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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 607/2019

PR. COMMISSIONER OF INCOME TAX -12 .....Appellant

Through: Mr. Indruj Rai, SSC with Mr. Sanjeev Menon, Mr. Rahul Singh, JSCs and Mr. Anirudh Narendra, Adv.

versus

SMT. SUDHA LOYALKA .....Respondent

Through: Dr. Rakesh Gupta, Mr. Somil Agarwal and Mr. Dushyant Agarwal, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% 03.07.2024

1. This appeal is preferred against the order of the Income Tax Appellate Tribunal ['**ITAT**'] dated 18th July 2018 and posits the following questions of law for our consideration:-

> "A. Whether the Hon'ble ITAT was justified in deleting the addition of Rs.3,50,94,758/- on account of sundry creditors, not proved as genuine on the ground that non-mentioning of precise provision of law makes the impugned addition bad in law though no such grounds of appeal was taken by the assessee or before the Hon'ble ITAT?
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> B. Whether the Hon'ble ITAT was justified in deleting the addition of Rs. 3,50,94,758/- on the ground that addition can't be made u/s 68,69,69C and 41(1) of the IT Act despite the failure on the part of the assessee to discharge the burden of proof of expenditure as per the provisions laid down in Section 37(1) of the Act?"

2. The solitary dispute appears to have centered upon the genuineness of certain sundry creditors and to whom payments had

been made by the assessee in the year in question.

3. The Commissioner of Income Tax (Appeals) ['**CIT(A)**'] while upholding the addition which had been made by the Assessing Officer ['**AO**'] had observed as follows: -

> "**9.8** Assessing Officer has discussed the details in para 3.1 of the Assessment Order in the case of each party. During the course of appellate proceedings, Appellant was asked to submit the addresses of the concerned parties, however, Appellant has stated vide order sheet entry dated 27.07.2016 that the addresses of the parties were not available. Appellant was also asked whether any transactions was done with the said parties during previous years. AR of the Appellant stated vide order sheet entry dated 17.11.2016 that no transaction was done with these parties in any of the previous years. <u>Appellant is not able to establish that these sundry creditors were genuine neither Appellant has offered to verify the genuineness of these parties during appellate proceedings. From the Balance-Sheet, it is apparent that liability on account of sundry creditors was Rs.6,77,21,342/- out of which verification of 20 parties amounting to Rs.2,78,20,495/- could not be done. When the payments are pending and Appellant is not able to give the address of these parties, it shows that liability on account of these sundry creditors were bogus and no actual liability was existing. Appellant has also claimed that she has made full and final payment to these parties during A.Y. 2013-14. However, from the perusal of the ledger account submitted, it is seen that all the payments are in cash and not a single payment has been made through cheque and if parties were existing, Appellant was free to provide the addresses during appellate proceedings which however has not been done</u>.
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> **9.9** <u>In order to claim that an expenditure falls u/s 37(1), burden of proving the necessary fact in this connection is on the Assessee. Onus was on the Appellant to submit the correct addresses of parties from whom she claims to have made purchases. However, Appellant has not submitted any detail in any of the aforesaid either before Assessing Officer or during appellate proceedings. Hon'ble Delhi High Court in the case of Modi Stone Ltd., 203 taxman 123 have held that when no details and evidence was submitted, Assessing Officer was justified in disallowing the entire amount and relief cannot be granted on the basis of past record and nature of claim when there was no evidence/material during the year to prove the claim</u>.
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> **9.10** Hon'ble Punjab & Haryana High Court in the case of SG Exports (P&H), 336 ITR 2 have held that onus is on the Assessee to prove the fact by producing cogent and convincing evidence including the identity of parties alongwith evidences of payment.
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> **9.11** There is also no basis in the claim of Appellant that Appellant has maintained complete book of account, books are audited and there are no adverse observations from auditors. Assessing Officer has conducted

inquiry and has established that no actual purchases were made from these parties. Hon'ble Delhi High Court in the case of Goodyear India Ltd., 246 ITR 116 (Del) have held that the broad proposition that once there is tax audit u/s 44AB, AO should not insist upon production of records or details cannot be laid down and merely because an audit report is available, there is no fetter on the power of Assessing Officer to require the Assessee to justify its claim with reference to records, materials and evidence as such power is inherent in an Assessing Officer in the scheme of the Act. Therefore, there is no substance in the claim of Appellant.

9.12 Therefore, it is apparent that these sundry creditors were not genuine and such the purchases itself was not genuine. Appellant has stated that gross profit cannot be so high. However, Appellant fails to realize that it was Appellant's onus to establish that purchases were genuine and sundry creditors were also genuine and not bogus. However, Appellant has not discharged her onus. Assessing Officer had issued notice u/s 133(6) on 22.12.2014 to 27 parties out of which letters in the case of 20 partiers were returned back unserved with the remarks of incomplete address/no such firm/left/koi jankari nahin/not related/ wrong address etc. Assessing Officer has discussed the details of each of the aforesaid cases in para 3.1 of the Assessment Order. Assessing Officer requested to furnish confirmation alongwith complete postal address in the case of all the 20 parties mentioned in para 3.1 of the Assessment Order. However, no reply neither any confirmation alongwith complete postal address was submitted by the Assessee before Assessing Officer. Even during the course of appellate proceedings, no details has been submitted. AR has stated that he has no addresses of any of these parties."

