

IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH MUMBAI
BEFORE SHRI C.N.PRASAD, JUDICIAL MEMBER
&
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No.3126/Mum/2011
(Assessment Year: 2006-07)

Meghraj Silk & Rayon Industries Pvt.Ltd. 163/165, 2 nd Floor Sheikh Memon Street, Zaveri Bazar Mumbai-400 002	Vs.	ITO, Ward-4(2)(4) Mumbai
PAN/GIR No.AAACM2873N		
Appellant)	..	Respondent)

Assessee by	Shri N.M. Porwal, AR
Revenue by	Ms. Kavita Kaushik & Shri R. Bhoopathi, DR's
Date of Hearing	28/02/2020
Date of Pronouncement	26/05/2020

आदेश / ORDER

PER: RAJESH KUMAR (A.M):

This appeal filed by the assessee is directed against, the order of the Ld. Commissioner of Income Tax (Appeals)–8, Mumbai, dated 01/03/2011 and pertains to Assessment Year 2006-07.

2. The assessee has raised the following grounds of appeal:

1. *On the facts and circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming invoking of provisions of section 145(3) of the Act and rejecting books of account maintained by the appellant. Provisions of the Act ought to have been properly construed and regard being had to facts of the case the books of accounts of the appellant should not have been rejected. Reasons assigned by him are wrong and insufficient to justify invoking of provisions of section 145(3) of the Act and rejecting books of accounts maintained by the appellant.*

2. On the facts and circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming rejection of claim by the learned Assessing Officer of loss of stock by flood of Rs. 6653796A- and treating the same as cash sales made by the appellant. Provisions of the Act ought to have been properly construed and regard being had to facts of the case loss of stock by flood of Rs.6653796/-, should not have been rejected and same should not be treated as cash sales effected by the appellant. Reasons assigned by him are wrong and insufficient to justify rejection of claim of loss of stock by flood of Rs. 665S796/- and treating the same as cash sales made by the appellant.

3. On the facts and circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming estimation of rate of gross profit at 15% and thereby arriving at gross profit alleged to have been earned by the appellant at Rs. 2510713/- on arbitrary figure of sales which includes Rs. 6653796/- which the Assessing Officer has deemed as cash sales. Provisions of the Act ought to have been properly construed and regard being had to facts of the case the rate of gross profit should not be estimated at 15% and amount of gross profit should not have been arrived at Rs. 2510713/-. Reasons assigned by him are wrong and insufficient to justify estimating rate of gross profit at 15% and gross profit at Rs. 2510713/-.

4. On the facts and circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming rejection of expenses under various heads as debited in profit and loss account of the appellant company.

• Manufacturing and operating expenses	Rs. 8019498.62
• Personal expenses	Rs. 139571.43
• Sales & Distribution expenses	Rs. 297410.00
• Administrative expenses	Rs. 637679.75
• Depreciation	Rs. 10743.26
• Export expenses	Rs. 480.00
• Out of interest paid	Rs. 1167849.00

And thereby arriving at net profit of Rs. 1533414/-. Provisions of the Act ought to have been properly construed and regard being had to facts of the case the above said expenses should not have been disallowed and net profit of the appellant company should not have been estimated at Rs. 1533414/-. Reasons assigned by him are wrong and insufficient to justify rejecting claim of said expenditure and estimating net profit at Rs. 1533414/-.

5. On the facts and circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming that profit chargeable on sale of fixed assets Rs. 4567190/- is taxable under the head 'Capital Gain'. Provisions of the Act ought to have been properly construed and regard being had to facts of the case the said income is to

be computed on the basis of provision of section 50 of the Act .Reasons assigned by him are wrong and insufficient to justify arriving at chargeable profit on sale of fixed assets at Rs. 4567190/- and including the same under the head 'Capital Gain'.

6. The order made under section 143 (3) of the Act by the learned Assessing Officer and confirmed by the learned Commissioner of Income Tax (Appeals) is illegal, bad-in-law, ultra virus and without allowing reasonable opportunity of the hearing, and without appreciating the facts, submission and evidences in their proper perspective and is liable to be annulled / quashed.

7. The learned assessing officer erred in charging interest under section 234B, 234 C and 234D of the Act.

8. The appellant crave leave to add, amend, alter and / or vary any of the grounds of appeal before or at the time of hearing.

3. The brief facts of the case are that the assessee company is engaged in the business of manufacturing of textile suiting and shirting, filed its return of income for AY 2006-07 on 27/11/2008, declaring total loss of Rs.51,41,233/-. During the course of assessment proceedings, the Ld. AO called upon the assessee to produce books of accounts and other details, for which, assesee has failed to furnish books of accounts, vide its letter dated 29/12/2008, stating that it is not possible to produce books of accounts, because all books of accounts were destroyed during flood in Mumbai on 26/07/2005. The Ld. AO after considering relevant submissions of the assessee and also taken note of fact that the assesee has claimed huge loss for the year under consideration and also by following certain judicial precedents, including the decision of Hon'ble Supreme Court in the case of CT shah vs CIT 59 ITR 533 rejected books of accounts u/s 145(3) of the Act and estimated profit from the business by taking into account average gross profit declared by the assessee for AY 2003-04 to 2005-06 which comes to 15.14%. Further, the Ld. AO has also rejected the claim of the assessee insofar as, loss of stock in trade on account of flood

claimed by the assessee, on the ground that the assessee has failed to justify loss of stock with any evidences including FIR lodged at nearest police station, copy of stock statement submitted to insurance company for insurance claim, surveyors report and stock statement submitted to bank for hypothecation. Thereafter, the Ld. AO has determined total sales at Rs.1,67,38,093/- and on which, he has applied 15% gross profit and determined total income from business at Rs.25,10,713/-. Further the Ld. AO has allowed total expenses of Rs.9,77,299/- and arrived at net profit of Rs.15,33,414/. In addition to estimation of profit, the Ld. AO has also made additions towards profit on sale of asset and treated the same as short term capital gain as against assessee admission under the head income from business.

4. Being aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has challenged rejection of books of accounts u/s 145(3) of the Act and estimation of profit from the business along with certain judicial precedents. The assessee has also challenged additions made by the Ld. AO towards disallowances of loss of stock by flood and consequent treatment of the same as cash sales. The assessee has also challenged disallowances of 10% adhoc expenses and disallowances of interest expenses by invoking section 40(a)(ia) of the Act. The assessee had also challenged additions made by the Ld. AO towards profit on sale of fixed receipts and taxing the same under the head capital gain.

5. The Ld.CIT(A) after considering relevant submissions of the assessee and also by following the decision of Hon'ble Delhi High

Court in the case of CIT vs Motor General Finance Limited(supra) has upheld rejection of books of accounts as per the provisions of section 145(3) of the I.T.Act, 1961. The Ld.CIT(A) has also upheld disallowances of loss of stock claimed on account of flood and treated the same as cash sales by holding that evidences filed by the assessee like transportation bills and affidavit of Mrs. P.J. Sanghvi cannot be considered as sufficient evidences to prove that stock was destroyed in flood. Further, the Ld.CIT(A) has upheld estimation of profit by applying average gross profit rate of 15% on total sales declared by the assessee plus cash sales of Rs.66,53,796/- being disallowances of loss of stock by flood. Insofar as, disallowances of certain expenses, including interest, the Ld.CIT(A) has upheld disallowances of interest of expenses u/s 40(a)(ia) of the Act for non deduction of tax at source. However, allowed relief in respect of adhoc disallowances of 10% of expenses by holding that the assessee has filed necessary evidences, including bills and vouchers in support of expenses. Insofar as, assessment of profit on sale of fixed assets of Rs.45,67,190/- and taxing the same under the head capital gains, the Ld.CIT(A) has upheld additions made by the Ld. AO, on the ground that profit on sale of fixed assets is assessable as per provisions of section 50 of the Act and such profit should be treated as short term capital gain. Aggrieved by the Ld.CIT(A) order, the assessee is in appeal before us.

6. The first issue that came up for our consideration from ground No.1 of assessee's appeal is rejection of books of accounts u/s 145(3) of the I.T.Act, 1961. The Ld. AR for the assessee submitted that the Ld.CIT(A) has erred in confirming the action of the Ld. AO

in rejection of books of accounts, despite the fact that the assessee has explained the reasons for non submission of books of accounts as per which, all the books of accounts were destroyed in flood and for which necessary evidences has been filed. Therefore, merely for the reason that the assessee could not produce books of accounts, the books of accounts cannot be rejected u/s 145(3) of the Act. In this regard, he relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs Rahul J Jain in ITA No. 857/Mum/2016 dated 11/12/2018.

