

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

ITA-208-2013

Pronounced on: 8th January, 2015

The Commissioner of Income Tax-II, Chandigarh Appellant

VERSUS

Narender Kumar Gupta Respondent

**CORAM: HON'BLE MR. JUSTICE RAJIVE BHALLA
 HON'BLE MR. JUSTICE B. S. WALIA**

Present: Ms.Urvashi Dhugga, Advocate, for the appellant.

**Mr.Ravi Shankar, Advocate, and
Mr.B.M.Monga, Advocate, for the respondent.**

RAJIVE BHALLA, J. (ORAL)

The revenue is before us impugning correctness of order dated 23.01.2013, passed by the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal'), Chandigarh Bench 'B', Chandigarh, by seeking answer to the following substantial questions of law: -

“1. Whether the order of the ITAT is perverse, in the facts and circumstances of the case, in not deciding the issue of bogus purchases amounting to Rs.23,37,352/- (i.e. Rs.18,12,777/- plus Rs.5,24,575/-) on merits in a case of the assessee claiming audited books of accounts and in directing the assessing officer to work out the income of the assessee by applying net profit rates of 6% compared to 5.48% declared by the assessee itself without controverting the categorical findings of the AO supported with concrete evidence brought

on record?

2. Whether on the facts and circumstances of the case, the Hon'ble ITAT erred in law in deleting the additions made on account of unsubstantiated expenses amounting to Rs.15,87,181/- as the assessee was not able to justify the payments made for alleged purchases as clearly brought out by the AO in his order?

3. Whether on the facts and circumstances of the case, the Hon'ble ITAT erred in law in first directing the assessing officer to determine the Net Profit of the assessee at 6% compared to 5.48% declared by the assessee itself and then deleting the addition made on account of disallowance made u/s 40(a)(ia) amounting to Rs.3,59,424/- on this issue on merit in spite of the fact that the AO had given ample evidence in support of its finding?

4. Whether on the facts and circumstances of the case, the Hon'ble ITAT erred in law in first directing the assessing officer to determine the Net Profit of the assessee at 6% compared to 5.48% declared by the assessee itself and then deleting the disallowance of Rs.1,98,900/- out of machinery repair & maintenance rather than deciding the grounds of appeal on this issue on merit after taking into account the evidence and findings of the AO?"

The assessee is a contractor engaged in construction of roads. The assessee filed his return of income for assessment year 2009-10 declaring an income of Rs.44,89,030/- which included income from salary amounting to Rs.2,64,115/- and profits and gains from business and profession amounting to Rs.42,34,916/- respectively. The assessing officer made an addition of Rs.3,59,424/- under Section 40(a)(ia) read with Section 194C of the

Income Tax Act, 1961 (hereinafter referred to as the 'Act') for failure to deduct tax on freight and cartage payments made to one M/s V.R.Enterprises. The assessing officer made an addition of Rs.6,88,326/- on account of payments exceeding Rs.20,000/- made in cash to Sh.Desraj, M/s Sangam Stone Dust Supplier, M/s Dahia Stone Crusher, M/s V.K.Contractors and M/s Shamsheer Singh Grid Supplier. An addition of Rs.15,87,181/- was made by holding that these purchases were bogus by referring to variation in the name of the party on the voucher and on the corresponding bill etc. The assessing officer added Rs.18,12,777/- on account of purchases from M/s V.K.Contractor, Sh.Shamsheer Singh Grid Supplier, M/s Sangam Stone Dust Supplier and M/s Dahia Stone Crusher by holding that these are bogus transactions. A sum of Rs.3,97,800/- claimed on account of repairs and running of machinery was disallowed to the extent of 50% and Rs.1,98,900/- was added. An addition of Rs.5 lacs was made under Section 69C of the Act by deleting all the additions and directing the assessing officer to assess income at a net profit rate of 6%.

Aggrieved by this order, the assessee filed an appeal. The CIT(A), vide order dated 12.09.2012, deleted the addition of Rs.5 lacs under Section 69C of the Act but affirmed the other additions and dismissed the appeal. The appeal filed by the assessee before the Tribunal was allowed.

