

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

ITA No. 11 of 2012 alongwith
ITA No. 30 of 2014.

Judgment reserved on: 25.10.2018.

Date of Decision : November 5, 2018

1. ITA No. 11 of 2012

M/s J.M.J. Essential Oil Company

... Appellant

Versus

Commissioner of Income Tax, Shimla

...Respondent

2. ITA No. 30 of 2014

M/s J.M.J. Essential Oil Company

... Appellant

Versus

Commissioner of Income Tax, Shimla

...Respondent

Coram:

The Hon'ble Mr. Justice Sanjay Karol, Judge.

The Hon'ble Mr. Justice, Chander Bhusan Barowalia, Judge.

Whether approved for reporting? Yes.

For the appellants : Ms. Vishal Mohan, Mr. Sushant Keprate and Mr. Aditya Sood, Advocates, for the appellant(s).

For the respondents : Mr. Vinay Kuthiala, Senior Advocate with Mr. Diwan Singh Negi, Advocate, for the respondent(s).

Whether reporters of Local Papers may be allowed to see the judgment?

Sanjay Karol, Judge.

The appeals stand admitted on the following substantial questions of law:

ITA No. 11 of 2012:

“(a) Whether the Ld. Income Tax Appellate Tribunal is right in law in upholding the addition made under Section 68 of the Income Tax Act of Rs. 3.12 crores when the books of accounts had been accepted and as such the provisions of Section 68 of the Income Tax Act, 1961 were not attracted?

(b) Whether the Ld. Income Tax Appellate Tribunal is right in law in upholding that the assessee had failed to discharge his burden of proof in proving the cash credits when the books of account alongwith supporting vouchers had been accepted coupled with the fact that the purchases against the said sales stands accepted?

(c) Whether the addition sustained by the Ld. Income Tax Appellate Tribunal qualifies for deduction under Section 80 IC of the Income Tax Act, 1961?”

ITA No. 30 of 2014:

“(a) Whether the Ld. Income Tax Appellate Tribunal is right in law in upholding the addition made under Section 68 of the Income Tax Act of ₹ 1.94 crores when the books of accounts had been accepted and as such the provisions of Section 68 of the Income Tax Act, 1961 were not attracted?

(b) Whether the Ld. Income Tax Appellate Tribunal is right in law in upholding that the assessee had failed to discharge his burden of

proof in proving the cash credits when the books of account alongwith supporting vouchers had been accepted coupled with the fact that the purchases against the said sales stands accepted?

(c) Whether the addition sustained by the Ld. Income Tax Appellate Tribunal qualifies for deduction under Section 80 IC of the Income Tax Act, 1961?

(d) Whether the Ld. Income Tax Appellate Tribunal is right in law in holding that the interest earned/accrued was not attributable to the Manufacturing Activity of the appellant?

(e) Whether the Ld. Tribunal is right in law in holding that the entire interest income did not qualify for deduction under Section 80 IC of the Income Tax Act and no expenditure was to be allowed in respect of the same?"

2. In relation to the assessee's returns filed with respect to the Financial Year 2006-07 [Assessment Year 2007-08], the Assessing Officer passed order dated 24.12.2009, under Section 143(3) of the Income Tax Act, 1961 (hereafter referred to as the Act), holding the assessee not to have sufficiently explained the cash sales amounting to ₹3.12 crores effected only in one month i.e. September of the year, 2006. Consequently the same was added into the total income of the assessee and charged to

income tax with further initiation of resultant proceedings of imposition of penalty.

3. Such order dated 24.12.2009 (Annexure A-1) stands affirmed both by the Commissioner of Income Tax (Appeals) Shimla [Order dated 3.12.2010 (Annexure A-2)] and the Income Tax Appellate Tribunal [Order dated 19.10.2011 (Annexure A-3)], subject matter of ITA No. 11 of 2012.

4. Similar is the position with regard to the next Financial Year i.e. 2007-08 (Assessment Year 2008-09), subject matter of ITA No. 30 of 2014, where cash sales amounting to ₹1,94,37,600/- effected only in one month of the year, 2007, were found unexplained and as such, charged to income tax with the initiation of consequential proceedings for imposition of penalty.

5. According to the assessee, with the introduction of new product *Pan Shamama*, process of retail counter sale on test market basis was introduced and the product sold as over the counter sale. For the Financial Year 2006-07, 2.5 tons of the produce was sold in the packaging of drums of 25 – 50 kilograms, at the sale price of ₹12,000/-

per kilogram and with respect to Financial Year 2007-08, 1557.50 kilograms of such sales were effected.

6. The Authorities below, after considering the factual matrix, rejected such explanation resulting into the filing of present appeals.

7. Inviting our attention to the findings returned by the Authorities below, terming them to be absolutely erroneous, Sh. Vishal Mohan, learned counsel contends that in the absence of rejection of the books of accounts, the authorities erred in assessing the amount of sales as an income of the assessee. In support, he seeks reliance upon *M/s. Lakhmichand Baijnath vs. Commissioner of Income Tax West Bengal*, AIR 1959 SC 341; *Roshan Di Hatti vs. Commissioner of Income Tax, Delhi*, (1977) 2 SCC 378; and *R.B. Jessaram Fatehchand (Sugar Dept.) vs. Commissioner of Income Tax, Bombay City- II*, (1970) 75 ITR 33 (Bom).

8. On the other hand Mr. Vinay Kuthiala, learned Senior Advocate, contends that findings of fact are based on full appreciation of cogent material and that there being no illegality or perversity therein, no interference is warranted. He refers to and relies upon the following

decisions rendered by the Apex Court in *Sumati Dayal vs. Commissioner of Income Tax, Bangalore*, 1995 Supp (2) SCC 453; *Commissioner of Income Tax vs. P. Mohanakala*, (2007) 6 SCC 21; and *Commissioner of Income Tax, Ahmedabad vs. Reliance Petroproducts Private Limited*, (2010) 11 SCC 762.

9. For answering the questions we find it prudent to refer to certain provisions of the Act.

10. The Act is divided into several Chapters containing several Sections.

11. Chapter IV deals with the computation of total income and in terms of Section 44AA thereof, subject to exceptions contained therein, every person carrying on business or profession, is required to keep and maintain such books of account and other documents as may enable the Assessing Officer to compute the total income in accordance with the provisions of the Act. Every person falling within the ambit of Section 44B is required to have such accounts audited. There is no dispute that such provisions of the Act stand complied with by the assessee.

12. Chapter XIV of the Act deals with the procedure for carrying out assessments. By virtue of Section 139 falling within the said Chapter, subject to the conditions contained therein, every person is obliged to furnish return of his income in the prescribed format and manner. The return can be processed and income assessed on the basis of self assessment, in terms of Section 140A. However, by virtue of Section 142, the Assessing Officer is authorized and empowered to call upon the assessee, asking him to *inter alia* produce such accounts or documents as may be so required for completing the proceedings. Section 143 of the Act prescribes how the return filed or information furnished under Section 142 is to be processed. Total income or loss, as the case may be, is required to be computed after accounting for and making adjustments, *inter alia* of incorrect claims apparently emanating from the information furnished in the return [Section 143(1)(a)(ii)].

13. By virtue of sub-Section (3) of Section 143, the Assessing Officer is empowered to assess and pass an order on the evidence so produced by the assessee in relation to the queries put by the Officer or other material on record.

The order has to be in writing, indicating the assessment of total income or loss of the assessee, after determining the sum payable by him or refund of amount due, if any, on the basis of such assessment.

14. We notice that failure of any person in filing the return under Section 143 of the Act or complying with the notice under Section 142(1) or terms thereof, so issued under sub-Section (2) of Section 143, the Assessing Officer, after accounting for all the relevant material which can be gathered, carry out assessment on the basis of what is commonly termed as Best Judgment Assessment. [*Dhanalakshmi Pictures vs. Commissioner of Income-Tax, Madras*, (1983) 144 ITR 452 (Madras)]

15. Chapter VI of the Act specifically deals with aggregation of income; set off and carry forward. How the income or the loss in the relevant assessment year is required to be computed stands specified therein. Cash credit; unexplainable investment; unexplainable money; investments not disclosed in the books of account; unexplained expenditure or amount borrowed or paid on 'hundi' are relevant factors for consideration. All this is

required to be carried out by the authority, in the manner specified therein. Under the said Chapter, Section 68 categorically deals with the issue of cash credit with which we are concerned, relevant portion whereof, we reproduce as under:

“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 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.”

16. The said Section mandates fulfillment of the following essential ingredients: (a) A sum is found credited in the books of the assessee (b) for which the assessee offers no explanation about the nature and source thereof (c) the explanation offered if any, (d) is not (e) in the opinion of the Assessing Officer, (f) satisfactory (g) then the sum so credited may be charged to income tax as income of the assessee in the relevant year.

17. In the instant case, undisputedly, in the relevant year(s) there has been cash sales made across the counter,

which was credited in the books of accounts maintained for the relevant year(s). Further the assessee was asked to furnish information regarding the nature and source thereof, which he did so, but in the opinion of the Assessing Officer was found to be not satisfactory and as such, the said sum was charged to the income of the assessee in the relevant year(s).

18. The core issue which arises for consideration is as to whether explanation offered by the assessee with respect to the nature and source thereof, was in the opinion of the Assessing Officer satisfactory or not?

19. To contend that in the absence of rejection of books of accounts, the Assessing Officer erred in carrying out the assessment under Section 143(3) of the Act, in our considered view is legally unsustainable. Section 68 categorically does not refer about rejection of books of accounts. In fact it is also not the mandate of chapter XIV containing Section 143, that the Officer must reject the books of accounts maintained by the assessee. It is not a case of Best Judgment Assessment. In the instant case, certain entries reflected in the books of accounts, which on

the basis of explanation furnished by the assessee were found not to be satisfactory, the Assessing Officer carry out the assessment under sub-Section 3 of Section 143 of the Act.

20. Falsification of books of accounts is one thing and not furnishing explanation with respect to the entry made therein is another thing. [*Dilip N. Shroff vs. Joint Commissioner of Income Tax, Mumbai and another*, (2007) 6 SCC 329]

21. Two more issues arise for consideration. The first being as to whether is it open for us to go into the explanation furnished by the assessee and the second as to whether the explanation furnished in the opinion of the Assessing Officer is satisfactory or not. Here only we may observe that we are dealing with a case where we are required to answer the substantial questions of law but not of fact, hence, required to deal only with the second issue.

22. What is 'opinion' and what is 'satisfactory' or so to say satisfaction of the Assessing Officer are the terms which require examination.

23. In *P. Mohanakala* (supra) the Apex Court while dealing with the true nature and scope of Section 68 of the Act has held that the opinion of the assessing officer for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The court further held that the opinion of the assessing officer is required to be formed objectively with reference to the material available on record. Hence, application of mind is *sine qua non* for forming the opinion.

24. The Apex Court in *CIT v. McMillan & Co.*, 1958 SCR 689 : AIR 1958 SC 207 : (1958) 33 ITR 182 while dealing with section 13 of the Income Tax Act, 1922 (11 of 1922), inter alia, observed that the words “in the opinion of the Income Tax Officer” are not to be construed in the sense of a mere discretionary power; but in the context of the words used in the proviso to Section 13 they impose a statutory duty on the Income Tax Officer to examine in every case the method of accounting and to see whether or not it is regularly employed and to determine whether the

income, profits and gains can properly be deduced therefrom.

25. In *CIT v. A. Krishnaswami Mudaliar*, (1964) 7 SCR 776 : AIR 1964 SC 1843 : (1964) 53 ITR 122 the Hon. Supreme Court while interpreting the expression “in the opinion of the Income Tax Officer” reiterated at para 10 its earlier view taken in *CIT v. McMillan & Co* (supra).

26. The observations made in *Barium Chemicals Ltd. v. Company Law Board*, 1966 Supp SCR 311 : AIR 1967 SC 295 that even if the formation of opinion is a subjective process, the existence of the circumstances upon which such an inference is based must be demonstrable stood reaffirmed in *Rohtas Industries Ltd. v. S.D. Agarwal*, (1969) 1 SCC 325.

27. The Apex Court in *Dalgobinda Paricha v. Nimai Charan Misra*, 1959 Supp (2) SCR 814 : AIR 1959 SC 914 defined opinion to mean something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question.

28. In *Rajesh Kumar v. CIT*, (2007) 2 SCC 181, the Hon. Apex court while interpreting and examining the application of Section 142(2-A) of the Act held that formation of opinion of the assessing officer must be on the premise that while exercising his power regard must be had to the factors enumerated therein and therefore formation of opinion indisputably must be based on objective consideration.

29. In *Sahara India (Firm) (1) v. CIT*, (2008) 14 SCC 151 while dealing with Section 142(2-A) of the Act, the Apex Court held that opinion required to be formed by the assessing officer for exercise of power under the said provision must be based on objective criteria and not on the basis of subjective satisfaction.

30. The Apex Court in *CIT v. Calcutta Knitweaves*, (2014) 6 SCC 444 held that for the purpose of Section 158-BD of the Act a satisfaction note is sine qua non and must be prepared by the assessing officer before he transmits the records to the other assessing officer who has jurisdiction over such other person.

31. In *S.R. Bommai v. Union of India*, (1994) 3 SCC, while construing the expression “if the President... is satisfied” under Article 356(1) the Court at para 74 held that it is not the personal whim, wish, view or opinion or the ipse dixit of the President dehors the material but a legitimate inference drawn from the material placed before him which is relevant for the purpose.

32. In fact, decision rendered in *M/s. Lakhmichand Baijnath* (supra) clarifies the position in law in the following terms:

“10. The position may thus be summed up: In the business accounts of the appellant we find certain sums credited. The explanation given by the appellant as to how the amounts came to be received is rejected by all the Income-tax authorities as untenable. The credits are accordingly treated as business receipts which are chargeable to tax. In *V. Govindarajulu Mudaliar v. Commissioner of Income-tax, Hyderabad*, Civil Appeals Nos. 41 to 43 of 1957 D/- 24-9-1958 : (AIR 1959 SC 248) this Court observed :

"There is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amounts of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipts are of an assessable nature."

That is precisely what the Income-tax authorities have done in the present case, and we do not find any grounds for holding that their finding is open to attack as erroneous in law.”

(Emphasis supplied)

33. As much emphasis is laid by the assessee on paragraph – 11 of the said report, as such, we also reproduce the same:-

“11. (3) Lastly, the question was sought to be raised that even if the credits aggregating to Rs. 2,30,346 are held to be concealed income, no levy of excess profits tax can be made on them without a further finding that they represented business income, and that there is no such finding. When an amount is credited in business books, it is not an unreasonable inference to draw that it is a receipt from business. It is unnecessary to pursue this matter further, as this is not one of the questions referred under S. 66 (2).”

34. Noticeably issue which the assessee wants to raise, of inference in the affirmative, to be drawn of the amount credited in the business books as receipt from business was left open by the Apex Court.

35. Similarly in *Roshan Di Hatti* (supra) the Apex Court in paragraph – 6 of the report has held that “The burden of accounting for the receipt of these assets was

clearly on the assessee and if the assessee failed to prove satisfactorily the nature and source of these assets, the Revenue could legitimately hold that these assets represented the undisclosed income of the assessee", which in the instant case we find the assessee not to have explained to the satisfaction of the Assessing Officer.

36. Reliance on *R.B. Jessaram Fatehchand* (supra) in our considered view is equally of no help, for in the said case the Tribunal found the Assessing Officer to have adopted the perverse approach in rejecting the entries of cash in books of accounts on the basis of surmises and conjectures, which is not the case in hand, for all the authorities have found the assessee to have not sufficiently explained the source of income.

37. In *Sumati Dayal* (supra) the Apex Court observed that "It is no doubt true that in all cases in which a receipt is sought to be taxed as income the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee.

[See: *Parimisetti Seetharamamma v. CIT*, (1965) 57 ITR 532; AIR 1965 SC 1905]. But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year the same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such a case there is, prima facie, evidence against the assessee, viz., the receipt of money, and if he fails to rebut, the said evidence being unrebutted, can be used against him by holding it was a receipt of an income nature”.

38. The Apex court in *Reliance Petroproducts Private Limited* (supra) explained the difference between concealment of income and furnishing of inaccurate particulars in the context of Section 271 of the Act which we find to be applicable in the instant case.

39. Applying the aforesaid principles, we notice that the authorities below found the explanation furnished by the assessee not to be satisfactory. What was found peculiar, which fact remains unexplained, as to why and

how should be their transactions, in cash, only in a particular month of the only two years. Such transactions are of huge amount. Assuming that they were sold across the counter on test market basis, even then such sales ought to have been spread throughout the year. It is not the case of the assessee that the product was manufactured or sold for seasonal consumption or that such sales could have been affected only in the particular months of the respective years. The satisfaction of the officer no doubt has to be based on the material so placed by the parties, which in the instant case is there. Formation of opinion has to be after accounting for all the factors and that too on objective consideration of which we have no doubt.

As such, the questions of law answered accordingly and we find no merit in the present appeals which are disposed of in the aforesaid terms. Pending applications, if any, also stand disposed of accordingly.

**(Sanjay Karol),
Judge.**

**(Chander Bhusan Barowalia),
Judge.**

November 5, 2018 (PK)