

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH : KOLKATA

[Before Shri J.Sudhakar Reddy, AM ]

I.T.A No. 1430/Kol/2016

Assessment Year : 2005-06

Shri Pijush Kumar Sadhukhan  
[PAN: ASFPS 7425 J]  
(Appellant)

-vs-

ITO, Ward-2(3), Hooghly  
(Respondent)

For the Appellant : Shri Somnath Ghosh, Advocate

For the Revenue : Shri P.K. Mondal, Addl. CIT

Date of Hearing : 15.11.2017

Date of Pronouncement : 21.12.2017

**ORDER**

This appeal by the assessee arises out of the order of the Learned Commissioner of Income Tax (Appeals)-21, Kolkata [ in short the Id CITA] dated 17.06.2016 against the order passed by the ITO, Ward-2(3), Hooghly [ in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 31.12.2007 for the Assessment Year 2005-06.

2. The assessee is an individual engaged in the business of trading in electronic goods under the name and style of M/s P.K. Sadhukhan and grandsons. He filed his return of income u/s 139(1) of the Act on 23.10.2006 disclosing total income of Rs. 1,05,381/-. The Assessing Officer passed an order u/s 143(3) on 31.12.2007 determining total income at Rs. 19,96,099/-, inter alia, making an addition of Rs. 11,72,593/- u/s 40A(3) of the Act and Rs. 7,19,126/- u/s 69B of the Act. Aggrieved the assessee carried the matter in appeal without success. Further aggrieved the assessee is in appeal before us on the following grounds:

*1. For that the Ld. Commissioner of Income Tax (Appeals)-21, Kolkata failed to appreciate that none of the conditions precedent existed for and/or were fulfilled by the*

*Ld. Income Tax Officer, Ward-2(3), Hooghly for his specious action of assuming jurisdiction u/s 40A(3) of the Income Tax Act, 1961 in the instant case and the alleged addition upheld on that basis in the amount of Rs. 11,72,593/- is therefore, ab initio void, ultra vires and ex-facie null in law.*

*2. For that on a true and proper interpretation of the scope of the provision of Section 40A(3) of the Income Tax Act, 1961, the Ld. Commissioner of Income Tax (Appeals)-21, Kolkata was absolutely in error in upholding the specious addition of Rs.11,72,593/- resorted to by the Ld. Income Tax Officer, Ward-2(3), Hooghly without considering the matter in the proper perspective and such spurious conclusion reached on extraneous considerations not germane to the issue in dispute is totally arbitrary, unwarranted and perverse.*

*3. For that the Ld. Commissioner of Income Tax (Appeals)-21, Kolkata was remiss in sustaining the purported addition to the tune of Rs. 7,19,126/- within the province of Section 69B of the Income Tax Act, 1961 made by the Ld. Income Tax Officer, Ward-2(3), Hooghly by misreading the facts and circumstances of the instant case and the adverse conclusion reached on that behalf in violation of the statutory prescription thereof is completely unfounded, unjustified and untenable in law.*

*4. For that the specious approach of the Ld. Commissioner of Income Tax (Appeals)-21, Kolkata of misreading evidence, considering improper facts, failing to consider proper position in law and thus coming to an erroneous finding in sustaining the impugned addition in the sum of Rs. 7,19,126/- made by the Ld. Income Tax Officer, Ward-2(3), Hooghly on the manifestly wrong application of the provisions of Section 69B of the Income Tax Act, 1961 basing on considerations not relevant to the issue in dispute is wholly illegal, illegitimate and infirm in law.*

3. I have heard Mr. Somnath Ghosh, Ld. Counsel for the assessee and Mr. P.K.Mondal, Ld. DR, Addl. CIT on behalf of the Revenue. On careful consideration of the facts and circumstances of the case a perusal of papers of records, the orders of the authorities below as well as the case law cited I held as follows:

The assessing officer made addition u/s 40A(3) based on summary of alleged cash payments, as submitted by one Shri Pradip Kumar Sadhukhan who was originally representing the assessee. The assessee withdraw his power granted to Shri P.K. Sadhukhan and had authorized Shri K.C. Kundu and Madan Mou Mukherjee in his place to represent before the Assessing Officer. The undisputed fact is that there are no

books of accounts available either with the assessee, their counsels or the Assessing Officer at the time of assessment. The Ld. AO alleged that the earlier counsel, P.K. Sadhukhan had produced books of accounts from where it was noticed that there were numerous instances of cash payments in excess of Rs. 20,000/-, which results in violation of Section 40A(3) of the Act. No independent verification of the so-called books of accounts was done. There is no details of the names of the parties to whom the Ld. AO has alleged that the payment in cash was made. The assessee contends that the so-called books of accounts laid to have been produced by Shri P.K.Sadhukhan, earlier before the Assessing Officer, do not belong to him. Despite the assessee strongly disputing this fact, the AO has not summoned Shri P.K. Sadhukhan nor took any steps to prove that the disallowance made u/s 40A(3) of the Act was based on books of account which belong to the assessee. No such books or name of parties to whom the alleged cash payments in excess of Rs. 20,000/- was paid and other details are produced.

4. It is well settled that when the Ld. AO invokes a section of the Act to disallow the claim of the assessee of an expenses the initial burden lies on the AO to prove that the assessee did contravene the said section i.e. Section 40A(3) in this case. Thus, in my considered opinion, the disallowance made u/s 40A(3), is not based on any evidence and hence, the same is liable to be deleted. Disallowance cannot be made on presumption and surmises. Accordingly, this ground of the assessee is allowed and the addition of Rs. 11,72,593/- is deleted.

5. Coming to the addition of Rs. 7,19,126/- u/s 69B, I find that the assessee has demonstrated that the bank authorities have received the statement of stock as on 31.03.2005, only in the month of October, specifically on 7<sup>th</sup> October, 2005. The bank claims that the statement was verified on 31<sup>st</sup> October, 2005. The time gap between 31.03.2005 and 07.10.2005 is large and hence the so-called verification by the bank

cannot be relied on. Thus, it proves that there was no verification of stock done by the bank on 31.03.2005. Hence, a variance between the closing stock as recorded in the financial statement of the assessee filed before the Income tax Authorities and that which was furnished to the bank, much after the closure of accounts cannot be treated as income or the undisclosed stock of the assessee. The assessee has produced item wise stock register of opening stock, purchase, sales and of closing stock. It is true that such practices of giving inflated stock statement to the bank with a view to obtain a higher loan should not be encouraged. In fact, such practices should be depreciated. But at the same time, it is only the real income of the assessee that can be brought to tax. The assessee cannot be told that you have uttered lie and I would tie you up on that lie, though there is no actual income. The true stock should be taken into account for the purpose of arriving at income inflated and unverified stock statement cannot be the basis of computation income. The assessee relied on the decision of Kolkata "C" Bench of the Tribunal in the case of I.T.A. No. 1055/Kol/2011 dated 25.03.2014 in the case of *Shri Madhusudan Chowdhury vs. I.T.O. ward-31(2), Kolkata*. In this case, the issue was adjudicated in favour of the assessee.

6. In view of the above discussion, I delete the addition made by the Assessing Officer u/s 69B of the Act of Rs. 7,19,126/- on the ground that this is not the real income of the assessee. Thus, this ground of the assessee is allowed.

7. In the result, the appeal of the assessee is allowed.

**Order pronounced in the Court on 21.12.2017**

Sd/-  
[J. Sudhakar Reddy]  
Accountant Member

Dated : 21.12.2017  
SB, Sr. PS

Copy of the order forwarded to:

1. Pijush Kumar Sadhukhan, C/o, S.N. Ghosh & Associates, Advocates, "Seven Brothers" Lodge, P.O.-Buroshibtala, P.S.-Chinsurah, Dist. Hooghly, Pin-712105.
2. ITO, Ward-2(3), Hooghly, Aayakar Bhawan, Hooghly, G.T. Road, Khadina More, P.O.-Chinsurah, P.S.-Chinsurah, Dist. Hooghly, Pin-712101,
- 3..C.I.T.(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary  
Head of Office/D.D.O., ITAT, Kolkata Benches