

Civil Appeal No. 2728 of 1972.

Appeal by Special Leave from the Judgment and Order dated 22 2 1971 of the Bombay High Court in I.T.R. No. 76/63.

H. G. Advani, Ashok Advani Bar at Law, Hiranandan, Mrs. Sheila Sethi and K. Balasubramaniam for the Appellant.

P. J. Francis and Miss A. Subhashini for the Respondent.

The Judgment of the Court was delivered by BHAGWATI J.

The short question which arises for determination in this appeal by special leave is whether there was any material evidence to justify the finding that a sum of Rs. 1,07,350 was remitted by the assessee from Madras to Bombay and that it represented the undisclosed income of the assessee.

The assessee before us is the firm of M/s. Kishinchand Chellaram and the assessment year with which we are concerned is 1947 48, the relevant accounting year being the year ending 6th April 1947.

The original assessment of the assessee for this assessment year was completed long back, but it seems that some information was received by the Income Tax Officer that a sum of Rs. 1,07,350 was remitted by the assessee from Madras by two telegraphic transfers through the Punjab National Bank Limited and the Income Tax Officer therefore addressed two letters dated 14th January 1955 and 10th February 1955 to the Manager of the Punjab National Bank Limited making inquiries about this remittance.

Neither these two letters nor their copies 723 appear to have been brought on record and it was common ground between the parties that they were at no time disclosed to the assessee and even now the copies of these two letters which ought to be in the record of the Income Tax Departments have not been produced before us.

The Manager of the Punjab National Bank Limited replied to the inquiries made by the Income Tax Officer by his letter dated 18th February 1955 in which he stated: "one telegraphic telegraphic transfer of Rs. 1,07,350 sent by M/s. Kishinchand Chellaram from Madras was received by us on 16 10 46.

T.T. receipt was issued by us on the same day in favour of one Mr. Nathirmal and paid in cash on the same day.

" Though this letter of the Manager of the Punjab National Bank Limited was on the record of the Income Tax Officer, he did not disclose it to the assessee nor did he make any reference to it in the letters dated 24th February 1955 and 4th March 1955 which he addressed to the assessee making inquiries about the remittance of Rs. 1,07,350 said to have been made by the assessee from Madras to Nathirmal in Bombay.

These two letters addressed by the Income Tax Officer also make inquiries in regard to various other matters besides the remittance of Rs. 1,07,350 and the assessee replied to these inquiries by its letter dated 24th March 1955 in which amongst other things it pointed out that it was not able to trace any entry in its Madras books in regard to this remittance of Rs. 1,07,350 indicating clearly that no such remittance was sent by it from Madras to Nathirmal in Bombay.

There was no further communication from the Income Tax Officer to the assessee until 2nd February 1955 when the Income Tax Officer once again addressed a letter to the assessee reiterating that one telegraphic transfer of Rs. 1,07,350 was sent by the assessee from

Madras on 16th October, 1946 in favour of Punjab National Bank Limited, Kalba Devi Road, Bombay and this amount was paid to one Nathirmal in cash on the same day and requesting the assessee to explain the nature of this transaction and to produce the relevant proofs of having accounted for this amount in its books of account. The assessee reiterated by its reply dated 9th February 1956 that it had once again looked into its books of account but did not find any entry in regard to the remittance of Rs. 1,07,350 and in the absence of such entry, it was not in a position to say anything further in the matter.

Then again there was a lull in the correspondence for a period of about one year and on 4th March 1957, the Income Tax Officer once again addressed a letter to the assessee repeating its request to explain the nature of the remittance of Rs. 1,07,350 and to produce relevant books of account and complaining that the assessee did not seem to have given any reply 724 to his earlier letter dated 2nd February 1956.

This complaint was, of course, unjustified because the assessee had replied to the earlier letter of the Income Tax Officer by its letter dated 9th February 1956.

But even so the assessee once again reiterated in its reply dated 13th March 1957 that no amount of Rs. 1,07,350 was remitted by the assessee from Madras and pointed out that Nathirmal was a common name in the Sindhi community and requested the Income Tax Officer to kindly give his father 's name to enable the assessee to look into the matter further and also to inform the assessee as to who on behalf of the assessee purported to have sent the telegraphic transfer from Madras.

