order of the Income Tax Appellate Tribunal, Allahabad Bench, Allahabad (for short 'the I.T.A.T.') dated 30.10.2006, for the assessment year 1999-2000, whereby the Tribunal partly allowed the appeal filed by the Revenue.

2. The instant appeal was admitted on the questions of law, as mentioned in the memo of appeal, which are as follows:-

> "(i) Whether, on the facts and in the circumstances of the case, the Tribunal was legally justified in upholding the order of the assessing officer of making addition U/s 68 of the Income Tax Act at Rs.4,00,000/- in the hand of the firm?
> (ii) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the assessee was not able to prove the source of income of partners who have made the deposit with the firm in their capital account therefore addition u/s 68 is justified?"

3. The records of the case before us indicate that the assessee has described itself as a partnership firm having sixteen partners engaged in the business of cold storage. For the assessment year 1999-2000, the assessee filed a return

of income on 01.11.1999 declaring an income of Rs.36,92,056/-. The case was selected for scrutiny and notices under Section 143(2)/142(1) of the Act were issued. The assessment was thereafter made under Section 143(3) and in terms of an order dated 26.03.2002 the Assessing Officer noted the following credits in the names of the partners:-

Sr. No.	Name	Amount/ Date	Nature	Evidence
1	Vishwanat Prasad Kesharwani (HUF)	50,000/- 01-03-99	Agricultural Income	Photo copy of hand record
2	Bhairo Nath (HUF)	50,000/- 01-03-99	---do---	---do---
3	Prabhu Nath (HUF)	50,000/- 01-03-99	---do---	---do---
4	Raj Kumar	50,000/- 01-03-99	---do---	---do---
5	Subhash Chandra	50,000/- 01-03-99	---do---	---do---
6	Satish Chandra	50,000/- 01-03-99	---do---	---do---
7	Harish Chandra Kesharwani	50,000/- 01-03-99	---do---	---do---

4. The Assessing Officer held the credits as unproved and made an addition of Rs.4,00,000/- under Section 68 of the Act relying upon a decision of this Court in **Commissioner of Income Tax, Lucknow *v* Kapur Borthers**[1], which was a case where the assessee had entered deposits in the books of firm in the names of partners and upon the explanations for deposits being rejected the same were treated as income of

1 [1979] 118 ITR 741 (All)

the firm and not of the individual partners.

5. An appeal was filed by the assessee against the aforesaid order dated 26.03.2002 before the Commissioner of Income Tax (Appeals), Allahabad, which was partly allowed and the addition made by the Assessing Officer under Section 68 of the Act with regard to the cash credits in the names of the partners in their capital accounts was deleted.

6. The deletion of the cash credits was made on the ground that the partners had shown agricultural income in their returns. It was taken note of that the partners were identifiable and separately assessed to tax and the firm had explained the source of investment as agricultural income of the partners, therefore, if at all additions were to be made, then the same had to be made in the hands of the partners and not in the hands of the firm.

7. Aggrieved against the aforesaid order, the Revenue filed an appeal before the Income Tax Appellate Tribunal, Allahabad being I.T.A. No.344/(Alld) of 2004 to which the assessee filed cross-objections, being C.O. No.16(Alld) of 2006. The I.T.A.T. by the order impugned dated 30.10.2006 partly allowed the appeal filed by the Revenue and dismissed the cross-objections filed by the assessee. The Tribunal held that credits in the names of partners as agricultural income were not proved within the meaning of Section 68 and therefore the order of the Assessing Officer treating the same to be as the firm's deemed income, was restored and the order passed by the I.T.A.T., in that regard, was set aside.

8. We have heard counsel for the parties and perused the records.

9. The principal ground sought to be canvassed by the appellant assessee is that the partners having shown the agricultural income in their personal returns of the previous years, which had been accepted by the Revenue as such without any addition, and out of the said agricultural income the partners having made the deposits with the firm in their capital accounts, the appellant assessee had satisfied the conditions provided under Section 68 of the Act with regard to the identity and capacity of the depositors as well as genuineness of the transactions. It is submitted that the only point which was required to be considered on the question of making addition under Section 68 of the Act in the hands of the firm was the nature and source of the transaction and the appellant assessee was not required to prove the source of the source.

10. It has been further contended that the genuineness of the transactions having been proved and the firm having duly explained the deposit, the impugned order passed by the Tribunal was not justifiable, and deserves to be set aside.

11. *Per contra*, the learned counsel appearing for the Revenue has supported the order passed by the Tribunal by submitting that the credits having been found in the hands of the firm the onus was on the firm to prove the creditworthiness of the partners as well as genuineness of the transaction and no evidence having been given with regard to agricultural operations of the partners, the

transactions in the books of the firm were rightly held to be not genuine and proved within the meaning of Section 68 and there was no infirmity in the order passed by the Tribunal restoring the order of the Assessing Officer and setting aside the order passed by the C.I.T.(A). Reliance has been placed upon the decision in the case of **Kapur Brothers** (supra) to contend that the cash credits which are unexplained are to be added in the hands of the firm.

12. In order to answer the questions of law upon which the present appeal has been admitted it would be necessary to advert to the provisions contained under Section 68 of the Act. For ease of reference, Section 68 of the Act, as it stood prior to the Finance Act, 2012, is being extracted below:-

> "**68. Cash credits**—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 Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the Assessee of that previous year."

13. As per Section 68, 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 of the same or the explanation offered by the assessee is not satisfactory, in the opinion of the Assessing Officer, the sum so credited may be charged to income tax as the income of the assessee of that previous year.

14. The conditions for the applicability of Section 68 would therefore be as follows—

(i) the existence of books of accounts made by the

assessee itself;

(ii) a credit entry in the books of account; and

(iii) the absence of a satisfactory explanation by the assessee about the nature and source of the amount credited.

15. The requirement under the Section is that the assessee is to submit an explanation about the nature and source of the sum which has been credited. The explanation furnished by the assessee is to be satisfactory and the creditworthiness or financial strength of the creditor is to be proved by showing that it had sufficient balance in its accounts to explain the source and the credits in the books of accounts of the assessee. The assessee would be required to explain the source of credit in the books of accounts but not the source of the source i.e. source of the creditor. It is seen that although the requirement under Section 68 is that the Assessing Officer must be satisfied that the explanation offered by the assessee is genuine, but it is also provided that in the absence of a satisfactory explanation, the unexplained cash credit "may" be charged to income tax – therefore, the unsatisfactoriness of the explanation would not automatically result in deeming the amount credited in the books as income of the assessee.

16. A similar view was taken in the case of **Deputy Commissioner of Income Tax *v* Rohini Builders**[2], wherein referring to the judgment of the Supreme Court in the case of **Commissioner of Income Tax *v* Smt. P.K. Noorjahan**[3],

2 [2002] 256 ITR 360 (Guj)
3 [1999] 237 ITR 570 (SC)

rendered in the context of Section 69 of the Act, it was held as follows:-

> "The phraseology of section 68 is clear. The Legislature has laid down that in the absence of a satisfactory explanation, the unexplained cash credit may be charged to income-tax as the income of the assessee of that previous year. In this case the legislative mandate is not in terms of the words "shall be charged to income-tax as the income of the assessee of that previous year". The Supreme Court while interpreting similar phraseology used in section 69 has held that in creating the legal fiction the phraseology employs the word "may" and not "shall". Thus the unsatisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as the income of the assessee as held by the Supreme Court in the case of *CIT v. Smt. P.K. Noorjahan [1999] 237 ITR 570*."

