

HIGH COURT OF RAJASTHAN
Commissioner of Income-tax, Bikaner

v.

Jaimal Ram Kasturi*

DINESH MAHESHWARI AND ARUN BHANSALI, JJ.
D.B. IT APPEAL NO.145 OF 2006†
JANUARY 15, 2013

JUDGMENT

Arun Bhansali, J.- The Revenue has preferred this appeal under Section 260-A of the Income Tax Act, 1961 ('the Act') against the judgment and order dated 03.06.2005 passed by the Income Tax Appellate Tribunal, Jodhpur Bench, Jodhpur ('the Tribunal') in ITA No.160/JDPR/1998 and CO No.48/05 for the assessment year 1991-1992, whereby the Tribunal has dismissed the appeal of the Revenue and has allowed the cross-objection of the assessee; and in the result, has deleted in toto the impugned addition towards country liquor business of the assessee, as made by the Assessing Officer ('the AO') in the assessment order dated 11.03.1996, and as partly retained by the Commissioner of Income Tax (Appeals), Jodhpur ('the CIT(A)') in the order dated 28.01.1998 as passed in the assessee's appeal.

2. The appeal has been admitted on the following questions of law:-

- "(1) Whether Tribunal was justified in holding that best judgment assessment made by the Assessing Officer is not based on cogent and relevant criteria?
- (2) Whether Tribunal was justified in upholding the order passed by CIT (Appeals) when it held that Assessing Officer was not justified in applying the criteria of comparable cases and taking into account the past history of the assessee himself?"

3. The facts relevant for determination of the questions involved in this appeal are that the assessee is engaged in liquor business and during the period relevant to assessment year 1991-1992, the income of the assessee was assessed at Rs.4,15,32,865/- as against the declared profit of Rs.3,87,66,937/- by adopting a net profit rate of 20.5% towards the total outgoings (total payment made to Government for lifting goods) as against the declared rate of 19.13% after rejecting the books of accounts of the assessee, under Section 145 of the Act. The profit rate was adopted by the AO by taking into account the comparable case of one M/s Malu Khan & Party, Bikaner.

4. Feeling aggrieved, the assessee preferred an appeal before the CIT(A), which was partly allowed by the order dated 28.01.1998. The CIT(A) though upheld the order of the AO for applying the provisions of Section 145(2) as the sales of the assessee were not supported by vouchers but, came to the conclusion that the addition made by the AO was in fact excessive, keeping in view the past results of the assessee. While observing that the assessee had shown better rate of profit for the year 1991-1992 as compared to the last year and when books of accounts are rejected, past history of the case becomes relevant and the same could be a guide for reasonable profit, the learned CIT(A) restricted the addition made by the AO to Rs.10,65,928/-.

5. Aggrieved by the aforesaid order dated 28.01.1998, the Revenue preferred an appeal before the Tribunal and the assessee took cross-objections therein.

6. By the impugned order dated 03.06.2005, the Tribunal has allowed the cross-objections taken by the assessee and has dismissed the appeal preferred by the Revenue; and, in the result, has deleted the additions altogether while observing and holding as under :-

"11. Having discussed the relevant legal position, we revert to the facts of this case, the business of the assessee has been totally controlled by the Department of Excise, Government of Rajasthan. Naturally there are no chances of suppression of sales/ purchases, rather the assessee has to suffer a compulsory deposit for not lifting the contracted amount of IMFL/BEER etc. Be that as it may, no suppression of purchases or sales have been alleged by AO in this case. No specific defects have been pointed out by Ld. AO. The only suspicion is that the Assessee may have been charged more sale price than recorded. The AO has rejected the books of the accounts but, has relied totally on the figures recorded herein except the 'sales' and for that reason has concluded that the assessee may have earned more profits. But the AO cannot be given a very long rope for estimation purposes. It is to be guide judiciously. He cannot be allowed to act in an arbitrary manner. That is why in such cases where, only 'sales prices' are doubted, the accepted past history or the comparable case have been accepted as best guide.

12. The charts reproduced hereinabove are not disputed by Ld. DR. These charts were also available before the AO. From all the angles, be it gross profit on sales, net profit on sales or net profit on outgoings, the respective declared results are better than the assessed rates of GP, NP on sales, NP on outgoings in the past year. This fact is obvious from the above charts. There is no doubt about the same.

13. Therefore, in our considered opinion, the accepted past history is the best guide. And when the assessee has declared the better results from all angles as stated above, the declared results have to be accepted and no additions can be made therein. The case of Malu Khan cannot be applied when assessee's past history is available and there is no difference at all in the facts in this year. The facts of both the years are on all fours. Otherwise, also the case of Malu Khan is not at all comparable one.

14. The CIT(A) has accepted the submission of the assessee to some extent but has retained the additions to a substantial amount, even after accepting the past history theory. No reasons have been given for the same. The sustained addition is baseless and arbitrary, which cannot be sustained in the given facts of this case. No evidence has been brought by the AO for sustenance of any addition for that matter. Consequently, the impugned addition is hereby deleted in toto made in the country liquor business. As a result, the appeal is dismissed and the CO is allowed."

