

AFR**Reserved.****Court No. - 35****Case :- INCOME TAX APPEAL No. - 50 of 2009****Appellant :- M/S Deepak Rugs Hariyawan Gyanpur Road Bhadohi****Respondent :- Commissioner Income Tax Varanasi****Counsel for Appellant :- Shambhu Chopra, Arun Pratap Singh, Rishi Raj Kapoor****Counsel for Respondent :- C.S.C., Ashish Agarwal****Hon'ble Bharati Sapru, J.****Hon'ble Vivek Varma, J.*****(Delivered by Hon'ble Vivek Varma, J.)***

1. The present appeal has been filed by the assessee under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') against the order of the Income Tax Appellate Tribunal, Allahabad Bench dated 16.3.2009 for the Assessment Year 2004-05, by which Tribunal dismissed assessee's appeal and confirmed the order dated 4.9.2006 passed by Commissioner of Income Tax (Appeals) Varanasi.
2. The Commissioner of Income Tax (Appeals), Varanasi, by order dated 4.09.2006 enhanced the addition by estimating the gross profit at 23.01 % and accordingly sustained the addition of Rs. 1,32,02,572/- which includes the addition made by Assessing Officer vide order dated 13.02.2006.
3. The instant appeal was admitted on the following questions of law:
 1. Whether, the Income Tax Appellate Tribunal was legally justified in upholding the application of Section 145(3) of the Income Tax Act, 1961, upholding the rejection of books of account, and application of hypothecated G.P. Rate of 23.01 % as enhanced by the Commissioner of Income Tax (Appeals)?
 2. Whether the Income Tax Appellate Tribunal as well as learned Commissioner of Income Tax (Appeal) were legally justified in giving their new

reasoning for justifying the application of Section 145(3) of the Income Tax Act, 1961 for upholding the rejection of books of account, contrary to the findings and conclusions mentioned by the assessing authority in paras 4.1, 4.II, 4.III, 4.IV and 4.V of the assessment order wherein the assessing authority has recorded positive findings in favour of the appellant for fall of GP rate in the current year, even though applying hypothetical GP rate at 15 %?

3. Whether, the Income Tax Appellate Tribunal was legally justified in upholding the order of lower authorities and addition of Rs. 1,32,02,742/- towards trading profit merely on the basis of surmises and conjectures, ignoring the cogent material on record such as comparative chart, fall in rupee value, etc. and even though no defects were pointed out in the books of account and other records maintained by the appellant and produced before the assessing authority?

4. Whether, the fall in GP rate as declared by the appellant at 14.52% being comparable to the rate in the industry, the addition of trading profits of RS. 1,32,02,742 for the year under consideration is legally sustainable?

4. The assessee is a firm and is engaged in business of manufacture and export of woolen carpet rugs. It filed its return of income showing income at Rs 86,19,540/- for the assessment year 2004-05. The case of the assessee was selected for scrutiny and thereafter notices under section 143(2)/142(1) of the Act were issued.

5. The accountant of the assessee firm and its counsel appeared before the assessing officer and produced cash book, ledger account, journal book, purchase and sale registers, stock register, bills, vouchers etc.

6. The Assessing Officer on examination of records found that sales and purchase was satisfactory. However, on verification, he noticed that the weaving charges and

manufacturing expenses were not verifiable as per record of the assessee and the gross profit rate for assessment year 2004-05 has gone down considerably as compared to the preceding assessment years i.e. 2002-03 and 2003-04.

7. The Assessing Officer required the assessee to explain the fall in Gross Profit rate and also the non verifiable nature of weaving charges and other manufacturing expenses and why books of account may not be rejected by invoking the provisions of section 145(3) of the Act.

8. The assessee stated that the fall in G.P. Rate is mainly attributable to increase in cost of raw material, secondly the sale price has gone down as compared to the previous assessment years and the cost of the labour charges (weaving charges payment) paid to weavers and production expenses has increased in the said assessment year.

9. The Assessing Officer after considering the reply of the assessee and after perusing the account books of the assessee came to the conclusion that verifiability of books of account is not possible in the absence of supporting documents, even the trading/manufacturing result shown by the assessee is not acceptable as such the assessing officer applied the provisions of section 145(3) of the Act and rejected the books of the assessee. He adopted G.P. Rate @15% instead of 14.52% as disclosed by the assessee. Accordingly the extra profit was worked out at Rs 7,42,607/-and the same was added to the income of the assessee. Apart from this addition various other additions on account of disallowance of travelling and conveyance expense, disallowance of printing and stationary expenses, disallowance of general expenses and disallowance of other expenses.

10. Thereafter the Assessing Officer made an assesment vide

Assessment order dated 13.02.06 and came to the following conclusion.

“ III. On verification of weaving charges payment, it is seen that the payment of Rs. 4,22,48,507 are made to weavers/weavers contractor after deducting tax at source and total of deduction of tax was Rs. 8,49,906, many of weaver/weaver contractor, as per TDS deduction list, are assessed to tax and have been allotted PAN, however, in some of cases PAN have not been quoted. No doubt as far as the genuineness of the person is concerned, the person with the PAN number can be said to be verifiable but as in the maximum no. of weavers cases, they are not maintaining their own books so cross verifiability of correctness of weaving charges is not possible. In some of the weavers cases total payment of 5,89,324 have been made as weaving charges without any deduction of taxes as most of payment were below Rs. 20,000/- as the addresses of these persons are not complete so verifiability of weaving charges is not possible. Similarly in the case of manufacturing expenses case it cannot be said to be fully verifiable. In view of these facts applicability of Section 145(3) cannot be ruled out.

IV. The assessee has maintained purchase/ manufacturing and sale register, stock register but in view of nature and work of the industry and maintenance of assessee's own accounts, the stock position and consumption of raw material and cost there upon can not be correctly deduced as piece to piece manufacture, consumption, cost, sale etc is not co-relatable from the books kept by the assessee, so consumption as well as stock cannot be said fully verifiable. Hence applicability of Section 145(3) on this score also cannot be denied. ”

11. The Assessing Officer, thus computed and assessed the income of the assessee at Rs 92,52,420/-

12. The assessee aggrieved by the additions made in the assessment order dated 13.02.2006 challenged the same by filing appeal before the CIT (A). In that appeal the books of account were again examined by the first appellate authority. The CIT(A) vide order dated 04.09.16 rejected the appeal of the

assessee and upheld the invocation of the provisions of section 145(3) of the Act, rejecting the books of account. However, he enhanced the addition by estimating the gross profit @23.01%, after considering the past history of the assessee and for this purpose the CIT (A) compared the G.P. Rate of the assessee of the last 5 assessment years and adopted the average of gross profit rate of last two assessment years. The CIT (A) also confirmed and upheld the various other disallowances made by the Assessing Officer.

13. The assessee challenged the order of the CIT(A) before the Income Tax Appellate Tribunal, Allahabad Bench, Allahabad. The Tribunal vide order dated 16.03.2009 dismissed the appeal filed by the assessee and confirmed the order passed the CIT (A).

14. Hence, the present appeal, at the instance of the assessee.

15. Heard Sri Kushagra Srivastava holding brief of Sri Rishi Raj Kapoor, learned counsel for the appellant and Sri Ashish Agarwal, learned counsel for the revenue.

16. It is contended by learned counsel for the appellant that the Tribunal as well as the lower authorities have erred in law as well as on facts in upholding the rejection of book of accounts and application of Section 145(3) of the Income Tax Act. The assessing authority had found that the assessee had maintained purchase/manufacturing register, sale register and stock register. He also submitted that in case the Assessing Officer, CIT(A) or Tribunal doubted the transactions carried out by the assessee regarding the payment of weaving charges they should have summoned the persons/weavers in question. Without summoning those persons, tax liability could not be fastened on the assessee on presumptions and conjectures.

17. It is further submitted, that there was no suppression in sales/purchase order or of raw materials nor excess raw material had been found in assessee's case to assume hypothecated GP rate of 23.01 % as assessed by the Commissioner of Income Tax (Appeal) and upheld by the Income Tax Appellate Tribunal. Learned counsel for the assessee relied upon the judgement of this court in the case of M/s Kaka Carpets vs Commissioner of Income Tax, Varanasi, Income Tax Appeal No. 8 of 2008, delivered on 28.04.08.

18. To the contrary, learned counsel for the revenue submitted that books of account were not properly maintained by the appellant-assessee which were rightly rejected by the Assessing Officer by invoking provisions of Section 145(3) of the Act. The CIT (Appeals) not only confirmed the action of the assessing officer but also enhanced the GP rate from 15 % to 23.01 %. and there is no apparent error either on the part of the learned Tribunal or in the order passed by the authorities below.

19. It is further submitted that the maximum number of weavers could not be verified in absence of necessary details being furnished by the assessee. Regarding correctness of weaving charges and further the stock position and consumption of raw materials and cost thereupon cannot be correctly deducted as piece to piece manufacture, consumption, cost, sales was also not correlated from the books of account. He also submitted that in maximum number of cases neither PAN was provided nor the address of the weavers were disclosed. As such genuineness of the transaction cannot be established. The Commissioner of Income Tax (A) after giving a detailed notice for the enhancement of Income, in accordance with law enhanced the

income of the assessee. The finding of fact recorded by the Assessing Officer and CIT(A) on examination of books of account and other details produced by the assessee would show that the assessee had failed to prove genuineness of the weaving charges, thus the order of Tribunal is wholly just. In any case, the said order records a finding of fact based on appraisal of evidence and therefore warrants no interference by this Court. There is no substantial question of Law involved,

20. We have considered the rival submissions made by learned counsel for the parties and perused the material on record.

21. The assessee during the Assessment year 2004-05 has shown his income from manufacture and export of carpets. The comparative trading chart for the year in dispute as well as the preceding year is quoted below:

Assessment Year	Sales	Gross Profit	GP Ratio
2002-03	91991908	24167934.22	26.27%
2003-04	104485531	21048985.80	20.14 %
2004-05	155555112	22590659.63	14.52 %

22. The above chart shows the fall in GP ratio with reference to previous years, which was due to increase in cost of raw material, as per assessee. To verify the fall in GP rate, the Assessing Officer examined the books of account and found that the sale and purchase were found verifiable. However, on verification of weaving charges payment, it was found that although payment of Rs, 4,22,48,507 was disclosed to have been made to weavers after deducting tax at source however, only some of the weavers/contractors had permanent account number. About half of them, no permanent account number was

available. Total deduction of tax was Rs. 8,49,906, but in case of some of the weavers total payment of Rs. 589324 had been made as weaving charges without any deduction of tax at source. As the addresses of these persons were not complete, verification of weaving charges was not possible. Similarly in the case of manufacturing expenses, it could not be fully verified. The Assessing Officer recorded that the stock position and consumption of raw material and cost thereof cannot be correctly deduced as piece to piece manufacture, consumption, cost, sales is not correlated from the books kept by the assessee and therefore, in view of the unverifiability of the same with reference to the records of the recipients and non maintenance of proper stock records, the AO has invoked the provisions of Section 145(3) of the Act, 1961 and thereafter estimated the GP rate at 15 % as against the 14.52 %.

23. It may be stated here that section 145 (3) of the Act, provides that where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee or where method of accounting or accounting standards under subsection (2) have not been regularly followed by the assessee, The Assessing officer may make assessment in the manner provided under section 144 of the Income Tax Act.

