

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

Income Tax Appeal No. 126 of 2015 (O&M)

**Date of Decision: 21.07.2016**

The Pr. Commissioner of Income Tax-3, Ludhiana ....Appellant

versus

M/s Khushi Ram & Sons, Foods (P) Ltd. Ludhiana ....Respondent

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

1. Whether Reporters of local papers may be allowed to see the judgment?
2. Whether to be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

Present : Mr. Rajesh Katoch, Advocate, for the appellant.  
Mr. Akshay Bhan, Senior Advocate with  
Mr. Alok Mittal, Advocate, for the respondent.

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**S.J.VAZIFDAR, ACTING CHIEF JUSTICE**

This is an appeal against the order of the Income Tax Appellate Tribunal dated 28.10.2014 allowing the respondent's assessee appeal against the order of the Commissioner of Income Tax-II, Ludhiana dated 31.03.2014 for the assessment year 2010-11. The Commissioner of Income Tax (CIT) in exercise of the powers under Section 263 of the Income Tax Act, 1961 (for short 'the Act') cancelled the assessment framed by the Assessing Officer and directed him to make a fresh assessment. The appellant has raised the following questions of law:-

- i) Whether in the facts and circumstances of the case, the order of Hon'ble ITAT is perverse in law in quashing the order under section 263 ignoring the decision of Hon'ble Punjab and Haryana High Court in case of **CIT v. M/s Abhishek**

**Industries Limited, ITA No. 312 of 2011 dated 20.12.2012 and CIT v. Assam Tea House 344 ITR 507 (O&H)** wherein in the similar circumstances, Hon'ble Court has upheld the invoking of revisional power by the CIT.

- ii) Whether in the facts and circumstances of the case, the order of Hon'ble ITAT is perverse in law in quashing the order under section 263 ignoring that assessment order is erroneous in so far as it is prejudicial to the interest of the revenue as the Assessing Officer has not followed the **decision of Hon'ble High Court of Punjab and Haryana in the case of M/s Kim Pharma (P) Ltd. v. CIT Panchkula, ITA No. 106 of 2011 (O&M) dated 27.04.2011** that income surrendered during survey is to be taxed u/s 69-A and set off losses u/s 70 and 71 is not permissible against such income.
- iii) Whether in the facts and circumstances of the case, the order of Hon'ble ITAT is perverse in law in quashing the order under section 263 ignoring that assessment order is erroneous in so far as it is prejudicial to the interest of the revenue as the assessee had failed to maintain the quantity wise details and as such it was not possible to compare the input with output and therefore books of account were liable to be rejected in the light of **decision of Hon'ble Punjab and Haryana in the case of Hargopal Singh proprietor, Gopal Sweets v. CIT 273 ITR 507** which the AO failed to do.

2. The arguments were limited to questions (i) and (ii). The third question does not raise a substantial question of law. The appeal is admitted only in respect of question No. (ii).

3. The C.I.T.(A) held that the Assessing officer had failed to make necessary enquiries including recording the statements of the persons concerned and had accepted the low G.P. rate taken by the respondent. It was also held that the net profit rates were very low even in the previous assessment years namely 2008-09 and 2009-10. In the assessment year 2010-11 the G.P. rate was only 10.85%. Further if the amount surrendered was excluded there would be a loss. It was further held that the Assessing officer had failed to ascertain whether the G.P. rate shown by the assessee was appropriate keeping in view the nature of the business. It was further observed that the Assessing Officer could have gathered the necessary data by recording the statements of the employees who actually manufactured the products, namely, sweets, by gathering data from other sources which would indicate how much raw material was required to manufacture a particular item of sweet and the corresponding sale price. After referring to the authorities, the C.I.T. merely expressed the opinion that the order framed by the Assessing Officer was erroneous in so far as it is prejudicial to the interest of the revenue and cancelled the assessment order and directed the Assessing Officer to make a fresh assessment.

4. The Tribunal on the other hand considered this issue in considerable detail. The respondent succeeded in demonstrating before the Tribunal that the Assessing Officer had made a detailed enquiry at the assessment stage with regard to the fall in the G.P. rate. The Assessing Officer sought complete details with regard to the manufacturing process,

month-wise production, consumption, quantitative sale and justification of major expenses. It was not contended that the respondent failed to furnish these details. The respondent produced his books of account which had been checked by the Assessing Officer. The Tribunal after considering the nature of the respondent's business held that it may not have been possible for the respondent to give exact details of the manufacture of its products and noted that the Assessing Officer had examined this aspect considering the respondent's history. It was found for instance that the CIT had not adversely commented upon the earlier assessment orders. In this view of the matter it was relevant that the assessee continued with the same business which in the earlier years had not been doubted. It is difficult to hold as perverse or unreasonable the Tribunal's acceptance of the respondent's explanation for the fall in the G.P. The reason furnished was that in the earlier year the purchase price of the items used in manufacturing the products was lower and in the year under consideration the purchase prices had increased. This is especially so in view of the fact that the respondent had furnished the data of the same before the Assessing Officer. Further, as noted by the Tribunal, the objections raised by the CIT had been met by the assessee before the Assessing Officer at the stage of assessment.

