

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, CHANDIGARH**

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND Ms. RANO JAIN, ACCOUNTANT MEMBER

ITA No. 1049/CHD/2011

Assessment Year: 2007-08

The ITO,
Ward - 2,
Panchkula.

Vs

Shri Pardeep Singh Hooda,
1048, Sector 4,
Panchkula.

PAN: AVDPS1927L

&

ITA No. 1056/CHD/2011

Assessment Year: 2007-08

Shri Pardeep Singh Hooda, Vs
1048, Sector 4,
Panchkula.

The ITO,
Ward 2,
Panchkula.

PAN: AVDPS1927L

(Appellant)

(Respondent)

Assessee by : S/Shri Rohit Goel & Ajay Jain, CAs
Department by : Shri Jitender Kumar

Date of Hearing : 16.10.2015

Date of Pronouncement : 28.10.2015

ORDER

PER BHAVNESH SAINI, JM

Both the cross appeals are directed against the order of ld. CIT(Appeals) Panchkula dated 16.08.2011 for assessment year 2007-08.

2. We have heard ld. Representatives of both the parties, perused the findings of authorities below and

considered the material available on record. Both the appeals are decided as under.

Assessee's Appeal

3. On ground No. 1, assessee challenged the addition of Rs. 3,97,000/- on account of undisclosed investment in residential houses. During the course of assessment proceedings, the Assessing Officer noted that assessee purchased plot No. 1562 Sector 17 at Jagadhari for Rs. 24,70,000/- including Stamp Duty. The assessee could explain the source of investment in the house to the extent of Rs.18,90,000/-. Accordingly, the balance amount invested in the purchase of residential house was stated as assessee's income from undisclosed sources and addition of Rs. 5,80,000/- was made. The addition was challenged before Id. CIT(Appeals). The written submission of the assessee is quoted in the appellate order in which the assessee briefly explained that assessee filed copy of the Sale Deed to explain the issue but Assessing Officer is wrong in making addition of Rs.5,80,000/- as it is merely stated in order that the residential house was purchased on 4th October 2006 whereas the amount of Rs. 4 lacs used for the purchase of this house is stated to have been withdrawn on 01.09.2006. There is no written agreement or documentary evidences on the basis of which it could be said that the amount was paid on 01.09.2006 for purchase of the house. There is also no record available

to show that the cash was used for some other purposes other than purchase of the said house. Out of the total addition of Rs. 5,80,000/-, the amount of Rs. 4 lacs was paid on 01.09.2006 out of withdrawal of Rs. 8 lacs from HDFC Bank account No. 56760 on 25.08.2008 hence, addition of Rs. 4 lac is unjustified. In respect of Rs.1,83,000/-, which was paid on 04.10.2006 for purchase of Stamp Paper, same was paid in cash and assessee produced cash book depicting the sufficient cash in hand. The Assessing Officer has completely ignored these evidences.

4. The ld. CIT(Appeals) noted with regard to plea of the payment of Rs. 4 lacs on 01.09.2006 out of withdrawal of Rs. 8 lacs from HDFC Bank account on 25.08.2006 that same is not acceptable due to time gap of one month and 10 days between the date of withdrawal and date of purchase of the house. It was also not acceptable that this amount was lying at the house for almost 1 ½ month. Accordingly, addition of Rs. 4 lacs was confirmed. However, as regards balance payment of Rs. 1,83,000/- for purchase of Stamp Papers, the explanation of the assessee was accepted that sufficient cash was available in the cash book on 04.10.2006. Therefore, addition of Rs. 1,83,000/- was deleted.

5. After considering rival submissions, we do not find any merit in the addition made by the authorities below.

PB-1 is copy of the bank account to show that on 25.08.2006, assessee has withdrawn Rs. 8 lacs from HDFC Bank account. PB-2 is cash book in which assessee has entered Rs. 8 lacs on account of withdrawal from HDFC Bank account on 25.08.2006. This amount is available to the assessee. The ld. DR submitted that since there is a gap of 1 month and 10 days between withdrawal and purchase of the house, therefore, amount lying at house could not be accepted. However, the authorities below have failed to note that no evidence has been brought on record if the assessee has spent the amount of Rs. 4 lacs for some other purposes other than the amount used for purchase of the house. There is no big or unreasonable gap between the amount withdrawn from the bank account and paid for purchase of the property. Since the amount is taken into cashbook after withdrawal from the bank account, therefore, it is available to the assessee for using for purchase of the house.

5(i) Hon'ble Punjab & Haryana High Court in the case of Shiv Charan Dass 126 ITR 263 considered the issue of unexplained amount. The deposit was made after 4/5 years from withdrawal. It was held that the revenue should prove that it was assessee who spent the amount in question. In the absence of any evidence on record that assessee has spent Rs.4 lacs after withdrawal from the bank account for any other purposes, authorities

below were not justified in disbelieving the explanation of the assessee regarding availability of the cash of Rs. 4 lacs with the assessee for purchase of the property. In view of the above discussion, we set aside the orders of authorities below and delete the addition of Rs. 3,97,000/- Ground No.1 of appeal of assessee is allowed.

6. On ground No.2, assessee challenged the addition of Rs.12,27,500/-. During the course of assessment proceedings, the Assessing Officer noted that assessee was asked to explain as to how 60% share in rental income in respect of SCO 133-134 has been shown. The assessee has given no explanation in this regard. The rental income from this property was taken in full by the Assessing Officer in assessee's hands for 5 months @ Rs.90,000/- per month on the basis of the agreement filed in respect of this property. As the assessee did not bring any evidence on record in respect of the expenses coupled with the fact that huge amount of interest and depreciation were claimed in the Profit & Loss Account, whole of the income was assessed in assessee's hands. It was computed at Rs. 13,62,500/- for 5 months out of which deduction under section 24 was allowed at Rs.1,35,000/- for five months' rent amounting to Rs.4,50,000/-. The net income was taken at Rs. 12,27,500/-.

7. The assessee challenged the addition before Id. CIT(Appeals) and it was briefly explained that Assessing Officer has ignored the fact that same income was part of the business income of the assessee as it was being received as minimum guarantee from M/s Reebok India Co. which has been duly accounted for by the assessee in the balance sheet and Profit & Loss Account submitted during the assessment proceedings. It was further submitted that assessee was retail trader of the products of Reebok India Company and he had entered into agreement with the company w.e.f. 30.10.2006. As per clause 7 of the Agreement, company was to offer the assessee the gross margin @ 30% of MRP on all its products or to pay on minimum guarantee of Rs. 2,72,500/- per month, whichever is higher. The details of minimum guarantee included the rent of Rs. 90,000/- and the rest of the amount for the other charges. The Assessing Officer, however, assessed the whole of the amount as minimum guarantee amount. When the assessee had considered all its business receipts in the gross margin, there is no question of making separate addition under the head 'House Property'. The assessee alternatively submitted that the addition of Rs. 12,27,500/- is part of the gross business receipts declared in the return of income on which Assessing Officer has already applied net profit rate of 10%. Therefore, addition is unjustified.

8. The ld. CIT(Appeals), however, dismissed appeal of the assessee on this ground. The ld. CIT(Appeals) found that break-up of the sale is not filed and assessee has received minimum guarantee amount as per agreement, therefore, addition was confirmed.

9. After considering rival submissions, we are of the view the matter requires re-consideration at the level of the Assessing Officer. PB-40 to 53 is the Agreement in question between assessee and M/s Reebok India Company. As per para 7 of the agreement, the company has offered to Retail Operator a gross margin of 30% of MRP on all its products. The Retail Operator shall be entitled to a minimum guarantee of Rs. 2,72,500/- as per Annexure-I. The minimum guarantee will be paid on monthly basis, however, full and final settlement and re-conciliation of minimum guarantee paid will be done within 15 days of the end of the financial year ending 31st March. Copy of the Annexure-I is filed at page 53 of the Paper Book which according to the ld. counsel for the assessee is the notional figures. PB-54 is the details of minimum guarantee/commission and according to ld. counsel for the assessee, the actual amount payable as on 06.05.2007 was Rs. 3,40,389/-. PB-30 to 32 is the computation of income for subsequent assessment year 2008-09 in which assessee has shown the amount of Rs. 3,60,936/- as minimum guarantee from Reebok India Company and PB-33 to 37

is the assessment order for assessment year 2008-09 under section 143(3) dated 31.12.2010 and Assessing Officer accepted the contention of the assessee. These facts pleaded by ld. counsel for the assessee clearly show that even if some minimum guarantee was fixed but actual working was done later on and assessee was entitled for a lesser amount which was shown in subsequent assessment year and accepted by the Assessing Officer in the order under section 143(3) of the Act. The assessee also pleaded before ld. CIT(Appeals) that same amount is also shown as gross business receipts of the assessee on which Assessing Officer has accepted the business income applying profit rate. These facts have not been verified by the authorities below and even according to the ld. CIT(A), break-up of the sales is not filed. Therefore, on the basis of evidences and material produced before us, it is clear that the amount in question, made as addition may not sustain after verification of the facts and figures. We, accordingly, set aside the orders of authorities below and restore this issue to the file of Assessing Officer with direction to re-decide this issue after giving reasonable sufficient opportunity of being heard to the assessee. The assessee shall produce sufficient material before Assessing Officer on this issue for final determination. Ground No. 2 of appeal of assessee is allowed for statistical purposes.

10. On ground No. 3, assessee challenged the addition of Rs. 8,78,969/- on account of investment from undisclosed sources in the construction of the show-room. The revenue has also raised the sole ground of appeal on this issue and challenged the order of Id. CIT(Appeals) in deleting the addition of Rs. 24,18,853/- out of total addition of Rs. 32,97,822/- made on account of investment on construction. During assessment proceedings, the assessee was asked to explain the source of investment in construction of show-room SCO 133-134, the construction cost of which during the relevant period has been shown at Rs. 32,97,822/-. As regards the source of investment in its construction, it has been stated that it was decided between the co-owners namely Shri Sandeep Singh and Shri Rajat Singh that they shall put up the funds at the disposal of the assessee and the assessee was free to use these funds in whatever mode he likes. In respect of the source of funds with co-owners, the assessee has filed J-Forms with regard to sale of agriculture produce by these persons. In this regard, it may be stated that no documentary evidences with regard to ownership of the agriculture land in the shape of 'Ferd Jamabandi' was filed. Further, no 'khasra girdawari' in support of the fact that land was under cultivation/crops was filed. The assessee was not able to show details and source of construction. The Assessing Officer, therefore, made

addition of Rs. 32,97,822/- considering the investment from undisclosed sources.

11. The assessee challenged the addition before Id. CIT(Appeals) and written submission of the assessee is reproduced in the appellate order in which the assessee briefly explained that the show-room was jointly purchased by the assessee alongwith the above two co-owners. The copy of the Sale Deed was filed. It was mutually agreed by all the co-owners that funds shall be made available to the assessee for construction of the show-room. The assessee submitted copy of the MOU and cash book narrating the construction expenditure incurred, copy of the bills of raw material, valuation report and Form-J to explain the source of investment in construction of building. The Assessing Officer has completely ignored these evidences. It was also submitted that since show-room was co-owned by the assessee with two other co-owners above, therefore, cost of construction of Rs. 32,97,822/- was jointly met by the assessee and other two co-owners. The details of distribution of the construction cost was explained which is reproduced at page 9-10 of the appellate order in which assessee has explained his share in both the properties and investments made by assessee in cost of construction and share of the assessee comes to Rs. 13,74,095/- and balance construction cost of Rs. 19,23,733/- was met by other two co-owners. It was,

therefore, submitted that entire addition in the hands of the assessee was unjustified. It was further explained that cost of construction of the share of assessee was met by the assessee from his personal sources for which cash-flow statement and cash book was provided to the Assessing Officer. The assessee also filed Form-J with regard to sale of agriculture produce and all other evidences were filed to support that addition was wholly unjustified.

12. The ld. CIT(Appeals) accepted the contention of the assessee with regard to the fact that assessee has only part of the share in these properties because property was owned by two other co-owners as well. The assessee's share of cost of construction was accepted in a sum of Rs. 13,74,095/-. The source of investment was claimed from sales, bank withdrawals and cash book withdrawals in a sum of Rs. 4,95,136/-. The ld. CIT(Appeals) gave benefit of the same to the assessee and restricted the addition to Rs. 8,78,969/-.

13. We have heard the rival submissions and perused the material on record. The ld. DR contended that no details were filed before Assessing Officer and ld. CIT(Appeals) merely considered additional evidences. The ld. counsel for the assessee, however, reiterated the submissions made before authorities below and referred to PB-26 which is Schedule of the Fixed Assets as on 31.03.2007 filed with the Profit & Loss Account and

balance sheet of assessee to show that in the year under consideration, assessee has made addition of Rs. 13,74,093/-. He has also filed copy of the account of building under consideration to show that each and every entry was explained and source of investment and construction of the property as well. Therefore, addition is wholly unjustified.

14. Considering the submissions of the parties in the light of the findings of the authorities below, it is clear that property in question was jointly held by the assessee alongwith two other co-owners Shri Sandeep Singh and Shri Rajat Singh. The assessee explained his share in these properties before Id. CIT(Appeals) based on the Sale Deed and material which have been correctly accepted by the Id. CIT(Appeals). It is, therefore, clear that the Assessing Officer could have considered the addition of this nature in the hands of assessee in respect of the share of the assessee in the property only. However, Assessing Officer has considered the entire cost of construction in the hands of assessee which was wholly unjustified. The Assessing Officer cannot ask for the sources of investments made by other co-owners in the case of the assessee. The Revenue Department would be at liberty to consider the source of the co-owners in their individual cases and could not draw any adverse inference against the assessee for making whole addition in the hands of the assessee

individual. The ld. DR contended that since no evidence was filed before Assessing Officer and additional evidences have been considered by ld. CIT(Appeals), therefore, deletion of addition is unjustified. However, revenue has not raised any ground of appeal against the findings of the ld. CIT(Appeals) considering additional evidence. Since Revenue Department did not challenge the order of ld. CIT(Appeals) in considering evidences and material on record, therefore, in the absence of any specific ground of appeal in the departmental appeal with regard to acceptance of additional evidences, no interference is called for in the matter.

14(i) The ld. CIT(Appeals), therefore, on the basis of material and evidences on record correctly found that the assessee's share of construction cost of Rs. 13,74,095/- which is also proved from PB-26 which is Schedule of Fixed Assets as on 31.03.2007 in the case of assessee which also provides that in assessment year under appeal, assessee has made addition to the property in question in a sum of Rs. 13,74,093/- only. Therefore, the departmental appeal has no merit, the same is accordingly dismissed on this ground. However, as regards the addition of Rs. 8,78,969/- is concerned, the ld. CIT(Appeals) correctly appreciated the facts of availability of Rs. 4,95,136/- on account of sales made by assessee, bank withdrawals and cash withdrawals. The assessee, however, filed copy of the Building

Construction Account which shows all the entries of the construction and investments made by assessee. Since this account is shown in the books of account of the assessee, therefore, contention of the assessee is correct that cost of construction was met by assessee out of his personal sources for which even the cash-flow statement and cash book was submitted to the Assessing Officer. If the construction account is shown in the books of account and all entries are coming from the cash book of the assessee, there is no question of treating any amount to be unexplained cost of construction in the hands of the assessee. Thus, the entire addition in the hands of assessee is wholly unjustified. We, accordingly, set aside the orders of authorities below to the extent of making addition of Rs. 8,78,969/- and delete this addition as well.

15. In the result, ground No. 3 of appeal of assessee is allowed and ground No. 1 of departmental appeal is dismissed.

16. On ground No. 4, assessee challenged the rejection of the books of account and application of profit rate of 10%. During the course of assessment proceedings, the Assessing Officer noted that assessee had shown profit of Rs. 2,90,601/- under section 44AF which is applicable wherever the turnover is below Rs. 40 lacs. The assessee has shown profit of 5% as per Section 44AF. However, in the case of assessee, turnover was

Rs. 58,12,200/-, therefore, Section 44AF will not be applicable. The Assessing Officer, accordingly, applied profit rate of 10% on the turnover and assessed business income of Rs. 5,81,220/-. The Assessing Officer also noted that assessee has taken time for production of the books of account which shows that assessee has taken time for preparation of the books of account, therefore, books of account were not found reliable. The Assessing Officer also noted that since assessee failed to file Audit Report on time, therefore, no reliance can be placed on the accounts of the assessee. The assessee submitted before Id. CIT(Appeals) that Assessing Officer has not pointed out any discrepancy in the GP ratio which is quite reasonable. The Assessing Officer has not rejected the books of account under section 145(2) by pointing out any specific defects in the books of account, therefore, addition is unjustified. The Id. CIT(Appeals) found that since turnover of the assessee was more than Rs. 40 lacs, therefore, Section 44AF has no application. No reliance was placed on the books of account of the assessee since audit report was not furnished by the specified date. The balance sheet was not prepared in the regular course of business and even no stock register was produced before the Assessing Officer, therefore, this ground was dismissed.

17. After hearing rival submissions, we do not find any justification to sustain the addition. It is not in

dispute that turnover of the assessee was more than Rs. 40 lacs therefore, Section 44AF will not apply in the case of the assessee. Therefore, profit rate shown by the assessee at 5% would not be applicable. When the Assessing Officer confronted this fact to the assessee, assessee contended that it was mistakenly stated that Section 44AF will apply because the assessee's case was of tax audit. The assessee, however, took number of adjournments and according to Assessing Officer, assessee got time for preparation of the books of account and ultimately, assessee prepared the Profit & Loss Account, balance sheet and audit report which were filed before Assessing Officer. The Assessing Officer, however, disbelieved explanation of the assessee because audit report was not filed on time. Therefore, A.O. hold, no reliance was placed on the books of account. The Assessing Officer, despite giving these findings, have not examined Auditor who has prepared the audit report for coming to the conclusion that how the audit report has been prepared later on. Further, the Assessing Officer despite giving these findings has not rejected the books of account of the assessee under section 145(3) of the Act. Since books of account of the assessee have not been rejected, therefore, Assessing Officer is not justified in enhancing the net profit rate to 10%. The ld. counsel for the assessee has filed copy of the GP and NP rate in preceding and subsequent assessment year. In assessment year under appeal i.e.

2007-08, assessee has shown GP rate of 28.15% and NP rate of 5.53%. In preceding assessment year 2006-07, the GP & NP rate was 12.09% and 3.52%. In subsequent assessment year 2008-09, the GP rate and NP rate was 27.75% and 1.49%. It is also stated that in assessment year 2008-09, Assessing Officer passed scrutiny assessment under section 143(3) (PB-33) in which no further addition on account of GP or NP have been made. This chart and history of the assessee clearly show that in assessment year under appeal, the GP and NP rate of assessee was higher as compared to the preceding assessment year 2006-07 and subsequent assessment year 2008-09. No comparable case have been stated by the Assessing Officer to prove if assessee suppressed the profit from taxation.

18. Considering the above discussion, it is clear that authorities below were not justified in applying NP rate of 10% against the assessee. Hon'ble Punjab & Haryana High Court in the case of Rajinder Prasad Jain 374 ITR 545 held that "Tribunal applying NP consistent with past history of the assessee held justified." Since in the present case, no enquiry have been conducted by Assessing Officer with regard to preparation of the accounts by assessee later on and no books of account have been rejected under section 145(3) and history of the assessee is not considered for the purpose of applying higher rate, would clearly show that authorities below were unjustified in making the

addition against the assessee. We, accordingly, set aside the orders of authorities below and delete the addition made by the Assessing Officer. However, we direct that since assessee has shown the business income by applying profit rate of 5% as per Section 44AF of the Act which is below the net profit rate shown by assessee in assessment year under appeal @ 5.53%, therefore, Assessing Officer shall take the profit rate at 5.53% for the purpose of computing business income instead of 5% declared by the assessee. With these directions, this ground of appeal of the assessee is allowed.

19. On ground No. 5, assessee challenged the addition of Rs. 1 lac under section 80C of Income Tax Act. The assessee, during the appellate proceedings submitted that Assessing Officer was wrong in not giving the claim of LIC receipt of Rs. 1 lac claimed by assessee under section 80C of the Act stating that no source of investment have been explained ignoring the fact that assessee had drawings of Rs. 3,97,000/-. The ld. CIT(Appeals) dismissed this ground of appeal of the assessee.

20. On consideration of the rival submissions, we are of the view this matter also requires re-consideration at the level of the Assessing Officer. The assessee has filed copy of the ledger account at page 55 of the Paper Book to show that both the Insurance Premiums have

been made by assessee through cheque. Therefore, these could not be considered as unexplained. This fact is not examined by the authorities below. We, therefore, set aside the order of authorities below and restore this issue to the file of Assessing Officer with direction to verify if the payments towards LIC contribution are made through banking channel, Assessing Officer shall delete the addition.

21. This ground of appeal is therefore, allowed for statistical purposes.

22. On ground No. 6, assessee challenged the addition of Rs. 3,36,754/- towards capital introduction. The Assessing Officer made above addition because source of the capital introduction was not explained. The assessee, however, submitted before Id. CIT(Appeals) that no show cause notice was given for explaining this issue. The assessee made the capital addition out of agriculture produce. The Id. CIT(Appeals), however, confirmed the addition.

23. On consideration of the rival submissions, we are of the view this issue also requires re-consideration at the level of the Assessing Officer. The order of the Assessing Officer did not show if any opportunity was given to assessee to explain this issue. The assessee filed PB-56 which shows that assessee has availability of Rs. 1,02,004.97 on refund of Insurance HDFC Standard Life Insurance. The assessee also filed capital account to show

that some amount is received from his father. Since, no opportunity have been given to assessee to explain this issue, we, therefore, set aside the orders of authorities below and restore this issue also to the file of Assessing Officer with direction to re-decide this ground after giving reasonable sufficient opportunity of being heard to the assessee.

24. In the result, this ground is allowed for statistical purposes.

25. No other point is argued or pressed.

26. In the result, appeal of the assessee is partly allowed.

Departmental Appeal

27. The department has raised only one ground which was connected with ground No. 3 of the appeal of assessee and is decided against the department.

28. In the result, departmental appeal is dismissed.

29. In the result, appeal of the assessee is partly allowed and departmental appeal is dismissed.

Order pronounced in the Open Court.

Sd/-

(RANO JAIN)
ACCOUNTANT MEMBER

Sd/-

(BHAVNESH SAINI)
JUDICIAL MEMBER

Dated: 28th Oct., 2015.

'Poonam'

Copy to:

The Appellant, The Respondent, The CIT(A), The CIT, DR

Assistant Registrar
ITAT/CHD