

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री भागचन्द, लेखा सदस्य एवं श्री कुल भारत, न्यायिक सदस्य के समक्ष
BEFORE: SHRI BHAGCHAND, AM AND SHRI KUL BHARAT, JM

आयकर अपील सं./ITA No. 129/JP/2015
निर्धारण वर्ष/Assessment Year : 2009-10.

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| M/s Ram Avtar Pareek, 4F, Natraj Colony, Tonk Road, Jaipur. | बनाम Vs. | The ITO, Ward-6(2), Jaipur. |
| स्थायी लेखा सं./जीआईआर सं./PAN No. AABFR 6301 E | | |
| अपीलार्थी / Appellant | | प्रत्यर्थी / Respondent |

निर्धारिती की ओर से / Assessee by : Shri P.C. Parwal (C.A)
राजस्व की ओर से / Revenue by : Shri R.A. Verma (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 25.04.2017.
घोषणा की तारीख / Date of Pronouncement : 27/04/2017.

आदेश / ORDER

PER SHRI KUL BHARAT, JM.

This appeal by the assessee is directed against the order of Ld. CIT (A)-2, Jaipur dated 24.12.2014 pertaining to A.Y. 2009-10.

The assessee has raised the following revised grounds of appeal :-

- "1. The Ld. AO erred in facts and law by applying provisions of section 145(3), whereas all the material facts required at the time hearing is provided with third party evidence.
2. The Ld. AO erred in facts and law by disallowing depreciation to the tune of Rs. 323450.00 on building machinery for want of evidence for purchase of building machinery whereas same has been brought forward from previous year/s and not acquired during the year under consideration and in previous years return has been filed u/s 44AD which not required to show these separately.
3. The Id. AO erred in facts and law by making addition of Rs. 4.00 lacks cash deposited out of books as unexplained.
4. The commissioner Appeals erred in facts and law by directing AO to increase the income by Rs. 28.00 lacks u/s 68 as undisclosed cash balance whereas same was no where ground of appeal before him.

5. The appellant craves right to add, alter, or amend any of the grounds of appeal before or at the time of hearing.”

2. At the time of hearing, the Ld. Counsel for the assessee submitted that he does not wish to press ground no. 1. The Revenue has no objection. The ground no.1 of the Assessee’s appeal is dismissed has not pressed.

3. Ground no. 4, is general in nature and needs no separate adjudication.

4. Ground no. 5 is prayer of awarding cost of the assessee. The assessee has not made any submission with regard to awarding of cost. Therefore this ground of the assessee’s appeal is dismissed.

5. The only ground are to be adjudicated is ground nos. 2 and 3.

6. Briefly stated the facts of the case are that, the case of the assessee was picked up for scrutiny assessment and the assessment was framed under section 143(3) of the IT Act, 1961 (hereinafter referred to as the Act) vide order dated 25.10.2011. While framing the assessment, the AO after noticing various defects rejected the books of accounts of estimating net profit @ of 10%. Further, the Assessing Officer also made disallowance of depreciation of Rs. 3,23,450/- and made addition in respect of opening cash balance of Rs. 34 lakhs. Against this, the Assessee preferred an appeal before Ld. CIT(A), who after considering the submissions confirmed the disallowance of depreciation, rejection of books of accounts and reduced the addition out of Rs. 34 lakhs by sustaining amount of Rs. 28 lakhs. Aggrieved by this, the assessee is in present appeal.

7. Ground no. 2 of the assessee’s appeal is with regard to confirming the disallowance of claim depreciation to the extent of Rs. 3,23,450/-. The Ld. Counsel

for the assessee reiterated the submissions as made in the written synopsis. The written synopsis are reproduced as under:

" Facts and submission:-

- 1. During the year assessee claimed depreciation of Rs.3,46,571/- which include depreciation of Rs. 23,121/- on maruti car and depreciation of Rs. 3,23,450/- on building machinery (shuttering material). Assessee was required to produce evidence in respect of assets acquired to verify their existence and the year of acquisition. The evidence in respect of car purchased during the year was furnished but no evidence for purchase of building machinery was produced. Accordingly, assessee was required to show cause as to why depreciation of Rs. 3,23,450/- should not be disallowed in respect of building machinery.*
- 2. Assessee vide letter dt. 12.10.2011 (PB 18-19) submitted that shuttering material (building machinery) was purchased gradually in earlier years since AY 1998-99 and since return was filed u/s 44AD in earlier years, details of fixed assets were not shown in the return. Further, copy of work order awarded & executed during the year under consideration in which major work is RCC in which shuttering material (building machinery) is used was also provided. No hire charges has been claimed in the P & L A/c on this type of machinery which shows that assessee is having such assets which is being used for execution of work. However, AO did not accept the contention of the assessee by holding that the assessee has not produced any evidence of having shuttering material. Section 44AD does not say that evidence for fixed assets are not required or will have no relevance in future also. It is accepted that assessee has not claimed any shuttering hire charges but that does not prove the existence of shuttering material owned b6y the assessee. Considering the year's turnover and of preceding years, the requirements of keeping shuttering material amounting to Rs. 21,56,630/- cannot be accepted. Thus, in the absence of any evidence, assessee's claim of depreciation of Rs. 3,23,450/- on building machinery is not allowed.*

3. *The Id. CIT(A) confirmed the disallowance by holding that the only details given by the appellant in support of the claim of depreciation is the depreciation chart of this year which merely states that the opening balance of the plant & machinery is Rs. 21,56,630/-. No evidence or details has been submitted in respect to the above opening balance. No working showing how this opening balance has been arrived at has been submitted. Also no depreciation chart of the preceding years have been submitted which could justify the computation of the opening balance. The contention of the assessee that it was filing return u/s 44AD prior to this year does not show as to how he has arrived at the figure of the opening balance.*
4. *It is submitted that assessee is a civil work contractor and is engaged in this business since 1997. The turnover of the assessee ranges from Rs. 2 lacs to Rs. 33 lacs. The shuttering material(building machinery) is purchased in parts as per the requirement of business on year to year basis. Copy of work order awarded & executed during the year under consideration in which major work is RCC in which shuttering material(building machinery) is used was provided by the assessee vide letter dt. 12.10.2011 (PB 18-19). Thus, looking to the nature of business and quantum of turnover, the ownership of such asset and the amount of opening WDV of such asset cannot be doubted more particular when the assessee has not claimed any hire charged in the P & L A/c on this type of machinery. The depreciation chart of previous year has also been provided which show that these are brought forward from earlier years. In earlier years, the assessee was filing the return u/s 44AD which does not require maintenance of books of accounts and thus the evidence of purchase of such assets could not be produced. However, looking to the reasonableness of the claim the depreciation be directed to be allowed.*

7.1 On the contrary, the Ld. Departmental Representatives opposed the submissions and submitted that, there is not illegality into the order of the authorities below. He submitted that the Assessing Officer has given a finding that

no evidence has been furnished in respect of assessee's claim of depreciation, in respect of building and machinery. The Ld. DR submitted that neither before the Assessing Officer nor before the Ld. CIT(A), any evidence was placed by the assessee in support of the claim of the depreciation. He submitted even before this Tribunal no such evidence has been placed. Therefore, the Ld. CIT(A) has rightly sustained the disallowance.

7.2 We have heard the rival contentions perused the material available on record and gone through the authorities below. The Ld. CIT(A) has decided the issue by observing as under:

"3.3 I have perused the facts of the case, the assessment order and the submissions of the appellant. This is a case where the appellant has been disclosing profit u/s 44AD prior to this year. In this year, the assessee has shown opening balance of building, machinery and car at Rs. 21,56,630/- and has claimed depreciation on the same at Rs. 3,23,450/-. The only detail given by the appellant in support of the above claim of depreciation is the depreciation chart of this year which merely states that the opening balance in this year for the above plant and machinery is Rs. 21,56,630/-. No evidence or details whatsoever has been submitted in respect to the above opening balance. In fact no working showing how this opening balance has been arrived at, has been submitted. Also, no depreciation charts of the preceding years have been submitted which would justify the computation of the opening balance of Rs. 21,56,630/-. The contention that he was filing return of income u/s 44AD prior to this year, does not show as to how he has arrived at the figure of the opening balance. In view of the above discussion, the addition of disallowance of depreciation made by the Assessing Officer is upheld. Ground no. 3 is dismissed."

7.4 The above finding of the Ld. CIT(A) was not controverted by the Ld. Counsel for the assessee by placing any material evidence in support of his claim of the depreciation. Therefore, in our considered view, the Ld. CIT(A) was justified in confirming the disallowance of depreciation. Therefore, We do not see any reason

to interfere into the order of the Ld. CIT(A), same is hereby affirmed. Thus, this ground of the assessee's appeal is dismissed.

