

(2015) 09 GUJ CK 0006

In the Gujarat High Court

Case No : Tax Appeal Nos. 527 and 528 of 2015

Pr. Commissioner of Income Tax-2

APPELLANT

Vs

Rameshwar Textile Mills Ltd.

RESPONDENT

Date of Decision : 07-09-2015

Acts Referred:

Income Tax Act, 1961 — Section 131, 133A, 143, 145, 145(3)

Citation : (2015) 09 GUJ CK 0006

Hon'ble Judges : Harsha Devani and Abdullah Gulamahmed Uraizee, JJ.

Bench : Division Bench

Advocate : Sudhir M. Mehta, Advocate, for the Appellant

Judgement

Harsha Devani, J.—By these appeals under section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), the appellant revenue has challenged the common order dated 9.1.2015 passed by the Income Tax Appellate Tribunal "D" Bench, Ahmedabad in ITA No. 1568/Ahd/2010 and ITA No. 1937/Ahd/2010 by proposing the following questions stated to be substantial questions of law:

TAX APPEAL No. 527 of 2015.

"Whether the decision of ITAT is perverse in dismissing the appeal of the revenue where the CIT (A) has restricted the addition upto 10% i.e. Rs. 42,07,397/- instead of addition of Rs. 4,20,73,972/- made by AO of unaccounted sales, despite the fact that AO has clearly noted that assessee has debited all the expenses in regular books of accounts and assessee has failed to prove otherwise at any stage?"

TAX APPEAL No. 528 of 2015.

"Whether the decision of ITAT is perverse in restricting the addition of 6.5% of unaccounted sales, despite the fact that AO has clearly noted that assessee has debited all the expenses in regular books of accounts and assessee has failed to prove otherwise at any stage?"

2. Since both these appeals arise out of a common order of the Tribunal and the parties are also common, the same were taken up for hearing together and are disposed of by this common judgment.

3. The assessment year is 2007-08 and the relevant accounting period is the previous year 2006-07. In this case, a survey action under section 133A of the Act was conducted at the business premises of the respondent assessee on 3.3.2008. Out of the five Directors of the assessee company, one of the Directors Shri Rajesh R. Bansal on behalf of the company, voluntarily admitted that the assessee company had earned unaccounted income to the tune of Rs. 13,01,00,000/- and promised to pay tax on the unaccounted income disclosed by way of admission. However, vide letter dated 4.5.2008 such disclosure came to be retracted. The Assessing Officer framed the assessment under sub-section (3) of section 143 of the Act on 30.12.2009 determining the total income at Rs. 2,55,24,151/- as against Rs. 1,65,710/- declared in the return of income so filed, by making addition of Rs. 4,20,73,972/- on account of job receipts outside the books. During the course of survey, statements under section 131 of the Act of the Directors as well as some of the collection clerks of the group were recorded, wherein they had admitted that benami cheques which were received by way of payments to the assessee company were deposited with a local shroff Mr. Jaikumar Periwal, and cash was received back. During the survey, Shri Sanjay Sudhrania admitted that he maintains parallel accounts on USB hard disc operated through his laptop. During the year under consideration, an amount of Rs. 4,72,05,175/- had been discounted by the assessee from the Shroff, as revealed from Jaikumar's account obtained from Mr. Sudhrania's Laptop. In the statement under section 131 of the Act, in answer to question No. 13, Shri Jaikumar admitted that he was discounting cheques for Shri Sanjay Sudhrania of Kirtida Silk Mills and Rameshwar Silk Mills Ltd. for the last two years. The employees of the assessee company, by their respective statements during the course of survey, had confirmed that they had given cheques to Shri Jaikumar and in turn received cash, which was returned to Shri Sudhrania. The Assessing Officer, after analysis of the material on record, estimated the percentage of proportionate discount at 10.87%, which amounted to Rs. 51,41,203/- and granted deduction accordingly out of the total unaccounted process charges. Accordingly, an amount of Rs. 4,20,73,972/- came to be added to the total income of the assessee company. The assessee carried the matter in appeal before the Commissioner (Appeals), who directed the Assessing Officer to estimate the income at 10% of Rs. 4,20,73,972/- and sustained the addition of Rs. 42,07,397/-. Both the assessee as well as the revenue went in appeal before the Tribunal against the order passed by the Commissioner (Appeals). The Tribunal vide impugned order dismissed the appeal preferred by the revenue and partly allowed the appeal preferred by the assessee by further restricting the gross profit at 6.50%, as against 10% as estimated by the Commissioner (Appeals).

4. Mr. Sudhir Mehta, learned senior standing counsel for the appellant assailed

the impugned order by submitting that the Tribunal has failed to appreciate that the Assessing Officer has considered the material on record, namely, data contained in the Laptop of Shri Sanjay Sudhrania wherein the accounts pertaining to processing charges received by the assessee company had been entered regularly. It was submitted that the Tribunal has failed to consider that the assessee had debited all expenses relating to unaccounted sales in its books of accounts without considering the unaccounted investment for making this unaccounted sales. It was pointed out that the Commissioner (Appeals) had erred in estimating the gross profit at 10% and the Tribunal had further erred in estimating the gross profit at 6.50%. It was submitted that the Assessing Officer having properly analysed the material had rightly made the addition of Rs. 4,20,73,972/- to the total income of the assessee company and that the Tribunal was not justified in estimating the gross profit at 6.50%. It was, accordingly, submitted that the appeals deserve consideration on the questions as proposed or as may be deemed fit by this court.

5. This court has considered the submissions advanced by the learned counsel for the appellant and has perused the impugned orders passed by the Tribunal as well as the orders passed by the lower authorities.

6. The facts as emerging from the record reveal that the Assessing Officer rejected the books of accounts of the respondent assessee under section 145 of the Act and was of the view that the total income of the assessee is to be determined taking into account various factors that were detected during the survey assessment proceedings. The Assessing Officer found that during the relevant year an amount of Rs. 4,72,05,175/- had been discounted by the assessee from the Shroff as revealed from the account of Jaikumar in Mr. Sudhrania's Laptop. The Assessing Officer after rejecting the books held that the entire sum of Rs. 4,72,05,175/- is to be treated as assessee's additional receipt not accounted for in its regular books. The Assessing Officer allowed an amount of Rs. 51,31,203/- at the rate of 10.87% as the total discount ceded by the assessee and calculated the net unaccounted receipt after discount at Rs. 4,20,73,972/-. As regards the claim of the assessee on other counts, the Assessing Officer was of the view that such expenses had already been claimed in the assessee's books and hence, no further expenses could be allowed. Accordingly, the book results came to be determined by increasing the profit by an amount of Rs. 4,20,73,972/-.

7. In the appeal preferred by the assessee, the Commissioner (Appeals) was of the view that during the course of survey, the evidences found and impounded related to both, accounted and unaccounted transactions which were recorded systematically in the form of books of accounts maintained on the Laptop and, therefore, could not be ignored. The Commissioner (Appeals) noted that the Assessing Officer had treated the entire additional turnover of Rs. 4,72,05,175/- as net income of the assessee and granted deduction on estimated basis for discount granted by the assessee for the reason that the entries for discount

were reflected in job charges receipt. However, at the same time, the entries of all other expenses as claimed to be unaccounted were also reflected in the accounts maintained by the Director on his Laptop for all unaccounted transactions. The Commissioner (Appeals) was of the view that details of such unaccounted expenditure in support of various entries found in the Laptop along with various evidences were submitted and thereby the existence of such expenditure was proved by the assessee and, therefore, it was unjustifiable to allow some of the expenditure, namely, discount of Rs. 51,31,203/- on estimate basis and to ignore the claim of the other expenditures. The Commissioner (Appeals) further found force in the arguments of the authorised representative that the co-existence of evidences of unaccounted income and unaccounted expenditure cannot be ignored in toto as the department cannot approbate and reprobate the same document at the same time. The Commissioner, however, noticed that the assessee had also failed to prove categorically that the impugned unaccounted transactions as reflected in the combined books of accounts maintained on the laptop were not accounted for in the regular books of accounts. However, at the same time, the Assessing Officer could not establish with evidence that the assessee's claim was incorrect and all the transactions of unaccounted expenditure were incorporated in the regular books of accounts. He was, therefore, of the view that if on one hand it is not justifiable to reject the claim of unaccounted expenditure in toto but at the same time, it was also not justifiable to grant the deduction of all the expenditure as claimed by the assessee. The Commissioner (Appeals) was, therefore, of the view that there was no alternative but to resort to estimation of gross profit on the basis of available records and past trend as well as the prevailing rate of net profit in case of similar industries as the books of accounts maintained by the assessee were not correctly reflecting the profit of the assessee and had rightly been rejected under section 145(3) of the Act. The Commissioner (Appeals) observed that the assessee has incurred gross loss for assessment year 2005-06, whereas the gross profit in the assessment year 2006-07 was 5.22%. In the year under appeal, the assessee had shown gross profit at the rate of 4.85% and comparative instances as quoted by the authorised representative showed the gross profit margin at 8.81% and 11.32%. The Commissioner (Appeals) was of the view that if the entire addition is confirmed, the gross profit ratio would go upto 23% which was definitely a distorted result looking to the present profit of the assessee concern. Considering the past trend of loss, the margin of profit in the earlier year and the large volume of turnover and also the possibility that some expenses might have been incorporated in the regular books of accounts, the Commissioner (Appeals) was of the view that the profit margin from the unaccounted additional turnover should be on the higher side as compared to the margin shown in the regular books of accounts due to which it could be safely assumed that the assessee must have earned at least 10% of the gross margin of the additional turnover which was almost double the normal gross margin as reflected in the regular books of accounts. He, accordingly, directed the Assessing Officer to estimate the income at 10% of Rs. 4,20,73,972/- and

