Court No. - 35

Case :- INCOME TAX APPEAL No. - 283 of 2015
Appellant :- Pr. Commissioner Of Income Tax, Varanasi
Respondent :- M/S Banaras Hotels Ltd.
Counsel for Appellant :- Shubham Agrawal
Counsel for Respondent :- Ashok Trivedi

Hon'ble Bharati Sapru,J.
Hon'ble Vinod Kumar Misra,J.

Heard Sri Shubham Agrawal, learned Counsel for the department and Sri Ashok Trivedi, learned Counsel for the assessee.

This is an appeal filed by the department under Section 260A of the Income Tax Act, 1961 against an order of the Tribunal dated 27.04.2015 for the assessment year 2009-10. The questions of law on which the appeal was admitted and sought to be answered are quoted hereunder:-

> "(i) Whether the Tribunal was justified in affirming the order of the Ist Appellate Authority with regard to the deletion of the addition made under Section 69 of the Income Tax Act on the ground that the books of accounts were not examined?
>
> (ii) Whether the Tribunal was justified in deleting the addition of Rs.1,21,61,243/- towards extra profit after rejecting the books of accounts under Section 145(3) of the Income Tax Act?"

The brief facts of the case are that the assessee company is limited company which has filed its return on 30.09.2009 declaring income of Rs.4,62,02,180/-. The assessment was completed on 29.12.2011 u/s 143 (3) of the act determining the income of the assessee at Rs.7,30,38,800/-. The assessing officer has made addition of Rs.1,27,54,745/- u/s 69 of the Act, being difference between the cost of construction as estimated by the DVO and as declared by the assessee. The assessing officer has referred the cost of construction of building to valuation officer where the assessee has failed to produce its account books despite being given various opportunities.

Thereafter, the notice was issued to the assessee on 12.08.2011 for producing its books of account on 29.08.2011. The assessee failed to produce the account books on 29.08.2011, hence the assessing officer made the reference to the DVO on 09.09.2011. The DVO has submitted its report on 20.12.2011, upon which the objections were filed by the assessee on 26.12.2011 which were rejected on 28.12.2011. Till the date of passing of the assessment order on 29.12.2011, complete account books as were required by the assessing officer were not produced by the assessee and hence the account books were rejected on 29.12.2011 whereas a reference had already been made to the DVO on 09.09.2011 that is before the rejection of account books.

It is also a matter of record that 15th September, 2011 was fixed to produce the account books so it is clear from the statement of facts that in fact the reference to the DVO was made *'A' much before the date when the account books were to be produced and 'B' the account books were rejected much later than making a reference to the DVO*. It is clearly against the settled law. Under the provisions of Section 142A of the Act a reference could have been made to the DVO only in a case where the books of account had been rejected.

The Hon'ble Apex Court has conclusively held in the case of **Sargam Cinema vs. Commissioner of Income Tax** reported in **(2011) 241 CTR (SC) 179** that a reference could have been made to the DVO only in a case where the books of account had been rejected.

In view of the facts stated above, the reference made to the DVO by the authority concerned is clearly bad and illegal in this case. **The question of law no.1** is, therefore, answered in favour of the assessee and against the department.

Insofar as the next question is concerned, the assessing officer had made an addition of Rs.1,21,61,243/- towards extra profit by adopting the gross profit rate of 30.18% instead of 35.66% as disclosed by the assessee after rejecting the account books.

For ready reference the paragraphs no.4, 7, 8 & 9 of the assessment order are quoted here-under:-

"4. At the outset it will be relevant to mention that assessee never produced all the books of accounts on any single date of hearing either on one pretext or other protext. Only in piece meal on some days representatives of the assessee produced some books of account which always resulted in incomplete verification of accounts, bills, vouchers and entries made in the balance sheet. So assessee group was hesitant in producing all the books of accounts and bills and vouchers. Perusal of whatever books of accounts produced and examined at this end reflected that books of accounts are not being maintained.

7. Aforesaid facts show that the assessee did not produce all the books of accounts particularly the vouchers as mentioned above. During the year under consideration assessee has sold the food items and beverage of more than 8 crores but no stock register is being maintained by the assessee for these items. Assessee is a manufacturing concern and in the absence of details of raw material consumption correct profit of the assessee can not be worked out. Assessee also failed to establish co-relation between raw material consumed and goods produced. In relevant column para 28 (b) of the audit report for the year under consideration the assessee's auditor have been mentioned the following note:-

"*The nature of the business is such that it is not possible to furnish quantitative details of Raw Materials and Finished Products"*

8. In the light of the said facts and circumstances of the case following facts emerge out:-

(i) Opening and closing stock of the assessee are not verifiable.

(ii) Day to day consumption of raw – material is not verifiable.

(iii) No co-relation can be established between raw material consumed and finished products prepared.