4. When the matter reached the ITAT, it firstly found itself unable to sustain that addition observing that neither the AO nor the CIT(A) had alluded to any specific provision of the Act which would sustain the additions which were ultimately made. In view of the above, it came to hold that the non-mentioning of a precise provision of law while making the addition rendered the same unsustainable.

5. However, it did not stop merely at that, and as would be evident from a reading of the impugned order, it proceeded further to examine the challenge on the basis of the provisions contained in Sections 68, 69 and 69C of the Income Tax Act, 1961 ['**Act**']. Insofar as the sustainability of additions under Sections 68 and 69 are concerned, the ITAT observed as under: -

"**6.** After hearing both the parties and perusing the entire material on record, we find that the only effective issue in the present appeal is against the addition of Rs.3,50,94,7581- made by A.O. and confirmed by Ld. CIT(A) on the ground that closing credit balances of 26 parties could not verified. The above addition included a sum of Rs. 5,50,000/- made by AO vide page 16 of the assessment order ·in the name of Erica Enterprises P Ltd. This difference is due to the cheque issued but not presented for payment. The A.O. has given the list of 26 parties under two heads i.e. one list of 20 suppliers aggregating to Rs. 2,78,20,4951- i.e. where notices were issued u/s 133(6) but were received back undelivered with the remarks that no such firm/left/koi jankari nahin/not related/wrong address etc. given at page 3-4 of the assessment order and six suppliers aggregating to Rs. 67,24,2631- in respect of which though notices were served but confirmations were not received given at page 13-14 of the assessment order. We further find that Ld. CIT (A) has confirmed the addition vide discussion made -at page 25-30 of the appeal order. These amounts added are the closing credit balances of the suppliers as on 31.3.2012 which is evident from PB 42-66. In our considered opinion, the sustaining of impugned addition is not justified due to the following reasons:-

i) It has not been mentioned either by A.O or by Ld. CIT(A) as to under which section of the Income Tax Act, these closing credit balances appearing as on 31.03.2012 could be added. Therefore, non-mentioning the precise provision of law makes the impugned addition bad in law.

ii) If addition has been made u/s 68, such could not be added and that too of this much of amount as there was no sum received from these parties & that too during the year under appeal which is evident from the copies of account of these parties enclosed in the paper book at PB 42-66 which would show that either there were opening credit balances or were purchases.

iii). After perusing the PB Pg. 42-66 and PB Pg. 144, we find that purchases from these parties were aggregating to Rs 1,90,88,538/- and it has been held in the following judicial decisions that credit on account of purchases cannot be added u/s 68.

Addition under section 69 - Unexplained investment in purchases - Purchases made by assessee having been properly recorded in books of account and supported by authenticated purchase bills/vouchers for which payments were made through banking channels, and sales against these purchases are not doubted, addition under section 69 was not justified merely because suppliers could not be located and were not produced for examination - RAJESH P. SONI VS. ACIT 100 TTJ 892 (AHD 'D').

> Section 68 cannot be applied for taxing unconfirmed sundry creditors - CIT vs. Vardhman Overseas Ltd. (2012) 343 ITR 0408 (Del).
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> Income-Cash credit-Credit purchases-Provisions of s. 68 are not attracted to amounts representing purchases made on - credit-Tribunal- has recorded a categorical finding of fact based on appreciation of materials and evidence on record that the AO has accepted the purchases, sales as also the trading result disclosed by the assessee-It has also recorded a finding that the two amounts in question represented the purchases made by the assessee on credit-Therefore, addition of said amounts could not be made under s. 68 (COMMISSIONER OF INCOME TAX vs. PANCHAM DASS JAIN 74 CCH 0623 (All HC)
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> Income-Cash credit-Credit purchases-Provisions of s. 68 are not attracted to amounts representing purchases made on credit -Astt. CIT vs. Har Singar Gutkha (P) Ltd. 9 DTR 604(Lucknow)
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> Construction business-Trade purchases-Assessing Officer rejecting books while deciding purchase transactions not genuine but relying on return accepting profit-Assessing Officer ought to have proceeded under section 144-Addition under section 68 not justified-Income-tax Act, 1961, ss. 68,144, 14S(3)-Amitabh Construction P. Ltd. vs. Addl. CIT 335 ITR 523 Glharkltand) (PARA 11-15 OF THE DECISION)."

6. Before us and on the basis of the arguments which were addressed, we find that the invocation of Section 69C of the Act would also not sustain since the said provision concerns itself with the source of expenditure. That was clearly not an issue of dispute.

7. The appellant would contend that apart from the above, the veracity of the expenditure would have to be examined on the anvil of Section 37, and which provision had been duly pressed into aid before the ITAT. We, however find that no specific finding in that respect has been returned by it.

8. While Mr. Rai is correct in his submission that the mere non-mentioning of a provision would not invalidate an addition as long as it be otherwise sustainable under the Act, we find that the matter

would merit being remitted to the ITAT which may examine the issue afresh and bearing in mind the provisions contained in Section 37 of the Act.

9. We accordingly allow the instant appeal and set aside the order of the ITAT dated 18 July 2018. The matter shall stand remanded to the ITAT for considering the appeal afresh bearing in mind the observations made hereinabove.

10. All rights and contentions of respective parties are kept open.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JULY 3, 2024/ RW