

(2016) 11 RAJ CK 0064

In the Rajasthan High Court

Case No : Income Tax Appeal No. 305 of 2008

Commissioner of Income Tax

APPELLANT

Vs

M/s. Bright Future Gems

RESPONDENT

Date of Decision : 02-11-2016

Acts Referred:

Income Tax Act, 1961 — Section 69C

Citation : (2017) 392 ITR 580

Hon'ble Judges : Mr. K.S. Jhaveri and Mr. Mahendra Maheshwari, JJ.

Bench : Division Bench

Advocate : Mr. Nikhil Simlote, for Mr. R.B. Mathur, Advocates, for the Appellant;
None present, for the Respondent

Final Decision : Disposed Off

Judgement

Jhaveri, J.—By way of this appeal, the appellant has challenged the judgment and order of the Tribunal whereby the Tribunal has reversed the finding of the CIT (A) confirming the order of the A.O. and allowed the appeal preferred by the assessee.

2. While admitting this appeal, the Court framed the following substantial questions of law :

"(1) Whether in the facts and circumstances of the case the ITAT has not acted perversely in deleting the additions without appreciating the proviso to Section 69C and CBDT's circular dated 23.12.1998 ?

(2) Whether in the facts and circumstances of the case, the ITAT has not acted perversely in relying the books of accounts when the same were rejected by invoking provisions of section 145(3) of the Act as the assessee was unable to explain the purchases and the day to day quantitative tally of goods consumed was also not maintained ?

(3) Whether the ITAT was justified in upholding the action of CIT (A) in directing

to adjust the MAT credit before charging the interest u/s 234B and 234C of the IT Act ?"

3. The brief facts of the case are that the assessee firm is engaged in the business of precious and semi precious stones and it is a 100% exporter. During the course of assessment proceedings the AO has noticed that the assessee was not maintaining quantitative details of day to day purchases and manufacturing of the items. Further on verification it was also noticed by him that the purchases was made from M/s. Vinayak Overseas and M/s. JVH Gems. The purchases from above parties were established to be bogus after making in depth enquiries by the AO. During the course of assessment the AO has recorded Statements of concerned parties were established to be bogus after making in depth enquiries by the AO. During the course of assessment proceeding it has been gathered that the assessee has failed to produce the owners of the two concerns. The reasons like nonavailability of the said two suppliers at the given addresses, non production of two suppliers by the assessee in spite of various opportunities granted, statement of Sh. Mohan Prakash Sharma Power of Attorney holder of M/s. Vinayak Overseas stating of giving accommodation entireties only and nature and volume of transaction appearing in their bank accounts leads the AO to the conclusion that the purchases were bogus.

4. He further contended that the Tribunal on the statement of Mr. M.P. Sharma who was power of attorney holder Vinayak Overseas has reversed the finding of A.O and CIT (A). He also relied on decisions of High Courts in case of bogus purchases and contended that the judgment of Vijay Proteins Ltd. v. Commissioner of Income Tax, Special Leave to Appeal (C) No.8956 of 2015 decided on 06.04.2015 whereby the Supreme Court has dismissed the SLP and confirmed the order dated 09.12.2014 passed by the Gujarat High Court and other decisions of the High Court of Gujarat in the case of Sanjay Oilcake Industries v. Commissioner of Income Tax (2009) 316 ITR 274 (Guj) and N.K. Industries Ltd. v. Dy. C.I.T., Tax Appeal No.240 of 2003 decided on 20.06.2016. He has also relied upon Commissioner of Income Tax v. Precision Finance Pvt. Ltd., reported in (1994) 208 ITR 465 (Cal.) wherein in paragraph 5 and 6, the Court observed as under :-

"5. It appears from the order of the Commissioner of Income-tax (Appeals) that the Income-tax Officer allowed opportunity to the assessee for about 7? years starting from September 16, and ending on February 24, 1986, to produce the relevant documents in support of the contentions that the loans were genuine. Those opportunities were not availed of. Nothing was produced before the Commissioner of Income-tax (Appeals). Enquiries were conducted through the inspector on different dates and it was found that either the files do not exist as per details given by the assessee or the records do not tally with the facts mentioned by the assessee, except in two cases where the records were available in respect of Moolchand Chhabra and Somani Supply Syndicate Company and in all other cases creditors were not even found at the addresses

given by the appellant. Apart from having enquiries made by the inspectors several letters were also issued to the assessee between January 16, 1982, and February 24, 1986, bringing to its notice that the loans could not be verified and adequate proof is required. At no stage have the appellant's representatives responded properly. Nowhere was the question of checking up the bank account raised.

6. It is for the assessee to prove the identity of the creditors, their creditworthiness and the genuineness of the transactions. In our view, on the facts of this case, the Tribunal did not take into account all these ingredients which have to be satisfied by the assessee. Mere furnishing of the particulars is not enough. The enquiry of the Income-tax Officer revealed that either the assessee was not traceable or there was no such file and, accordingly, the first ingredient as to the identity of the creditors had not been established. If the identity of the creditors had not been established, consequently the question of establishment of the genuineness of the transactions or the creditworthiness of the creditors did not and could not arise. The Tribunal did not apply its mind to the facts of this particular case and proceeded on the footing that since the transactions were through the bank account, accordingly, it is to be presumed that the transactions were genuine. It was not for the Income-tax Officer to find out by making investigation from the bank accounts unless the assessee proves the identity of the creditors and their creditworthiness. Mere payment by account payee cheque is not sacrosanct nor can it make a non-genuine transaction genuine. In that view of the matter, the question before us is answered in the negative and in favour of the Revenue."