5. It is evident, therefore, that no question of law arises in this regard. The appeal so far as it relates to question No. (iii) is dismissed.

6. This brings us to question No.(ii). The respondent had filed a return of income on 24.09.2010 declaring an income of ₹ 63,42,650/- which was processed under section 143(1) of the Act. The case was selected for scrutiny and a notice under section 143(2) of the Act was

issued on 28.09.2011. The assessment was completed under section 143(3) by making an addition of ₹ 1,00,620/-. A survey was conducted under section 133(A) of the Act at the respondent's business premises during the course of which a sum of ₹ 80 lacs were surrendered as additional income and the respondent bifurcated the surrendered income as ₹ 50,00,000/- on account of building renovation, ₹ 15,000,00/- on account of office equipment and ₹ 15,000,00/- on account of sundry receivables. The assessee claimed a set off of ₹ 14,84,641/- towards unabsorbed loss and declared a total income of ₹ 63,42,648/-.

7. Section 72(1)(i) of the Income Tax Act, 1961 reads as under:-

**72.** (1) Where for any assessment year, the net result of the computation under the head "Profits and gains of business or profession" is a loss to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of [section 71](#), so much of the loss as has not been so set off or, where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and—

(i) it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year ;

8. It was contended that the respondent had not established that the profits and gains in the year in question were on account of any business or profession carried on by it. The contention is well founded. The record does not indicate that the respondent had indicated the source of income.

9. Mr. Bhan's reliance upon the order of the C.I.T. under section 263 of the Act is of no assistance. The respondent had surrendered a sum of ₹ 80 lacs. The order merely records the assessee's contention that it had surrendered a sum of ₹ 50 lacs, ₹ 15 lacs and ₹ 15 lacs towards building renovation, office equipments and sundry receivable respectively. This, however, is not an admission on the respondents' part regarding the source of the respondent's income. Infact the order records that an analysis of the facts showed that the Assessing Officer failed to make enquiries and to apply his mind inter-alia with regard to the fact that the surrendered amount cannot be taxed under any head of income until and unless the assessee furnishes evidence of the same. In other words the appellant's case was that the source of income had not been established. The order further expressly states that *"a perusal of assessment record shows that the assessee has failed to produce any evidence that the surrendered amount is on account of business income. The assessee did not place on record any evidence by way of vouchers etc. in regard to the construction of building/office equipments"*. The respondent asserts that the surrendered amount is on account of business income. It is for the assessee to establish the same.

10. Mr. Bhan then relied upon the following observations in the notice under section 263 which is reproduced in the order under section 263:-

“(iv) The Assessee has shown a GP of 10.85% even after including surrendered amount. After excluding the surrendered amount the assessee has shown loss. Even after including the surrendered amount the GP rate is on the lower side. The AO failed to make inquiry on this aspect even though the assessee

failed to produce the data of raw material consumption/production.”

11. This is not an admission on the appellant’s part that the surrendered amount is from the assessee’s business income. This observation is in respect of the GP rate of 10.85%. The appellant by this observation accepted that the surrendered amount is from business income. The observation only proceeds on the basis of the assessee’s assertion of the G.P. rate of 10.85% after including the surrendered amount.

13. It is not necessary that the surrendered amount is from business income. It could be on account of any other transaction legal or otherwise. Merely because an assessee carries on certain business, it does not necessarily follow that the amounts surrendered by him are on account of its business transactions. There is no presumption that absent anything else an amount surrendered by an assessee is his business income. It is for the assessee to establish the source of such surrendered amount.

14. Question No. (ii) is, therefore, answered in favour of the appellant.

15. The appeal is accordingly allowed so far as question No. (ii) is concerned and dismissed so far as question No. (i) is concerned.

(S.J.VAZIFDAR)  
ACTING CHIEF JUSTICE

21.07.2016  
‘ravinder’

(DEEPAK SIBAL)  
JUDGE

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| To be referred to the reporter | √Yes | No. |
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