(iv) Assessee failed to produce all the vouchers of the building construction even after availing so many opportunities as discussed above.

In the light of the aforesaid facts and circumstances of the case Section 145(3) is being applied in the case of the assessee. Consequently books of accounts of the assessee company are not reliable and the same are being rejected accordingly.

9. In the year under consideration gross profit of the assessee company have come down substantially without any reasonable cause. On this score assessee was confronted vide para (xvi) of notice u/s 142 (1) dated 12-08-11. For ready ready reference said para of notice is being reproduced below:-

"xvi

During the year under consideration as per para 32 of tax audit report net profit% has been shown at 15.94% in comparison to 20.31% in AY 08-09. Further as per annexure 1 of the audit report for the year under consideration gross profit rate of the assessee company is 30.18% in comparison to 35.66% in AY 08-09 and 35.05% in AY 07-08. You are required to justify net % and GP % with documentary evidence.

In compliance to said querry assessee submitted reply vide para 9 of letter dated nil. For ready reference the same is being reproduced below :-

"That as regards G.P. And NP rates please appreciate that this is a case of Hotel and not a trader. There can never be identical rate of profits for any two years. This particular year there was terrorist attack on MUMBAI on 26-11-2008 as a result of which the foreign tourist inflow was badly affected in the next few months. It may also be appreciated that the peak tourist season is from October to March and this year the business was badly and adversely affected."

It is important to note that Gross receipts of the assessee in the year under consideration is almost same like last years and gross profit for the AY 07-08 and 08-09 are also same. But gross profit of the assessee has come down substantially in the year under consideration in comparison to last year. Assessee's reply on this score is against the facts mentioned above. Its reply has no force and the same is being rejected because on account of reasons mentioned in reply receipt of the assessee is almost same as in last year. Had the contention of the assessee been correct receipt of the assessee for the year under consideration would have come down substantially. For ready reference details of the gross receipt, gross profit and gross profit% of the assessee as shown in Annexure A of audit report is being reproduced below:-

FY	Gross receipt as per Annexure A of audit report in Rs.	Gross profit as per annexure A in Rs	Gross profit%

08-09	201877562/-	60941757/-	30.18%
08-07	216886562/-	77354462/-	35.66%
07-06	194333086/-	68113843/-	35.05%

In the light of said facts purchases and consumption of raw material of the assessee is not verifiable. Assessee has suppressed its sales and inflated its purchases. No separate accounts of restaurant has been maintained by the assessee. No stock register of day to day consumption of raw material has been maintained and produced by the assessee. Vouchers to justify opening and closing stock of the assessee has not been produced by the assessee. All the vouchers and bills of building construction has also not been produced by the assessee. So section 145 (3) of the IT Act is being applied in the case of the assessee company. Sales of the assessee company are being estimated at Rs.20,50,00,000/- with corresponding increases in the purchases and gross profit rate of last year i.e. 35.66% is being applied in the case of the assessee company. Extra profit in the case of the assessee company for the year under consideration is being worked out as under:-

(i) Gross receipt shown by the assessee.	Rs.20,18,77,562/-
(ii) Gross profit shown by the assessee	Rs.6,09,41,757/-
(iii) Gross profit % shown by the assessee	Rs.30.18%
(iv) Gross profit % applied as shown last year	Rs.35.66%
(v) Estimated gross receipt	Rs.20,50,00,000/-
(vi) Profit @ 35.66%	Rs.7,31,03,000/-
(vii) Difference between (ii and vi)	Rs.1,21, 61,243/-

From a reading of these paragraphs it is apparent that full particulars and details were never supplied by the assessee. The assessing officer, therefore, made an addition. The CIT and Tribunal have not considered these aspects at all, who have ignored them and have, therefore, deleted the addition.

Learned Counsel for the department, Sri Shubham Agrawal has relied on two decisions of this Court in the case of **Izhar International vs. Deputy Commissioner of Income-tax** reported in **(2013) 40**

taxman.com 452 (Allahabad) and in the case of **Shri Venkteshwar Sugar Mills vs. Commissioner of Income-tax (Appeals)** reported in **(2012) 20 taxman.com 650 (Allahabad)** to substantiate his point that where the books of account were not properly maintained and the vouchers pertaining to the consumable items were not available for verification, then there is no option before the assessing officer except to make estimation on the basis of best judgment and also it would be open to him to make addition if amounts are so found against the assessee.

Consequently, the second question is decided in favour of the department and the matter requires reconsideration by the CIT on the second question.

The matter is, therefore, remanded to the CIT for reconsideration. The CIT may reconsider and decide the matter within a period of three months from the date a certified copy of this order is being placed before it. Certified copy of this order be placed before the CIT within the next 15 days.

The appeal is disposed of as above. No costs.

Order Date :- 31.1.2017
S.P.

(Vinod Kumar Misra, J.) (Bharati Sapru, J.)