

A.F.R.

OD-3

ITA/167/2010

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (Income Tax)
ORIGINAL SIDE

SRI SANJAY SAHA

-Versus-

COMMISSIONER OF INCOME TAX,
KOLKATA- XII

BEFORE :

THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI

And

THE HON'BLE JUSTICE RAJARSHI BHARADWAJ

Date : 12th December, 2023

Appearance:

Ms. Anupa Banerjee, Adv.

...for the appellant.

Mr. Amit Sharma, Adv.

...for the respondent.

1. Supplementary paper book filed today by the assessee is taken on record.
2. Heard Ms. Anupa Banerjee, learned counsel for the appellant/assessee and Mr. Amit Sharma, learned standing counsel for the respondent/Income Tax Department.

Facts:

3. Briefly stated facts of the present case are that the assessee is engaged in trading (export and domestic) of

various commodities. During the assessment year in question i.e., A.Y. 2005-06, the appellant/assessee received gift of jewellery valued at Rs.34,68,900/- which was introduced as capital in the business. Out of the aforesaid jewellery, the assessee sold jewellery valued at Rs.9,00,000/- to M/s. Bhootnath Jewelers (P) Limited and received two cheques of State Bank of India, Burrabazar Branch, Kolkata being cheque no.572020 of Rs.5,00,000/- dated 17th January, 2005 and another cheque no.572022 of Rs.4,00,000/- dated 4th February, 2005. During the course of assessment proceedings, the assessing officer enquired the said sale of jewellery. He also made enquiries from the State Bank of India, Burrabazar Branch with respect to bank account No.10461496292 whereas both the aforesaid cheques bear account No.01000060015. However, the assessing officer rejected the contention of the assessee and added the entire Rs.9,00,000/- in the income of the assessee under Section 68 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act, 1961').

4. The Commissioner of Income Tax (Appeals) [CIT(A)] upheld the aforesaid addition.
5. The second addition was made by the assessing officer in the Gross Profit (GP) Rate disclosed by the assessee. The assessee disclosed GP Rate of 4.6% and export turn-over

of Rs.20,96,65,679/- and domestic sales of Rs.58,34,015/-. The assessing officer increased the GP Rate from the disclosed rate of 4.6% to 6% and thus, made an addition of Rs.30,19,867/- in the income of the assessee.

6. Being aggrieved, the assessee filed first appeal before the CIT(A), who determined the GP Rate to 5% and sustained the addition under Section 68 of the Act, 1961.
7. Aggrieved, the revenue filed ITA No.1809/Kol/2009 and the assessee filed ITA/2002/Kol/2009 before the Income Tax Appellate Tribunal (ITAT), Bench-B, Kolkata which were decided by the impugned common order dated 23rd April, 2010. By the impugned common order, the ITAT dismissed the appeal of the revenue and partly allowed the appeal filed by the assessee. The Tribunal made *ad hoc* addition of Rs.4,00,000/- in the GP rate disclosed by the assessee and sustained the addition of Rs.9,00,000/- under Section 68 of the Act, 1961.
8. Aggrieved with the order of the ITAT, the assessee filed the present appeal under Section 260A of the Act, 1961. It is stated by learned counsel for the respondent that the Income Tax Department has not filed any appeal against the impugned order of the Tribunal.

Submission on behalf of the Appellant/Assessee:

9. Learned counsel for the appellant submits that the addition on the point of GP Rate is totally baseless and without reference to any adverse material on record. The only thing which has been made the basis is the earlier year GP rate whereas each year being an independent unit of assessment, addition solely on account of earlier year's GP Rate cannot be made. She submits that it is undisputed that the turn-over of the assessee has substantially increased during the assessment year in question and, as such, a little reduction in GP rate is a natural outcome. With respect to the addition under Section 68 of the Act, 1961, she submits that there was no basis to make this addition inasmuch the gift of jewellery, sale of jewellery and receipt of sale proceeds through account payee cheques have neither been disputed nor the assessing officer could bring on record any material to disbelieve the transaction. The assessing officer made enquiries from the bank with respect to a bank account which has no relation or concern with the cheque issued by the purchaser to the petitioner as consideration for sale of jewellery by the assessee. She, therefore, submits that the assessee's explanation could not have been rejected. Consequently, the addition made by the assessing officer as upheld by the Tribunal under

Section 68 of the Act, 1961 is totally arbitrary and illegal. She further submits that the finding recorded by the Tribunal with respect to the cheques and the bank account, is perverse inasmuch as the cheques received by the assessee in consideration of the jewellery sold are of a different bank account and not the bank account which was enquired by the assessing officer. Therefore, the finding recorded by the Tribunal is perverse and deserves to be set aside. She submits that both the substantial questions of law deserve to be answered in favour of the assessee and against the revenue and the appeal deserves to be allowed.

Submission on behalf of the Respondent/Revenue:

10. Learned counsel for the respondent/revenue submits that the *ad hoc* addition made by the Tribunal with respect to GP rate disclosed by the assessee is quite genuine and it does not suffer from any perversity. Therefore, no interference in appeal under Section 260A of the Act, 1961 can be made and no substantial question of law is, in fact, involved. He submits that since the assessee has completely failed to establish the transaction of sale of jewellery of Rs.9,00,000/-, therefore, the addition made under Section 68 of the Act, 1961 is quite correct and it

does not give rise to any substantial question of law. The finding recorded by the Tribunal in this regard is the findings of fact.

