

**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR.**

DB INCOME TAX APPEAL NO.35/2003.

Malpani House of Stones, A registered Partnership firm
Pitaliyon Ka Chowk, Jaipur, through its Partner Shri Shyam Das
Malpani S/o Shri Shrikrishan Malpani aged about 50 years R/o
Pitaliyon Ka Chowk, Jaipur.

Versus

Commissioner of Income Tax-II, Income Tax Office, New
Central Revenue Building, Statue Circle, Jaipur.

DATE OF ORDER ::: 04.10.2016.

HON'BLE MR. JUSTICE K.S. JHAVERI
HON'BLE MR. JUSTICE BANWARI LAL SHARMA

Mr. Prakul Khurana for the appellant.
Mr. Anuroop Singhi for the respondent.

1. By way of this appeal, the assessee has challenged the judgment and order of the Tribunal whereby the Tribunal has allowed the appeal preferred by the assessee and dismissed the appeal preferred by the department.

2. This court while admitting the matter, has framed following questions of law:

"Whether trading additions by rejecting the whole books of account as well as the addition by rejecting some of the purchases can be made simultaneously and whether this would not tantamount to double addition?"

3. Counsel for the appellant has contended that the assessee's books of account were rejected and they were assessed on the basis of estimation and while estimating the other income also addition was made under section 69C of the

Income Tax Act which would amount to double taxation while estimating the income. While rejecting the books of accounts, the AO has considered the over all turn over for the head as has been detailed as under:

"Subject to the above remarks total income is computed as under:

Net profit as per P&L a/c	2,47,877
Add: Income tax	20,751
Donation	1,102
Dep. To be considered separately	31,550

53,403

3,01,280

Addition on account of undisclosed income as discussed above 13,740

Trading addition as discussed above 84,508

Out of dalali a/c a sum of Rs.3535/- is disallowed as alleged sales as discussed above 3,535

Out of foreign travelling exp. A sum of Rs.10,908/- is disallowed and added back to the total income of the assessee. 10,908

Out of misc. exp. a sum of Rs.3194/- is added as discussed above.
(u/s37(2A)) 2,194

Out of misc. exp. which includes exp. on Deewali gifts etc. as discussed above. 1,000

Out of Car & Scooter exp. a sum of Rs.2,000 is disallowed as discussed above. 2,000 1,17,885

		4,19,165
Less: Depreciation as claimed	52,633	
Deduction u/s 80HHC as per claim	46,553	99,186
	Total income	3,19,979/-
	Less: Firm's tax	59,809/-
	Divisible income	2,60,170/-

Share allocation is made as under:

1.	Smt. Mohini Devi	1/3	86,723
2.	Sh. Harinarain	1/3	86,723
3.	Sh. Shyamdas	1/3	86,723"

4. The CIT (Appeals) has confirmed the same and the Tribunal has also. Counsel for the appellant contended that in view of the decision of this Court reported in Commissioner of Income Tax Vs. Tyaryamal Bal Chand- (1987) 165 ITR 453 (Raj.), it has held as under:

"The ITO was within his right to tax the amount of Rs.16,950 as income from disclosed source, even though he had added the amount of Rs.18,117 in addition to the profits shown by the respondent-firm in its account books. However, the assessee was well within his rights to plead that this amount of Rs.16,950 is covered by the intangible income assessed at Rs.18,117 and added to the income of the firm and apart from this, since for the last preceding three years, substantial additions amounting to Rs.32,797 have been made, the amount of Rs.16,950 could be taken as having come out of such intangible additions. In the facts and circumstances of the case, the Tribunal was right in treating the unexplained cash credit entries to the extent of Rs.16,950 as covered by added gross profit in the sum of Rs.18,117 on the basis of the estimate."

5. The Allahabad High Court in the case of Commissioner of Income Tax Vs. Babban Pandey- (1970) 77 ITR 601 (All) has held as under:

"The word "undisclosed source" means a source which has not been disclosed by the assessee. It may refer to any of the sources mentioned in S.6 of 1922 Act, not excluding "profits and gains of business, profession, or vocation". The mere fact that the explanation of the assessee as to the source of the amount in question was rejected and that he did not set up the plea in his grounds of appeal that it formed part of his business profit, did not preclude the Tribunal from finding out the correct source thereof. The finding of the Tribunal that the item in question stands covered by the addition of Rs.18,000 made by the ITO in the trading account obviously means that it came out of the profits of the business. It was competent on the part of the Tribunal to come to that finding, although no such ground was set forth in the memorandum of appeal by the assessee. The Tribunal was competent to hold that the sum of Rs.6,531 came out of and was covered by the addition of Rs.18,000 to the business profits. The finding of the Tribunal in point is a finding of fact which this Court cannot interfere."

6. The Andhra Pradesh High Court in the case of Maddi Sudarsanam Oil Mills Co. Vs. Commissioner of Income Tax- (1959) 37 ITR 369 (AP) has held as under:

"Accounts- Rejection- Profit estimated at flat rate- Further addition on account of cash credits- IT authorities cannot adopt a flat rate to compute gross profit as well as rely on the books for purpose of adding unexplained cash credit which were part of the scheme of balancing the accounts.

The Tribunal was careful in emphasising that it is basing its computation on the estimate of 9.5% and not upon any of the items which

were taken into account by the IT authorities. The scrutiny by the Tribunal of the items of addition made by the IT authorities was merely for the purposes of showing that the accounts could not be relied upon. The contention that the Tribunal having adopted as the basis of assessment a gross profit of 9.5% instead of 5.1% had computed the figure Rs.1,37,189 wrongly is valid. Having computed the gross profit at 9.5% the AAC further added a sum of Rs.56,345 on account of unaccounted for profit on sale of permits restricted to the unproved cash credits. This addition is obviously wrong when a flat rate of 9.5% on the total turnover is being adopted in computing the gross profits. The assessee had recourse to the several entries of cash credits only for the purposes of balancing the accounts with a view to reducing the rate of gross profits. If once the IT authorities have rejected the books, they cannot have it both ways, namely, adopting a flat rate to compute gross profit as well as rely on the books for the purposes of adding unexplained cash credits which were part of the scheme of balancing the accounts. Having regard to the categorical observations of the Tribunal that the addition should be unitary where the proviso to S.113 is applied by making an estimate it cannot be assumed that the Tribunal intended to negative the statement by also adding cash credits in computing the gross profits."

7. The Andhra Pradesh in yet another case in *Indwell Constructions Vs. Commissioner of Income Tax- (1998) 232 ITR 776 (AP)* has held as under:

"The pattern of assessment under the IT Act is given by s.29 which states that the income from profits and gains of business shall be computed in accordance with the provisions contained in ss. 30 to 43D. Sec.40 provides for certain disallowances in certain cases notwithstanding that those amounts are allowed generally under other sections. The computation under s.29 is to be made under s.145 on the basis of the books regularly

maintained by the assessee. If those books are not correct or complete, the ITO may reject those books and estimate the income to the best of his judgment. When such an estimate is made it is in substitution of the income that is to be computed under s.29. In other words, all the deductions which are referred to under s.29 are deemed to have been taken into account while making such an estimate. This will also mean that the embargo placed in s.40 is also taken into account. No doubt there is big difference between profit earned with own capital and profit earned with borrowed capital and such a difference could have been taken into account by the ITO while making an estimate. If the CIT had set aside the estimate on the ground that the vital fact that the business was carried on with own capital and not with borrowed capital has been ignored by the ITO, there may not have been any difficulty in upholding that order. But, when he proposes to add back an exact item in the P&L a/c, he was relying on the rejected books which he could not do. There is also a further difficulty if s.40 is to be taken into account even after making an estimate. When there are certain other deductions which are to be disallowed such as wealth-tax payment in s.40, can it be said that after making an estimate, the wealth-tax charged in the P&L a/c should again be added back to the profit. This example illustrates how the contention of the Revenue, that s.40(b) makes a difference in the situation, is untenable. Therefore, it is not correct in law to make a separate addition representing the interest and remuneration paid to partners, to the income already estimated and assessed from contracts.- *Maddi Sudarsanam Oil Mills Co. Vs. CIT* (1959) 37 ITR 369 (A): TC 42R.1310 followed."

8. Mr. Singhi, counsel for the respondent, has contended that in view of the concurrent findings of both the authorities for which no question has been framed and the

assessment made by the authority is just and proper, no interference is called for.

9. We have heard counsel for the appellant and the counsel for the respondent.

10. In view of the well settled principle of law that when income is estimated and while assessing the same and rejecting the books of accounts, it would not be appropriate to rely on the books of accounts for any addition other than estimate made by A.O.

11. In that view of the matter, the contention raised by the appellant deserves to be accepted. The income which has been added on the basis of books of accounts having been rejected and in that view of the matter, addition of Rs.13,740/- requires to be deleted.

12. The appeal is allowed. The question is answered in favour of the assessee and against the Department.

(BANWARI LAL SHARMA), J.

(K.S. JHAVERI), J.