

**(2006) 09 GAU CK 0025**  
**In the Gauhati High Court**

Pyarelal Mittal

APPELLANT

Vs

Assistant Commissioner of Income Tax

RESPONDENT

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**Date of Decision :** 25-09-2006

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 100  
Income Tax Act, 1961 — Section 132, 143, 144, 260A, 271

**Citation :** (2007) 211 CTR 512 : (2007) 1 GLR 181 : (2007) 291 ITR 214

**Hon'ble Judges :** M.B.K. Singh, J;D. Biswas, J

**Bench :** Division Bench

**Final Decision :** Allowed

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**Judgement**

D. Biswas, J.—This appeal u/s 260A of the Income Tax Act, 1961 has been preferred challenging the order date 31.5.2002 passed by the Income Tax Appellate Tribunal, Guwahati Bench in I.T.A. No. 49(Gau) of 1998 relevant for the assessment year 1993-1994.

2. The appeal was admitted on 10.1.2003 for hearing on the following questions of law:

(a) Whether on the facts and in the circumstances of the case, the Tribunal was justified in upholding the addition of Rs. 20,51,718 to the profits of the appellant on the only premises that the percentage of brokerage was reasonably estimated by the Assessing Officer on the basis of the prevailing practice in the recognized stock exchange, without giving a specific finding that the accounts of the appellant were not correct and complete and/or that the income cannot be properly deduced from the accounting method employed by the appellant?

(b) Whether on the facts and circumstances of the case the Tribunal was justified in upholding the determination of notional profits by the Assessing Officer on the basis of pure estimates?

(c) Whether on the facts and circumstances of the case the order impugned against was perverse and for which reason the order dated 31.5.2002 to the

extent appealed against is liable to be set aside and quashed?

3. We have heard Mr. A.K. Saraf, learned senior counsel for the appellant and also Mr. U. Bhuyan, learned Counsel for the Revenue.

4. The appellant carries on the business of stock and share brokeship having its office at Fancy Bazar, Guwahati and owns two firms, namely, Tokofin and Associate and Mittal Investors. In pursuance of search conducted in the business as well as residential premises of the appellant on 22.10.1992 and 23.10.1992, books of account, share certificates, cash amounts were found. The appellant filed his return of income on 30.3.1995 showing a total income of Rs. 1,28,030. Notices u/s 143(2) were issued whereupon the representative of the appellant appeared and explained the return of income with reference to the seized documents and other materials on record. The Assessing Officer assessed the total income at Rs. 25,66,270 and computed the tax payable at Rs. 23,40,409 inclusive of surcharge and interest. The Assessing Officer also directed initiation of penalty proceeding u/s 271(1)(c). The Assessment Officer computed the total income in the following manner:

(a) Income from business Rs. 27,967 (b) Income from share transaction business Rs. 3,86,453 (c) Disclosure made u/s 132(4) Rs. 1,00,000  
\_\_\_\_\_ Rs. 5,14,420 (d) Profit arising dues brokerage and share Rs. 23,04,236 dealing Less net profit shown Rs. 3,52,518 Rs. 20,51,718 (e) Income from bther sources Rs. 64 Total income Rs. 25,66,074 or Rs. 25,66,070

5. The appellant being aggrieved preferred Appeal No. 202/1996-97 before the CIT (Appeals), Guwahati. The CIT (Appeals) held that the addition of Rs. 3,86,543 was on misconception of the actual state of affairs without reference to the documents and papers, and the explanations submitted by the appellant. The decision to add has been dubbed as high pitched assessment based on illogical and erroneous conclusion. The CIT (Appeals) directed deletion of the addition of Rs. 3,86,543 as income from share transaction business. The CIT (Appeals) also deleted the addition of Rs. 20,51,718 on account of profit assessed by the Assessing Officer based upon turnover of the clients and brokers. The CIT (Appeals) was of the opinion that the appellant was following a proper and regular accounting method and the profits could be properly deduced from the books of account. It was also held that the accounts were complete and correctly maintained and the Assessing Officer could not detect any discrepancy.

6. The Revenue being aggrieved approached the learned Tribunal in ITA No. 49(Gau)/1998. The learned Tribunal by the order dated 31.5.2002 partly allowed the appeal. The learned Tribunal remanded the issue relating to addition of Rs. 3,86,435 on account of undisclosed investments on shares for decision afresh by the Assessing Officer. As regards addition of Rs. 20,51,718 by the Assessing Officer on account of profit, the learned Income Tax Tribunal reversed the findings of the CIT (Appeals). The Tribunal held that the Assessing Officer was justified by taking 1% and 1/2% as profits on transactions of shares of the clients, and brokers.

7. In this appeal, the assessee has challenged the order of the learned Tribunal confirming the assessment order in so far it relates to addition of Rs. 20,51,118 on account of profits based upon turnover from clients and brokers. Dr. Saraf argued that the addition of Rs. 20,51,718 has not been consistent with the books of account duly kept and maintained by the assessee. The books of account were produced before the Assessing Officer, and the Assessing Officer after examination of the same could not detect any discrepancy or error. No objection was raised as to the admissibility of the contents of the books of account. According to Dr. Saraf, no brokerage was involved for the transactions amongst the brokers and in the present case huge transactions took place between brokers to brokers without involvement of any brokerage. Therefore, Dr. Saraf submitted that the question of assessment on brokerage in respect of such transactions is not permissible. In support of this contention, Dr. Saraf has relied upon Regulation 14, Appendix A of the Gauhati Stock Exchange Ltd. and a certificate issued by the General Manager.

8. The certificate reads as follows:

This is to certify that the member brokers of the Stock Exchange are at liberty to charge any brokerage to their clients but not exceeding the scale prescribed in Appendix A to the Regulation 14 of this stock exchange. Further no brokerage is involved in the transactions entered into by one broker with the other at the floor of the stock exchange.

9. From above, it is apparent that the brokers of the Gauhati Stock Exchange are permitted to charge brokerage to their clients not exceeding the rate prescribed in Appendix A to regulation 14 and that they are not allowed to charge any brokerage in respect of transactions made by one broker with another at the floor of the stock exchange.

10. The Assessing Officer observed that the assessee did not furnish trading account along with return of income for which total turnover was not ascertainable. But, during the course of hearing the assessee submitted details of the turnover and the Assessing Officer relying upon the same assessed notional profit at the rate of 1% in respect of transactions with the clients and 1/2% in respect of transactions with the brokers. Thus, net notional profit has been assessed at Rs. 17,53,650 and Rs. 5,50,586 respectively. Out of this, net profit on secondary market operation and brokerage on new issues was deducted and the sum of Rs. 20,51,718 worked out. The Assessing Officer did not express any doubt about the correctness of the turnover. In fact, he had accepted the same and acted upon. Merely because, he could not detect any variation in the total income shown in the turnover cannot be a ground for assessment on the basis of notional profit. There is no dispute that the brokerage charged from clients is variable and it may differ from client to client and script to script. The rate may also vary upon the volume of transactions with a particular client. There cannot be any fixed jacket formulae for assessment of income. The CIT (Appeals) found that the appellant was employing a proper and regular accounting method and

his profits could be deduced from the books of account which were complete and correct, and no discrepancy could be detected by the Assessing Officer. Therefore, there was no scope for any notional assessment of profits at a fixed rate. The relevant observation of the CIT (Appeals) is quoted below:

I have considered the submissions of the A.R. in detail and find that the appellant was employing a proper and regular accounting method and his profit could be properly deduced from the books of account. The accounts were complete and correctly maintained and no discrepancy was detected by the A.O. Therefore, the A.O. does not appear to be at all justified in making an addition merely on the basis of other parties more so he has not detected any defect in the accounts maintained by the appellant which had been regularly maintained and following the same accounting method. Reliance can be placed on the hon''ble Supreme Court's judgment in the case of Commissioner of Income Tax, Gujarat Vs. A. Raman and Company, , wherein the Apex Court have observed - "The law does not oblige a trader to make the maximum profits that he can out of his trading transactions. Income which accrues to a trader is taxable in his hands : Income which he could have, but has not earned, is not made taxable as income accrued to him.

In view of the foregoing discussion and respectfully following the pronouncement of the Apex Court and after due consideration of the whole aspects of the case in its entirety, I am of the opinion that the appellant's profit has to be deduced from his accounts. The A.O. ought to have keep in mind that low profit, in absence of any specific defect found in the accounts books of the appellant, can never be a sufficient and valid ground for making an addition on his own motion. I, therefore, delete the addition of Rs. 20,51,718.

11. The learned Tribunal in para 6 of the impugned judgment and order observed that at the time of hearing the details of turnover were submitted before the Assessing Officer. The Assessing Officer calculated commission earned on the basis of the details of turnover filed by the assessee and estimated the profits from the turnover with clients at the rate of 1% and with the brokers at the rate of 1/2%. Relying upon the submission made on behalf of the Revenue that no share ledger scrip-wise gain or loss for secondary market transactions was produced before the Assessing Officer, reversed the finding of the CIT (Appeals) though the CIT (Appeals) has categorically stated that the share ledger had been produced before the Assessing Officer which shows scrip-wise gain or loss. That apart, the CIT (Appeals) also held that for better understanding copies of such ledger in respect of certain scrips at random was also submitted before it to place the same on record. This observation of the CIT (Appeals) have not been verified by the learned Tribunal. The learned Tribunal had acted upon a sweeping remark made by the departmental representative that no share ledger showing scrip-wise gain or loss for secondary market transactions was produced before the Assessment Officer.

12. The observation of the learned Tribunal about the percentage of profit

appears to be contrary to Appendix A to Regulation 14 as well as the established practice of the Gauhati Stock Exchange Ltd. that no brokerage is involved for transactions between one broker with another at the floor of the stock exchange. Therefore, outright rejection of the assessee's case appears to be contrary to the established principles of law. The Assessing Officer was apparently in error in computing profits in respect of the transactions with other brokers @ 1/2% since the provisions of the Regulation 14 and the established practice of the Gauhati Stock Exchange have not been taken into consideration. Similarly, the computation of profit at the rate of 1% in respect transactions with clients on notional basis is also not sustainable in law.