The Income Tax Officer did not give any further information to the assessee and proceeded to make an order of reassessment under section 34 of the Indian Income Tax Act, 1922 bringing to tax the amount of Rs. 1,07,350 on the ground that it represented the concealed income of the assessee.

The Income Tax Officer observed in the order that the Punjab National Bank Limited had stated that one telegraphic transfer of Rs. 1,07,350 was sent by M/s. Kishinchand Chellaram from Madras and received by them on 16 10 1946, and "there was no reason to doubt the banker 's statement that the amount was remitted by M/s. Kishinchand Chellaram from Madras.

" It was also stated in the order that the telegraphic transfer was encashed by one Nathirmal who was identified by an officer of the bank and whose address was the same as that of the Bombay office of the assessee, and it was found from assessee records that this Nathirmal was an employee of the assessee in the relevant accounting year and, therefore, the conclusion was irresistible that the telegraphic transfer was sent by the assessee from its Madras office and encashed by the assessee 's employee on its behalf in Bombay and since it was not accounted for in the books of account it must be held to be the undisclosed income of the assessee.

The assessee being aggrieved by the order of the Income Tax Officer preferred an appeal to the Assistant Appellate Commissioner.

It was pointed out on behalf of the assessee at the hearing of the appeal that Nathirmal who was supposed to have received the amount of Rs. 1,07,350 sent by telegraphic transfer from Madras and to have

signed the voucher in regard to the receipt of this amount as 'N.B. Bani ' had left the service of the assessee long back and a grievance was made that it was not known as to who was the person who was supposed to have made the remittance on behalf of the assessee, because in the absence of this information, it was not possible for the assessee to meet the case of the Revenue.

The Appellate Assistant Commissioner thereupon obtained from the 725 Madras office of the Punjab National Bank Limited a copy of the telegraphic transfer application by which the amount of Rs. 1,07,350 was remitted and this copy which was disclosed to the assessee showed that the application was signed by one Tilok Chand as follows: "Tilok Chand, C/o M/s. K. Chellaram, 181, Mount Road, Madras".

The assessee pointed out to the Appellate Assistant Commissioner that there were two Tilok Chand 's working in the assessee 's office at Madras at the material time, one was Tilok Chand Thadani and the other was Tilok Chand Chellaram and both these Tilok Chands had left the service of the assessee long back.

The assessee informed the Appellate Assistant Commissioner that the whereabouts of Tilok Chand Thadani were not known and so far as Tilok Chand Chellaram was concerned, he was then at Hong Kong.

It was also pointed out to the Appellate Assistant Commissioner that the business in Madras was carried on by the assessee in the name of M/s. K. Kishinchand Chellaram and not M/s. K. Chellaram and that the remittance of Rs. 1,07,350 said to have been made by Tilok Chand was not on behalf of the assessee nor was it sent to the assessee and that its inclusion as undisclosed income of the assessee was not at all justified.

The Appellate Assistant Commissioner however negatived these contentions of the assessee and held that the remittance of the amount of Rs. 1,07,350 was by an employee of the assessee from Madras to another employee in Bombay and the Bank had also reported that the remittance related to the assessee and hence the burden was on the assessee to explain and prove the nature and source of the remittance and since this burden was not discharged, the inclusion of the amount in the assessment of the assessee was liable to be sustained.

The Appellate Assistant Commissioner accordingly rejected the appeal and confirmed the assessment of the assessee.

The assessee thereupon preferred a further appeal to the Tribunal but this appeal was also unsuccessful.

The Tribunal relied on the letter of the Bank dated 18th February 1955 to which we have already referred earlier, and surprisingly enough, though this letter was strongly relied upon both by the Appellate Assistant Commissioner and the Tribunal, and an extract of it was given in the order of the Appellate Assistant Commissioner, it was not produced before the assessee nor was a copy of it given to the assessee.

The Tribunal also placed reliance on another letter dated 9th March 1957 addressed by the Bank to the assessee where it was stated by the manager of the Bank that they had received one telegraphic transfer from Madras office on 16th October 1946 favouring Nathirmal and this amount was remitted by the assessee 726 through their Madras office.