Discussion & Findings:

11. We have carefully considered the submissions of learned counsels for the parties and perused the records of appeal.

12. This appeal was admitted on the following substantial questions of law;

(i) *Whether in the facts and circumstances of the instant case, the Tribunal was justified in making an ad hoc addition of Rs.4,00,000/- to the gross profit computed by the assessee without assigning any reason, having disagreed with the order of assessment and appellate authority rejecting the gross profit percentage adopted by the assessee and the findings of the Tribunal to this extent is arbitrary, unreasonable and perverse ?*

(ii) *Whether in the facts and circumstances of the instant case, the order of the Tribunal, in complete disregard of the evidences produced by the assessee, was justified in making an addition of Rs.9,00,000/- under Section 68 of the Act and the findings of the Tribunal to this extent is arbitrary, unreasonable and perverse ?*

Re: Substantial question of law No.(i)

13. We find that the Tribunal itself has recorded a finding that sale turn-over of the assessee has substantially increased during the assessment year in question. No material has been produced or brought on record by the revenue which may give rise to disbelieve the GP rate disclosed by the assessee. The assessing officer has determined the GP rate at 6% as against the disclosed GP rate of 4.6%, which was reduced by the CIT(A) to 5%. The ITAT has further reduced it and made an *ad hoc* addition of Rs.4,00,000/- to the Gross Profit. The revenue has accepted the impugned order of the Tribunal, but the assessee being aggrieved with the *ad hoc* addition of Rs.4,00,000/- to the GP rate has filed the present appeal. No reason whatsoever has been assigned by the Tribunal to sustain the addition of Rs.4,00,000/- in the GP rate of the assessee. Under the circumstances, the finding of the ITAT that *ad hoc* addition of Rs.4,00,000/- to the disclosed GP rate of the assessee would be reasonable and fair, is based on no material. Even the Tribunal has not recorded any finding based on any material so as to disbelieve the GP rate disclosed by the assessee. Under the circumstances, the *ad hoc* addition made by the Tribunal to the GP of the assessee is wholly arbitrary and based on no evidence, consequently, it cannot be

sustained. Therefore, the substantial question of law no.(i) is answered in favour of the assessee and against the revenue. The addition of Rs.4,00,000/- made by the Tribunal is hereby set aside.

Re: Substantial question of law No.(ii)

14. From the brief facts as noted above, it is evident that the revenue has not disputed receipt of gift of jewellery by the assessee during the assessment year in question to the tune of Rs.34,68,900/-. Out of the aforesaid gifted jewellery the assessee has sold jewellery valued at Rs.9,00,000/- and filed documents in support of sale of jewellery. The assessee received payment through two account payee cheques as briefly noted above. The sale of jewellery was made to a private limited company. No finding has been recorded by the assessing officer or the Tribunal that the purchaser i.e., M/s. Bhootnath Jewellers (P) Ltd. is non-existent or is not a registered company or is a fake company. The enquiries which the assessing officer made from the bank is with respect to some other bank account and not the bank account of which the assessee received two cheques in consideration of the jewellery sold. Neither any material was brought on record nor any finding based on any material could be recorded by the assessing officer or the Tribunal to

dispute the transaction of sale of jewellery. No finding has been recorded by the assessing officer or the Tribunal that M/s. Bhootnath Jewellers (P) Ltd. is a fake concern or the transaction of sale is fake. Under the circumstances, the explanation submitted by the assessee for receipt of consideration for sale of jewellery through account payee cheques could not be disbelieved. The findings recorded by the Tribunal to uphold the addition of Rs.9,00,000/- under Section 68 of the Act, 1961 is, thus, perverse.

15. Bare reading of Section 68 of the Act, 1961 suggests that there has to be credit of amount in the books maintained by the assessee during the assessment year relevant to the previous year and the assessee could not offer explanation about the nature and source of such credit found in the books or the explanation offered by him is not satisfactory. It is only then the sum credited may be charged to income tax as income of the assessee of that previous year. The phrase "the assessee offers no explanation about the nature and source or the explanation offered by him is not satisfactory in the opinion of the Assessing Officer satisfactory" means that the assessee offers no proper, reasonable and acceptable explanation as regards the sum found credited in the books maintained by

him. But where the assessee had offered explanation supported by documentary evidences including receipt of payment by cheque and the genuineness of the cheque or the party to whom the jewellery were sold, could not be disputed by the department based on any evidence or adverse material then Section 68 of the Act, 1961 could not be invoked. The opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory is necessarily required to be based on proper appreciation of material and other attending circumstances available on record. The Assessing Officer has to form his opinion objectively with reference to the materials available on record and not merely on surmises and conjecture. Application of mind is a *sine qua non* for framing the opinion of the Assessing Officer. Since in the present set of facts the assessee has offered proper explanation based on documentary evidences and the evidences so filed by the assessee were not found to be in-genuine or fake, therefore, genuineness of the sale transaction of jewellery by the assessee could neither be disputed nor Section 68 of the Act, 1961 could be invoked to make addition in the income of the assessee. The legal proposition with respect to applicability of Section 68 of the Act, 1961 has also been settled by the Hon'ble Supreme

Court in ***Commissioner of Income Tax Vs. P. Mohanakala*** reported at **AIR 2007 SC 2116 (paragraph 15)** which also helps the assessee in the present set of facts. Therefore, the addition of Rs.9,00,000/- upheld by the Tribunal cannot be sustained and is hereby set aside. The substantial question of law no.(ii) is answered in favour of the assessee and against the revenue.

16. For the reasons afore-stated, the impugned order dated 23rd April, 2010 in ITA No.1809/Kol/2009 (A.Y. 2005-06) passed by the Income Tax Appellate Tribunal, Bench- B, Kolkata, is hereby set aside and the appeal of the appellant/assessee is allowed. Both the substantial questions of law are answered in favour of the assessee and against the revenue.

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)

As.

A.F.R.