Counsel for the revenue submits that the Tribunal had no jurisdiction to direct the assessing officer to assess income at 6% and thereafter delete all additions made by the assessing officer without considering the issue of bogus purchases amounting to Rs.23,37,352/- unsubstantiated expenses of Rs.15,87,181/-, Rs.3,59,424/- added under Section 40(a)(ia) of the Act and Rs.1,98,900/- disallowed on account of machinery repair and maintenance. It is further submitted that as the assessing officer as well as the Commissioner of Income Tax (Appeals), Chandigarh (hereinafter referred to as the 'CIT(A)') have recorded findings of fact that purchases were made from bogus firms and these facts were verified by the inspector, the onus to prove otherwise lay upon the assessee. A perusal of the record reveals that the assessee was unable to adduce any evidence much less prove the existence of the firms from whom he had allegedly purchased material. The Tribunal has rejected the addition made on account of bogus purchases without assigning any reason and while referring to the amount of Rs.5,24,575/-, which it deleted, abruptly directed the assessing officer to compute the income of the assessee at a net profit rate of 6%. The Tribunal ignored the absence of any explanation relating to the bogus purchases, non-deduction of tax on freight and cartage payments, the fact that payment exceeding Rs.20,000/- had been made to one party on a single day, rendering its order illegal and

void.

Counsel for the assessee submits that the impugned order is legal and valid. The assessing officer having doubted the accounts of the assessee, in essence, rejected the accounts and, therefore, had no jurisdiction to make further additions. The Tribunal has merely rectified this error and directed the assessing officer to assess income of the assessee at a net profit rate of 6% and deleted all other additions by relying upon a judgment of this Court in “Commissioner of Income Tax Vs. Smt.Santosh Jain” (2008) 296 ITR 324 P&H. Counsel for the assessee also relies upon the judgment of this Court in “The Commissioner of Income Tax, Patiala Vs. Shri Ajay Kumar Singla”, recorded in ITA-181-2014, decided on 07.10.2014.

We have heard counsel for the parties and perused the impugned order.

A perusal of the order passed by the Tribunal reveals that it has directed the assessing officer to assess income at a net profit rate of 6% and thereafter deleted all additions. The Tribunal, while considering the question of disallowance under Section 40A(3) of the Act held in paragraph 7 of its order, that payments made by the assessee to different persons on different dates were less than Rs.20,000/- and the CIT(A) had accepted this fact but still proceeded to confirm the assessment by adding Rs.18,12,777/- which included

Rs.5,24,574/-. After holding as above, the Tribunal proceeded to deal with the matter regarding the bogus bills and held that the assessing officer did not make any inquiries as to the status of the assessee as at best he made general inquiries regarding the non-registration of the supplier with the Sales Tax Authorities and the Pollution Control Board and thereafter abruptly and without assigning any tangible reason, directed the assessing officer to apply a net profit rate of 6% to workout the income of the assessee and deleted all additions.

We are of the considered opinion that the impugned order suffers from a fundamental flaw. The Tribunal ignored the evidence relied by the assessing officer particularly the reference to variation in the name of the party on the voucher and the corresponding bill, variation in description of purchases on the voucher and the corresponding bill, variation in rates of the same item of purchase etc. The assessing officer also referred to failure of the assessee to prove the existence of these parties and while doing so did not merely rely upon absence of a sales tax registration number/ or absence of registration with the Pollution Control Board (as held by the Tribunal) but also sought a report from an inspector who found that these parties did not exist at the addresses mentioned in the bills. A relevant extract from the order passed by the assessing officer, referring to the report received from the inspector, reads as

follows: -

“c) On the spot verification was also conducted by the Inspector and it was found that no such parties existed at the addresses mentioned on the bills. The report of the inspector is placed on record and an extract from the same is produced below: -

“As directed, today i.e. 09-12-2011 I went to Chandigarh Crusher Zone Chandimandir Road, Distt. Panchkula to collect the information u/s 133(6) of the I-Tax Act, 1961 from M/s Dahiya Stone Crusher, M/s V.K. Contractor & Supplier, Samsher Singh Grit Supplier and M/s Sangam Stone Dust Supplier. I could not find the above parties on the mentioned addresses. Then I contacted Mr. Tarsem, who is working in M/s R.K. Trading Co. since 2005. He told me that he had not heard any of the above mentioned names of these firms. Then I contacted Mr. Jai Ram of M/s Rekhi Stone Crusher, Burj Kotian, Chandimandir, he told me that he is working as foreman for the last 6 or 7 years and he had also not heard any of these firms. I also contacted Mr. Vinod Kumar who is working as Munshi for the last 10 yrs in M/s Hargobind Stone Crusher, Burj Kotian, Chandimandir, Distt. Panchkula (Haryana), Mr. Raju, who is working as Chowkidar in M/s Janta Woshing Plant and Mr. Suresh, who is working for the last 8 years in Bhiwani Stone Crusher, Chandimandir. Who also told me that these firms are not in existence here as they have never heard these names. At the last I went to Sangam Stone Crusher, where I met Mr. Ashish Kumar who is working as a helper (Mobile No. 8950695356), he gave me the telephone no. of Mr. Deepak, owner of M/s Sangam Stone Crusher, who told me that no such firm was in existence in the area.”

A perusal of the report reveals that the inspector could not find these firms/entities. Upon receipt of the report and as recorded in the order passed by the assessing officer, the assessee was afforded an opportunity to produce the concerned persons so as to prove the genuineness of the bills. The assessee filed replies which were primarily rejected on the ground that the assessee could

not prove the existence of these parties. A relevant extract from the assessment order reads as follows: -

“The reply submitted by the assessee has been considered and is not acceptable. The assessee not only failed to produce the said persons but was also not able to provide the PAN No./Sales Tax No. or Pollution Clearance certificate of these parties from which he has claimed to have made substantial purchase which have been made in cash. Further, the suppliers mentioned have addresses which are clearly mentioned on their respective bills. Spot verification carried out has clearly shown that no such parties existed at those addresses even in the year under consideration. Thus the contention of the assessee that they were present on-site is not also acceptable.

It is also worth mentioning that notices u/s 133(6) of the Income Tax Act, 1961 for furnishing of information were also sent to the above mentioned concerns requiring them to provide a copy of the ledger of M/s Harsoria Construction Co. These letters returned to the office undelivered.”

The Tribunal, however, has not dealt with this aspect nor has it chosen to record any opinion on the failure of the assessee to produce these parties or to prove their existence or to rebut the report prepared by the inspector but abruptly directed the assessing officer to apply a net profit rate of 6%, without assigning any ostensible reason. The Tribunal having ignored relevant facts, in our considered opinion, has committed an error of jurisdiction. We would like to clarify that we are not recording any opinion as to the legality or otherwise of the bills, the vouchers and the expenses etc. particularly as the assessee who is a contractor must have purchased some material but as the Tribunal has directed assessment at a net profit rate without examining the material on record, referred to in

detail by the assessing officer particularly the paragraphs extracted hereinbefore, the questions of law have to be answered in favour of the revenue by holding that the Tribunal has erred in applying a net profit rate without considering the material collected by the assessing officer and by ignoring relevant facts and factors referred to by the assessing officer, thereby leading to miscarriage of justice and an error of jurisdiction that must necessarily be rectified by the Tribunal itself.

Consequently, we allow the appeal, set aside order dated 23.01.2013, passed by the Tribunal insofar as it relates to the questions of law raised before us and restore the appeal to the Tribunal for adjudication afresh and in accordance with law.

Parties are directed to appear before the Income Tax Appellate Tribunal, Chandigarh Bench 'B', Chandigarh, on 03.03.2015.

[RAJIVE BHALLA]
JUDGE

8th January, 2015
Shamsher S.Sabharwal

[B. S. WALIA]
JUDGE