8. Ground no. 3 is against confirming the addition of Rs. 4 lakhs and enhancing the same by 28 lakhs u/s 68 of the Act. The Ld. Counsel for the assessee reiterated the submission as made in the written synopsis. The submissions are reproduced as under:

"Facts and Submission:-

- 1. AO observed that assessee has deposited Rs. 4 lacs in the bank account opened in the name of partner on 17.11.2008. The assessee explained that the same is out of opening cash balance as on 01.04.08 of Rs. 34 lacs.*
- 2. The AO vide show cause notice dt. 05.10.2011 (PB 15-17) required the assessee to explain that as to why this amount should not be treated as unexplained income of the assessee as in the return for AU 07-08 & 08-09 filed u/s 44AD, column which requires the details of cash balance at the close of the year has been left blank. Details of gross receipts, profit, sundry debtors, creditors shown in ROI for both the preceding AYs shows that the firm could not have Rs. 4 lacs a opening cash balance as on 01.04.2008. The opening cash balance shown by the firm is baseless. In response to same, assessee vide reply dt. 12.10.2011 (PB 18-19) explained that column which requires details of closing cash balance in the return for AYs 07-08 & 08-09 has been left blank by mistake. The assessee is running its partnership business since AY 1998-99 and it is natural that he is having some cash balance. However, AO held that the argument of assessee that the firm is in existence since 1998-99 is not sufficient to prove probability of cash balance to the extent of Rs. 34 lacs. The possibility of firm having turnover of barely Rs. 1 lacs or Rs. 2 lacs in the last couple of years to have cash balance of Rs. 34 lacs is beyond*

imagination. Accordingly, he treated Rs. 4 lacs as unexplained income of assessee u/s 68 of the Act.

- 3. The Ld. CIT(A) held that the assessee has not been able to show how this huge cash balance has been brought forward as on 1st April. The amount of profit disclosed in the preceding years cannot result in huge cash balance of Rs. 34 lacs. Moreover in the return of income for AY 07-08 & 08-09, this huge cash balance has not been disclosed in the column. Accordingly, he confirmed the addition of Rs. 4 lacs by treating it as unexplained deposit in the bank account.*
- 4. The Ld. CIT(A) further vide show cause notice dt. 11.11.2014 required the assessee to explain as to why the opening cash balance should not be taxed u/s 68 as looking to the profit disclosed in the preceding years, it does not support the opening cash balance of Rs. 34 lacs. In response to same, assessee vide letter dt. 10.12.2014 explained that capital account for the year ended 31.03.08 shows the capital balance of Rs. 33.50 lacs and bank balance as zero which shows that whatever balance was in capital account is available as cash with the firm. Further, partners of the firm are also doing the agricultural activity on their 40 bighas agriculture land at Kuchaman city and having annual income of Rs. 4-5 lacs which is also invested in the firm.*
- 5. The Ld. CIT(A) did not accept the contention of the assessee by holding that the assessee initially stated that this opening cash balance of Rs. 34 lacs was on account of profits of the firm of the preceding years but not it is stating that the source of this opening cash balance is the capital of the partner totaling to Rs. 33,50,778/- and the agriculture income, whereas no such cash balance has been disclosed in the returns of income for AY 07-08 & 08-09. It is therefore, difficult to fathom that the appellant firm would carry an accounted balance of Rs. 34 lakhs in cash for a long period of time especially when it holds a bank account since 2006. No details has been furnished with respect to the source of the opening cash balance of Rs. 34 lacs introduced in the books of accounts on 01.04.08 except the*

capital account of the partners which is found not satisfactory. Accordingly, since an amount of Rs. 4 lacs has already been added by the AO which has been upheld and looking to the turnover & the past profits of the appellant firm, an opening cash balance of Rs. 2 lacs is a fair estimate, the remaining amount of %Rs. 28 lacs is added to the total income of the assessee u/s 6 on account of unexplained opening cash balance. Thus, the Ld. CIT(A) enhanced the addition of Rs. 4 lacs made by the AO to Rs. 32 lacs.