13. Mr. Bhuyan, learned Counsel for the Revenue submitted that the Tribunal being the final authority of facts has decided the matter in favour of the Revenue and that this Court in exercise of its powers u/s 260A may not interfere with the findings of facts as it involves no substantial question of law. Mr. Bhuyan relied upon the judgment in Deputy Commissioner of Income Tax Vs. Marudhar Hotels (P.) Ltd., in order to show that the finding of facts, howsoever erroneous, cannot be disturbed by the High Court in exercise of powers u/s 260A. He has also relied upon a judgment of the Bombay High Court in Commissioner of Gift Tax Vs. P.K. Somarajan Pillai, in order to show that the question formulated based on facts finally decided by the Tribunal cannot be a question of law. Mr. Bhuyan also relied upon a decision of this Court in Commissioner of Income Tax Vs. Down Town Hospital Ltd., to show that remand to the Tribunal for rehearing on factual issue is not permissible u/s 260A.

14. To counter the above submission, Dr. Saraf relied upon a judgment of this Court, in Aluminium Industries (R) Ltd. v. Commissioner of Income Tax (1995) GLR 216 . From this judgment, we find that addition of any amount to the gross profit on the ground that the assessee has declared low profit as compared to the previous year cannot be justified in the absence of adequate and relevant materials. For best judgment assessment u/s 144, the ITO should make an intelligible well grounded estimate. The question formulated on this factual matrix was answered in favour of the assessee and against the Revenue. In M. Durai Raj Vs. Commissioner of Income Tax, Ernakulam, , the Kerala High Court was of the view that relevant consideration is whether the assessee's accounts are maintained according to the method regularly employed by him, whether such method is correct and complete and whether income can be properly computed from the accounts. If these criteria are satisfied, in that case question of best judgment assessment could not arise. In Kejriwal Enterprises and Another Vs. Commissioner of Income Tax, , the Calcutta High Court was of the view that a conclusion by the authority which otherwise could not have been drawn by any reasonable person is perverse in law. In Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax 26 ITR 775 , the hon'ble Supreme Court was of the view that Income Tax Officer is not fettered by technical rules of evidences and pleadings, and he is entitled to act on material which cannot be accepted as evidence in course of law. But the officer is not entitled to make a

pure guess and make an assessment without reference to any evidence or any material at all. There must be some evidence than mere suspicion. In *Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs.*, , the hon''ble Supreme Court observed that if the appraisal of evidence by the trial court suffers from material irregularities and is based on inadmissible evidence or on conjectures and surmises, the Appellate Court is entitled to interfere with the findings of fact. The Supreme Court held that the first appeal is a valuable rights of the parties and unless restricted by law, the whole case therein is open for rehearing both on question of fact and law. The judgment of the Appellate Court must, therefore, reflect its conscious application of mind and the findings supported by reasons on all the issues. It has further been observed that as a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity and is based on inadmissible evidence, or on conjectures and surmises, the Appellate Court is entitled to interfere with the findings of fact. This judgment was rendered in the context of interpretation of Section 100 of the Code of Civil Procedure. In *Commissioner of Income Tax, Gujarat Vs. A. Raman and Company*, relied upon by the CIT (Appeals), it has been made clear by the hon''ble Supreme Court that law does not oblige a trader to make the maximum profit that he can out of his transactions. It is the income in the hand of the trader which is taxable. Any income he could have, but not earned, is not exigible to tax as income. In *Highways Construction Co. (P.) Ltd. Nalipool, Diabrugarh v. Commissioner of Income Tax, North Eastern Region, Shillong* (1992) 2 GLR 385, a Division Bench of this Court found fault with levy of notional interest on a loan given by the assessee without interest. The Division Bench held that the addition of notional interest is not justified since the assessee did not bargain for interest or had not calculated interest. In such a situation, the Division Bench held that the addition of notional interest as due could not form part of the income.

15. The ratio available from the above judgment would show that in a case where the findings of fact, even by the Tribunal is perverse and contrary to materials on record and based on surmises and conjectures, the High Court u/s 260A would be competent to interfere. The other feature that emerges is that the income has to be deduced from the books of account and other documents furnished and there is no scope for any conjectures and surmises. If the method of accounting is not faulty and there is no suppression of material facts, the authority cannot embark upon a speculative assessment of notional profit. In the instant case, from the discussion made hereinbefore, it would appear that the Assessing Officer did not find any fault with the books of account and the method of accounting employed by the assessee, and that there has been suppression of any material fact which deterred him from computing the actual net profit. The Assessing Officer has not pointed out any defect in the detail turnover submitted during the assessment, and from this point of view, the appeal at hand cannot be dismissed for want of substantial question of law. Therefore, the judgment and order of the Tribunal in upholding the addition of Rs. 20,51,718 to the profits of the assessee is not sustainable on facts.

16. In the result, the appeal is allowed, the judgment and order of the learned Tribunal is set aside and that of the CIT (Appeals) are restored. The questions of law formulated in this appeal are answered accordingly in favour of the assessee and against the Revenue.