17. The question of addition under Section 68 in a case of capital introduced by the partners was considered in **Commissioner of Income Tax *v* Taj Borewells**[4], and taking note of the fact that Section 68 is a charging section and also a deeming provision it was held that once the firm had offered explanation and established that the capital was contributed by the partners, the same could not be assessable in the hands of the firm. The relevant observations made in the judgment are as follows:-

> "7. Section 68 is a charging section and it is also a deeming provision. Unless the following circumstances exist, the Revenue cannot rely on section 68 of the Act.
>
> (a) Credit in the books of an assessee maintained for the year.
>
> (b) the assessee offers no explanation or if the assessee offers explanation the Assessing Officer is of the opinion that the same is not satisfactory, the sum so credited is chargeable to tax as "income from other sources".
>
> x x x x x
>
> 13. ...Once the firm had offered an explanation and

4 [2007] 291 ITR 232 (Mad)

> established that the capital was contributed by the partners, the same could not be assessable in the hands of the firm. Unless there are contradictions and inconsistencies in the statement of the partners, the credit cannot be treated as unexplained and cannot be added under section 68 of the Act in the hands of the assessee-firm..."

18. The issue relating to addition under Section 68 also came up in **Commissioner of Income Tax *v* Pragati Co-operative Bank Limited**[5], and taking note of the language of Section 68 it was held that the word "may" indicates that the intention of the legislature is to confer a discretion on the Assessing Officer in the matter of treating the source of investment or credit which had not been satisfactorily explained as income of an assessee, but it is not obligatory to treat such source as income in every case where the explanation offered was found to be not satisfactory. It was held thus:-

> "14. Section 68 of the Act requires that there has to be a credit in the books maintained by an assessee; such credit has to be of a sum during the previous year; and the assessee offers no explanation about the nature and source of such credit; or the explanation offered by the assessee is not, in the opinion of the assessing authority, satisfactory, then the sum so credited may be charged to tax as income of the assessee of that previous year. The apex court in the case of *CIT v. Smt. P.K. Noorjahan [1999] 237 ITR 570* has laid down that the word "may" indicated the intention of the Legislature that a discretion was conferred on the Assessing Officer in the matter of treating the source of investment/credit which had not been satisfactorily explained as income of an assessee, but it was not obligatory to treat such source as income in every case where the explanation offered was found to be not satisfactory."

19. The nature and scope of Section 68 of the Act fell for consideration before the Supreme Court in **Commissioner**

5 [2005] 278 ITR 170 (Guj)

of Income Tax *v* P. Mohanakala[6], and it was held as follows:-

> "16. The question is what is the true nature and scope of section 68 of the Act? When and in what circumstances section 68 of the Act come into play? A bare reading of section 68 suggests that there has to be credit of amounts in the books maintained by an assessees; such credit has to be of a sum during the previous year; and the assessees offer no explanation about the nature and source of such credit found in the books; or the explanation offered by the assessees in the opinion of the Assessing Officer is not satisfactory, it is only then the sum so credited may be charged to income-tax as the income of the assessees of that previous year. The expression "the assessees offer no explanation" means where the assessees offer no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessees. It is true the opinion of the Assessing Officer for not accepting the explanation offered by the assessees as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the *sine qua non* for forming the opinion."

20. The aforementioned principle of law has been reiterated and followed in a recent judgment in **Principal Commissioner of Income Tax (Central)-I *v* NRA Iron and Steel Private Limited**[7].

21. The judgment in the case of **Kapur Brothers**, which forms the basis of the order passed by the Assessing Officer and also that of the Tribunal, and upon which strong reliance has been placed by the Revenue, was a case where the entries had been made in the books of account of the assessee firm about three weeks prior to the end of the accounting period and the different explanations furnished

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6 [2007] 291 ITR 278 (SC)
7 [2019] 412 ITR 161 (SC)

by the assessee at different stages of the proceedings were disbelieved for the reason that the assesee had failed to establish that the partners had actually deposited the money and that the entries were not fictitious, and it was in view of the said facts that the court proceeded to answer the question referred to it by holding that the cash credit entries standing in the names of the partners in the account books of the firm could validly be treated as income of the firm from the undisclosed sources. The operative portion of the judgment in the case of **Kapur Brothers** is being extracted below:-

> "In that case, the entries were alleged to have been made a week before the end of the accounting period. In the present case, the entries were made about three weeks prior to the end of the accounting period. Identical amounts were entered as deposited in the name of each partner. Different explanations were given by the assessee at different stages of the proceedings. They were disbelieved. In this view of the matter, the Tribunal was not justified in treating the amount as the income of the individual partner in view of the finding that the assessee had failed to establish that the partners have actually deposited the money and that the entries were not fictitious.
>
> Accordingly, we answer the question referred to us by holding that the cash credit entries standing in the names of the partners in the account books of the firm could validly be treated as the income of the firm from undisclosed sources. As no one appeared on behalf of the assessee, there will be no order as to costs."

22. The question as to whether in a case where there are cash credit entries in the books of the assessee firm in which accounts of individual partners exist and it is found as a fact that the cash was received by the firm from its partners then in the absence of any material to indicate that there were profits of the firm, the sum so credited could be assessed in the hands of the firm was considered in the decision in

Commissioner of Income Tax, Allahabad *v* Jaiswal Motor Finance[8], and it was stated thus:-

> "...It appears to be well settled that if there are cash credit entries in the books of the firm in which the accounts of the individual partners exist and it is found as a fact that cash was received by the firm from its partners then in the absence of any material to indicate that they were profits of the firm, could not be assessed in the hands of the firm. We are, therefore, of the opinion that the Tribunal did not commit any error of law and rightly held that the deposits shown in its accounts were satisfactorily explained."

23. The questions with regard to burden of proof in respect of an addition under Section 68 came up for consideration in **India Rice Mills *v* Commissioner of Income Tax**[9], and it was held that where capital contributions are made by the partners prior to the commencement of the business by the assessee firm, it is for the partners to explain the source of such capital contribution and if they failed to discharge such onus then such capital contributions, although entered in the books of accounts of the assessee firm, cannot be regarded as income of the assessee firm but the same were to be added in hands of the partners. Distinguishing the judgment in the case of **Kapur Brothers**, it was held as follows:-

> "Reliance on *Kapur Brothers*' case *[1979] 118 ITR 741 (All)* is misplaced, inasmuch as in that case deposits were entered in the books of the firm when it was already carrying on its business. The firm was called upon to explain the source of the deposits. The explanation of the firm was that the deposits represented the sale proceeds of certain assets belonging to the partners. When no evidence was adduced to substantiate that explanation, the assessing authority added the amount as income of the partnership-firm. These facts are materially different from the fact of the Infant case. Most striking feature of the case on hand is that all the deposits came to be made during

8 [1983] 141 ITR 706 (All)
9 [1996] 218 ITR 508 (All)

> the accounting year in the books of he assessee-firm before it started its business. Therefore, the onus was on the partners to explain the source in the case on hand and if they failed, the amount could have been added in their hands only and not in the hands of the assessee-firm."

24. The question as to whether in a case where there was credit in the capital account of partners in books of the firm, addition thereof could be made in the hands of the firm or the same had to be considered in the hands of the partners, came up in a reference under Section 256(1) of the Act in **Commissioner of Income Tax *v* Metachem Industries**[10], and it was held that according to Section 68 the burden was on the assessee to satisfactorily explain the credit entry in the books of account of the previous year and in a case where satisfactory explanation had been given by establishing that the amount had been invested by a particular person, be he a partner or any individual then the burden of the assessee firm is discharged and the credit entry could not be treated to be income of the firm for the purposes of income tax. The relevant observations made in the judgment are as follows:-

> "...Section 68 of the Act of 1961 says that 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 charged to income-tax as the income of the assessee of that previous year. Therefore, according to section 68, the first burden is on the assessee to satisfactorily explain the credit entry in the books of account of the previous year. If the explanation given by the assessee is satisfactory, then that entry will not be charged with the income of the previous year of the assessee. In case the explanation offered by the assessee is not satisfactory or the source offered by the assessee-firm is not satisfactory, then in that

10 [2000] 245 ITR 160 (MP)

> case, the amount should be taken to be the income of the assessee. In the present case, the Assessing Officer did not feel satisfied with the explanation given by the assessee and accordingly assessed all the three credit entries to the account of the assessee as the income.
>
> ...Once it is established that the amount has been invested by a particular person, be he a partner or an individual, then the responsibility of the assessee-firm is over. The assessee-firm cannot ask that person who makes investment whether the money invested is properly taxed or not. The assessee is only to explain that this investment has been made by the particular individual and it is the responsibility of that individual to account for the investment made by him. If that person owns that entry, then the burden of the assessee-firm is discharged. It is open to the Assessing Officer to undertake further investigation with regard to that individual who has deposited this amount.
>
> So far as the responsibility of the assessee is concerned, it is satisfactorily discharged. Whether that person is an income-tax payer or not or from where he has brought this money is not the responsibility of the firm. The moment the firm gives a satisfactory explanation and produces the person who has deposited the amount, then the burden of the firm is discharged and in that case that credit entry cannot be treated to be the income of the firm for the purposes of income-tax. It is open to the Assessing Officer to take appropriate action under section 69 of the Act, against the person who has not been able to explain the investment..."

25. A similar question was considered in **Commissioner of Income Tax *v* Burma Electro Corporation**[11] wherein the deletion of the addition made by the Tribunal, on the ground that though there was no evidence on record to show availability of funds with partners at the time of investment with the assessee firm the concerned partners having admitted to have made those investments and there being no material to indicate that those investments were profits of the assessee firm, the sum so credited could not be assessed as income of the firm in terms of Section 68 but

11 [2001] 252 ITR 344 (P&H)

could be assessed in the hands of the individual partners, was upheld.

26. We may also refer to the decision in the case of **Abhyudaya Pharmaceuticals *v* Commissioner of Income Tax**[12], wherein the earlier decision in the case of **Jaiswal Motor Finance** was followed on the point that if there are cash credit entries in the books of the assessee firm in which accounts of an individual partner exists, and it is found as a fact that the cash was received by the firm from its partners then in the absence of any material to indicate that the same were profits of the firm, it could not be assessed in the hands of the firm. The judgment in the case of **Kapur Brothers** was also considered and distinguished on facts. The relevant observations made in the judgment are as follows:-

> "13. So far as the second limb of the argument that at whose hands the addition should be made is concerned, it is apt to have a look to section 68 of the Income-tax Act. Heading of the said section is "Cash Credits" and it reads that 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 Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as income of the assessee of that previous year.
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> 14. It may be noted that section 68 of the Income-tax Act, 1961 is a new provision in the sense that there was no such provision under the old Act, i.e., the Indian Income-tax Act, 1922. Even then the underlying principle of section 68 was given judicial recognition by courts. In other words, the principle has been developed on the basis of judicial decisions which has been given statutory recognition by section 68.
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> 15. *CIT v. Jaiswal Motor Finance [1983] 141 ITR 706 (All)* is a Division Bench authority of this court wherein it has been laid down that if there are cash credit entries in the

12 [2013] 350 ITR 358 (All)

books of the assessee-firm in which accounts of an individual partner exists, and it is found as a fact that the cash was received by the firm from its partners then in the absence of any material to indicate that they were profits of the firm, it could not be assessed in the hands of the firm. The learned counsel for the appellant submits that the aforesaid decision applies with full force to the facts of the case on hand. Noticeably, this was also a case where it was the first year of assessment of the firm. The observations made therein if read in the context of the facts of the present case, the submission of the appellant's counsel is well founded. The relevant extract is reproduced below (page 707):-

> "It appears to be well settled that if there are cash credit entries in the books of the firm in which the accounts of the individual partners exist and, it is found as a fact that cash was received by the firm from its partners then in the absence of any material to indicate that they were profits of the firm, it could not be assessed in the hands of the firm. We are, therefore, of the opinion that the Tribunal did not commit any error of law and rightly held that the deposits shown in its accounts were satisfactorily explained."

16. At this stage, the learned standing counsel for the Department places reliance upon another Division Bench decision of this Court in the case of *Kapur Brothers [1979] 118 ITR 741 (All)*. It is apt to examine the facts of the case of *Kapur Brothers* (supra). The Assessing Officer found a deposit of certain amount while making assessment of M/s. Kapoor Brothers. The amount was deposited in the name of its partners. The deposits were entered as on October 20, 1966. The accounting period for the assessment year 1967-68 ended on November 11, 1968. The explanation offered by the assessee was not found satisfactory. In this factual background, it was noticed that the entries were made about three weeks prior to the end of the accounting period. In this factual background the High Court held that cash credit entries standing in the name of partners in the account books of the Firm would validly be treated as income of Firm from undisclosed source.

17. On a first flash, it appears that the ratio of the aforesaid decisions given in the case of *Kapur Brothers [1979] 118 ITR 741 (All)* and *Jaiswal Motor Finance [1983] 141 ITR 706 (All)* is conflicting, but on a meaningful reading thereof, would show that they were rendered in different factual matrix. The ratio laid down in

the case of *Kapur Brothers [1979] 118 ITR 741 (All)* will be applicable in a case where a partner brings capital amount at the formation of the firm itself, before the commencement of business by the firm. It would not be applicable in a case where the deposit is reflected in the account books of the firm during the currency of the business of the firm. The underlying idea in the case of *Kapur Brothers [1979] 118 ITR 741 (All)* is that when the assessee-firm has no business, it cannot possibly have any income. Therefore, in such a case the question of presumption of income of the assessee-firm would not arise generally. But it is not appropriate when the assessee-firm is earning income from its business and in that situation the assessee-firm has to explain the cash credit standing in its account. If the above line of distinction is kept in mind, we find that both the decisions are standing on a different factual background.

18. It is interesting to note that the aforesaid two decisions one given in the case of *Jaiswal Motor Finance [1983] 141 ITR 706 (All)* and another in the case of *Kapur Brothers [1979] 118 ITR 741 (All)* were again up for consideration before a Division Bench of this court in the case of *India Rice Mill v. CIT (1996) 218 ITR 508*. The relevant extract is reproduced below (page 510 of 218 ITR):

> "However, the Tribunal relying on *CIT v. Kapur Brothers [1979] 118 ITR 741 (All)*, held that since the amount was credited in the books of the assessee-firm, it is for the assessee to explain the source of the deposits and as the assessee-firm failed to discharge that onus, the deposits were rightly taken to be the income of the assessee-firm from undisclosed sources by the assessing authority..."
>
> Reliance on *Kapur Brothers*' case *[1979] 118 ITR 741 (All)* is misplaced, inasmuch as in that case deposits were entered in the books of the firm when it was already carrying on its business. The firm was called upon to explain the source of the deposits. The explanation of the firm was that the deposits represented the sale proceeds of certain assets belonging to the partners. When no evidence was adduced to substantiate that explanation, the assessing authority added the amount as income of the partnership-firm. These facts are materially different from the fact of the instant case. Most striking feature of the case on hand is that all the deposits came to be made during the accounting year in the books of the assessee-firm before it started its business. Therefore, the onus was on the

> partners to explain the source in the case on hand and if they failed, the amount could have been added in their hands only and not in the hands of the assessee-firm."
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> 19. On the facts and circumstances of this case, we are of the considered opinion that the authorities below have committed error as they have failed to take into account that this was the first year of the business of the assessee firm. The partnership firm was formed on July 5, 1990 and on July 7, 1990, Master Shishir Garg deposited Rs.1,90,000 and Rs.72,000 as capital money with the Firm through bank clearance of two bank drafts. The accounting period being financial year, i.e., ending on March 31, 1991, the Firm could not have any income at the time of its formation. The identity of the depositor, i.e., Master Shishir Garg was not in issue at any point of time before the income-tax authorities. They treated the said deposit by Master Shishir Garg. This being so, if for one reason or the other, they were not satisfied with the financial capability of Master Shishir Garg, the amounts could have been added at the hands of Master Shishir Garg and not at the hands of firm.
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> 20. The decision relied upon by the learned counsel for the Department is clearly distinguishable on facts as it was not in respect of first year of the business and has no application whatsoever. The argument put by him that the income was liable to be added in the hands of firm as Master Shishir Garg being minor could not be prosecuted, has no substance.
>
> 21. It may be noted that the decision given in the case of *Jaiswal Motor* (supra) is being constantly followed by this court in the subsequent decisions. Reference can be made to *Surendra Mohan Seth v. CIT [1996] 221 ITR 239 (All)*.
>
> 22. The Rajasthan High Court in *CIT Vs. Kewal Krishna and Partners [2009] 18 DTR 121 (Raj)* has also taken similar view."

27. Section 68 requires the Assessing Officer to satisfy itself of the source of the credit and if during the course of enquiry undertaken, the entries are found to be not genuine then the sum represented by such credit entry is to be added as income of the assessee. The satisfaction of the Assessing Officer thus forms the basis for invocation of the provisions of Section 68. The satisfaction in this regard, however, must

not be illusory or imaginary but is required to be based on the facts and the evidence and on the basis of a proper enquiry of the material before the Assessing Officer. The enquiry envisaged under the provision is to be reasonable and just.

28. Under Section 68, the onus is on the assessee to offer explanation where any sum is found credited in the books of account and where the assessee fails to prove to the satisfaction of the Assessing Officer, the source and nature of the amount of cash credits an inference may be drawn that the credit entries represent income taxable in the hands of the assessee. This does not however absolve the responsibility of the Assessing Officer to prove that the cash credits constitute the income of the assessee. The onus on the assessee has to be understood with reference to the facts of each case and if the *prima facie* inference on the basis of facts is that the assessee's explanation is probable, the onus shifts to the Revenue. It has been consistently held that once the assessee has proved the identity of its creditors, the genuineness of the transactions and the creditworthiness of the creditors *vis-a-vis* the transactions which it had with the creditors, the burden stands discharged and the burden then shifts to the Revenue to show that the amount in question actually belong to, or was owned by the assessee himself.

29. The question as to whether in a case where money has come from a partner, addition, if any, has to be made in the hands of the partner or of the firm came up for consideration upon the reference under Section 256(1) of the Act in the case of **Commissioner of Income Tax *v***

Kishorilal Santoshilal[13], and referring to the language used under Section 68 and various authorities on the point it was held that in this regard the following points are required to be noted:-

> "On the basis of the language used under section 68 and the various decisions of different High Courts and the apex court, the only conclusion which could be arrived at is :
>
> (i) that there is no distinction between the cash credit entry existing in the books of the firm whether it is of a partner or of a third party,
>
> (ii) that the burden to prove the identity, capacity and genuineness has to be on the assessee,
>
> (iii) if the cash credit is not satisfactorily explained the Income-tax Officer is justified to treat it as income from "undisclosed sources",
>
> (iv) the firm has to establish that the amount was actually given by the lender,
>
> (v) the genuineness and regularity in the maintenance of the account has to be taken into consideration by the taxing authorities,
>
> (vi) if the explanation is not supported by any documentary or other evidence, then the deeming fiction credited by section 68 can be invoked."

30. It is therefore seen that in a case where a sum is credited in the books of account of a firm from a partner, the assessee firm could discharge its onus by proving three things: (i) identity of the creditor; (ii) creditworthiness of the creditor; and (iii) genuineness of transaction in question. Once the assessee proves all the three things its onus is discharged. It has also been consistently held that the assessee only needs to prove the source of credit entries and he is not required to prove the source of the source or the creditors' credit.

31. In a case where the integrity of the creditors is

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established and the entries are shown to be not fictitious, the burden would shift on the Revenue.

32. In the case at hand, the partners have shown the agricultural income in their personal returns of the past years which had been accepted by the department as such. The partners are all identifiable and separately assessed to tax. The source of investment having been explained, in the event the Assessing Officer was not satisfied the addition could have been considered in the hands of the partners and not in the hands of the firm. The burden of proving the source of the credits having been sufficiently explained the addition could not have been made in the hands of the firm in the facts of the present case.

33. In view of the aforementioned facts and circumstances the questions of law are answered in favour of the assessee and against the Revenue.

34. The appeal stands, accordingly, allowed.

Order Date :- 24.04.2020
Shahroz

(Biswanath Somadder,J.)

(Dr. Y.K. Srivastava,J.)