7. The Ld. DR, on the other hand strongly supported order of the Ld.CIT(A).

8. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. It is an admitted fact that there was a flood in part of Mumbai city for heavy rain on 26/07/2005. The assessee claims that due to flood, books of accounts were destroyed and it could not produce books before the Ld. AO. The assessee further claims that although, it could not produce books, but fact remains that the Ld. AO has not pointed out any discrepancies in financial results declared by the assessee, other than citing non production of books of accounts. We find that non production of books of accounts may be a good reason for rejection of books of accounts u/s 145(3) of the Act. But, before invoking section 145(3) of the Act, it is necessary to consider the reasons given by the assessee for non production of books of accounts. In this case, there is no doubt of whatsoever with regard to the fact that there was a flood in the month of July, 2005, due to this book of accounts of the assessee were destroyed. The

assessee has also filed necessary evidences indicating the destruction of books of accounts due to heavy rains on 26/07/2005. Besides, the assessee has also filed necessary evidences in form of affidavit from the directors in support of his arguments. Under these circumstances, it is highly incorrect on the part of the Ld. AO, as well as the Ld.CIT(A) to come to the conclusion that financial results declared by the assessee are not true and correct, merely for non furnishing books of accounts for verification, that to when the assessee has explained the reasons for non production of books of accounts, because the same destroyed in a flood. This legal proposition is supported by the decision of Hon'ble Bombay High Court in the case of CIT vs Rahul J Jain (supra), where it was clearly held that the assessee has filed evidences indicating the destruction of physical accounts due to heavy rains. Further, best judgment assessment should not be made as best punishment assessment. We, therefore are of the considered view that the Ld. AO, as well as the Ld.CIT(A) were erred in rejection of books of accounts u/s 145(3) of the Act and estimation of net profit by taking average gross profit rate of 15% on the basis of last three years gross profit declared by the assessee. Hence, we direct the Ld. AO to accept financial results declared by the assessee for the year under consideration.

9. The next issue that came up for our consideration from ground No.2 of assessee's appeal is rejection of claim of loss of stock of Rs.66,53,796/- and treatment of the same as cash sales. The Ld. AR for the assessee submitted that the Ld.CIT(A) has erred in confirming rejection of claim of loss of stock by flood without appreciating the fact that the assessee has lost its stock in trade due

to heavy flood in the month of July, 2005, for which necessary evidences are produced before the Ld. AO. The Ld. DR, on the other hand strongly supported order of the Ld.CIT(A).

10. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. The facts borne out from the records indicate that the assessee has shifted its stock in trade form its existing premises to godown at Bhiwandi for the reasons that the assessee was in the process of disposing its factory premises, for which necessary evidences in the form of invoices from transporter M/s Siddivinayak Transport company has been produced before the Ld. AO. The said stock was destroyed by floods due to heavy rains on 26/07/2005. The assessee has claimed loss of stock and debited into profit and loss account. The Ld. AO has disallowed loss of stock, on the ground that no evidences regarding value of stock lying at Bhiwandi godown could be produced, including copy of FIR lodged at nearest police station, details of claim before the insurance company and stock statement submitted to bank. We find that the assessee has produced all possible evidences including transportation of stock from existing factory to godown at Bhiwandi along with bills of transportation. The assessee has also produced evidences in the form of news paper report to prove that there was heavy flood in Biwandi on 26/07/2005. The assessee had also produced affidavit from Mr. P.J. Sanghvi stating that goods transferred to Bhiwandi destroyed due to floods. Therefore, we are of the considered view that the Ld. AO, as well as the Ld.CIT(A) were completely erred in disallowing claim of loss of stock by flood and treatment of the same as cash sales despite producing all possible evidences, for simple

reasons that no FIR was lodged at nearest police station and no claim was made with insurance companies, ignoring the fact that the assessee has filed evidences to prove that its insurance policy was expired in the month of April and, it could not renew insurance on stock in trade due to bad financial conditions. Further, it has highly incorrect on the part of the revenue authorities to ask for copy of FIR lodged at nearest police station, when it was very clear from other evidences filed by the assessee, including news paper report, that there was heavy flood in Bhiwandi on July, 2005. We therefore are of the considered view that the Ld. AO, as well as the Ld.CIT(A) were erred in rejection of loss of stock in trade claimed by the assessee on account of flood and treatment of the same as cash sales. Hence, we direct the Ld. AO to delete additions made towards disallowances of loss of stock in trade and treatment of the same as cash sales and allow the loss claimed by the assessee.