7. Assailing the order aforesaid, it is contended on behalf of the appellant that the Tribunal has not examined the matter in its entirety, objectively and in correct perspective; it is more appropriate to estimate the profit by comparing it with the case of an assessee in identical line of business and if, as per the findings given by the Tribunal, the assessee's own history be made the basis for estimation of profits, then a particular assessee who has never been subjected to scrutiny assessment and who had been showing the gross profit at its own sweet will, would be

in a advantageous position and the principle laid down by the Tribunal regarding precedence of past history over comparable cases would be against the basic canons of taxation.

8. No one has appeared on behalf of the assessee despite notice.

9. After having heard the learned counsel for the appellant and having perused the material placed on record, we are unable to find any infirmity in the order passed by the Tribunal so as to call for interference in appeal; and we are of the view that the questions as formulated deserve to be answered against the Revenue.

10. In the present case, the AO while passing the assessment order under Section 143(3) read with Section 254 of the Act came to the conclusion that though all the purchases of country liquor were from Ganganagar Sugar Mills Limited, a Government undertaking, and the same were fully vouched but, in the absence of a primary record like sale vouchers, the assessee had shown sales in the manner suitable to it; and, while holding that the books of account maintained by the assessee were not reliable, applied provisions of Section 145(2) of the Act and rejected the same. The AO then held that the profit of the country liquor business of the assessee had to be determined in comparison with other analogous assessee engaged in the same line of business because considering the stiff competition for acquiring monopoly rights, it could be reasonably presumed that the assessee were likely to have profit comparable with each other. The AO then compared the case of the assessee with a contractor of the adjoining area, M/s Malu Khan & Party, Bikaner, who had shown the net profit at 22.70% for the period in question; and assessed the assessee by taking 20.5% net profit instead of 19.13% as declared by him.

11. The CIT(A), after taking into consideration the figures relating to assessee's own case and considering the submissions of the assessee that the case of M/s Malu Khan & Party, Bikaner was not comparable or identical as the said M/s Malu Khan & Party operated in an area which was 250 kms. away from that of the operational area of the appellant, came to the conclusion that the AO was not justified in making addition by comparing the results of the assessee with those of M/s Malu Khan & Party, Bikaner, as the facts of the two case were altogether different. The CIT(A) thus, held that the addition made by the AO was excessive and unreasonable; and the profit declared by the appellant was quite fair and reasonable; and hence, reduced the addition by Rs.17,00,000/-.

12. In *Ram Prakash v. CIT* [\[1983\] 15 Taxman 533](#), the Hon'ble Allahabad High Court, while considering a similar issue, upheld the finding of the Tribunal that the applicant's profits could properly be worked out in the light of its assessment in earlier years; and held thus:

"3. The learned counsel for the assessee contends that the Tribunal committed a mistake of law in ignoring the exemplars of country liquor dealers of Lucknow, cited by him and in taking irrelevant material into consideration by relying upon the exemplar of a country liquor dealer of Allahabad district. This, according to him, vitiates the finding recorded by the Tribunal.

4. We find no merit in the aforementioned submission made by the learned counsel. A perusal of the order of the Tribunal shows that what it in effect finds is that neither the exemplars pertaining to the country liquor dealer of Allahabad nor those which concerned other country liquor dealers of Lucknow, could, in the circumstances of the case, provide a proper basis for assessing the profits earned by the petitioner. Account to it, applicant's

profits could properly be worked out in the light of its assessment in earlier years. In this view of the matter, no question of the Tribunal either ignoring any relevant material or its relying upon an irrelevant material arises. The findings recorded by the Tribunal in this regard are findings of fact based on appraisal of material on record and they do not appear to be vitiated by any error of law."

13. In *CIT v. Saddruddin Hussain* [\[2003\] 263 ITR 677/\[2002\] 120 Taxman 798](#), this Court while considering a case of another liquor contractor upheld the order passed by the Tribunal which relied on the assessee's own case in the immediate preceding year and the appeal filed by the Revenue was dismissed.

14. The findings of the Tribunal reproduced herein-above make it clear that the Tribunal has examined the issue involved in its correct prospective and has assigned cogent reasons for not approving the order passed by the AO. The AO was obviously in error in taking the case of M/s Malu Khan & Party as a comparable one for the reasons given by CIT(A) and in the face of assessee's available and consistent past history.

15. In our view, ultimately, the matter had been of putting a estimate on the profit of the assessee while recording the findings on facts. The CIT(A) has given cogent reason for not endorsing the approach of the AO in making assessment with reference to the case of another assessee after finding it to be not a directly comparable case and hence, not a safe guide more particularly, when assessee's past history was available and there was no material difference in the facts pertaining to the relevant assessment year and the past history year. The CIT(A), even while accepting past history as the relevant basis for assessment, proceeded to retain a part of the addition to the tune of Rs.10,65,928/- without cogent and sufficient reason therefor. The Tribunal, therefore, while endorsing the basis adopted by the CIT(A), has found no reason to sustain any addition and hence, deleted the addition altogether.

16. In the totality of circumstances, the Tribunal cannot be faulted in accepting the profit rate as declared by the assessee while not approving the rate as applied by the AO. The order as passed by the Tribunal does not appear suffering from any perversity or from the application of any wrong principle so as to call for interference.

17. Accordingly and in view of the above, the answer to the questions formulated in the present case is in the affirmative i.e. against the revenue and in favour of the assessee.

18. Consequently, the appeal fails and is hereby dismissed. No costs.