
(2007) 03 P&H CK 0094
In the Punjab And Haryana At Chandigarh

Davinder Singh	Vs	APPELLANT
Commissioner of Income Tax		RESPONDENT

Date of Decision : 13-03-2007

Acts Referred:

Income Tax Act, 1961 — Section 143, 40A

Citation : (2007) 209 CTR 159

Hon'ble Judges : Rajesh Bindal, J;M.M. Kumar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Rajesh Bindal, J.—The assessee has approached this Court by filing the present appeal, raising the following substantial question of law, arising out of order passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (for short, "the Tribunal") in ITA No. 94/Asr/2005 dt. 24th March, 2006, in respect of asst. yr. 2001-02:

(a) Whether, under the facts and circumstances of the case, a sum of Rs. 2,82,950 and Rs. 1,03,613 paid to Shri Baljeet Singh, Proprietor of M/s Maya Cotton & General Mills and Sardar Gurcharan Singh, Proprietor of M/s Gee Ess. Ahuja Cotton & General Mills as sister concerns of the appellant are permissible deduction in computing the business income of the appellant or not?

(b) Whether, under the facts and circumstances of the case, the order of the Tribunal is perverse by not dealing with the finding of the assessing authority and also that of the CIT(A) in respect of disallowance u/s 40A(2)(a) wherein the quantum of being excessive and unreasonable has not been ascertained and found out and no evidence has been given in respect of the extraneous consideration ?

2. Briefly, the facts are that the assessee, who is engaged in the business of commission agent, filed his return of income for the asst. yr. 2001-02 on 31st Oct., 2001 declaring his income at Rs. 2,01,570. The same was processed on

16th Jan., 2002 on income returned. Subsequently, the case was taken up for scrutiny under selective scrutiny scheme and statutory notice u/s 143(2) of the IT Act, 1961 (for short "the Act") was issued to the assessee. Finally, the income was assessed at Rs. 66,75,459. One of the issue on which addition was made, was pertaining to sharing of "Dami" earned by the assessee as commission agent with his two sister concerns owned by the father and brother of the appellant. As per P&L a/c for the year ending 31st March, 2001, the assessee declared to have received a sum of Rs. 1,48,923.77 paise as Dami. After debiting various shop expenses and depreciation, net profit from the Dami business is shown at Rs. 46,893.77 paise. However, during the course of assessment proceedings, it came to the notice that assessee had actually received Rs. 5,35,486 on account of Dami. On being asked to clarify the discrepancy, the assessee submitted that out of the total Dami earned by the appellant, a sum of Rs. 3,86,563 was refunded back to his two sister concerns owned by his father and brother to whom the assessee had sold the agricultural produce from his shop. The claim of the assessee was that it was because of the help by his father and brother that he was able to earn. The claim made by the assessee was rejected by the AO and the entire amount, which was claimed to have been refunded, was added to the income of the assessee. The order passed by AO on this account was upheld by the CIT(A). In further appeal before the Tribunal, the order passed by the AO was upheld with the following observations:

We have heard both the parties and carefully considered the rival submissions, examined the facts, evidence and material on record. It is settled law that if the assessee claims deduction of any expenses, the burden of proof is on him to establish that such expenditure was incurred wholly and exclusively for the purpose of his business. Reliance in this regard is placed on the three judgments of Hon'ble Supreme Court in the case of Commissioner of Income Tax, West Bengal Vs. Calcutta Agency Ltd., , Lakshmiratan Cotton Mills Co. Ltd. Vs. Commissioner of Income Tax, Uttar Pradesh, and L.B. Sugar Factory and Oil Mills (P) Ltd., Pilibhit Vs. Commissioner of Income Tax , U.P., Lucknow, . There is no dispute about the fact that there is 75 per cent of the commission had been paid. Even if there is no written agreement the assessee could still claim deduction for the expenses provided he is able to establish with documentary and cogent evidence that such expenditure was incurred for the purpose of assessee's business. Now in this case, the assessee has not been able to lead any evidence about the nature of services rendered by two sister concerns. In fact, we have gone through the copies of the statements of Shri Gurcharan Singh and Shri Baljeet Singh to whom commission was paid. They were not able to show any record or evidence about the names of persons who were sent/recommended for selling their produce through the assessee. In fact, they simply stated that such parties were not known to them. Now if these parties were not known to them and they have no record of the persons who were sent to the assessee, how it could be presumed that those parties who sold the produce through the assessee were sent by them. As regards increase in the "Dami" receipts over the years,

