

ORDER SHEET

ITA NO.316 OF 2009
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION(INCOME-TAX)
ORIGINAL SIDE

M/S. KALYANI MEDICAL STORES
Versus
COMMISSIONER OF INCOME TAX, BURDWAN & ANR.

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ASHA ARORA

Date : 15th June, 2016.

MR.R.K.BISWAS, MR.AVRA MAZUMDER,ADVOCATES FOR APPELLANT
MR.P.K.BHOWMICK,ADVOCATE FOR RESPONDENTS

The Court : The appeal is directed against a judgment and order dated 10th July, 2009 by which the Income Tax Appellate Tribunal “C” Bench, Kolkata in ITA No.72/Kol/2009 dismissed the appeal preferred by the assessee agreeing with the order passed by the learned CIT(A). Brief facts of the case are stated as follows:-

The assessee had in its trading account shown purchase of Rs.1,12,81,262/- whereas sale was shown at Rs.1,18,82,877/-. The assessing officer was of the opinion that the assessee had failed to prove the purchases to the extent of Rs.9,23,142/-. He, therefore, added the aforesaid sum to the income of the assessee and in an appeal filed by the assessee, the CIT deleted the addition.

In a further appeal filed by the revenue, the learned Tribunal by its order dated 10th May, 2006 restored the matter to the file of the assessing officer giving one more opportunity to the assessee to prove purchases worth Rs.9,23,142/- from JKDPL. In spite of opportunity being granted, the assessee was unable to adduce satisfactory evidence as regards the aforesaid purchases from JKDPL. In that view of the matter, the assessing officer once again added the sum to the income of the assessee.

The CIT(A) accepted purchases to the extent of a sum of Rs.52,501/-. He, therefore, reduced the addition to a sum of Rs.8,70,641/-. There is some doubt whether the amount is Rs.8,70,641 or the sum of Rs.8,70,671. But that is not of much importance. In an appeal preferred by the assessee, the learned Tribunal confirmed the addition relying on the judgment of the Andhra Pradesh High Court in the case of CIT Vs. Transport Corporation of India and a judgment of the

Supreme Court in the case of CIT Vs. Calcutta Agency Limited, where it was held that if the assessee failed to establish the fact necessary to support his claim for deduction, the claim was not admissible. It is against this order of the learned Tribunal that the present appeal has been preferred by the assessee.

The question whether the assessee had purchased the goods worth Rs.8,70,671/- or Rs.8,70,641/- from JKDPL is essentially a question of fact. The assessee has been unable to prove that the aforesaid purchases were in fact made. The finding arrived at by the CIT(A) and the learned Tribunal has become final and no interference is possible.

The questions formulated at the time of admission of the appeal are as follows:-

- (i) *Whether on the facts and in the circumstances of the case the Tribunal is justified in law in confirming the addition of Rs.8,70,641/- as bogus expenditure in absence of primary evidence after totally ignoring all the secondary evidence namely books of accounts, cash book, purchase ledger, profit and loss account and balance sheet etc. of the assessee firm produced by the appellant before the Tribunal in support of its claim when all the items of medicines deals with by the Appellant are M.R.P. (Maximum Retail Price) based products ?*

- (ii) *Whether on the facts and circumstances of the case the Tribunal is justified in law in accepting the amount of total sale at Rs.1,18,82,877/- as disclosed by the Appellant in his books of account but at the same time confirmed the rejection of purchase amounting to Rs.8,70,641/- as bogus purchase out of the total purchase price at Rs.1,12,81,262/- as disclosed by the Appellant when all the items of medicines deals with by the appellant are MRP (Maximum Retail Price) based item ?”*

From the judgment of the learned Tribunal our attention has not been drawn by Mr.Biswas to any discussion as regards any secondary piece of evidence to show that the aforesaid purchases were made. On the contrary, the finding recorded by the learned Tribunal in that regard is as follows:-

“the assessee failed to establish the genuineness of the purchases from JKDPL as claimed by it”

We have enquired of Mr.Biswas and from his submission we understand that the purchase bills of less than Rs. 20,000/- were not produced. The payments, according to him, were made all in cash. The stock register was not produced. The absence of these documents go to suggest that the purchase from JKDPL may be a bogus purchase. In any

event the view taken by the assessing officer, CIT(A) and the learned Tribunal is not an impossible view. If the assessee chooses to withhold the best evidence and relies on the secondary evidence even assuming that any secondary piece of evidence was adduced then the presumption in law shall be against the assessee.

Reference may be made to Clause (g) of Section 114 of the Indian Evidence Act, 1872, which provides that “*The Court may presume-*

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.”

We, as such, are of the opinion that the question no.1 has to be answered in the affirmative and against the assessee-appellant.

The question of any lapse on the part of the learned Tribunal in accepting the sales at a sum of Rs.1,18,82,877/- did not arise because the aforesaid figure was furnished by the assessee himself. The assessee admits that the sale was for the aforesaid sum. What the assessee has done is that he tried to reduce the profit by showing artificial purchases. When the assessee was unable to show genuineness of those purchases the amount of profit is bound to be increased. Therefore, the question no.2 is also answered in the affirmative and against the assessee. In the result, the appeal fails and is dismissed.

Parties shall, however, bear their own costs.

(GIRISH CHANDRA GUPTA, J.)

(ASHA ARORA, J.)

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