This letter was admittedly written by the manager of the Bank to the assessee in reply to the assessee 's letter dated 7th March 1957 but obviously it did not carry the matter any further since it was in the same terms as the letter dated 18th February 1955 addressed by the manager of the Bank to the Income Tax Officer.

The Tribunal then proceeded to observe that: "The assessee was not in a position to show that the respective employees in Madras and Bombay were carrying on any business and were in a position to send from one place to another such a large sum of Rs. 1,07,350.

The assessee merely informed the Income Tax Officer that it had nothing to do with this amount.

It would have been easy for the assessee to have the said persons examined so as to show that the sum of Rs. 1,07,350 cannot represent any amount belonging to the assessee.

But for the reasons best known to itself it did not choose to do so. By remitting the amount as cash and by not bringing it into its books the assessee cannot escape the consequences of having to explain the source for this and especially when the bank through which the amount was remitted has in categorical terms stated that the remitter from Madras was the assessee.

It would have been open to the assessee to establish the contrary by showing that the bank 's statement that the assessee did remit the amount is not correct and thus displace the evidence on record, but it did not choose to examine the bank officers with reference to this aspect either.

Therefore, this is a case where a sum of Rs. 1,07,350 has been remitted by the assessee as shown by the bank 's letter from Madras to its employee in Bombay which has not been brought to books.

In the said circumstances, it is for the assessee to explain the source for the fund and it cannot escape the consequence by merely adopting an attitude of non co operation.

" The Tribunal accordingly held that the assessee had not satisfactorily explained the source of the amount of Rs. 1,07,350 and the Income Tax Officer was therefore justified in adding this amount as the undisclosed income of the assessee.

This order of the Tribunal led to the filing of an application for a reference by the assessee and on the application being rejected by the Tribunal, the assessee preferred an application to the High Court for directing the Tribunal to make a reference and on this application, the High Court directed the Tribunal to refer the following question for the opinion of the High Court: 727 "Whether there was any material evidence to justify the findings of the Tribunal that the amount remitted by an employee of the Madras Branch to an employee of the Bombay Branch was the income of the firm of M/s. Kishinchand Chellaram from undisclosed source ?" The Tribunal thereupon drew up a statement of the case and referred the above question to the High Court.

The entire evidence in the case was considered by the High Court and taking the view that there was material evidence to justify the finding that the amount of Rs. 1,07,350 remitted by Tilokchand to Nathirmal was the undisclosed income of the assessee, the High Court answered the question in favour of the Revenue and against the assessee.

The assessee thereupon preferred the present appeal with special

leave obtained from this Court.

The sole question which arises for determination in the appeal is whether there was any material evidence to justify the findings of the Tribunal that the amount of Rs. 1,07,350 said to have been remitted by Tilokchand from Madras represented the undisclosed income of the assessee.

The only evidence on which the Tribunal could rely for the purpose of arriving at this finding was the letter dated 18th February 1955 said to have been addressed by the Manager of the Punjab National Bank Limited to the Income tax Officer.

Now it is difficult to see how this letter could at all be relied upon by the Tribunal as a material piece of evidence supportive of its finding.

In the first place, this letter was not disclosed to assessee by the Income Tax Officer and even though the Appellate Assistant Commissioner reproduced an extract from it in his order, he did not care to produce it before the assessee or give a copy of it to the assessee.

The same position also obtained before the Tribunal and the High Court and it was only when a supplemental statement of the case was called for by this Court by its order dated 16th August, 1979 that, according to the Income Tax Officer, this letter was traced by him and even then it was not shown by him to the assessee but it was forwarded to the Tribunal and it was for the first time at the hearing before the Tribunal in regard to the preparation of the supplemental statement of the case that this letter was shown to the assessee.

It will therefore be seen that, even if we assume that this letter was in fact addressed by the manager of the Punjab National Bank Limited to the Income Tax Officer, no reliance could be placed upon it, since it was not shown to the assessee until at the stage of preparation of the supplemental statement of the case and no opportunity to cross examine the 728 manager of the Bank could in the circumstances be sought or availed of by the assessee.

