



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA No. 730 of 2008**

with

ITA No. 660 of 2004

% **RESERVED ON: JANUARY 7, 2011**
PRONOUNCED ON: 24 JANUARY, 2011

1) ITA No. 730 of 2008

COMMISSIONER OF INCOME TAX ...Appellant

through : Ms. Prem Lata Bansal, Advocate.

VERSUS

M/s. CHADHA AUTOMOBILES (INDIA) . . .Respondent

through: Mr. M.S. Syali, Sr. Advocate with
Mr. Mayank Nagi, Ms. Madhavi
Swaroop and Ms. Husnal Syali,
Advocates for the respondent.

2) ITA No.660 of 2004

COMMISSIONER OF INCOME TAX ...Appellant

through : Ms. Prem Lata Bansal, Advocate.

VERSUS

M/s. CHADHA AUTOMOBILES (INDIA) . . .Respondent

through: Mr. M.S. Syali, Sr. Advocate with
Mr. Mayank Nagi, Ms. Madhavi
Swaroop and Ms. Husnal Syali,
Advocates for the respondent.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?



A.K. SIKRI, J.

1. Both these appeals pertain to same assessment year in respect of same assessee. Even the question of law raised is identical. It so happened that two appeals, one preferred by the Revenue and the other by the assessee, were decided by the tribunal on different occasions by passing two orders and that is the reason that two appeals are before us. ITA 660/2004 was admitted on 8th November, 2004. Since decision in the second appeal was rendered subsequently by the tribunal, the appellant filed ITA 730/2008 which was admitted on 26th October 2010. Identical question of law was framed while admitting the two appeals. This question of law is as under :

“Whether the Tribunal is justified in not making any addition on account of trading result in spite of rejecting books of accounts and recording specific findings that in the pre-survey period trading results were in the negative and assessee had no explanation for the same.”

2. The aforesaid question has cropped up for consideration in the following factual backdrop.

In the premises of the respondent assessee, which is in the business of sale of automobile accessories, a survey was conducted by the income tax department on 7.1.2000. Certain discrepancies were found in the stock which was physically verified and the stock which was shown in the books of accounts. There was a difference of ₹15 lakhs on this account. The assessee accepted this discrepancy and surrendered a sum of ₹15 lakhs on account of unexplained stock. Likewise there was an unexplained cash to the tune of ₹5 lakhs during of survey. The assessee made a surrender of this amount also during the survey. In this manner



3. By due date the assessee filed income tax return for t assessment year 2000-01 declaring an income of ₹20,30,048/-. During the assessment proceedings the assessee produced the account books. The Assessing Officer found various discrepancies therein and thus rejected those account books. In such a scenario, for the purpose of ascertaining the income of the assessee, the Assessing Officer undertook the exercise of finding the GP rate. The Assessing Officer took up case of one M/s Kohli & Co. which was trading in the same commodities. As per the AO, it was found that GP rate disclosed by the said M/s Kohli & Co. was 13.04%. As per the Assessing Officer since M/s Kohli & Co. was a comparable example, the GP rate declared by M/s Kohli & Co. was adopted as the basis of computation of the income of the assessee as well. Taking this GP rate of 13% on the trading results shown, trading addition of ₹33,06,687/- by the Assessing Officer was made and on this basis the assessment order was framed.
4. The assessee herein challenged the aforesaid order of the Assessing Officer by preferring appeal before the CIT(A). The assessee challenged the adoption of GP rate at 13%. The assessee also challenged the order of the Assessing Officer rejecting the books of accounts. It was also the case of the assessee that in any case the assessee had surrendered income of ₹20 lakhs during the survey and that had to be telescoped in the trading addition made by the Assessing Officer which the Assessing Officer omitted to do. The CIT(A) after hearing the appeal upheld the finding of the Assessing Officer whereby the books of accounts of the assessee were rejected. The CIT (A) also



on the basis of comparison made with M/s Kohli & Co. However the CIT (A) was of the view that the assessee was entitled to telescope the amount already surrendered during survey.