sustained the addition to the extent of Rs. 42,07,397/- as against the addition of Rs. 4,20,73,972/- made by the Assessing Officer.

8. The Tribunal, after considering the material on record, has recorded that the Assessing Officer had accepted the expenses shown in regular books as correct and had only taken receipt from the data found in the Laptop and had given absolutely no reason as to why only receipt was taken from the Laptop data and why expenses appearing in the Laptop data were not taken into consideration. The Tribunal noted that it was not the case of the revenue that the data found in the Laptop showed the actual net income of the assessee was more by Rs. 4,20,73,972/- than the income disclosed in the return of income. The Tribunal observed that it is an established position of law that even when the undisclosed sale or receipt is found, then also only the income embedded in such undisclosed receipt can be brought to tax. Reliance was placed upon the decision of this court in the case of Commissioner of Income Tax Vs. Samir Synthetics Mill, , wherein it has been held that income from suppressed sale should be determined by estimating the gross profit of the assessee as well as upon the decision of this court in the case of Commissioner of Income Tax Vs. President Industries, , wherein it has been held that the entire sales cannot be added as income of the assessee but addition can be made only to the extent of estimated profits embedded in the sales. The Tribunal, accordingly, did not find any merit in the appeal preferred by the revenue and dismissed the same.

9. Thus, in the assessee's appeal challenging the rate of gross profit estimated at 10% on the ground that it was on the higher side, the Tribunal has found that the Commissioner (Appeals) while estimating the gross profit at 10% had not given any basis for the same, though he had referred to the gross profit rate of the assessee at 5.22% in assessment year 2006-07 and 4.85% in the current assessment year. The Tribunal was of the view that having regard to the fact that the highest rate of gross profit shown by the assessee in assessment year 2006-07, which was 5.22%, had been accepted by the department, the gross profit rate disclosed by the assessee at 4.85% was on the lower side and, accordingly, estimated the gross profit of the unrecorded receipt at 6.50%. The Tribunal, accordingly, modified the order passed by the Commissioner (Appeals) to that extent and directed the Assessing Officer to accept the gross profit rate of the suppressed receipt of Rs. 4,20,73,972/- at 6.50%.

10. From the findings recorded by the Tribunal insofar as the appeal preferred by the revenue before the Tribunal is concerned, as can be seen from the findings recorded by the Tribunal, the Tribunal has merely applied the principles laid down by this court in the case of CIT v. Samir Synthetics Mill (supra) as well as CIT v. President Industries (supra) wherein it was held that the entire sales cannot be added as income of the assessee but addition can be made only to the extent of estimated profits embedded in the sales and that the income from suppressed sales should be determined by assessing the gross profit of the assessee, to the facts of the present case.

11. Insofar as the assessee's appeal is concerned, from the facts noted hereinabove, it is evident that the Commissioner (Appeals) had estimated the gross profit at 10%, whereas the Tribunal having regard to the gross profit of the previous year, which was 5.22% and which had been accepted by the revenue has, on the very same material, estimated the gross profit at 6.50%, which is higher than the gross profit accepted by the Department in relation to the previous year. Nonetheless, both, the Commissioner (Appeals) as well as the Tribunal, have resorted to estimation for the purpose of computing the gross profit. Thus, ultimately the gross profit has been determined on the basis of an estimate. As to whether the estimate of gross profit by the Commissioner (Appeals) is to be accepted or that by the Tribunal is to be accepted, cannot in any manner be said to give rise to a question of law, much less, a substantial question of law, so as to warrant interference.

12. In the absence of any substantial question of law, the appeals fail and are, accordingly, summarily dismissed.