It is true that the proceedings under the Income Tax law are not governed by the strict rules of evidence and therefore it might be said that even without calling the Manager of the Bank in evidence to prove this letter, it could be taken into account as evidence. But before the Income Tax Authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross examine the Manager of the Bank with reference to the statements made by him.

Moreover, this letter was said to have been addressed by the Manager of the Bank to the Income Tax Officer on 18th February 1955 in relation to a remittance alleged to have been sent on 16th October, 1946 and it is impossible to believe in the absence of any evidence to that effect, that manager who wrote this letter on 18th February 1955 must have been in charge of the Madras Office on 16th October 1946 so as to have personal knowledge as to who remitted the amount of Rs. 1,07,350.

What the Manager of the Bank wrote in this letter could not possibly be based on his personal knowledge and it does not appear from the letter as to what were the original documents and papers from which

he gathered the information conveyed by him to the Income Tax Officer.

The statements contained in this letter addressed by the Manager of the Bank to the Income Tax Officer were in the nature of hearsay evidence and could not be relied upon by the Revenue authorities. The Revenue authorities could have very well called upon the manager of the Bank to produce the documents and papers on the basis of which he made the statements contained in his letter and confronted the assessee with those documents and papers but instead of doing so, the Revenue authorities chose to rely merely on the statements contained in the letter and that too.

without showing the letter to the assessee.

There is also one other important circumstance which deserves to be noted.

It appears that when the letter dated 9th March 1957 was addressed by the manager of the Bank to the assessee, a copy of it was forwarded by the manager to the Income Tax Officer and this copy contained the following endorsement: "Copy to Mr. T. K. Surendran, 2nd Income tax Officer, Income Tax Office, C IV Ward, Bombay for information with reference to his summons dated 5 3 1957.

One only T. T. for Rs. 1,07,350 was received with particulars as above.

Mr. Nathirmal was identified by Mr. B. N. Mallaya, the then Officer in our office.

" 729 This copy of the letter dated 9th March 1957 was obviously in the record of the Income Tax Officer but it was not disclosed to the assessee at any stage and according to the Income Tax Officer, it was not traceable until the case came back to him for evidence in connection with the preparation of the supplemental statement of the case.

He then seemed to trace it and forwarded it alongwith his report to the Tribunal and it was at the hearing before the Tribunal in connection with supplemental statement of the case that it was shown to the assessee for the first time.

It is difficult to understand how this copy of the letter dated 9th March 1957 as also the letter dated 18th February 1955 said to have been addressed by the Manager of the Bank to the Income Tax Officer were not traceable in the records of the Income Tax Officer all this time and they came to be traced only when the supplemental statement of the case was called for by this Court.

There is no explanation given by the Revenue as to why these two important documents were not traceable and they were not disclosed to the assessee.

The reason perhaps was, and this was the suggestion made by the learned counsel appearing on behalf of the assessee, that the Revenue authorities did not wish to give an opportunity to the assessee to call the manager of the Bank for cross examination, lest the edifice which they wanted to construct for taxing the assessee on the amount of Rs. 1,07,350 might be jeopardised.

It is interesting to note that the endorsement made at the foot of the copy of the letter dated 9th March 1957 sent to the Income Tax Officer clearly shows that the Manager of the Bank was served by the Income Tax Officer with a summons dated 5th March 1957 and one can reasonably presume that the Manager of the Bank must have appeared

in answer to the summons before the Income Tax Officer and given his statement.

But no such statement has been produced by the Revenue authorities nor are we told as to what happened when the Manager of the Bank appeared in obedience to the summons.

It is impossible to believe that the Manager of the Bank should have failed to appear before the Income Tax Officer in answer to the summons and there is no doubt that his statement must have been recorded.

The question then is, why has this statement been kept back by the Revenue authorities ? Even if we assume that the Income Tax Officer did not record the statement of the Manager of the Bank, it is difficult to appreciate why he should not have done so and probed into the matter further with a view to finding out what was the basis on which the manager had made the statement that the remittance was sent by the assessee.