there is nothing on record to show that the increase was due to the efforts made by the assessee's two sister concerns. In other words, there is no evidence whatsoever to support the claim of the assessee that they had rendered any services for which commission was paid when they did not even know them. As regards the payments assured by the sister concerns, there is also no evidence for the same. In any case, when they had made purchases, they were duty-bound to make the payments. In fact substantial amounts of purchases made in the months of November, December, 2000 and January, 2001 through the assessee, the payments were delayed and were made only in the succeeding assessment year. Thus, the claim of the assessee for payment of 75 per cent of commission is not supported by any evidence direct or indirect. Therefore, it cannot be said that the assessee has discharged the onus to prove that the commission was paid wholly and exclusively for the purpose of his business. There does not appear to be any trade practice for sharing Dami with buyers of such produce. As regards the various judgments relied upon, the same are on their own facts. The question whether the assessee has established that the expenditure was incurred wholly and exclusively for the purpose of business is essentially a question of fact to be decided on the merits of each case. In case the assessee has been able to establish that payment was made wholly and exclusively for the purpose of business the same would be allowable. The claim of the assessee also requires to be seen in the light that such payments had been made to its sister concerns and not to outside parties. Therefore, it was all the more necessary for assessee to establish that payments were made for the services rendered by them. In the absence of any evidence and material on record, we are of the view that authorities below were justified in disallowing the claims. Thus, in the light of these facts and circumstances of the case, we are of the considered opinion that the order of the CIT(A) does not merit any interference and this ground of appeal is dismissed.

3. Learned Counsel for the assessee has raised three-fold submissions, namely; (i) that in the previous and subsequent year, such type of claim by the assessee has not been disallowed, keeping in view the principal consistency, even during this year, the expenses deserve to be allowed; (ii) the provisions of Section 40A(2)(a) of the Act has not been given effect to as the authorities have failed to quantify the reasonable amount which was to be allowed/disallowed in the facts and circumstances of the case; and (iii) that the judgment of Hon'ble Supreme Court in McDowell and Co. Ltd. Vs. Commercial Tax Officer, has been overruled by the Hon'ble Supreme Court in Union of India and Anr. v. Azadi Bachao Andolan and Anr. (2003) 184 CTR (SC) 450 : (2003) 263 ITR 706. Suffice to add here that both the judgments do not deal with the questions in issue in the present case. Learned Counsel has further relied upon Shahzada Nand and Sons Vs. Commissioner of Income Tax, Patiala, ; J.K. Steel and Industries Ltd. Vs. Commissioner of Income Tax, ; and Sassoon J. David and Co. Pvt. Ltd., Bombay Vs. Commissioner of Income Tax , Bombay, .

4. After hearing learned Counsel for the appellant, we do not find any substance

in any of the contentions raised by him. The Tribunal has recorded a definite finding of fact that the assessee has not been able to lead any evidence about the nature of services rendered by his two sister concerns. The claim for deduction, in fact, was not supported by any evidence direct or indirect. Further, the claim is not supported by any trade practice for sharing of "Dami" with a buyer of such produce. Concurring with this finding of fact recorded by the authorities below, we do not find that any illegality has been committed by the Tribunal in rejecting the plea of the assessee to claim deduction for sharing his income for Dami business with his sister concerns. As far as, consideration of the claim u/s 40A(2)(a) of the Act is concerned, a question of estimation would arise only if the claim is considered to be justified and a dispute is only regarding the quantum thereof. In the present case, all the authorities below have not found the claim made by the assessee to be tenable at all. There was no question of quantification thereof. As far as the contention regarding consistency is concerned, such a plea having been raised before the Tribunal is not borne out from the paras 8 to 12 of the order where this issue has been dealt with. The judgments relied upon by learned Counsel for the assessee also do not support the proposition canvassed by the assessee, as in the facts and the circumstances of the present case, the assessee was not able to substantiate his claim on the basis of the evidence produced before the authority.

5. In view of our above discussion, we do not find any merit in the present appeal and the same is accordingly dismissed.