
(2011) 01 GUJ CK 0003
In the Gujarat High Court
Case No : Tax Appeal No. 1090 of 2009

CIT

APPELLANT

Vs

Vijay M. Mistry Construction Ltd.

RESPONDENT

Date of Decision : 10-01-2011

Acts Referred:

Income Tax Act, 1961 — Section 133(6), 260A, 40A(2)

Citation : (2011) 01 GUJ CK 0003

Hon'ble Judges : Harsha Devani, J;H.B. Antani, J

Bench : Division Bench

Advocate : M.R. Bhatt, for Mauna M. Bhatt, for the Appellant; R.K. Patel, for the Respondent

Final Decision : Dismissed

Judgement

Harsha Devani, J.—In this appeal u/s 260A of the Income Tax Act 1961 (the Act), the Appellant revenue has challenged order dated 5-9-2008 made by the Income Tax Appellate Tribunal (the Tribunal), proposing the following questions:

(A). Whether the Appellate Tribunal has correctly appreciated the facts on record so as to confirm addition to the extent of 25% only out of the addition made in respect of bogus purchases from G.M. Traders and Steel Trading Co.?

(B). Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by the Commissioner (Appeals) deleting the addition of Rs. 7,88,590/- made on account of inflation in purchase cost of MMTC?.

(C). Whether the Appellate Tribunal has correctly appreciated the facts on record so as to confirm addition to the extent of 25% only out of the addition made in respect of cash withdrawal from MMTC/GMT?

(D). Whether the Appellate Tribunal has correctly appreciated the facts on record so as to confirm addition to the extent of 25% only out of the addition made in respect of purchases from N.D. Steel Traders?.

(E). Whether the Appellate Tribunal has correctly appreciated the facts on record so as to confirm addition to the extent of 25% only out of the addition made in respect of purchases from Krunal Enterprises?

(F). Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by the Commissioner (Appeals) deleting the addition of Rs. 44,54,426/- made on account of purchase of Crane and allowing depreciation on the same?

2. The assessment Year is 1997-98 and the relevant accounting period is the year that ended on 31-3-1997. The assessing officer with a view to verify the genuineness of the parties supplying iron and steel items to the Assessee, called for information u/s 133(6) of the Act. In most of the cases, replies were received. However, in two cases, viz., M/s. G.M. Traders (GMT) and M/s. Steel Trading Co. (STC), the assessing officer deputed his Inspector to verify their address and existence and it was reported by the Inspector that the addresses were of residential premises. The assessing officer, therefore, made enquiries from the bank where the cheques issued by the Assessee were encashed. After making further enquiries which indicated that in many cases the cheques were encashed by employees of the Assessee and that withdrawals were made in cash, the assessing officer ultimately framed assessment u/s 143(3), inter alia disallowing the cash withdrawn by STC and GMT of Rs. 13,04,400/- and Rs. 36,26,650 respectively, in all Rs. 49,31,050/-. The Assessee went in appeal before the Commissioner (Appeals). The Commissioner (Appeals) after appreciating the evidence on record was of the view that though the aforesaid two parties had issued bills but actually purchases had been made in cash which must have resulted into saving the cost, but the purchase price had been inflated. The Commissioner (Appeals) was further of the view that had the intention of the Assessee been fair and bonafide, there was no need to make purchases from the said concerns and then withdraw cash through the employees of the Assessee. Upon considering the facts and circumstances of the case, the Commissioner (Appeals) was of the view that the ends of justice would be met if out of the cash withdrawal which the assessing officer has totally disallowed as bogus purchase, 20% is disallowed which will make up the inflation of purchase price of the material purchases through the said associate concerns, viz., GMT and STC. He, accordingly, confirmed 20% disallowance out of Rs. 49,31,050/-. While confirming the disallowance to the extent of 20%, the Commissioner (Appeals) placed reliance upon a decision of the Tribunal in the case of Vijay Proteins reported in 58 ITD 432.

3. In revenues appeal before the Tribunal, it was contended that even if the decision of the Tribunal in the case Vijay Proteins (supra) were to be followed, the Commissioner (Appeals) ought to have restricted the addition to 25% and not 20%. The Tribunal in the impugned order, after appreciating the evidence on record enhanced the disallowance to 25% of the cash withdrawals by following its earlier order in the case of Vijay Proteins.

4. Mr. M.R. Bhatt, learned senior advocate, appearing on behalf of the Appellant revenue submitted that the decision of the Tribunal in the case of Vijay Proteins (supra) is subject matter of challenge before this Court in IT Reference No. 139 of 1999. It was submitted that in the circumstances, the appeal deserves to be admitted and the question of law as proposed or as may be deemed fit by the court is required to be formulated.

5. On the other hand, Mr. R.K. Patel, learned advocate appearing on behalf of the Respondent Assessee on caveat, opposed admission of the appeal submitting that the controversy involved in the present case stands concluded by various decisions of this Court as well as a decision of the Supreme Court. The learned advocate placed reliance upon the decisions of this Court in the case of Sanjay Oilcake Industries Vs. Commissioner of Income Tax, as well as in the case of Deputy Commissioner of Income Tax v. Adinath Industries (2001) ITR 476 . Reliance was also placed upon the decision of the Supreme Court in the case of Kachwala Gems, Jaipur Vs. Joint Commissioner of Income Tax, Jaipur,

6. As is apparent from the facts noted hereinabove, the Commissioner (Appeals) after appreciating the evidence on record has found that the Assessee had in fact made the purchases and hence the assessing officer was not justified in disallowing the entire amount. He, however, was of the view that the Assessee had inflated the purchases and accordingly, by placing reliance on the decision of the Tribunal in the case of Vijay Proteins (supra) restricted the disallowance to 20%. The Tribunal in the impugned order has followed its earlier order in the case of Vijay Proteins to the letter and enhanced the disallowance to 25%. Thus, in both cases, the decision of the Commissioner (Appeals) as well as that of the Tribunal is based on estimate. This High Court in the case of Sanjay Oil Cake (supra) has held that whether an estimate should be at a particular sum or at a different sum can never be a question of law.

7. The Apex court in the case of Kachwala Gems (supra) has held that in a best judgment assessment there is always a certain degree of guess work. No doubt, the authorities 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 necessarily some amount of guess work involved in a best judgment assessment.

8. Examining the facts of the present case in the light of the aforesaid decisions, the decision of the Tribunal, being based on an estimate, does not give rise to any question of law so as to warrant interference.

9. Insofar as the proposed questions (C), (D) and (E) are concerned, the same are similar to proposed question (A) wherein the Tribunal has restricted the addition to 25% on similar facts. In the circumstances, for the reasons stated hereinabove, the said grounds of appeal do not give rise to any question of law.

10. As regards proposed question (B) which pertains to deletion of addition of Rs. 7,88,590/- made on account of inflation of expenses paid to Metal and Machine

Trading Co. (MMTC), the assessing officer has found that MMTC was a partnership firm of Shri Nitin Gajjar along with his father and brother operating from Bhavnagar. A perusal of their transactions with the Assessee indicated that there is some inflation of expenses as detailed in paragraph 6.1 of the assessment order. After considering the evidence on record, the assessing officer disallowed the amount Rs. 7,88,590/- on account of payment made to MMTC.

11. The Assessee preferred appeal before the Commissioner (Appeals), who upon appreciation of the evidence on record found that the assessing officer had not rejected the genuineness of the purchases made from MMTC while making the disallowance. His observations were based on inflation of rates which were being charged from the Assessee. According to the Commissioner (Appeals) though MMTC in some respect could be attributed to be associated with the Assessee Company, still it could not be expected that MMTC was carrying out its business without any motive or profit. According to the Commissioner (Appeals) it was proved by the Assessee that the rates charged by MMTC were comparable with the prevailing market rates, no such addition can stand. The Commissioner (Appeals) took note of the fact that it was not the case of the assessing officer that the purchases had been directly effected from third parties and not directly from MMTC; the difference could not be the net profit in the hands of MMTC; and that while conducting the entire exercise MMTC would have to incur certain expenditure in transportation, in engaging personnel in the office and other operations and was accordingly of the view that there was no case of actual inflation of rates and deleted the addition.

12. The Tribunal, in the impugned order has concurred with the findings recorded by the Commissioner (Appeals) and has found that the Assessee had made purchases from MMTC at prevailing market rates and that MMTC had incurred certain expenditure in engaging personnel in the office and other operations and would make some income from the entire exercise. In the circumstances the purchases made by the Assessee from MMTC would not be hit by the provisions of Section 40A(2) of the Act.

13. Thus, the conclusion arrived at by the Tribunal is based on concurrent findings of fact recorded by the Commissioner (Appeals) as well as the Tribunal. It is not the case of the revenue that the Tribunal has taken into account any irrelevant material or that any relevant material has not been taken into consideration. In the absence of any material to the contrary being pointed out on behalf of the revenue, the impugned order being based on concurrent findings of fact recorded by the Tribunal upon appreciation of the evidence on record, does not give rise to any question of law insofar as the present ground of appeal is concerned.

14. In relation to proposed question (F) which relates to deletion of addition of Rs. 44,54,426/- made on account of purchase of Crane and allowing depreciation on the same, the assessing officer observed that the Assessee had purchased a Crawler Crane for an amount of Rs. 24,61,000/- excluding the cost of spare parts

of Rs. 14,98,490/-. The assessing officer after examining the evidence on record and considering the explanation given by the Assessee, made addition of Rs. 44,54,426/- Rs. 39,59,490/- being the purchase price of the Crane along with its spare parts and Rs. 4,94,936/- being depreciation claimed by the Assessee. The Commissioner (Appeals), upon appreciation of evidence on record, was of the view that the assessing officer has not appreciated the facts of the case properly and had made disallowance which was not permitted by the Income Tax Act. It was held that disallowance could only have been made in respect of expenses debited to Profit & Loss account whereas in the present case the purchase of crane and spare parts of the crane and other machineries were in the nature of acquisition of capital asset. According to the Commissioner (Appeals) the disallowance could have been made on depreciation only if at all the assessing officer conclusively proved that the purchases of crane and other parts are bogus. Upon appreciation of the material on record the Commissioner (Appeals) found that the assessing officer has simply brushed aside all the evidence on account of technical infirmities and that the evidence such as octroi receipt; hypothecation of the crane to the Bank; existence of the crane even till date with the Assessee; conclusively proved that the crane was purchased and it was in use even as on date with the Assessee. The Commissioner (Appeals) accordingly found that there was no scope for any disallowance and accordingly deleted the disallowance made on account of purchase of crane and allowed the depreciation as claimed by the Assessee.

14. The Tribunal, in the impugned order, has noted that the cost of crane was never claimed by the Assessee in the return of income. Before the Tribunal, the Assessee produced evidence that the crane in question was registered with the RTO and the same was wholly and exclusively used for the purposes of its business. The Tribunal, therefore, held that the Commissioner (Appeals) was legally and factually correct in deleting the disallowance of cost of crane as well as depreciation thereon.

15. From the facts emerging from the record, it is apparent that the Assessee had never claimed the cost of the crane in the return nor had it debited the expenses to the profit and loss account, and as such the question of disallowing the same and adding the same to the income would not arise. Moreover, in the absence of any evidence to indicate that the purchase was bogus or that the crane in fact did not exist, the question of disallowing the depreciation in respect of the same also would not arise. When the Assessee had conclusively proved the purchase and existence of the crane, and had not debited the expenses to the profit and loss account, no addition could have been made in respect of the purchase price nor could have depreciation been disallowed in respect thereof. The Tribunal was, therefore, justified in deleting the addition as well as disallowance of depreciation.

16. In the light of the aforesaid discussion, it is not possible to state that there is any legal infirmity in the impugned order made by the Tribunal so as to warrant

interference. In the absence of any question of law, much less, a substantial question of law, the appeal is dismissed.