(2013) 07 RAJ CK 0312

In the Rajasthan High Court

Case No : IT Appeal No. 268 of 2010

CIT APPELLANT

Vs

Babulal Agarwal RESPONDENT

Date of Decision : 10-07-2013

Acts Referred:

Citation : (2013) 07 RAJ CK 0312

Hon'ble Judges : N.K. Jain, J;Dinesh Maheshwari, J

Bench : Division Bench

Judgement

Dinesh Maheshwari, J.—By way of this appeal u/s 260A of the Income Tax Act, 1961 (the Act), the Revenue seeks to question the order dt. 20-11-2009 passed by the Tribunal, Jaipur Bench, Jaipur in ITA No. 1473/Jp/2008 for the assessment year 2005-06.

2. It may be pointed out at the outset that the aforesaid ITA No. 1473/Jp/2008 by the Revenue was earlier considered and partly allowed by the Tribunal on 13-2-2009. However, the said order dt. 13-2-2009 was recalled by the Tribunal on 25-5-2009 while allowing an application (Misc. Appln. No. 24/Jp/2009) moved on behalf of the assessee, stating the grievance against denial of adequate opportunity of hearing. The said order dt. 25th May, 2009 was sought to be questioned by the Revenue in this Court in D.B. IT Appeal No. 407 of 2011. The said appeal, was, however, dismissed as infructuous by this Court on 6-8-2012, essentially for the reason that since after recalling its earlier order, the Tribunal had decided the main appeal (ITA No. 1473/Jp/2008) by the impugned order dt. 20-11-2009, which has been challenged in the instant appeal.

3. In this appeal, the Revenue has suggested the following as substantial questions of law for consideration :

"(i) Whether on the facts and in circumstances of, the case the Tribunal was justified in law in deleting addition made on account of trading addition despite the fact that invoking of provisions of section 145(3) has been upheld?

(ii) Whether on the facts and in circumstances of the case the Tribunal was justified in law in deleting addition of Rs. 13,05,091 made on account of unexplained expenditure in marriage without considering the material and facts discussed by the assessing officer ?"

4. In brief, the relevant background aspects of the matter are that the respondent-assessee is engaged in manufacturing and trading of bed sheets, cotton cloths, general cloths and quilts. During the year under consideration, he had shown gross profit of Rs. 8,28,531 on a total turnover of Rs. 1,11,55,235, while giving GP rate at 7.43 per cent.

5. The assessing officer proceeded to complete the assessment while taking the total income at Rs. 17,42,360 as against the returned income of Rs. 2,30,830. The assessing officer observed that the assessee did not maintain stock register; and quantitative and qualitative details of goods could not be verified; and the sales were also not verifiable. The assessing officer rejected the books of accounts and, invoking the provisions of section 145(3) of the Act, estimated the gross profit by applying GP rate on the estimated sales. The assessing officer applied GP rate of 8.5 per cent on the estimated turnover of Rs. 1.20 crores, resulting into the trading addition of Rs. 1,91,439.

6. The assessing officer further found that during the year under consideration, marriage of two daughters of the assessee were solemnized but the assessee failed to furnish complete details as regards various expenditures on engagement/ring and marriage ceremonies. The assessing officer deduced that the assessee had incurred more than the declared expenditure on the ceremonies and, while putting an estimate of Rs. 14,79,591 on expenditure and considering the gifts received by the daughters at Rs. 1,74,500, made an addition of Rs. 13,05,091 on account of unexplained and undisclosed expenditure. After making certain more additions, the assessment was completed on the total income of Rs. 17,42,360.

7. In appeal by the assessee, the CIT(A)-II, Jaipur proceeded to delete the abovereferred additions, in the trading result and towards unexplained expenditure, as made by the assessing officer. As regards the trading addition of Rs. 1,91,439, the Commissioner (Appeals) observed, with reference to the decided cases, that mere rejection of books of accounts would not necessarily lead to addition in the returned income. The Commissioner (Appeals) further observed that the assessee had shown 7.43 per cent GP rate as against 7.01 per cent for the last year, which was of better trading result. The Commissioner (Appeals) also referred to the decision of this Court in Kansara Bearings (P) Ltd. Vs. Assistant Commissioner of Income Tax, wherein this Court had observed that the last years profit declared by the assessee was the best guide for application of profit rate. The Commissioner (Appeals), therefore, found the assessing officer not justified in applying GP rate of 8.5 per cent and deleted the trading addition of Rs. 1,91,439.

8. With regard to the addition of Rs. 13,05,091 on account of alleged unexplained expenditure relating to engagement/ring and marriage ceremonies of two daughters, the Commissioner (Appeals) found the approach of the assessing officer unjustified and deleted such addition while observing as under :

"I have considered facts of the case and arguments taken by Shri Khandelwal quite carefully. It is seen that except the statement recorded of these daughters and son in law, the assessing officer was not having any evidence with her in support of estimate of expenditure made by her. From time to time in various communication to assessing officer it were clearly explained by assessee also which were ignored by the assessing officer while estimating these expenditures. I have gone through the copies of letter dt. 17-9-2007, 26-11-2007 and 27-11-2007 in which detailed explanation for expenditure incurred on various heads and sources thereof were explained to the assessing officer. During the course of appellate proceedings on the basis of statement given by Shri Neeraj and Pushpa Agarwal to the assessing officer and by Shri Dheeraj Kumar and Preeti Agarwal before the assessing officer such expenditure on marriage of Pushpa Agarwal are worked out at Rs. 3,25,000 and on the marriage of Preeti Agarwal it is worked out at Rs. 6,25,000. It is seen that both the daughters of the appellant were assessed to tax. They were filing their IT return along with "capital account and balance sheet. Smt. Pushpa Agarwal has shown Rs. 2,35,023 from her capital account and assessing officer himself has accepted 41,000 gift to her and taking together the explained source becomes Rs. 2,76,000. Over and above, it is quite natural that the gold ornament of Rs. 50,000 were given by her mother namely Smt. Lalita Agarwal who is also assessed to tax since long. Similarly, in the case of Preeti Agarwal there were withdrawals from her bank account of Rs. 6,02,554 and the credits in the bank account were also explained as refund of deposit with various firms which were shown in earlier balance sheet as on 31-3-2004. Under these circumstances, in totality of the facts when assessing officer was not having any evidence of expenditure estimated on the engagement/ring ceremony and on marriage of his two daughters except the statement recorded of the daughters and son in law of the appellant and on this basis also the estimate of expenditure made by assessing officer were found on much higher side and accordingly, in my considered view the additions made for estimated expenditure on engagement and marriage ceremony over and above explained sources as discussed in the appellate order and as explained to assessing officer form time to time in assessing proceedings from time to time by the appellant does not survive and the same is hereby deleted at Rs. 13,05.091."

9. In further appeal by the Revenue (ITA No. 1473/Jp/2008), the Tribunal in its impugned order dt. 20-11-2009 has affirmed the observations and findings of the Commissioner (Appeals) and has held (as) justified the deletions ordered by the Commissioner (Appeals). As regards trading additions, the Tribunal has observed as under :

"We have heard the rival contentions and perused the facts of the case. The assessee is not maintaining the stock register on day to day basis and therefore, the results declared by the assessee cannot be relied upon and accurate income cannot be deduced therefrom. Therefore, the learned Commissioner (Appeals) has rightly confirmed the application of section 145(3) of the Act. As regards the estimation of income, we concur with the view of learned Commissioner (Appeals) who has rightly deleted the addition, since the results declared by the assessee are better during the impugned year as compared to the results declared by the assessee in immediately preceding year in view of the decision of Hon''ble jurisdictional High Court in case of Commissioner of Income Tax Vs. Gotan Lime Khanij Udhyog, Thus ground No. 1 of the Revenue is dismissed."

10. As regards the additions pertaining to the expenditure on the engagement and marriage ceremonies of the daughters, the Tribunal has examined in detail the estimate put by the assessing officer on the expenditure and that given out by the assessee; and has found the approach of the assessing officer based on his own guess work not justified while observing, inter alia, as under :

"We find that the assessing officer has recorded the statement of the daughter of the assessee Smt. Priti Agarwal and husbands of both the daughters. In their statement they have stated the estimated amount of expenditure. The assessing officer has not considered these statements and made the estimation on his own guess work. Therefore, the estimation made by assessing officer is rightly held by the Commissioner (Appeals) as without any basis and on higher side. So far as the source of expenditure is concerned, the same is out of the withdrawals made by daughter of the assessee which is duly reflected in the bank account/ return of income. The assessing officer has not considered that both the daughters of the assessee are income tax assessees and regularly filing return of income from last 6-7 years. In statement both the daughters stated that the parents have spent only upto the amount given by way of gifts and gold ornaments and remaining amounts were spent by each of the daughters from their own funds. The source of expenses is verifiable from their bank statements/ return as explained above. In view of above, the learned Commissioner (Appeals) has rightly deleted the addition and we uphold his order by dismissing the ground No. 2 of the Revenue."

11. Seeking to question the order so passed by the Tribunal, it is contended on behalf of the appellant-Revenue that the assessee had not properly explained and justified the book profit; and the assessing officer has made the addition in trading result after giving proper opportunity to the assessee. It is submitted that the deficiencies in the accounts having not been explained and invoking of s. 145(3) having been upheld, there was no reason for deleting the additions made by the assessing officer, It is further submitted that on the admitted fact situation where the assessee did not maintain stock register and sales were also not verifiable, application of GP rate of 8.5 per cent on the estimated turn over of Rs. 1.20 crores, resulting into trading addition of Rs. 1,91,439, did not suffer

from any error and the Tribunal has not been justified in deleting such a justified addition.

12. It is yet further submitted that during the year under consideration, marriage of two daughters of the assessee was solemnized but the assessee failed to furnish complete details with evidence for various expenditures; and In the given circumstances, the assessing officer made the estimate with reference to the statements recorded. It is also submitted that as per the prevailing social norms and the status of the assessee, the estimate put by the assessing officer on the marriage expenditure was justified and called for no interference.

Before me, no contrary decision of any other Hon''ble High Court or of the Hon''ble Supreme Court has been cited at the bar. In these facts of the case, I am bound by the ratio of the decision of the Rajasthan High Court cited supra, and since no contrary decision of any other Hon''ble High Court is brought to my knowledge, I respectfully following the same, agree with the order of the learned JM on the issue recorded in the points of difference by the learned Members of the Rajkot Bench in favour of the assessee and against the Revenue, and the points of differences referred to me by the learned JM and the learned AM are answered accordingly.

13. The matter will now go back to the Division Bench for passing order in accordance with majority view.

By The Bench:

14. The aforesaid appeals were listed for hearing pursuant to the directions given by the Hon''ble jurisdictional High Court to which reference has been made in the order of the AM. The order as proposed by the AM was dissented from by the JM. In terms of s. 255(4), the points of difference as emerging from their respective orders were referred separately by both the Members to the Hon''ble President of this Tribunal for reference to the Hon''ble Third Member for his opinion. The Hon''ble Vice President (Ahmedabad Zone) of this Tribunal was appointed as Third Member by the Hon''ble President. The opinion of Third Member has since been received in which the points of difference as referred by both the Members to the Hon''ble President have been reproduced. They are therefore not being reproduced here.

15. On receipt of opinion of the Third Member, the matter was listed for hearing for passing consequential order u/s 254(1). While the assessee did not enter appearance, the Revenue was represented by the learned Departmental Representative.

16. At the time of hearing, the learned Departmental Representative submitted that the Hon''ble Third Member has not expressed any opinion on. any of the points of difference referred by the AM to the Hon''ble President u/s 255(4). In this connection, he also referred to the judgment dt. 26-6-2012 of the Hon''ble jurisdictional High Court in Amod Stampings Pvt. Ltd. Vs. Commissioner of

Customs, He pleaded that the submissions made by him during the course of hearing before the Hon''ble Third Member have also not been dealt with in the opinion of the Hon''ble Third Member. In support of the aforesaid, the learned Departmental Representative has filed written submissions, which read as under :

"On account of the difference in opinion between the two Members, the case was referred to the Third Member which was heard on 3-5-2013. Both the Members had framed different questions in respect of points of difference between them. While the AM had framed 8 questions, the JM framed one general question. The Hon''ble Third Member vide his order dt. 13-5-2013 has reproduced the questions framed by the AM but has not dealt with them in his order. He has passed an order dealing with the facts of the case in general and has failed to answer the specific and pointed questions framed by the AM.

During the proceeding before the Third Member the learned counsel of the assessee had filed an unreported judgment of the Hon''ble Rajasthan High Court in the case of CIT v. Jitendra Singh Rathore in IT Appeal No. 90 of 2007 dt. 10-1-2013. When confronted to the undersigned it was pointed out, that in the case of Jitendra Singh Rathore (supra) there was a finding of the court in para 8 that the provision of penalty u/s 271D did not have any connection with the order in appeal before the Commissioner (Appeals) and, therefore, the penalty u/s 271D could have been passed without waiting for the order of the Commissioner (Appeals) u/s 275(1)(c). The attention of the Member was drawn to the fact that in the case of the assessee cash credit found during the course of search were treated as unexplained and added to the income of the assessee. The assessee was before the Commissioner (Appeals) in respect of this addition. Simultaneously proceedings u/s 271D were initiated, protectively treating this cash credit as loan. Therefore, if the addition was confirmed by the Commissioner (Appeals) then the proceedings u/s 27ID would have become infructuous and if the addition was deleted by the Commissioner (Appeals) then a valid order u/s 27ID could have been passed. It was clearly pointed out that both the orders were interlinked and inseparable from each other. The order u/s 27ID was required to be passed only after the order of Commissioner (Appeals) against the assessment. Therefore, the case of the present assessee was distinguishable from the case of Jitendra Singh Rathore (supra) and in view of the facts and circumstances the penalty order u/s 271 would be covered u/s 275(1)(a) and not 275(1)(c). The Third Member has passed an order without considering the arguments made by me.

This submission is made in respect of the proceedings by the Hon''ble Tribunal giving effect to the order of the Hon''ble Third Member."

17. All the facts are available on record. Relevant issues/points of difference framed by both the Members have already been reproduced in the order passed by the Hon''ble Third Member. This matter has seen two rounds of litigation before this Tribunal and one round of litigation before the Hon''ble High Court. Be that as it may, the Hon''ble Third Member has agreed with the opinion expressed

by the JM that the impugned penalty should be deleted. In this view of the matter, the impugned penalties are cancelled. Resultantly both the appeals filed by the Revenue are dismissed.