24. The order of Assessing Officer was challenged in Appeal before the CIT(A). The Commissioner (Appeals) called for the books of account at the appellate stage and examined the same and noted that the assessee has debited an amount of Rs 4,28,37,831/- towards weaving charges, Rs 99,20,335 towards repairing charges and Rs 29,38, 933/- towards finishing charges. All these payments had been made in cash. Thus the CIT(A) recorded that there was substantial increase in

expenses towards the weaving and repairing, incurred in cash, as per the assessee, but the assessee failed to provide the details justifying the payment in cash towards the said charges. The CIT(A) had also taken note of the fact that there is decline in the cost of raw materials as compared to earlier years. On account of the said unexplained expenses, there is increase in total expenses which resulted in the decrease of the gross profit. He held that the expenses so made, are not verifiable and they are made through self made vouchers. He also recorded that the identity of the weavers could not be established and they could not be contacted and therefore payments made to them cannot be verified. The systematic stock register was not maintained. On being satisfied, the first appellate authority enhanced the addition by estimating the gross profit at 23.01 % and accordingly sustained the addition of Rs. 1,32,02,572/- which includes the addition made by Assessing Officer vide order dated 4.9.2006, after confirming the rejection of the books of account in absence of production of any qualitative details either in assessment proceeding or before it.

25. Being aggrieved, the assessee carried the matter to the Tribunal. The Tribunal confirmed the rejection of books of accounts and recorded the finding to the effect that the assessee has failed to get the weaving charges, manufacturing expenses verified as the addressees of many weavers were incomplete and consumption as well as stock could not be fully verified. It also noticed that there was a change in the method of recording payment of weaving charges, repairing charges and finishing charges. The accounts were opened and the payments had been rooted to the accounts of the weavers/contractors. Thus, it concluded that there is an

element of non-genuine expenses. It also took note that there is decline in the cost of raw materials as compared to earlier years. The stock register was not properly maintained and as such it was not possible to ascertain the quantitative details of stock, cost as per unit.

26. Tribunal also noted that the assessee has failed to explain satisfactorily before it as to what was the reason for decline in the gross profit rate and increase in the manufacturing expenses and in absence of any reliable material on record, learned Tribunal did not interfere in the findings arrived at by the authorities below and held that the authorities below were justified in rejecting the book result of the assessee under Section 145(3) of the Act.

27. The Tribunal has recorded categorical finding that the assessee has failed to prove genuineness of weaving charges and no explanation was given as to why weaving charges were kept outstanding in the books of account for years together and even the complete addresses of the weavers were not furnished. Apart from this, a finding has been recorded that in case of half of the weavers no PAN number was provided before the authorities.

28. In the instant case, the burden to establish the identity of the weavers and the genuineness of the transaction rested on the assessee, which was never discharged. Thus upon failure to disclose and establish the identity, an adverse inference has been recorded.

29. The assessee having not led any evidence in the proceedings before the authorities below could not derive any benefit that the Assessing officer and CIT(A) did not summon the weavers. Once the identity of the weavers was not established the assessee could not in any case claim to

establish the genuineness of the transaction. Therefore, the objection raised by the counsel for the assessee as to summoning the persons in question is largely inconsequential.

30. Section 251 of the Income Tax Act provides for the powers of the Commissioner (Appeals). Clause (a) of subsection (1) of section 251 provides that the Commissioner (Appeal) may confirm, reduce, enhance or annul the assessment.

31. Sub section (2) of section 251 provides that the Commissioner(Appeals) shall not enhance an assessment unless the appellant has had a reasonable opportunity of showing case against such enhancement. In the instant case , a show cause notice dated 17.07.2006 was sent and after having considered the reply of the assessee, the CIT(A) considered the previous history of the assessee and concluded that the observation of the Assessing Officer was not based on past record and held that the past history proved that the appellant had disclosed G.P. Rate of 26.27% and 20.14% in the preceding years . The CIT (A) also concluded that the books of accounts are to be rejected being defective and on account of non-verifiability of the expenses.

32. So far as the enhancement of the gross profit rate from 14.52 % to 23.01 % by the CIT (Appeals) was concerned, Tribunal held that the CIT (Appeals) was right in estimating the gross profit rate on the basis of the previous history of the assessee particularly when huge manufacturing expenses have been claimed by the assessee.

33. The assessee has given details of sales for the assessment year under appeal and the preceding assessment years along with computation of gross profit rate but the Assessing Officer rejected books of account on the ground of

non maintenance of stock records and the CIT(A) on appeal has sustained the rejection of books of account of the assessee for want of stock records. Therefore, the findings of CIT(A) on the said point cannot be said to be faulted with when the assessee failed to explain the reason for non maintenance of the stock register and also made a bald statement that it is practically not possible for assessee to maintain stock register. The appellant-assessee failed to submit any cogent explanation.

34. Whether the books of account were being properly maintained or not, whether all the entries about the sale transactions therein were made or not, whether stock register was being maintained properly or not, are all questions of fact. The main issue with regard to weaving charges, the same remained unverified on account of non furnishing of necessary details of the weavers by the assessee. In such circumstances, the Tribunal has come to a conclusion that the assessing officer, has, rightly invoked the provisions of Section 145(3) of the Act and rejected the books of account. This action of the assessing officer has been upheld on the factual satisfaction so recorded, not only by CIT (Appeals) but also by the ITAT. The Tribunal has noted the findings of CIT (Appeal) in para 4 of its judgment.

35. The Tribunal has further recorded that the assessee did not bring on record any material or evidence to contradict the findings of the lower authorities and has failed to explain satisfactorily before the Tribunal as to what was the reason for decline in the gross profit rate and increase in manufacturing expenses. The rejection of books of account is based on due application of mind to relevant facts. It is not based on surmises and conjectures. Detailed reasoning has been recorded by the

authorities for the said rejection.

36. The judgement relied upon by the assessee in the case of ***M/s Kaka Carpets vs Commissioner of Income Tax, Varanasi, Income Tax Appeal No. 8 of 2008***, delivered on 28.04.08 is not applicable to the facts of the present case as in present case, the rejection of books of account had arisen because the assessee could not produce the details of the weavers to whom heavy payments had been made, whereas in the case of Kaka Carpets (supra) that assessee had placed on record individual affidavits of the weavers to whom it had made payments.

37. In this regard, we find that the Hon'ble Supreme Court in the case of ***M/S Kachwala Gems, Jaipur Vs Joint Commissioner of Income Tax reported in (2007) 288 ITR 10 (SC)***, has held as follows.

It is well settled that in a best judgement assessment there is always a certain degree of guess work. No doubt the authorities concerned should try to make an honest and fair estimate of the income even in a best judgment assessment, and should not act totally arbitrarily, but there is necessary some amount of guess work involved in a best judgment assessment, and it is the assessee himself who is to blame as he did not submit proper accounts. In our opinion there was no arbitrariness in the present case on the part of Income-Tax authorities. Thus, there is no force in this appeal, and it is dismissed accordingly. No costs.

38. In the case of ***Shri Venkateswar sugar mills V/s CIT (2012) 341 ITR 588 (AIID)***. In paragraph no. 12, 13 and 14 it has been laid down as follows.

12. For the assessment year under consideration, the assessee has shown the G.P. Rate 16.20 per cent, as against 33.44 percent. In the previous assessment year. Thus, during the assessment year under consideration, the G.P. Rate was low. The commissioner of Income- tax (Appeals) discussed the facts and circumstances pertaining to the

manufacturing cost and selling price. The Assessing Officer has taken the G.P. rate at 27 percent. When the books of account were not properly maintained and the vouchers pertaining to the consumable items were not available for verification, then we find justification for rejection of the books of accounts by the Assessing Officer. Once the books of account are rejected, then there is no option before the Assessing Officer except to estimate the sale and G.P. Rate which he determined by taking by taking by comparative figure of the assessee for the previous assessment year. The Tribunal has already given the partial relief in the facts and circumstances of the case, there is no scope to give any further relief specially when the estimation is a question of fact. The Tribunal is a final fact finding authority as per the ratio laid down in the case of *Kamala Ganapathy Subramaniam V. CED* (2002) 253 ITR 692 (SC).

13. In the instant case, the addition is made on the estimate basis, which is a question of fact as per the ratio laid down in the case of *Utkal Road Lines v. Registrar, ITAT* (2011) 336 ITR 149 (Orissa), wherein it was observed that the application of G.P. Rate on estimate basis is a question of fact. The hon'ble Supreme Court in the case of *CIT v. Indo Nippon Chemicals Co. Ltd.* (2003) 261 ITR 275 (SC) observed that valuation of raw material for the purpose of tax on estimate basis is a question of fact. Similar views were expressed in the following cases:

1. *New Plaza Restaurant v. ITO* (2009) 309 ITR 259 (HP) :
2. *Sanjay Oilcake Industries v. CIT* (2009) 316 ITR 274 (Guj):
3. *Shri Ram Jhanwar Lal V. ITO* (2010) 321 ITR 400 (Raj).
4. *Zora Singh v. CIT* (2008) 296 ITR 104 (P&H):
5. *Bharat Hari Singhania v. CWT* (1994) 207 ITR 1 (SC) ; (1994) Suppl. (3) SCC 46;
6. *CIT v. Green world Corporation* (2009) 314 ITR 81 (SC) ; (2009) 7 SCC 69 ; and
7. *Brij Lala v. CIT* (2010) 328 ITR 1 (SC); (2011) 1 SCC 1.

14. In view of the above, no substantial question of law is emerging from the impugned order. Hence, we find no reason to interfere with the impugned order passed by the Tribunal which is hereby sustained along with reasons mentioned therein.

39. We have also gone through the findings arrived at by the Tribunal as well as by the CIT (Appeals) and find that under the circumstances, the AO was right in invoking the provisions of Section 145(3) in rejecting the book result and estimating the gross profit. The assessee could not lead any evidence to the satisfaction of the AO to prove its genuineness. As regards the adoption of gross profit rate @23.01% the Tribunal has upheld the reasoning given by the CIT(A) wherein the CIT(A) has taken the average of the gross profit rate of the two preceding assessment years after considering the previous history of the assessee. On this issue, we find that the finding recorded by the Tribunal is a concluded finding of fact recorded on the basis of material and evidence on record and warrants no interference.

40. The law as to what amounts to substantial question of law is also well settled. It has been emphasized that the finding of fact recorded by the AO or the first appellate authority or the Tribunal cannot be disturbed by the High Court in exercise of powers under Section 260-A of the Act unless such finding is perverse or is such which no person of reasonable prudence could arrive at in the given facts of the case.

41. Undisputedly the powers of First Appellate Authority in matters of assessment are co-extensive with the Assessing Authority, in so far as the CIT (A) had issued a notice and thereafter made the enhancement on the basis of relevant material, no question of law may arise against such estimation as it would remain a finding of fact. In so far as the enhancement made by the CIT (A) is based on cogent material and evidence, the said finding does not suffer from any error of Law.

42. In **M. Janardhana Rao Vs Joint CIT, reported in (2005)**

273 ITR 50 (SC), the Hon'ble Supreme Court held that in the exercise of the powers under Section 260-A of the Act, the findings of fact of the Tribunal cannot be disturbed. The Hon'ble Court held as follows.

14. Without insisting on the statement of substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Court is not empowered to generally decide the appeal under Section 260A without adhering to the procedure prescribed under Section 260A. Further, the High Court must make every effort to distinguish between a question of law and a substantial question of law. In exercise of powers under Section 260A, the findings of fact of the Tribunal cannot be disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in Section 260A must be strictly fulfilled before an appeal can be maintained under Section 260A. Such appeal cannot be decided on merely equitable grounds.

(emphasis supplied)

43. Thus, we do not find any infirmity in the order of the Tribunal. The findings recorded by it are clearly findings of fact based on material evidence. In view of the above we answer the question no. 1, 2, 3 and 4 in favour of revenue and against the assessee.

44. The appeal is dismissed. No costs.

Dated: 12.07.2019

RavindraK Singh

(Vivek Varma, J.) (Bharati Sapru, J.)