5. The matter was carried out further by the assessee before the Income Tax Appellate Tribunal. As mentioned above the assessee filed appeal against that part of the order of CIT (A) whereby CIT (A) had rejected books of accounts and affirmed the GP rate of 13%. On the other hand, the department also filed the appeal whereby deletion of ₹20 lakhs was made by the CIT (A) in the manner indicated above. Appeal of the assessee came up for consideration first and has been decided by the Tribunal vide orders dated 16.4.04. Since in the second appeal which was preferred by the tribunal this order is followed, it would be safe to refer to the decision rendered by the tribunal vide order dated 16.4.2004.

6. The Tribunal after detailed discussion upheld the order of CIT(A) insofar as it pertains to the rejection of the books of accounts of the assessee. Since account books of the assessee were rejected, it became necessary to examine the orders of the authorities before fixing the GP rate. The Tribunal dealt with the issue as to whether the GP rate of 13% adopted by the Assessing Officer and affirmed by the CIT(A) was proper or not. After detailed discussion, it came to the conclusion that comparison with M/s Kohli & Co. was inappropriate inasmuch as the line of business of said M/s Kohli & Co. was different from the assessee. This finding necessitated the Tribunal to fix the GP rate. In such a scenario, proceeding further, the Tribunal observed that the past history of



department in earlier assessment years was relevant basis arriving at GP rate. The Tribunal looked into the GP rate declared by the assessee in last five years and on that basis came to the conclusion that it was fair and reasonable to apply a GP rate of 3.25% to estimated GP of the assessee for pre-survey period. Challenging this approach and conclusion, present appeals are filed.

7. Before we take note of the nature of challenge laid by the Revenue, we may state some more details. As pointed out above the survey was carried out on 7th January, 2000. During this period the assessee had shown a trading loss of ₹7,66,333/- by adopting GP rate of 3.25%. The Tribunal calculated that the GP of the assessee for this pre-survey period would come to ₹7,40,503/. On this basis the tribunal opined that a trading addition of ₹15,06,836/- would be required. Since the assessee had already surrendered a sum of ₹20 lakhs on account of excess stock and excess cash, telescoping the same the tribunal held that no further addition was required to be made as the trading addition sustained by the tribunal were to the tune of ₹15,06,836/-. We may also note at this stage that for the post-survey period of the assessment year the assessee had shown a sale of ₹1,66,46,688/- on which Gross Profits of ₹10,85,728/- was declared by the assessee in the income tax return which would show G.P. rate of 8 to 9%. This was accepted by the ITAT as reasonable holding that no interference in the GP shown by the assessee in the post survey period was necessary.

8. Mrs. Bansal, learned counsel appearing for the Revenue has



rate of 3.25% on the basis of past history namely GP rate declared by the assessee in the last five years' returns prior to the date of survey. Her submission is that during the survey it was found that there was discrepancy in the stocks in as much as on actual physical verification stock was in excess of ₹15 lakhs of what was reflected in the books of accounts. There was even a discrepancy regarding the cash. Because of this reason the GP declared by the assessee in the previous years was not the safe basis for arriving at the GP rate of year in question as it cannot be presumed that in last five years, proper books were maintained. She further tried to demonstrate, on the basis of post survey period GP declared by the assessee himself, that the GP rate should have been much more and this aspect was totally glossed over by the Tribunal. Dilating on this aspect she pointed out that as far as post survey period is concerned the assessee had himself shown sales of ₹1.66 Crores and GP of ₹10.85 lakhs thereupon. She further pointed out that the assessee was in the business of sale of truck accessories earlier and during this year, as per the assessee himself, the business was switched over to the sale of car accessories. Referring to the order passed by the Assessing Officer she pointed out that when the sale of car accessories during this period and the profitability thereupon is reduced from the total sales, the GP rate for this post survey period relating to the sale of truck accessories and freight containers would come to around 10%. In the alternative her submission was that sale and GP ratio was to be taken as it is without any adjustment of the aforesaid nature still it would be in the neighbourhood of 8 to 9%. According to Mrs. Bansal this post



safest indicator to arrive at GP rate for the pre-survey period well and on this basis also the fixation of the GP rate of 3.25% was grossly under rated.