5. He further relied upon the decision of this Court in *Arvind Gupta v. Commissioner of Income Tax*, in DB Income Tax Appeal No. 129 of 2015 decided on 6th May, 2016 wherein paragraph 22 and 23 read as under :

22. In the case of *Commissioner of Income Tax, Orissa v. Orissa Corporation (P) Ltd.* (supra), the facts noticed by the Apex Court were that the assessee has given names and addresses of the alleged creditors, it was in the notice of the Revenue that the said creditors were income tax assesseees, their index number was in the file of the Revenue, still the Revenue apart from issuing notices under Section 131 at the instance of the assessee did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit worthy or were such who could advance the alleged loan, there was no averment to pursue the so-called alleged creditors and on such finding, it came to the opinion that the assessee has discharged the burden and found no question of law to be involved. However, the facts in the instant case are entirely distinguishable in as much as at the instance of the assessee, notices were issued under Section 131 and the notices came back duly unserved, the Revenue again desired the assessee appellant to produce the parties for verification. However, though the appellant was in touch with the respective parties as confirmation was filed but was unable to produce the

parties and only after verification it could be known whether the parties had creditworthiness or genuineness of the transaction. On the contrary, the evidence available with the investigation wing of the Revenue and which was passed on to the AO clearly was brought on record that either the parties are not existing on the given addresses or if found, they denied of actual purchase or sale of the precious stone and jewellery and accommodated the assessee's but had obtained a paper bill without effecting actual purchases. Thus the judgment in the case of Commissioner of Income Tax, Orissa v. Orissa Corporation (P) Ltd. (supra) is inapplicable.

23. The other two judgments relied upon by counsel for the appellant in the case of Commissioner of Income-Tax v. Inani Marbles P. Ltd. (supra) and Commissioner of Income-Tax v. Gotan Lime Khanij Udhyog (supra) were on account of applying abnormal gross profit rate and this court found that abnormal fanciful additions cannot be made and assessee's own results of the previous year were required to be looked into whereas the present case is entirely distinguishable and the AO has not touched upon the gross profit rate rather has held the very purchases doubtful and non-verifiable which fact is now apparent and as discussed 15 hereinbefore. Thus these judgments are distinguishable."

5.1. He also relied on Commissioner of Income-Tax v. M/S. La Medica, Delhi, 250 ITR 575 wherein it has been held as under :-

"The fact that the alleged sellers have been found to be persons with no means to effect purchases or to carry on business is a factor which does not appear to have been considered by the Tribunal in its proper perspective. Materials on record clearly establish that Chedi Lal was a petty employee of a concern of which Satya Pal Jain was a partner. In fact Satya Pal Jain was partner of M/s. Medipac, one of the sister concerns of the assessed firm. On enquiries conducted by the authorities after due notice to the assessed it was found that there was no such concern called M/s. Kalpana Enterprises at either 71, Canning Street, Calcutta or 479, Bartan Market, Sadar Bazar, Delhi. Additionally Chedi Lal opened the bank account with the introduction of Satya Pal Jain and the amounts were withdrawn. If the purchases were really effected from M/s. Kalpana Enterprises it is not understood as to how some other person namely Inder Sain Jain (HUF) accepted that the materials were supplied by it. The question before the Tribunal was not whether purchases were made from another concern. What was under consideration was whether the purchases were made from M/s. Kalpana Enterprises as was claimed by the assessed. Ample material has been brought on record by the Revenue to show that the purchases were in fact not made from M/s. Kalpana Enterprises. These are some of the relevant materials which have not been considered by the Tribunal. Tribunal's conclusion that even if it is accepted that Chedi Lal was only an instrument used by Satya Pal Jain, assessed was not involved in it, is a conclusion arrived at without any foundation. On the contrary it has been established by materials on record that assessed knew that the whole

thing was a fictitious arrangement. Once it is accepted that the supplies were not made by Kalpana Enterprises to whom payments were alleged to have been made, the question whether the purchases were made from some other source ought not to have weighed with the Tribunal as a factor in favour of the assessed. The conclusions of the Tribunal are, therefore, clearly erroneous, contrary to materials on record and have been arrived at without taking into consideration relevant material and placing reliance on irrelevant materials. It is to be noted that assessed's stand was not that it had effected purchases from anybody else. Its stand throughout was that it had effected purchases from M/s. Kalpana Enterprises. It was not open to the Tribunal to make out a third case, which was not even the case of the assessed, to hold that the transactions were real and not fictitious as claimed by the Revenue."

6. We have heard the counsel for the appellant.

7. Before considering the matter, it will not be out of place to mention here that question which is posed for our consideration is whether the purchases which has been done from Vinayak Overseas is genuine or not. The Assessing Officer while observing at page 12 referred herein above and which was already considered by the CIT (A) has confirmed the finding and Vinayak Overseas has specifically contended that they were not transfer by Vinayak Overseas and they were absconding. The Tribunal only on the statement of M.P. Sharma who was power of attorney holder of Vinayak Overseas has given the finding. In our view, the finding is perverse. The view taken by the Tribunal is required to be reversed.

8. Apart from that merely voucher of the import export challans or challans of the custom clearance will not prove physical delivery of the material (precious stones). There is nothing on record to certify the stones which were verified by any of the valuer. In our view it is all paper transactions for the purpose of taking benefit of the export and tax benefits.

9. In that view of the matter, we are of the opinion that the view taken by the CIT (A) is required to be upheld and view taken by the Tribunal is required to be reversed. In that view of the matter, we are of the opinion that it is a bogus purchase and in our opinion, the finding which has been arrived by the Tribunal is not in consonance with the provisions of law, therefore, it is required to be reversed.

10. The issue is required to be answered in favour of Department against the assessee.