IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Income Tax Appeal No. 67 of 2014 (O&M)
Date of Decision: 08.08.2016

Commissioner of Income Tax-II, Jalandhar ..Appellant

versus

M/s Deepak Heritage ..Respondent

CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE.
HON'BLE MR. JUSTICE DEEPAK SIBAL.

Present : Mr. Vivek Sethi, Advocate, for the appellant.
Mr. Rohit Sud, Advocate, for the respondent.

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S.J.VAZIFDAR, CHIEF JUSTICE

This appeal is against the order of the Income Tax Appellate Tribunal in so far as it directs the Assessing Officer to apply a G.P. rate of 12.38% on the turnover declared by the respondent-assessee. The order was passed by the Tribunal in an appeal against the order of the Commissioner of Income Tax (Appeals) fixing the GP rate of 25%. The CIT(Appeals) in turn had passed the order on the respondent-assessee's appeal against the order of the Assessing Officer making an addition of about ₹ 1.32 crores to the respondent-assessee's returned income on account of bogus purchases claimed by it in order to reduce its G.P. and evade payment of taxes. The matter pertains to the assessment year 2009-10.

2. The appeal is admitted on the following substantial questions of law:-

(i) Whether on the facts and in the circumstances of the case and in law, having given a findings in para 12.1 that the purchases were bogus and that the assessee had created bogus creditors in the books of account, the Hon'ble ITAT was justified in applying G.P. rate instead of confirming the disallowance of bogus purchases of ₹ 1,31,28,580/-.

(ii) Whether on the facts and in the circumstances of the case and in law the Hon'ble ITAT failed to appreciate the fact that the A.O. highlighted the low G.P. rate only to strength the case for bogus purchases and did not make addition on account of law G.P. rate.

(iii) Whether on the facts and in the circumstances of the case and in law the Hon'ble ITAT was justified in estimating G.P. rate of the assessee ignoring the fact that in view of the specific investigation done, the past history and comparable cases were not entirely relevant to the present case while deciding the issue."

It is not necessary to answer the other two questions raised in the appeal.

3. The assessee filed a return of income declaring an income of ₹ 93,513/-. The Assessing Officer rejected the books of accounts under section 145(3) of the Income Tax Act, 1961 (for short 'the Act'). The assessee has not challenged the rejection of the books. The assessee carried on business *inter-alia* of trading in textiles. The Assessing Officer found that the gross profit percentage returned by the assessee of 7.71%, 7.74% and 8.19% for the assessment years 2007-08, 2008-09 and 2009-10 was very low. The finding was on a comparison with the G.P. rates of other assessees in the same line of business. 57 sundry creditors of the value of about ₹ 2.23 crores against purchases of an aggregate amount of about ₹ 3.85 crores were shown. A questionnaire was issued on 29.09.2010 to furnish the confirmation of creditors of over ₹ 50,000/- alongwith their PAN numbers and addresses. The confirmation was not furnished in respect of five creditors. There were also discrepancies in the books of accounts in respect of four creditors. The assessee was given sufficient time to show cause in this regard. The Assessing Officer also found the bills to be forged and that in some cases there was a difference in signatures. The CIT(Appeals) upheld

the Assessing Officer's decision to reject the books of accounts but applied a G.P. rate of 25% instead of adding an amount of ₹ 1.32 crores to the assessee's income. Cross appeals were filed. The department challenged the decision of the CIT (Appeals) applying the G.P. rate of 25% and setting aside the order of the Assessing Officer adding to the assessee's return of income in the sum of ₹ 1.32 crores. The respondent on the other hand challenged the G.P. rate of 25% adopted by CIT (Appeals). The Tribunal adopted the G.P. rate of 12.38%.

4. Section 144 of the Income Tax Act,1961 in so far as it is relevant reads as under:-

> **"Best judgment assessment:**
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> **144.** (1) If any person—
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> (*a*) fails to make the return required under sub-section (1) of section 139 and has not made a return or a revised return under sub-section (4) or sub-section (5) of that section, or
>
> (*b*) fails to comply with all the terms of a notice issued under sub-section (1) of section 142 or fails to comply with a direction issued under sub-section (2A) of that section, or
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> (*c*) having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of section 143, the Assessing Officer, after taking into account all relevant material which the Assessing Officer has gathered, shall, after giving the assessee an opportunity of being heard, make the assessment of the total income or loss to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment :
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> (2) The provisions of this section as they stood immediately before their amendment by the Direct Tax Laws (Amendment) Act, 1987 (4 of 1988), shall apply to and in relation to any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year and references in this section to the other provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year."

It is not necessary to refer to the proviso. In making a best judgment assessment, the authorities are entitled to adopt any reasonable approach which would best determine the actual tax liability.

5. The Assessing Officer found in respect of said 9 creditors that they had not furnished the confirmation or that there was a discrepancy in the accounts/documents. He also found that the cash payments on consecutive dates each of less than ₹ 25,000/- was only to circumvent the provisions of section 40A(iii) of the Act.

6. CIT(Appeals), however, disagreed with the addition of ₹ 1.32 crores to the assessee's returned income. Finding that if that was done the GP rate of the assessee would be more than 40% which was not possible. The CIT (Appeals), therefore, decided to apply the GP rate. On the rejection of the books of accounts on the ground that an assessee had returned low gross profit percentage, it is open to the authorities to ascertain the correct GP rate.

7. In such circumstances, the adoption of the GP rate instead of adding of ₹ 1.32 crores to the income of the assessee cannot be said to be perverse or irrational. The CIT(Appeals) had the GP rates of five assessees in respect of Phagwara and three in respect of Jalandhar. The GP rates of assessees of Phagwara ranged from 16.21% to 18.30% whereas the GP rates of three assesses at Jalandhar were 10.64%, 12.09% and 13.6%. The CIT (Appeals) adopted the GP rate of 25%. There is, however, nothing in the order to indicate why the GP rate of 25% was adopted. The average of GP rates of Phagwara and Jalandhar was also much less.

8. The Tribunal on the other hand adopted the average GP rate of assessees at Jalandhar as the assessee in the case before us also carried on the business at Jalandhar. The Tribunal observed that the CIT (Appeals) had fixed the GP rate of 25% which was not based on any material or cogent reasoning. This finding of the Tribunal is based on facts which is neither perverse nor absurd.

9. In the circumstances, the appeal does not raise a substantial question of law.

10. The appeal is, therefore, dismissed.

(S.J.VAZIFDAR)
CHIEF JUSTICE

08.08.2016 (DEEPAK SIBAL)
'ravinder' JUDGE

Whether speaking/reasoned	√Yes/No
Whether reportable	Yes/No√