

IT : Assessing Officer could have made additions to assessee's income on basis of window dressed financials, as they had been prepared to obtain bank loan and had no connection with actuals

■ ■ ■

[2018] 94 taxmann.com 422 (Calcutta)

HIGH COURT OF CALCUTTA

Binod Kumar Agarwala

v.

Commissioner of Income Tax, W.B.-XIX*

SANJIB BANERJEE AND ABHIJIT GANGOPADHYAY, JJ.

ITAT NO. 22 OF 2015

GA NO. 436 OF 2015

JUNE 21, 2018

Section 143, read with section 44AB, of the Income-tax Act, 1961, read with [rule 6G](#) of the Income-tax Rules, 1962 - Assessment - Addition to income (General) - Whether assessee having presented his financial position as in balance sheet and profit and loss account certified by a chartered accountant in Form 3CB in accordance with rule 6G(1)(b) for obtaining loan from bank could no longer resile from such position later at time of filing annual accounts for purpose of taxation on ground that earlier accounts had been prepared on basis of estimation for presentation thereof to bank - Held, yes - Whether balance sheet and profit and loss accounts of an assessee accompanied by a certificate as to its fairness, cannot be tailor-made to suit a particular purpose or window dressed to make it attractive for bankers to rely thereupon and all gloss and sheen removed thereafter when it was time to pay tax - Held, yes - Whether thus, it was open to Assessing Officer and income tax authorities to pin assessee down on basis of assessee's representation contained in earlier balance sheet to avail bank loan, having no relation with actuals and make additions - Held, yes [Para 13 & 14] [In favour of revenue]

FACTS

- The assessee, with an intent to avail credit facilities from the bank, submitted a balance sheet dated 18-7-2005 prepared by a firm of chartered accountants. The balance sheet indicated figures which may not have been commensurate with what was reflected in the books of account of the assessee. Nonetheless, a certificate was issued by the Chartered Accountants in Form 3CB under rule 6G(1)(b) of the Income-tax Rules, 1962. The figures in the balance sheet of 18-7-2005 were at variance with the figures indicated in the balance sheet presented by the assessee before the Assessing Officer dated 15-10-2005 prepared by another firm of chartered accountants. Assessing Officer, while completing assessment proceedings, relied on balance sheet dated 15-10-2005 to determine income of the assessee.
- On appeal, the Commissioner (Appeals) deleted the addition.
- On second appeal, the Tribunal set aside the order of the Commissioner (Appeals)

and upheld the addition made by the Assessing Officer in this regard.

- On appeal to the High Court the assessee contended that under rule 6G(2), the particulars which are required to be furnished under section 44AB are to be in Form No. 3CD. According to them the certificate issued by the Chartered Accountant Firm was not in Form No.3CD and the Tribunal fell into error in making observations as to the veracity of the particulars under section 44AB. It was further contended that it is usual practice for a balance sheet and profit and loss accounts to be prepared on the basis of estimates for the presentation thereof to a bank at a time prior to when the assessee is statutorily required to complete the annual accounts.

HELD

- The substance of the assessee's submission is that to suit a person's purposes before one authority or the other, different pictures as to the financial position of such person or any entity under the control of such person may be presented. This is a question larger than any legal issue under the Income Tax Act and is a matter of public policy. It is inconceivable that a person may approach a bank by inflating the value of his assets and a few months down the line he can deflate the value of the assets, so to say, while queuing up to pay tax. There is no doubt that the certificate issued on 18-7-2005 purported to give an impression that it was in exercise of an audit as required under section 44AB. It was also presented in a statutory form with the fine print in paragraph 2(A) thereunder indicating that it was only an estimate. It is scarcely expected of a banker to question the veracity of any accounts certified by a firm of chartered accountants or to look into the fine print and comprehend therefrom that utterly bogus figures had been furnished only for the purpose of availing of the credit facilities from the bank. [Para 10]
- The certificate issued on 18-7-2015 did not stop with the caveat indicated at paragraph 2(A) that the information and explanations herewith purely based on estimate basis and have no relation with the actual figures and to avail the bank loan, but such clause was followed by two other clauses: clause (B) was the opinion of the chartered accountants that proper books of account had been kept by the office of the assessee and clause (C) was the opinion that the accounts, which were based on estimation, gave a true and fair view of the state of affairs of the assessee as at 31-3-2005 in the appended balance sheet and a true and fair view of the profit of the assessee for the year ended 31-3-2005 in the appended profit and loss accounts. The balance sheet and the profit and loss accounts were prepared by the assessee and the certificate of the chartered accountant appended thereto with the intention of influencing the bank regarding the financial position of the assessee. [Para 11]
- A rosy picture as to the financial position of the applicant seeking credit facilities from a bank would be presented before the bank for the bank to assess the creditworthiness of the applicant and the desirability of extending credit facilities to such applicant; but later another balance sheet and profit and loss accounts would be slipped into the file, possibly indicating a less robust financial position of the constituent. If such was the object on the exercise, to which the chartered accountants appear to have been a willing accomplice, the assessee has been appropriately dealt with by the fora below. The balance sheet and profit and loss accounts of an assessee accompanied by a certificate as to its fairness, notwithstanding the caveat as noticed in paragraph 2(A) thereof, cannot be tailor-made to suit a particular purpose or

window-dressed to make it attractive for bankers to rely thereupon and all the gloss and sheen removed thereafter when it was the time to pay tax. The doctrine of *pari delicto* would apply and preclude the appellant herein from detracting from the figures contained in the balance sheet and profit and loss accounts certified on 18-7-2005 at any subsequent stage. [Para 13]

- When the assessee presented the financial position as in the balance sheet of 18-7-2005, the assessee could no longer resile from such position. It was then open to the Assessing Officer and the income tax authorities to pin the assessee down on the basis of the assessee's representation contained in the earlier balance sheet and the reasoning indicated in paragraph 2(A) by the Appellate Tribunal does not call for any interference. Indeed, the Appellate Tribunal may only be faulted for not reporting the chartered accountants to the Institute of Chartered Accountants for having apparently abetted in the commission of a colossal act of misrepresentation which the appellant assessee undertook before his bankers for the purpose of obtaining credit facilities by indicating a financial position that was not warranted by the books of the assessee. [Para 14]

- In the light of the above, the appeals are dismissed. [Para 15]

Gopal Ram Sharma and Ms. Smita Das De, Advs. *for the Appearing Parties*.

ORDER

1. : The matter is typical of how business is conducted in this country and why loans obtained from banks remain unpaid.
2. The question of law framed on behalf of the appellant-assessee is as follows:

"Whether any addition to income can be made on the basis of balance sheet and profit and loss accounts certified to have been prepared on estimate basis to avail bank loan and having no relation with the actual?"
3. Implicit in the question is that it is not the Income Tax Appellate Tribunal's business if the assessee has committed fraud on the bank and has obtained credit facilities by misrepresenting its financial position.
4. The facts need now to be noticed. This wily assessee was interested in obtaining credit facilities from a bank and had a balance sheet prepared by a firm of chartered accountants by the name of Roy Ghosh and Associates. The balance sheet was necessary for the purpose of the application to the bank to obtain credit facilities. The balance sheet indicated figures which may not have been commensurate with what was reflected in the books of account of the assessee. Nonetheless, a certificate was issued by the Chartered Accountants in Form 3CB under Rule 6G(1)(b) of the Income-tax Rules, 1962. The figures in the balance sheet of July 18, 2005 prepared by Roy Ghosh and Associates were at variance with the figures indicated in the balance sheet presented by the assessee before the Assessing Officer dated October 15, 2005 prepared by another firm of chartered accountants by the name of Naredi and Co.
5. The Assessing Officer sought to pin the assessee down on the basis of the figures contained in the balance sheet of July 18, 2005. It is such matter which has travelled through the various levels to reach this Court on the question whether the previous balance sheet of July 18, 2005 was of any relevance in the context of the formal balance sheet of October 15, 2005 having been presented before the income tax authorities.
6. In such context, the Appellate Tribunal has held, *inter alia*, as follows in the judgment and order

impugned herein:

"6. Ground No.2 relates to the additions made due to difference in two audited balance sheet. The Id. A.R vehemently contended before us that the audited report dated 18.7.2005 was made only on estimate basis and for the purpose of availing of the loan, the correct audited profit and loss account and balance sheet is dated 15.10.2005 as signed by Naredi & Company, Chartered Accountant. On the basis of the audited balance sheet dated 15.10.2005 no addition can be made as assessee was holding fixed assets of Rs.5,02,423/- only. The difference of Rs.20,09,788/- was only due to the over valuation of the fixed assets for availing of the bank loan. We do not agree with the contentions of the Id. A. R. in this regard we have pursued both the audited balance sheets and profit and loss account for the year ended 31st March, 2005 along with audit report in form No. 3CB. The audited balance sheet and profit and loss account nowhere state that these are on the basis of estimate. The audited profit and loss account and balance sheet dated 18.7.2005 which is signed by as partner of Roy Gosh & Associates does not give any indication that they are only the estimated figures. A Chartered Accountant is governed by certain discipline and he has to conduct audit in accordance with the provisions and rules of the Chartered Accountants Act. Schedule II and part 1 holds a chartered accountant guilty of professional misconduct if he permits his name or name of his firm to be used in connection with the audit based on estimate. The Assessing Officer in our opinion is bound to rely on the audited financial accounts dated 18.7.2005 for making the assessment and determining the taxable income of the assessee. We noted that the provisions of section 44AB are applicable in the case of the assessee. The assessee got the tax audit and obtained the tax audit report from two different auditors one is dated 18.7.2005 while the other is dated 15.10.2005. Section 44AB does not require that the tax audit should be conducted twice. Under rule 6G(1)(b) read with section 44AB, form 3CB has been prescribed under which audit report has to be furnished. This form require a certification from the chartered accountant. We were surprised to see that in the report dated 18.7.2005 under para 2 auditor has clearly certified that annexed balance sheet and annexed profit and loss account are in agreement with the books of account maintained at the office of the organization. The annexed balance sheet is duly signed by the assessee. The auditor under clause (b) also state that under his opinion the proper books of account have been kept by the office of the assessee so far as it appears from his examination of his books. The tax audit u/s 44AB is carried out as per the provision of Income Tax Act. The pro forma of the audit report cannot be changed just to give a false impression to the Assessing Officer or to the public at large. This audit is not conducted under the Banking Regulation Act so that the plea of the Id. A.R can be accepted. The purpose of the tax audit is to ensure that the balance sheet and profit and loss account gives the correct information as per the books of account maintained by the assessee. A party or an auditor cannot be permitted to getaway from the consequence of the information which he has given by way of a certificate subsequently when he has been caught merely by stating that the information was simply estimates for getting the bank loan. The Assessing Officer is bound to rely on the certificate issued by a professional whose profession is regulated by certain conduct rules. In our opinion it is a fit case where the revenue must have taken the action even against the chartered accountant for issuing the false certificate what to talk of making the addition. It appears that the CIT(A) has deleted the addition as if fish is taken out of the ocean. We therefore, set aside the order of the CIT(A) and sustain the addition made by the Assessing Officer in this regard. Thus, this ground No.2 is allowed."

7. The assessee submits that the Appellate Tribunal's observations against the assessee in the order impugned are perverse since the Appellate Tribunal may not have read the certificate furnished by Roy Ghosh and Associates. The certificate of Roy Ghosh and Associates appended to the balance sheet of July 18, 2005 was presented to the bank from which credit facilities had been sought. The certificate is in Form 3CB in accordance with Rule 6G(1) (b) of the said Rules. Paragraph 2(A) of the certificate, on

which much emphasis has been sought to be laid on behalf of the assessee, reads as follows:

" (A). We are giving the information and explanations herewith purely based on estimate basis and have no relation with the actual figures and to avail the bank loan."

8. Form 3CB is relatable to Rule 6G(1)(b) of the said Rules that pertains to the report of audit in the case of a person who carries on any business or profession other than a person covered by Rule 6G(1)(a) of the said Rules.

9. The assessee is quick to point out that under Rule 6G(2) of the said Rules the particulars which are required to be furnished under Section 44AB of the Income tax Act, 1961 are to be in Form No. 3CD. The assessee says that the certificate of July 18, 2005 of Roy Ghosh and Associates was not in Form No.3CD and, as such, the Appellate Tribunal fell into error in making observations as to the veracity of the particulars under Section 44AB as contained in the quoted passage.

10. The substance of the appellant's submission is that to suit a person's purposes before one authority or the other, different pictures as to the financial position of such person or any entity under the control of such person may be presented. This is a question larger than any legal issue under the Income Tax Act and is a matter of public policy. It is inconceivable that a person may approach a bank by inflating the value of his assets and a few months down the line he can deflate the value of the assets, so to say, while queuing up to pay tax. There is no doubt that the certificate issued on July 18, 2005 by Roy Ghosh and Associates purported to give an impression that it was in exercise of an audit as required under Section 44AB of the Act of 1961. It was also presented in a statutory form with the fine print in paragraph 2(A) thereunder indicating that it was only an estimate. It is scarcely expected of a banker to question the veracity of any accounts certified by a firm of chartered accountants or to look into the fine print and comprehend therefrom that utterly bogus figures had been furnished only for the purpose of availing of the credit facilities from the bank.

11. The certificate issued by Roy Ghosh and Associates did not stop with the caveat indicated at paragraph 2(A), but such clause was followed by two other clauses: clause (B) was the opinion of the chartered accountants that proper books of account had been kept by the office of the assessee and clause (C) was the opinion that the accounts, which were based on estimation, gave a true and fair view of the state of affairs of the assessee as at March 31, 2005 in the appended balance sheet and a true and fair view of the profit of the assessee for the year ended March 31, 2005 in the appended profit and loss accounts. The balance sheet and the profit and loss accounts were prepared by the assessee and the certificate of the chartered accountant appended thereto with the intention of influencing the bank regarding the financial position of the assessee.

12. It is submitted on behalf of the assessee that it is usual practice for a balance sheet and profit and loss accounts to be prepared on the basis of estimates for the presentation thereof to a bank at a time prior to when the assessee is statutorily required to complete the assessee's annual accounts. It is the further submission on behalf of the assessee that upon the regular balance sheet and profit and loss accounts being prepared, copies thereof would be furnished to the bank and retained with the records pertaining to the constituent.

13. In other words, a rosy picture as to the financial position of the applicant seeking credit facilities from a bank would be presented before the bank for the bank to assess the creditworthiness of the applicant and the desirability of extending credit facilities to such applicant; but later another balance sheet and profit and loss accounts would be slipped into the file, possibly indicating a less robust financial position of the constituent. If such was the object on the exercise, to which Roy Ghosh and Associates appear to have been a willing accomplice, the assessee has been appropriately dealt with by the fora below. The balance sheet and profit and loss accounts of an assessee accompanied by a

certificate as to its fairness, notwithstanding the caveat as noticed in paragraph 2(A) thereof, cannot be tailor-made to suit a particular purpose or window dressed to make it attractive for bankers to rely thereupon and all the gloss and sheen removed thereafter when it was the time to pay tax. The doctrine of *pari delicto* would apply and preclude the appellant herein from detracting from the figures contained in the balance sheet and profit and loss accounts certified on July 18, 2005 at any subsequent stage.

14. When the assessee presented the financial position of the assessee as in the balance sheet of July 18, 2005, the assessee could no longer resile from such position. It was then open to the Assessing Officer and the income tax authorities to pin the assessee down on the basis of the assessee's representation contained in the earlier balance sheet and the reasoning indicated in the quoted paragraph by the Appellate Tribunal does not call for any interference. Indeed, the Appellate Tribunal may only be faulted for not reporting Roy Ghosh and Associates to the Institute of Chartered Accountants for having apparently abetted in the commission of a colossal act of misrepresentation which the appellant-assessee undertook before his bankers for the purpose of obtaining credit facilities by indicating a financial position that was not warranted by the books of the assessee.

15. In the light of the above, ITAT No.22 of 2015 and GA No.436 of 2015 are dismissed with costs assessed at Rs.10,000/- to be paid to the Department within four weeks from date.

16. The Registrar, Original Side will forward a copy of this order to the Institute of Chartered Accountants of India for appropriate steps, if thought fit, to be taken against Roy Ghosh and Associates of NTE-206, Chandini Chowk, Golebazar, Kharagpur in accordance with law and upon due notice to such firm of Chartered Accountants.

17. Urgent certified website copies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

jyoti

*In favour of revenue.