We are clearly of the view that the letters dated 18th February 1955 and 9th March 1957 did not constitute any material evidence which 730 the Tribunal could legitimately take into account for the purpose of arriving at the finding that the amount of Rs. 1,07,350 was remitted by the assessee from Madras, and if these two letters are eliminated from consideration, it is obvious that there was no material evidence at all before the Tribunal which could support this finding.

But even if these two letters dated 18th February 1955 and 9th March 1957 were to be taken into account, we do not think they supply any reasonable basis for reaching the finding that it was the assessee which sent the remittance of Rs. 1,07,350.

It is undoubtedly true that the Manager of the Bank stated in these two letters that the amount of Rs. 1,07,350 was remitted by the assessee through the Madras office of the Bank, but this statement which was obviously not based on the personal knowledge of the manager, which was not supported by any documents or papers produced by the manager and in regard to which it was not known as to what was the material on which it was based, was clearly belied by the original application for remittance which was signed by Tilokchand in his own name and not on behalf of the assessee.

The primary evidence before the Tribunal in regard to the remittance of the amount of Rs. 1,07,350 was the application signed by Tilokchand and this application clearly showed that it was Tilokchand and not the assessee which remitted the amount of Rs. 1,07,350 from Madras.

There can be no doubt that if the amount had been remitted by Tilokchand on behalf of the assessee, he would have signed the application on behalf of the assessee and not in his own name.

We fail to appreciate how, in the face of this primary evidence showing Tilokchand as the person who remitted the amount of Rs. 1,07,350 the Tribunal could possibly accept the unsupported statement of the Manager of the Bank, based on hearsay, that the amount was remitted by the assessee.

Unfortunately, the Revenue authorities did not produce copies of the letters dated 14th January 1955 and 10th February 1955 addressed by the Income Tax Officer to the Manager of the Bank.

Copies of these letters, if produced, would perhaps have shown that

the suggestion that the amount of Rs. 1,07,350 was remitted by the assessee was made by the Income Tax Officer and taking the cue from this suggestion, the Manager of the Bank might have stated that the telegraphic transfer of Rs. 1,07,350 was sent by the assessee.

It is to our mind impossible to hold, in the face of the application for remittance signed in the name of Tilokchand, that this amount was sent by the assessee and the finding to that effect reached by the Tribunal must be held to be unreasonable and perverse.

What at the highest could be said to be established by the material evidence on record is that Tilokchand remitted the sum of Rs. 1,07,350 from Madras and this amount was received by Nathirmal in Bombay.

Even if we accept that Tilokchand and Nathirmal were employees of the assessee as held by the Tribunal, the utmost that could be said is that an employee of the assessee in Madras remitted the amount of Rs. 1,07,350 to another employee in Bombay.

But from this premise it does not at all follow that the remittance was made by the employee in Madras on behalf of the assessee or that it was received by the employee in Bombay on behalf of the assessee.

The burden was on the Revenue to show that the amount of Rs.

1,07,350 said to have been remitted from Madras to Bombay belonged to the assessee and it was not enough for the Revenue to show that the amount was remitted by Tilokchand, an employee of the assessee, to Nathirmal, another employee of the assessee.

It is quite possible that Tilokchand had resources of his own from which he could remit the amount of Rs. 1,07,350 to Nathirmal.

It was for the Revenue to rule out this possibility by bringing proper evidence on record, for the burden of showing that the amount was remitted by the assessee was on the Revenue.

Unfortunately, for the Revenue, neither Tilokchand nor Nathirmal was in the service of the assessee at the time when the assessment was reopened and the assessee could not therefore be expected to call them in evidence for the purpose of helping the Revenue to discharge the burden which lay upon it.

We must therefore hold that there was no material evidence at all before the Tribunal on the basis of which the Tribunal could come to the finding that the amount of Rs. 1,07,350 was remitted by the assessee from Madras and that it represented the concealed income of the assessee.

We accordingly allow the appeal, set aside the judgment of the High Court and answer the question referred by the Tribunal in favour of the assessee and against the Revenue.

The Revenue will pay the costs of the assessee throughout.

S.R. Appeal allowed.