

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Present

Mr. Justice Muhammad Khurshid Alam Sarkar

And

Mr. Justice Sardar Md. Rashed Jahangir

Income Tax Reference Application No. 648 of 2004

In the matter of:

Van Happen Fashion Manufacturing Limited
.... Applicant

-Versus-

Commissioner of Taxes, Taxes Zone-7, Segunbagicha,
Dhaka, Bangladesh

.... Respondent

Mr. Sarder Jinnat Ali, Advocate

.... For the applicant

Mr. Pratikar Chakma, D.A.G

.... For the respondent

Judgment on : 16.08.2023

Sardar Md. Rashed Jahangir, J:

The instant reference application has been filed by the assessee under section 160 of the Income-tax Ordinance, 1984 against an order dated 01.09.2004 passed by the Taxes Appellate Tribunal, Division Bench-1, Dhaka (in short 'the Tribunal') in Income Tax Appeal No. 5888 of 2003-2004 (assessment year, 2003-2004) upon formulating the following 3(three) questions of law:

Questions of Law:

- (I) Whether, in the facts and on the circumstances of the case, the Tribunal is justified holding the opinion that disallowances of expenditures that had been exclusively spent for business causes have judiciously been done when the applicant's books of accounts and method accounting were not assailed and while the applicant had complied with the provision of section 35(3) of the Income-tax Ordinance, 1984?
- (II) Whether, in the facts and on the circumstances of the case, the Tribunal is judicious in maintaining part disallowances of expenses charged under P & L account against the heads: (a) Salaries and allowances Tk.13,65,849/-; (b) Excess perquisite Tk.60,000/-; (c) Printing and stationeries Tk. 80,000/-; (d) Telephone Tk.1,00,000/-; (e) Service and maintenance and stamp and documentation Tk.10,00,000/-; (f) Maintaining and postage Tk.1,00,000/-; (g) Subscription Tk.1,57,325/-; (h) Training Tk.10,98,306/-; (i) Conveyance Tk.20,000/-; (j) Computer Tk. 60,000/- and (k) Miscellaneous Tk. 80,000/-?
- (III) Whether, in the facts and on the circumstances of the case, the Tribunal is judicious in maintaining estimate of excess gross profit just for enhancing rate of gross profit of last year ignoring applicant's books of accounts and finding no defects in accounts in particular?

For disposal of this reference application, we see no necessity to go into detail merit, save and except the facts, inter alia, that the assessee submitted return for the assessment year 2003-2004 declaring certain amount of taka as income. In the return, assessee claims certain

deductions and allowances under profit and loss account, out of which the Deputy Commissioner of Taxes (in short 'DCT') disallowed some claims under specific heads. Challenging the order of disallowances assessee filed an appeal before the Commissioner of Taxes (Appeals) [in short C.T. (Appeals)], in which the disallowances were reduced on modification, against the said modified disallowances assessee went before the Tribunal in second appeal challenging the order under specific heads, namely, 'salary and allowance', 'transportation expenses', 'printing and stationery', 'telephone bill', 'service and maintenance', 'mailing and postage', 'subscriptions and incidental expenses', 'training expenses', 'travelling and conveyance', 'computer expenses' and 'expenses for miscellaneous purpose'. After hearing the Tribunal directed to reduce the disallowed amounts further; therefore, the question arose whether the Tribunal was justified in maintaining part disallowances of the expenses claimed under profit and loss account under the aforementioned heads.

Earlier similar questions of law referred before this Division in Income Tax Reference Application Nos.623 of 2015, 367 of 2016 and 267 of 2017 and this Court after elaborate discussions held us under:

Now the next pertinent question comes into play, if the Assessing Officer has found as a matter of fact that complete and reliable accounts having not been placed or produced before him, having regard to that account he may proceed to estimate the assessable

income of assessee. The question is how far he enjoys such authority, whether he is permitted to proceed arbitrarily on presumption and or to act based on his whim?

The Assessing Officer must not act arbitrarily and must obtained materials or evidence and make his estimation or decision on the basis of said materials available before him and in doing so he enjoys a wide authorised power under Chapter-XIV of the Ordinance. It is needless to discuss here elaborately his authority and power, but he is not debarred from relying on private source of information or material in absence of better evidence and even in absence of any better evidence he may fall back on the assessment of the last preceding year (See Gopinath - Vs- CIT, 4ITR1).

From the aforesaid findings and observation of this Court, it appears that the Income-tax officer shall have the authority to discard the account submitted by the assessee, when in his opinion the taxable income cannot be deduced properly from the submitted account, i.e. before purporting to act, rejecting the account and making his estimation, he is to form the opinion that the income profit and gains of the assessee cannot be properly ascertained from the submitted account. In the case of Commissioner of Income-Tax Vs. M/s. Ata Hossain Khan Limited, reported in 28DLR(AD)141, the Apex Court held that the opinion of the DCT cannot be mere subjective or arbitrary one but it has to be formed judicially i.e. there must be some material basis for such an

opinion, because the opinion of the DCT may affect the assessee very much upon imposing a financial burden by increasing his tax liability and therefore, the formation of such an opinion should have an objective foundation which is amenable to judicial scrutiny.

Keeping in mind the above proposition of law, we have examined the assessment order, the first appellate order and the second appellate order of Tribunal and therefrom it appears to us that the disallowed expenses under the heads 'printing and stationery', 'mailing and postage', 'subscription and incidental expenses', 'training expenses' and 'computer expenses' are disallowed by pointing out specific defects and on the basis of specific finding as to the reasons for the said disallowances. Thus, those disallowances are just and legal, and the rest disallowed amounts have been determined on the basis of presumption and therefore, we are of the view that the disallowances under the head 'salary and allowance', 'transportation expenses', 'service and maintenance', 'travelling and conveyance' and 'telephone bill' are hereby set-aside and the concern DCT is hereby directed to make his estimation on the basis of the observations and directions made in the judgment of Income-tax Reference Application Nos.623 of 2015, 367 of 2016 and 267 of 2017, in the case of Bangladesh Edible Oil Limited (referred hereinabove).

So far the Question No.(I) is concerned, the authority of DCT under section 35 of the Ordinance to disallow claimed expenditure has

been well settled by the judgment passed in the case of Commissioner of Taxes Vs. Conference and Exhibition Management Service Limited, reported in 25BLC(AD)14 and in view of above this Court see no necessity to entertain such questions again.

So far the question No.(III) is concerned, the determination of the rate of gross profit is a mere question of fact, which cannot be a subject matter of reference under section 160 of the Income-tax Ordinance, 1984 which has been settled in the judgment of Commissioner of Income-tax A-Range, Chittagong Vs. Harendra Kumar Sil, reported in 34 DLR(AD)298.

In the premise above, the question Nos. 1 and 3 are decided against the assessee-applicant and question No. 2 is disposed of with the observations and directions made in the body of this judgment.

Accordingly, the reference application is disposed of without any order of cost.

The Registrar of the Supreme Court of Bangladesh is directed to take steps in view of the provisions under section 161(2) of the Income Tax Ordinance, 1984.

Muhammad Khurshid Alam Sarkar, J.

I agree.