6. *It is submitted that the finding of the Ld. CIT(A) that the assessee initially stated that opening cash balance of Rs. 34 lacs was on account of profits of the firm in the preceding year is incorrect. Assessee nowhere stated so. The opening cash balance was both out of the earlier years income and out of capital introduced by the partners out of their agriculture income which as on 31.03.08 stood at Rs. 33,50,778/-. Only because in the return for AY 07-08 & 08-09 filed u/s 44 AD, details of cash balance at the end of the year has not been shown cannot be a ground for making the addition. The assessee has been carrying on the business from last 10-12 years and thus the availability of cash as on 01.04.200 of Rs. 34 lacs cannot be said to be unreasonable. Otherwise also, where books of account of assessee had been rejected, same books of account could not be relied upon for making the addition. For this reliance is placed on the following cases:-*

CIT Vs. G.K. Contractor 19 DTR 305 (Raj.) (HC)

AO having estimated the profit by applying a higher net profit rate to total contract receipts after rejecting assessee's books of account by invoking the provisions of s. 145(3), no separate addition can be made on account of cash credit under s. 68 even though the assessee has failed to discharge its onus of proof in explaining the amount shown in the books of account as 'market outstanding'.

CIT Vs. Bahubali Neminath Muttin (2016) 388 ITR 608 (kar.)(HC)

Where books of account of assessee had been rejected by assessing authority, same books of account could not be relied upon in an addition on account of trade creditors and also for arriving at closing stock.

7. It is also submitted that in the cash book, opening balance as on 01.04.2208 is shown at Rs. 34,45,431/-. Thus, this balance is coming from the last year. It is not the case of the AO that this amount is credited in the books of accounts on 01.04.2008. Thus, no addition for this amount can be made in the year under consideration as it is brought forward amount of previous year. Further, the Ld. CIT(A) has made the addition u/s 68. The cash balance is an asset of a firm and not a liability and therefore sec. 68 is otherwise not applicable."

8.1 The submissions of the Ld. Counsel for the assessee is that, when the books of accounts have been rejected no separate addition can be made on account of cash credit u/s 68. In support of this, the Ld. Counsel for the assessee has relied upon the judgment of the Hon'ble Rajsthan High Court rendered in the case of CIT vs. G. K. Contractor 19 DTR 305 (Raj.)(HC). The Ld. Counsel for the assessee also relied upon the judgment of the Hon'ble Karnataka High Court rendered in the case of CIT vs. Bahubali Neminath Muttin (2016) 388 ITR 608 (Kar.) (HC).

8.2 On the contrary, the Ld. Departmental Representatives opposed the submissions and submitted that Ld. CIT(A) was justified in sustaining the addition. He submitted that the claim of the assessee is that, with regard to opening balance for this the assessee is required to prove the closing balance of the last year. The assessee has not placed any material on record, suggesting that, there was any closing balance in the last year. The Ld. DR has relied upon the judgment of the Hon'ble Supreme Court reported in the case of Commissioner of Income Tax vs. Devi Prasad Vishnunath Prasad 72 ITR 194 (SC) and 56 ITR 01 (SC), in support of the

contention that even the books of accounts are rejected. The addition of account of cash credit can be made.

8.3 We have heard the rival contentions, perused the material available on record. The Ld. Counsel for the assessee has contended that, after rejection of books of account no addition can be made relying on the books of accounts. However, the Id. Departmental Representatives has relied upon the judgment of the Hon'ble supreme court rendered in the case of Commissioner of Income Tax vs. Devi Prasad Vishnunath Prasad 72 ITR 194(SC). It is for the assessee to prove that even if the cash credit represents income it is the income from a source which has already been taxed in the present case, the assessee has not proved that the veracity of the opening balance. Therefore, we are unable to accept the contention of the Ld. Counsel for the assessee. Hence, we do not see, any reason to interfere into the order of the Ld. CIT(A), same is hereby affirmed. This ground of the assessee's appeal is dismissed.

9. In the result, appeal of the assessee in ITA No. 129/JP/2015 is dismissed.

Order is pronounced in the open court on Thursday, the 27th day of April 2017.

Sd/-
(भागचन्द)
(BHAGCHAND)
लेखा सदस्य / Accountant Member
Jaipur

Sd/-
(कुल भारत)
(KUL BHARAT)
न्यायिक सदस्य / Judicial Member

Dated:- 27 /04/2017.

Pooja/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- M/s Ramavtar Pareek, tonk Road, Jaipur.
2. The Respondent – The ITO, Ward-6(2), Jaipur.
3. The CIT(A).

4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 129/JP/2015)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar