

Court No. - 35

AFR
Reserved

Case :- INCOME TAX APPEAL No. - 58 of 2013

Appellant :- The Commissioner Of Income Tax Kanpur

Respondent :- M/S Kesarwani Sheetalaya Alld.

Counsel for Appellant :- Krishna Agrawal, C.S.C., Manu Ghildyal

Counsel for Respondent :- Umesh Chandra Kesharwani, Suyash Agrawal

Hon'ble Bharati Sapru, J.

Hon'ble Rohit Ranjan Agarwal, J.

1. This appeal under Section 260-A of the Income Tax Act, 1961 (hereinafter called as 'Act') has been filed assailing the order of the Income Tax Appellate Tribunal, Allahabad (hereinafter called as 'ITAT') dated 30.11.2012.

2. This appeal was admitted on 26.11.2013 on the following question of law:-

“(1) Whether on the ITAT erred in law as well as on facts in deleting the addition of Rs.23,31,28,321/- made on account of investment in potatoes in disregard of all the evidences on record, and the fact that this belonged to one of the partners Raj Kumar Kesarwani.

(2) Whether the ITAT has erred in law as well as in the facts and circumstances of the case in deleting the addition of Rs.37,30,710/- made on account of difference of cash balance as reflected in the balance sheet and cash as per seized documents on wrong appreciation of facts.

(3) Whether the ITAT was justified in substituting its own views which were based on interpretation of word “either” as used by both the A.O. and C.I.T.(A) in coming to conclusion that case reflected was either bogus liability or unexplained cash.

(4) Whether the ITAT has erred in law as well as in the facts and circumstances of the case in directing the A.O. to re-decide the issue by considering the books of

accounts produced by the assessee, ignoring the provision of Section 142A.”

3. Thereafter two additional substantial questions of law were added which are as under:-

“1. Whether the ITAT is legally justified in reversing the concurrent finding of fact of the authorities below without appreciating the material on record ?

2. Whether the ITAT is legally justified in reversing the concurrent findings of fact of the authorities below in the balance of fresh material placed before it ?”

4. Respondent-assessee is a partnership firm engaged in cold storage business having its Head Office at Sahson, Allahabad. The dispute relates to the assessment year 2008-09. It appears that action under Section 132(1) of the Act was taken in group cases of Kesarwani Zarda Bhandar, Allahabad and its partners on 27.8.2009.

5. The Assessing Officer framed assessment under Section 153-A of the Act on 28.12.2011 for the assessment year in question. The order of the AO was challenged before the Commissioner Income Tax (Appeals). The major challenge by the assessee was for two additions and dis-allowances of expenses. As far as the challenge to addition by the assessee was for Rs.37,30,710/- being the lesser cash in hand as per the seized paper as compared with the books of account, in which the assessee has shown more cash in hand. The other major addition was of Rs.23,31,28,321/- on the ground that the assessee was engaged in the business of potatoes. The CIT(A) accepted the addition so made by the AO.

6. Being aggrieved the assessee filed an appeal before the ITAT which was allowed to the extent as far as the addition of

amount of Rs.37,30,710/- and addition of Rs.23,31,28,321/- are concerned, while the Tribunal remanded back the matter to the Assessing Authority as far the addition of Rs.5,47,92/- on account of addition under the heading 'building'.

7. Sri Manu Ghildyal, learned Counsel appearing for the Revenue submitted that ITAT was not correct in deleting the addition of Rs.23,31,28,321/- made on account of investment in potatoes in disregard of all evidences on record, and further the papers seized during the search at the residential premises of one of the partners of assessee firm namely Raj Kumnar Kesarwani. He further submitted that the actual cash with the assessee firm was only Rs.27,39,932/- whereas in the audited balance-sheet, the amount was shown as Rs.64,70,642/- Thus the difference of Rs.37,30,710/- was considered as unexplained income by the Assessing Officer and the same was added. Lastly, it was submitted that ITAT was not correct to reverse the concurrent finding of fact recorded by the Income Tax Authorities without appreciating the material on record.

8. Per contra, Sri Ravi Kant, learned Senior Advocate assisted by Sri U.C. Kesarwani, learned Counsel for the Assessee submitted that no papers were seized from the residential premises of the partners of the firm and the documents relied upon were seized from the residence of the Chartered Accountant, an assessee being not the author of the document nor the same having been signed by any of the partners, nor the Chartered Accountant examined at the time of search or at the assessment stage. It was further contended

that the assessee had maintained the proper books of account and the AO had wrongly relied upon the provisions of Section 68 of the Act, which was not applicable in the case, and subsequently in appeal, the Commissioner of Income Tax (Appeals) held that the provisions of Section 69A were applicable, which according to him, the First Appellate Authority did not have the power to change the law to sustain the addition.

9. He further submitted that the assessee firm is not engaged in the business of potatoes and the assessee is running a cold storage and the business is of storing potatoes for which rent is realised from the farmers who store agricultural produce in the Cold storage.

10. The assessee maintains complete record as far as the storage of potatoes is done and the assessee maintains the storage (bhandaran) and delivery (nikasan) register and issues rent receipt for the period for which potatoes are stored.

11. Sri Ravi Kant, learned Senior Counsel further placed on record the U.P. Regulation of Cold Storage Act, 1976, which regulates the functioning of the Cold storage in the State of Uttar Pradesh.

12. Section 2 (c) defines the 'cold storage', means an enclosed chamber insulated and mechanically cooled by refrigeration machinery to provide refrigerated condition to agriculture produce stored therein but does not include refrigerated cabinets and chilling plants. Further Section 2(d) defines the word 'hirer' means a person who hires on payment

of the prescribed charges spaces in a cold storage for storing agricultural produce. Section 2(f) defines 'licensee' means any person to whom a licence is granted under this Act. Section 2(i) defines 'receipt' means a cold storage receipt including a duplicate receipt issued by licensee under this Act. Section 5 of the Act provides restrictions on carrying on the business of cold storage.

13. Section 12 of the Act provides for reasonable care of goods, while Section 13 is in regard to the duty to exhibit the capacity of the cold storage. Section 19 is in regard to the delivery of goods, where on the demand made by hirer, every licensee shall deliver the goods stored in the cold storage provided the hirer surrenders the receipt and pays all charges due to the licensee. Section 20 provides that the licensee is entitled to retain possession of the goods until the receipt therefor is surrendered and necessary charges are duly paid. Further Section 37 of the Act provides for penalty in case where any provision of the Act, or any rule, order or direction is contravened, then on conviction punishment with imprisonment for a term which may extend to two years or fine which may extend to Rs. 10,000/- or both shall be made.

14. Section 38 provides for the offences by companies, in the explanation to the said section, 'company' means any body corporate, and includes a firm or other association of individuals, and 'director' in relation to a firm, means a partner in the firm. Section 39 further provides for the cognizance of the offence punishable under the Act by the Court not inferior

to that of a Magistrate of the first class, who shall try any such offence.

15. Sri Ravi Kant, learned Senior Counsel laid emphasis that a cold storage cannot run without a licence being granted by licensing authority and no agricultural produce in a cold storage can be stored except in accordance with the terms and conditions of the licence. If, there is any contravention of any provision of the Act, the licensing authority can take punitive action as provided under the Act.

16. In the present case, no violation has been noticed or has been brought on record by the Assessing Officer meaning thereby that the assessee did not violate any of the terms of provisions of U.P. Regulation of Cold Storage Act, 1976. He further submitted that the addition is made merely on presumption and no material or evidence has been brought on record to prove that assessee is engaged in the business of potatoes. As in a cold storage potatoes can only be stored and it cannot be used for any other purposes. It was also submitted that the case of the assessee is only of bailee and the transaction between the assessee and the constituents are the bailment i.e. the storage of potatoes and later on delivery.

17. We have heard learned Counsel for the parties and perused the material on record.

18. It is not in dispute that the assessee is running of a cold storage, after being granted the licence as mandated under the U.P. Regulation of Cold Storage Act, 1976. Under the said Act, it is only the storage of the agricultural commodity for

which the licence is granted and no other business can be carried out by the licensee. The Act and the rules lay down the procedure for the storage of agricultural commodity and also the maintenance of the necessary records for regulating the storage of such commodity.

19. In the present case, learned Counsel for the Revenue has mainly relied upon the two deletions made by the ITAT of the addition so made by the AO as confirmed by the CIT (A). As to the addition made of Rs.37,30,710/-, which is lesser cash in hand as compared with the books of accounts in which the assessee has shown more cash in hand, the Tribunal held that it is neither a case under Section 68 of the IT Act nor Section 69-A of the Income Tax Act. The Tribunal further went on to hold that it was not a case where money is not recorded in the books of account of assessee, and in the present case cash in hand in the books of account was found to be more than the actual cash found during the course of search. At the most, authorities could have presumed that assessee has spent the difference of amount in question somewhere as per cash in hand, as per books of account and lesser cash as per seized documents, but that would also not suffice to make addition under any of the above propositions.

20. As far as the other addition made of Rs.23,31,28,321/-, the assessee had challenged the same on the ground that they are not engaged in business of potatoes and the entries in the seized register, gate pass and exit record were totally ignored by the assessing authority as well as by the first

appellate authority. The Tribunal being the last fact finding authority recorded a categorical finding that the assessee had submitted all the documents as well as all the entries of the *bhandaran* and exit register (*nikasan*) tallied with the stock, as such the addition made by the authorities were wrong.

21. The argument raised by the counsel for the assessee as far as no violation of the provisions of U.P. Regulation of Cold Storage Act is concerned, has force, as the Assessing Officer has failed to bring on record any notice given by any of the concerned licencing authority regarding violation of the Act or any proceedings pending against the assessee firm.

22. When this fact was confronted with the counsel for the Revenue, he failed to produced any document in regard to any violation made by the assessee, Cold Storage of the provisions of the U.P. Regulation of Cold Storage Act. Once it is established that the assessee did not violate any terms of provisions of U.P. Regulation of Cold Storage Act, 1976, then, the finding recorded by by AO as well as the first appellate authority that the assessee was in the business of potatoes and the addition so made by the Assessing Officer was merely on the basis of presumption and assumption and without any material on record.

23. The Tribunal has also recorded a categorical finding that no evidence of purchase, sales or unaccounted stock belonging to the assessee during the course of search or survey was found or established, thus, there was no justification for the authorities to make or confirm the addition

of the said amount. There is no doubt that the business of running a cold storage is governed by the U.P. Act of 1976 and it is only after the grant of licence by the licencing authority that a cold storage can run according to the terms and conditions of the licence. Any violation of the terms of licence has penal consequences as provided under Section 37 and 38 of the Act, for which the Magistrate of Ist Class is empowered to take cognizance of any offence so made by the licence holder. As, in the case in hand, during the search and survey in the business premises of the assessee, no such violation was found or recorded, nor any notice was given or action was taken against the assessee, as is evident from the perusal of the documents before us. Further, the counsel for the Revenue also could not point out to any such violation made by the assessee of the U.P. Act of 1976.

24. Once it is established that the assessee had not violated the terms of licence, so granted by the licencing authority, merely on the basis of presumption and assumption from any documents or papers seized during search and survey cannot be the basis for the addition of such an amount.

25. Having considered the facts and circumstances of the case and going through the records of the case, we are of the considered opinion that the Revenue has failed to establish that the order of the Tribunal is manifestly illegal and suffers from error apparent on face of the record. As the Tribunal being the last fact finding court has categorically recorded finding that the authorities below had wrongly made the

[10]

additions without any material on record on the basis of mere presumption and assumption.

26. The appeal is **dismissed**. The question of law is, therefore, answered against the Revenue and in favour of the assessee.

Order Date :- 20.8.2019

S. Singh