

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH 'A' KOLKATA

[Before Hon'ble Shri S.S.Viswanethra Ravi, JM & Dr.Arjun Lal Saini, AM]

ITA No.1484/Kol/2013
Assessment Year : 2009-10

I.T.O., Ward-2(2)
Asansol

(Appellant)

-versus-

M/s. Chinnamasta Traders
Kulti

[PAN: AANFM 8539 K]

(Respondent)

For the Appellant : Shri Anand Kumar Singh, JCIT

For the Respondent : Shri S.K.Tulsiyan, Advocate and Shri R.N.Ram, A.R.

Date of Hearing : 07.09.2016

Date of Pronouncement : 23.09.2016.

ORDER

Per Dr.Arjun Lal Saini, AM

The captioned appeal filed by the revenue pertaining to A.Y.2009-10, is directed against the order passed by the Commissioner of Income Tax –(Appeals) Asansol, in Appeal No.397/C.I.T.(A)/Asl/W-2(2)/Asl/11-12 dated 07.03.2013, which in turn arises out of an order passed by the Ld. Assessing Officer u/s 144/143(3) of Income Tax Act, 1961 (in short, the Act), dated 19.12.2012.

2. The facts of the case are stated in brief. The Assessee firm has filed its return of income for A.Y.2009-10 on 30.09.2009. The case was selected for scrutiny u/s 143(2) of the Act and statutory notices were sent by the AO to the assessee but there was no compliance to these notices. However, Shri Salil Baran Majumder appeared as Authorised Representative of the assessee on 14.10.2011 before the AO without submitting any vakalatnama and stated in a letter that one of the partners of the firm, Sri Joy Banerjee, with whom all the books of accounts were kept, had absconded. Because of this reason the books are not available. The assessee could not produce any books of account before the AO. Before completion of assessment several letters were issued to the assessee for obtaining the explanation regarding additions on

different heads. There was no compliance on the part of the assessee. The assessee firm has not cooperated with the department. One of the partners of the firm Shri Rakesh Verma has stated that Shri Joy Banerjee, a partner who is absconding for the last few months but they could not produce any FIR and the same could not be shown before the AO. All the partners are literate even then they did not file any FIR to search him. The Id. AO completed the assessment u/s 144 of the Act as per the best judgment and computed the total income at Rs.1,74,14,110/-. Aggrieved by the order of the Id. AO, the assessee filed an appeal before C.I.T.(A), Asansol.

3. The Id. C.I.T.(A) observed that the option before AO was to disallow expenses in full or part or to reject books of accounts u/s 145(3) of the Act. The latter is also justified as books of accounts were not produced due to the reasons that Shri Joy Banerjee, partner who is in possession of the books is absconding. The Id. CIT(A) relied on the determination of fixed percentage of gross receipts by the AO. However, he considered that the percentage cannot lead to figure equaling what has been fixed by the AO, has no precedent. On the other hand, considering the level of absence of vouchers and defects considered high in this case and 8% is not justified. One with low level of interest or depreciation liability will have higher income. Fixing income at 8% as pleaded by the assessee will be grave injustice to all assesses who has maintained correct and complete accounts. This is a case where even existence of books of accounts have not been made. Even eligibility of deduction is not established. Accordingly he directed the AO to assessee the income from contract work at 12.5% obtained by reducing value of materials supplied from gross receipts.

Not being satisfied with the order of Id. CIT(A), the revenue is in further appeal before us.

4. Although in this appeal the revenue has raised multiple grounds of appeal but at the time of hearing the grievance of the Revenue had been confined to ground nos. 1, 2, 3, 5, 6 and 7 and ground no.4 has not been pressed.

The Id. DR pointed out that the main grievance of the revenue is that assessment should be done based on the books of accounts and not on estimated basis. The Ld DR for the Revenue has pointed out that partners of the firm has joint responsibility and severally responsibility. The partners of the firm reported to the AO that one of the partners Mr. Joy Banerjee has absconded, does not mean that other partners are not responsible for getting the assessment done. Besides, there is no any evidence that Mr. Joy Banerjee has absconded, because partners neither lodged F.I.R nor they published in the newspaper that their partner has absconded, moreover after two years when the proceedings of CIT (A) started then also he remains absconded therefore this is a false statement made by partners and nobody can rely. Before the Id. CIT(A) the assessee could not file any documentary evidence that Mr. Joy Banerjee had absconded with books of accounts and books could not be recovered from him yet. He has not been caught by the police authorities till date.

5. On the other hand, the Id. AR for the assessee has submitted that the assessee could not produce the books of account before AO, the reason being one of the partners has absconded with the books of accounts. The assessee firm is trying to search the absconded partner with the help of relatives and friends circles. The Id. AR also prayed that in this case 8% of profit on gross receipts is reasonable and he cited before us two case laws decided by ITAT, New Delhi in the case of M/s. Balwan Singh & Co. vide ITA No.4040/Del/2011 order dated 04.11.2011 and ITAT Amritsar Bench in the case of Shri Janak Raj Vs.DCIT , vide ITA No.161(Asr)/2011 order dated 08.06.2012.

6. Having heard the rival submission, we are of the view that there is merit in the submissions of the Id. DR for the revenue, as the proposition canvassed by him are supported by the facts cited above. As he has explained that one of the partners of the firm has absconded with books of accounts but the assessee had not filed any FIR with the police department therefore their statements can not be relied. There is no point to reveal that the partner has absconded. The CIT(A) did not ask the assessee firm to produce before him the FIR and other documents which can show that one of

the partners has been absconded with books of accounts and till date the partner is not traceable. The assessee under consideration comes under the tax audit ambit and Tax audit report u/s 44AB has been certified by the Chartered Accountant therefore assessment can not be done based on estimate. If the books of accounts are absconded by one of the partners but then copy of the tax audit report must be available with the Chartered Accountant of the assessee. The said partner can not steal the tax audit report from CA office and the assessee must produce the tax audit report before AO along with other documents. Besides, the Id. AR for the assessee has submitted before us two case laws which are not applicable to the facts under consideration because the other partners have failed to prove the fact that one of the partners has absconded with the books of accounts and they had not filed the FIR with the police authorities. Therefore it is not acceptable. Therefore these two case laws cited before us are not applicable to the facts under consideration. Accordingly we are of the view that this issue requires fresh examination at the end of the AO. We also direct the assessee to produce the books of accounts, tax audit report etc, before the AO and get the assessment done. Therefore we set aside the order of CIT(A) and restore the issue to the file of AO with the direction to ascertain the net income of the assessee as per the discussion supra.

7. In the result, all the grounds of appeal of the revenue are allowed for statistical purposes.

Order pronounced in the court on 23.0-9.2016.

Sd/-
[S.S.Viswanethra Ravi]
Judicial Member

Sd/-
[Dr.Arjun Lal Saini]
Accountant Member

Date: 23.09.2016.
R.G.(.P.S.)

ITA No.1484/Kol/2013
M/s. Chinnamasta Traders
A..Y.2009-10

Copy of the order forwarded to:

1. M/s. Chinnamasta Traders, Village & P.O. Aldhi, Tintalla, P.O.Kulti-713343, C/o Md. Kamruddin.
- 2 I.T.O., Ward-2(2), Asansol.
3. C.I.T.(A)- Asansol. 4. C.I.T., Asansol.
5. CIT(DR), Kolkata Benches, Kolkata.

True Copy,

By order,

Deputy /Asst. Registrar, ITAT, Kolkata Benches