9. Mr. Syali, Sr. Advocate appearing for the assessee submitted at the outset that the question of fixing GP rate was entirely factual and no substantial question of law would arise on this aspect. In this behalf, Mr. Syali referred to the judgment of this court in the case of **Anil Bagla Vs. Commissioner of Income Tax in IT Appeal No.882/2007 (2008) 215 CTR (Del) 444**. Predicated on this, his submission was that no substantial question of law has arisen in this case and the appeal required to be dismissed on this ground itself. In the alternative, Mr. Syali's submission on merits was that the exercise undertaken by the ITAT in the given case was perfectly justified and legally in order. He countered the submission of Mrs. Bansal qua the adoption of past history of the assessee, by contending that the assessment in those years were complete and accepted by the department. Therefore, it was not open to the department now to contend that the GP which was declared by the assessee in those years could not be the basis of fixing GP rate in the year in question. He also submitted that if the department was of the opinion that no such argument was ever raised even before the tribunal or the CIT(A) and in any case if Department was of the opinion that the assessee had suppressed the income in the earlier years, no steps for reopening those assessments were ever taken by the department. He further submitted that the GP rate for post survey period was higher because of the change in the line of business from truck accessories to the lack accessories and the



prohibiting the entry of heavy vehicles like trucks. He also pointed out that for the assessment years 2001-02, 2002-03 and 2003-04, the assessee had filed the return declaring the GP rate of 4.59% to 5.39% which was duly accepted by the department. On this basis, his submission was that the GP rate of 13% arrived at by the Assessing Officer or the CIT (A) was totally out of tune whether it be compared with the past history of the returns filed by the assessee or the subsequent.

10. The aforesaid factual information would clearly demonstrate that in so far as books of accounts of the assessee are concerned these have been rejected by all the authorities below and this issue has attained finality. Furthermore, the CIT(A) as well as the Tribunal has allowed telescoping of ₹20 lakhs surrendered by the assessee at the time of survey and this cannot be questioned by the Department as this aspect was rejected at the time of appeal and no question of law has been framed. The entire dispute, in these circumstances, revolves around the GP rate that has been arrived at by the learned Tribunal.
11. After analyzing the peculiar facts of this case as well as the material on record, we intend to take the view that neither the Department nor the assessee is wholly correct. It would also follow that the approach of the Tribunal is not without blemish. We are inclined to agree with the submission of the learned counsel for the Revenue to the extent that the Tribunal could not have made the returns of last five years as the sole basis for arriving at GP rate in the year in question. We say so because of



- (a) In the year in question, the books of accounts of the assessee are specifically rejected finding discrepancies therein. During the survey, discrepancy was also found in the stock as entered into books of the accounts and actual stocks found at the premises on physical verification. Discrepancy was found even in respect of cash. The assessee had accepted this discrepancy and offered a sum of ₹15 lacs on account of unexplained stock and also unexplained cash to the tune of ₹5 lacs.
- (b) On the one hand, the Tribunal takes into consideration the GP declaration in last five assessment years, but conveniently ignores the GP shown by the assessee himself in this very year pertaining to post survey period. Since post survey period is of the same assessment year, that would provide better guide for fixing the GP rate for pre-assessment period.
12. For a moment, we are not suggesting that the GP rate declared in the earlier five years should not be taken into consideration at all, as the assessment for those years have been completed and the GP rate is accepted by the Department. At the same time, there is some question mark on the said GP rate in those years which becomes more apparent and visible when that is compared with the post survey period of the assessment year in question. Therefore, the proper methodology should have been to take into consideration the GP rate of the previous period, but at the same time GP rate of post survey period was also relevant to determine



- periods pertain to the same assessment year. We have also keep in mind that in the subsequent two assessment years, GP rate of 4.59% to 5.39% is duly accepted by the Department.
13. Normally, when we find that no proper exercise is done by any of the Authorities below, the matter should have been remitted back to the AO to take into consideration of those aspects and fix the GP rate. However, having regard to the fact that it is an old matter and all the relevant data are available with us which is taken note of above and this may provide a suitable yardstick for fixing the GP rate, we are doing this exercise ourselves. The average GP rate for the last five years is 3.25% and for the subsequent year it is 4.59% to 5.39%. The GP rate of post survey period is 8-9% but that period is less than three months. Keeping in mind these GP rates, we are of the opinion that the GP rate of 5% would meet the justice.
14. The question of law is answered in the aforesaid manner with a direction to the AO to work out the income of the assessee in this Assessment Year on that basis.
15. These appeals are disposed of in the aforesaid terms.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE