(2008) 07 SHI CK 0008

In the High Court Of Himachal Pradesh

New Plaza Restaurant APPELLANT

Vs

Income Tax Officer RESPONDENT

Date of Decision : 30-07-2008

Acts Referred:

Citation : (2009) 309 ITR 259 : (2009) 183 TAXMAN 33

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Deepak Gupta, J.—This appeal was admitted on the following substantial questions of law:

1. Whether the Tribunal was correct in law in upholding the addition of Rs. 3,74,387 as made by the learned Income Tax Officer as good though the same has been made without any basis and without any material on record to substantiate the same ?

2. Whether the Tribunal was justified in allowing the appeal of the Revenue solely on the ground that the figures of gross profit as returned in the instant year and the preceding years was not tendered before the Income Tax authorities, and without going into other merits of the case ?

2. The brief facts giving rise to the present appeal are that the appellant (hereinafter referred to as the assessee) runs the business of a restaurant under the name and style of New Plaza Restaurant, Middle Bazaar, Shimla. For the assessment year 1993-94, the assessee filed a return showing an income of Rs. 24,350. This return was filed on the basis of the books of account. The Assessing Officer on the basis of the material led before him rejected the books of account and on the basis of estimation enhanced the income by Rs. 3,74,387, vide his order dated January 10, 1996.

3. Aggrieved by the said order the assessee filed an appeal before the

Commissioner of Income Tax (Appeals) who, vide order dated April 9, 1996, partly allowed the appeal and made an addition to the extent of Rs. 1,20,000 only as against the addition of Rs. 3,74,387 made by the Assessing Officer.

4. Both the parties aggrieved by the said order filed further appeals before the Appellate Tribunal. It would be pertinent to mention that the appeal filed by the assessee was dismissed in default. The appeal filed by the Revenue was heard and decided in favour of the Revenue and the Tribunal restored the order of the Assessing Officer.

5. Aggrieved by this order the present appeal has been field by the assessee.

6. We have heard Sh. Vishal Mohan, learned Counsel for the assessee and Ms. Vandana Kuthiala, learned Counsel for the Revenue.

7. The main contention of Sh. Vishal Mohan is that assuming all things against the assessee even the assessment on estimation basis should have been made on a rational basis and there was no cogent reason why the methodology followed by the Tribunal in the case of Alfa Restaurant should not be followed in the case of the assessee. He submits that a judicial authority exercising discretion must exercise it in a judicious manner.

8. On the other hand, Ms. Vandana Kuthiala has submitted that no substantial question of law arises and that the estimation made by the Tribunal is an estimation based on evidence and, therefore, no question of law much less a substantial question of law arises in the appeal. She has relied upon a judgment of the Assam High Court in Safiullah v. AIR 1957 Ass 18 wherein it was held that the question whether the estimate is correct or not is a pure question of fact.

9. Reliance is also placed by both sides on the observations of the apex court in Brij Bhushan Lal Parduman Kumar Vs. Commissioner of Income Tax , Haryana Himachal Pradesh and New Delhi III, wherein the following observations made by the apex court are extremely relevant (page 530):

7. It will appear clear from what has been said above that the authority making a best judgment assessment must make an honest and fair estimate of the income of the assessee and though arbitrariness cannot be avoided in such estimate the same must not be capricious but should have a reasonable nexus to the available material and the circumstances of the case.

10. It is in the light of the aforesaid observations by the apex court that we proceed to decide the case.

11. The admitted facts are that the Tribunal as well as the Commissioner, Income Tax had dealt with three cases of estimation of different restaurants in Shimla. In the case of Baljees'' Restaurant, the Mall, Shimla, the Commissioner of Income Tax had come to the conclusion that while estimating the total sales the proper method would be to estimate the sales at 2.2 times the value of the raw material purchased by the assessee. In the case of Alfa Restaurant which is also situated

on the Mall Road the estimation was also made at 2.2 times of the cost of raw material by the Tribunal. The Commissioner of Income Tax did not apply the principle applied in Baljees'' case on the ground that in the case of Baljees'' Restaurant large proportion of the sales were in respect of sweet items sold from the counter in which the consumption of the raw material is bound to be on the lower side. The Commissioner of Income Tax, therefore, estimated the sales of the assessee by applying a multiply of 2.5 qua the cost of raw material.

12. The assessee in appeal relied upon the judgment of the Tribunal itself wherein in the case of Alfa Restaurant the multiple applied was 2.2. Ms. Kuthiala has contended that the Tribunal had applied the multiple of 2.2 by accepting the gross profit declared by the assessee and accepted by the Revenue for the previous four assessment years.

13. At the outset we may observe that even while making an estimation the Assessing Officer must follow some principles. The estimation cannot be arbitrary or capricious. The Assessing Officer is bound to follow the same yardstick for similar sorts of businesses. Admittedly, Alfa Restaurant and the assessee''s restaurant are engaged in the same business. There was no difference like the one in Baljees'' case wherein a large proportions of sales were from the counter. The Commissioner of Income Tax had followed a better system and had enhanced the multiple a little over 2.2 and fixed it a 2.5 even though in the case of Alfa Restaurant it was 2.2.

14. The contention of Ms. Vandana Kuthiala that the principle applied in Alfa Restaurant''s case cannot be applied in the present case because in the present case the assessee has not declared his gross profit is also incorrect. We find that the assessee had sent a letter to the Income Tax Officer, Ward No. 1, Shimla, on July 7, 1994, that is, much before the assessment was completed, clearly showing that his comparative gross profits in the 3 previous years were 36.92 per cent., 36.33 per cent. and 37.13 per cent. Therefore, this material was also available before the Tribunal. The rates of profit depicted for the previous three years are similar to the rates of profit in the case of Alfa Restaurant. Therefore, we find that there was no plausible reason for the Tribunal to deviate from the norm laid down in Alfa Restaurant''s case.

15. It is no doubt true that the question as to whether the estimation made by the Assessing Officer is correct or not is normally treated as a question of fact. However, when the concerned authority like in the present case, does not follow a uniform practice and applies different yardsticks in similar cases then such action is hit by article 14 and becomes arbitrary and capricious. This itself leads to the inference that the case involves a substantial question of law.

16. In view of the above discussion, the appeal filed by the assessee is allowed. The order of the learned Tribunal is set aside. Since the assessee''s appeal against the order of the Commissioner of Income Tax has already been dismissed in default, no further benefit can be granted to the assessee and the order of the

Commissioner of Income Tax is restored.

17. The appeal is allowed in the aforesaid terms. No costs.