11. The next issue that came up for our consideration from ground No.4 of assessee's appeal is disallowances of interest u/s 40(a)(ia) of the Act, for non deduction of tax at source u/s 194A of the I.T.Act, 1961. The Ld. AR for the assessee submitted that out of total interest disallowances of Rs.10,59,265/-, the sum of Rs.8,73,918/- paid to Bank of India for which no requirement of deduction of tax at source. Further, a sum of Rs.2,35,836/- was paid to M/s Rajaji Meghraj Sanghvi & Company, for which tax was not deducted for the reasons that the party has furnished form No. 15G and requested not to deduct tax at source.

12. Having heard both the sides and considered material available on record, we find that although, the Ld. AO has disallowed interest

payment of Rs.10,59,265/- for non deduction of tax at source, but he has failed to give details of interest and parties to whom said interest was paid. If interest is paid to national bank, then as per the provisions of the Act, there is no requirement of deduction of tax at source. Similarly, if any interest paid to a person without deduction of tax at source, because of the reasons that the party has given form No.15G, then there is no requirement of deduction of tax at source. In this case, the assessee claims to have paid interest to Bank of India, a sum of Rs.8,73,918/- and remaining amount of Rs.2,35,836/- has been paid to M/s Rajaji Meghraj Sanghvi & Company on the basis of form 15G submitted by them. If the claim of the assessee is correct, then there cannot be any disallowances of interest u/s 40(a)(ia) of the Act, because there is no requirement of deduction of tax at source on both payments. But facts are not clear, whether the assessee has placed necessary evidences before the AO or not. Therefore, we set aside the issue to the file of the Ld. AO and direct him to verify the fact in light of claim of the assessee that interest is paid to Bank of India and interest paid to M/s Rajaji Meghraj Sanghvi & Company is covered by form No.15G. If the claim of the assessee is correct, then the Ld. AO is directed to delete the additions made towards disallowances of interest u/s 40(a)(ia) of the Act.

13. The next issue that came up for our consideration from ground No. 5 of assessee's appeal is chargeability of profit on sale of fixed asset of Rs.45,66,190/-. The Ld. AR for the assessee submitted that profit on sale of fixed asset has been properly computed on the basis of provisions of section 50 of the Act. However, the Ld. AO

without assigning any reasons has taxed profit on sale of fixed assets under the head capital gains.

14. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. As per provisions of section 50 of the I.T.Act, 1961 any profit derived from transfer of depreciable assets needs to be taxed as short term capital gain. In this case, the assessee has credited profit on sale of fixed asset to the profit and loss account and treated the same as business income. On the other hand, claims that said profit is assessable as per the provisions of section 50 of the I.T.Act, 1961. There is no doubt insofar as taxability of profit on sale of fixed assets is concerned, and the same is assessable as short term capital gain, as per the provision of section 50 of the I.T.Act, 1961. But, in order to bring said profit under the provisions of section 50 of the Act, the asset should be depreciable asset. In this case, there is no clarity on the nature of assets, whether it is a depreciable or non depreciable asset. Therefore, we are of the considered view that the issue needs to be go back to the file of the Ld. AO to find out the fact with regard to the nature of assets. In case profit derived from sale of fixed asset is on account of transfer of depreciable assets, then the same needs to be taxed as per the provisions of section 50 of the Act, under the head short term capital gain. Accordingly, we set aside the issue to the file of the Ld. AO and direct him to verify the fact and take appropriate decision, as per the provisions of Act.

15. In the result, appeal filed by the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on this: 26/05 /2020

Sd/-
(C.N.PRASAD)
JUDICIAL MEMBER

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Mumbai; Dated: 26/05/2020
Thirumalesh Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai