IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1398 OF 2000

M/s Harish Textile Engrs. Ltd., Mumbai ..Appellant

Vs.

Dy. Commissioner of Income Tax,
Special Range-19 ..Respondent

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Mr. Nitesh Joshi a/w Jineshkumar Gandhi, Advocates i/b Dave & Girish & Co. for Appellant.
Mr. Suresh Kumar, Advocate for Respondent.

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CORAM : M.S. SANKLECHA &
G.S. KULKARNI, JJ.
RESERVED ON : 27 OCTOBER 2015
PRONOUNCED ON: 30 OCTOBER 2015

JUDGMENT (Per: M.S. Sanklecha, J.):

This appeal under Section 260A of the Income Tax Act, 1961 (the 'Act') challenges the order dated 6 July 2000 passed by the Income Tax Appellate Tribunal (the 'Tribunal'). The impugned order of the Tribunal disposes the revenue's appeal for the block period 1 April 1986 to 12 September 1996.

2. This appeal was admitted by this Court on 29 July 2002 on the following substantial questions of law:

"(1) Whether on the facts and in the circumstances of the case, the addition of Rs.10,00,000/- as 'on money' receipt in the period from 1986 to 1989, was without jurisdiction, patently illegal and invalid, there being no evidence or material in support?

(2) Whether on the facts and in the circumstances of the case, the third member of the Tribunal erred in holding that he is bound to accept the view of one of the two members inspite of the fact that he has a third view?

(3) Whether on the facts and in the circumstances of the case, the Tribunal erred in not allowing any deduction out of the expenditure of Rs.1,82,38,330/-?

(4) Whether on the facts and in the circumstances of the case, the conclusion of the Tribunal that the loose papers represented receipt of Rs.8,78,085/-, by the appellant on sale of scrap was perverse, being based merely on presumptions, conjectures and surmises?"

3. Mr. Nitesh Joshi, the learned Counsel for the appellant states that Question No.2 above is not pressed. Thus, Question No.2 is dismissed as not pressed.

4. Brief facts leading to the present appeal for consideration of Question Nos. 1, 3 and 4 are as under:

(a) The appellant is a manufacturer of Textile Machinery. On 12 September 1996, there was a search action under Section 132 of the Act on the appellant. Its office premises, factory at Umargaon, Gujarat and residence of two of its Directors were searched by the officers of the revenue.

(b) During the course of the search, the stocks lying in premises of the appellant were inventorised. Besides various loose documents, newspapers and books of accounts were seized by the officers of the revenue.

(c) Consequent to the search, on 16 December 1996, a notice under Section 158BC of the Act was served on the appellant. Upon service of the above notice, the appellant filed its return of income on 6 March 1997 disclosing its income at Rs.1.15 crores for the block period i.e. 1 April 1986 to 12 September 1996. This undisclosed income declared were interalia unaccounted cash, excess stock, seized jewellery, seized Indira Vikas Patra, seized Kisan Vikas Patra and investment in sundry assets.

(d) On 30 September 1997, the Assessing Officer passed an order under Section 158BC(c) of the Act determining the appellant's total income for the block period 1 April 1986 to 12 March 1996 at Rs.6.1 crores. This income was determined by the Assessing Officer on account of the following:-

(i) Undisclosed income on account of on-money on sale of textile machinery	Rs.4,10,22,595/-
(ii) Expenditure disallowed	Rs.1,82,38,330/-
(iii) Undisclosed Income on sale of scrap	Rs. 8,78,085/-
	Rs.6,01,39,010/-

(e) Being aggrieved, the appellant filed an appeal from order dated 30 September 1997 to the Tribunal. The appeal was filed to the extent of the following three additions made by the Assessing Officer:-

(i) Receipt of 'on money' to the extent of sale of textile machinery for the period 1 April 1986 to 31 March 1989 – Rs.40.39 lakhs;

(ii) Disallowed expenditure – Rs.1.82 crores; and

(iii) Sale proceeds of scrap – Rs.8.78 lakhs

(f) The appellant's appeal was heard by the Regular Bench of the Tribunal consisting of two members viz. Accountant Member and Judicial Member. However there was a difference of opinion between the two members constituting the Regular Bench. This difference was recorded in its order dated 3 August 1977 on the following three issues:-

(i) 'On-money' received for the period 1986-89 Rs.40.39 lakhs

The Accountant Member sustained the addition only to the extent of Rs.10 lakhs.

The Judicial Member sustained the addition to the extent of Rs.32.30 lakhs.

(ii) Disallowance of alleged expenses Rs.1.82 crores

The Accountant Member allowed an amount of Rs.45.59 lakhs as expenditure out of Rs.1.82 crores as claimed.

The Judicial Member disallowed the entire claim for expenditure of Rs.1.82 crores.

(iii) Income on sale of scrap Rs.8.78 lakhs

The Accountant Member deleted the entire addition of Rs.8.78 lakhs.

The Judicial Member sustained the addition of Rs.8.78 lakhs.

In view of the above difference of opinion, the President of the Tribunal nominated a third member to decide the above points of differences between the members of the Regular Bench.

(g) The third member of the Tribunal as nominated by the President, opined by an order dated 10 March 2000 on the difference of opinion as under:-

(i) 'on money' for the period 1986 to 1989 the addition of only Rs.10 lakhs is sustained. Thus agreeing with the view of the Accountant Member of the Regular Bench of the Tribunal;

(ii) disallowance of alleged expenses, the entire claim of of Rs.1.82crores was held to be not sustainable. Thus agreeing with the view of Judicial Member of the Regular Bench of the Tribunal; and

(iii) sale of scrap, the entire addition of Rs.8.78 lakhs was sustained. Thus agreeing with the view of Judicial Member of the Regular Bench of the Tribunal.

(h) Thereafter, the opinion of the third member was forwarded to the Regular Bench of the Tribunal. By order dated 6 July 2000, the Regular Bench of the Tribunal disposed of the appeal by taking into account the majority view on the three issues as under:-

(i) On the issue of 'on money', the addition of only Rs.10 lakhs out of Rs.40.39 lakhs made by the Assessing Officer was sustained for the period 1986 to 1989;

(ii) On the issue of disallowance of expenditure, the amount of Rs.1.82 crores made by the Assessing Officer was sustained; and

(iii) On sale of scrap, the addition of Rs.8.78 lakhs made by the Assessing Officer was sustained.

(i) Consequent to the order dated 6 July 2000, the appellant had preferred the present appeal which was admitted on 29 July 2002. We shall now deal with the three substantial questions of law which according to the appellant arise for our consideration.

5. Regarding Question No.1:-

(a) The Assessing Officer in the assessment order dated 30 September 1997 held that 'on money' on account of sale of Stenter machines for the block period 1 April 1986 to 12 September 1996 received by the appellant was Rs.4.10 crores. The Assessment Order records a finding that for the period 1 April 1989 to 12 September 1996, the 'on money' received was Rs.3.69 crores and for the period 1 April 1986 to 31 March 1989 on-money received was Rs.40.37 lakhs.

(b) The appellant does not dispute the Assessment Order dated 30 September 1997 to the extent it holds receipt of 'on money' to the extent of Rs.3.69 crores for the period 1 April 1989 to 12 September 1996. The appellant on the issue of receipt of 'on money' only disputes that it had received any 'on money' during the period 1 April 1986 to 31 March 1989.

(c) Mr. Joshi, the learned Counsel for the appellant submits that the addition of Rs.10 lakhs by the impugned order as being the 'on money' received by the appellant for the period 1 April 1986 to 31 March 1989 is not sustainable on account of the following:

(i) The assessment in this case has been done consequent to search under Section 132 of the Act. In terms of Chapter XIV-B of the Act, the assessment is restricted to only the undisclosed income for the block period computed on the basis of evidence found in the search in terms of Section 158B(b) of the Act. Thus, so far as the period 1 April 1986 to 31 March 1989 is concerned, as no incriminating evidence was found evidencing receipt of any 'on money' either by the appellant or it's agents on the sale of Stenter machines, the addition on account of 'on money' is bad.

(ii) Any evidence found of receipt of 'on money' for the period 1989 to 1996 cannot by itself be the basis of the estimating undisclosed income for the period 1986 to 1989 as has been done in this case; and

(iii) The impugned order incorrectly proceeds to uphold addition of Rs.10 lakhs to income of the appellant as 'on money' received for the period 1986 to 1989 on the basis of admission by the appellant to the extent of Rs.6 to 7 lakhs.

(d) As against the above, Mr. Suresh Kumar, the learned Counsel for the Revenue in support of the impugned order submits as under:

(i) It has been admitted by the appellant during the assessment proceedings that the amounts paid in cash and claimed as expenditure were paid out of cash receipts. In particular, he invites our attention to Annexure 'A' and 'C' to the Assessment order which indicates that payments had been made in cash during the year 1988-89 admittedly out of amounts received in cash by the appellant; and

(ii) The appellants in reply to the show cause notice have themselves offered Rs.5 to 7 lakhs as being an amount received in cash as about 10 Stenter machines were sold during the period 1986-89 in Surat Market. The appellants have further stated that they have received cash in respect of sales made by them in Surat Market in accordance with the prevailing practice in Surat. Thus this addition of Rs.10 lakhs by the impugned order cannot be found fault with.

(e) We have considered the rival submissions. The appellant sought to rely upon the definition of undisclosed income which has been defined in Section 158B(b) of the Act. Undisclosed income is defined as any income based on any entry in the books of account or other documents or transactions which have not been disclosed or would not have been disclosed for the purposes of the Act. It is submitted that in this case, there is no evidence in the form of any entry in the books of account or any other document to establish receipt of 'on money' by the appellant. Consequently, the amount of Rs.10 lakhs being added to the appellant's income as being 'on money' received for the period 1986-1989 is unsustainable in law. It is not in dispute that there is documentary evidence of receipt of 'on money' by the appellant for the period 1989-96. Thus there was evidence of receipt of 'on money' only for the part of the block period on sale of Stenter machines for the period 1989-96. This evidence was extrapolated in the impugned order to conclude that 'on money' had been received on the sale of Stenter machines also for the period 1986-89. This extrapolation in case of dealing outside the regular books of accounts was a subject of consideration

by the Supreme Court in ***Commissioner of S.T. Vs. H.M. Esufali***[1] and it was not disturbed. This interalia on the ground that the task of detecting escaped turnover is not easy and would involve some element of guess work. The above decision of Apex Court is sought to be distinguished on the ground that it was a case of best judgment assessment and therefore would have no application to the case of undisclosed income. We do not accept the above submission. As in case of best judgment assessment an assessment under Chapter XIV B of the Act also involves an element of guess work (see CIT Vs. Dr.M.K.E Memon 248 ITR 310). However the guess work should not be arbitrary. In this case besides the evidence for the period 1989 to 1996, we have noticed that while justifying it's claim for expenditure in cash of Rs.1.82 crores, the appellant itself has shown expenditure in cash for the period prior to 1989 out of amounts received in cash according to the appellant.

(f) Be that as it may, we find that the impugned order has proceeded on the basis that the appellant had himself admitted to receipt of 'on money' to the extent of Rs.6 to 7 lakhs in its letter dated 25 September 1997. This according to the appellant is an

1. AIR 1973(SC) 2266

incorrect reading of the communication as in that communication, the appellant had specifically stated that there is no receipt of 'on money' by the appellant during the period 1986 to 1989. The amount of Rs.6 to 7 lakhs according to the appellant was offered only to reconcile the difference in the value of Stenter machines as reflected by its customers in its books and as reflected by the appellant. Thus no reliance could be placed on the aforesaid communication to reach the conclusion that 'on money' was received by the appellant for the period 1986 to 1989. It would be appropriate at this stage to reproduce the relevant extract of the communication by the appellant dated 25 July 1997 which reads as under:

> *"Without prejudice to the above, we beg to state that we had sold about 10 machines, amounting to Rs.1,30,56,000/- during this period in Surat market. Discrepancy in figures, if at all is to be considered should be within the region of Rs.5 lakhs to Rs.7 lakhs. A list of parties to whom the machines were sold is enclosed.*
> *We submit that the receipt of portion of sale price in cash is peculiar only to Surat market. For the reasons best known to people staying in Surat, we only can confirm that it was not at our instance that part of the sale price was given to us in cash. It was because of their requirement that the monies were offered to us in cash. To remain in the other hand in no option but to accept the same. On the other hand in no other area we were dealing in this type of machine that here is no element of cash. Therefore, the sale price in respect of*

sale of machine to other parties other than Surat is the full and final sale proceeds which need no disturbance."

(emphasis supplied)

(g) From the above, it is evident that the appellants have themselves admitted that sale in Surat market had to be in cash as the buyers of the Stenter machines would insist on paying the appellant a part consideration in cash. Thus the appellant had no option but to accept the same. This coupled with the fact that in its appeal memo to the Tribunal, the appellant has urged the following ground:

"The Assessing Officer has erred in estimating that the appellant must have received on-monies to the extent of Rs.40,37,625/- in respect of the period from 1/4/86 to 31/3/89 as against the appellant's contention that the receipts were only to the extent of about Rs.6 lakhs. It is submitted that the determination by him of the figure on the items in question at Rs.4,10,22,595/- is not warranted for. The correct figure that he ought to have considered was Rs.3,64,81,970/-."

(emphasis supplied)

Thus undisputedly, receipt of 'on money' even for the period 1 April 1986 to 31 March 1989 is admitted by the appellant. The estimate of Rs.10 lakhs on the consideration of the facts is not shown to be perverse.

(h) The appellant interalia placed reliance upon the following decisions:

CIT Vs. Dr. M.K.E. Memon 248 ITR 310 (Bom)
CIT Vs. R.M.L. Mehrotra 320 ITR 403 (All)
CIT Vs. Faqir Chand Chamanlal 262 ITR 295 (P&H)
CIT Vs. Rajendra Prasad Gupta 248 ITR 350 (Raj)
CIT Vs. Smt. Usha Tripati 249 ITR 4 (All)
CIT Vs. Ghodawat Pan Masala Products Pvt.Ltd. 250 ITR 570 (Bom)

The reliance is placed on the above decisions to contend that in the absence of evidence found during the course of the search of receipt of 'on money' for the period 1 April 1986 to 31 March 1989, the revenue cannot tax the same as undisclosed income. The fact that there was evidence of receipt of 'on money' for the period 1989 onwards would not justify the authorities from extrapolating that 'on money' was received by the appellant even for the earlier period. These decisions are of no assistance as the addition on account of 'on money' is based on evidence and the admission of the appellant.

(i) We are of the view that the finding reached by officers of the Tribunal is essentially a finding of fact. There was evidence

available on record indicating receipt of 'on money' particularly for the period 1989 to 1996. This evidence of receipt of 'on money' with regard to the sale of Stenter machines is found in the appellant's letter dated 25 July 1998 is an admission of receipt 'on money' for sale for Stenter Machine in Surat Market during the period 1986-1989. Therefore, it could not be said that there was no evidence on record for the authorities to come to a conclusion that 'on money' was received by the appellant so as to hold that the finding is perverse.

(j) On the aforesaid factual scenario, the majority view taken by the Tribunal, that the addition of Rs.10 lakhs as receipt of 'on money' for the period 1986 to 1989 in the circumstances of the case on appraisal of the facts before them is a plausible view. This view has not been shown to be arbitrary or perverse. Thus Question No.1 is answered in negative i.e. in favour of the revenue and against the appellant-assessee.

6. Regarding Question No.3:-

(a) The claim of the expenses made in cash to the extent of Rs.1.82 crores was disallowed by the Assessing Officer and upheld

by the majority view of Tribunal in the impugned order. During the course of the search, the search party came across the documents which Mr. Joshi, the learned Counsel for the appellant points out could be classified into three different categories as under:-

(i) Documents indicating an expenditure of Rs.66.87 lakhs paid as gifts to various people associated with the appellant's business;

(ii) Documents indicating an expenditure of Rs.60.46 being amounts paid as speed money, protection money to union workers and

(iii) Documents indicating an expenditure of Rs.55.04 lakhs paid as overtime to the workers.

The expenditure in the aggregate was Rs.1.82 crores. The Assessing Officer in his order dated 30 September 1997 did not accept that any expenditure was incurred on the ground that complete evidence in support of payment was not provided. It further added the same as appellant's income under Section 69C of the Act as the appellant was unable to explain the source of such expenditure.

(b) Before the Tribunal, the impugned order has deleted the addition made by the Assessing Officer to income as unexplained expenditure under Section 69C of the Act. However so far as claim for deduction on account of expenditure was concerned, the Accountant Member allowed deduction to the extent of 25% of Rs.1.82 crores. This after holding that the appellant has not been able to substantiate the same, yet on the ground that the appellant may have incurred some expenditure for business purposes. The rest of the expenditure was disallowed. While the Judicial Member denied the entire deduction on the ground that no evidence had been led to establish that any expenditure had been incurred. In any event, according to him, the same would also be hit by the Explanation below Section 37(1) of the Act. Similarly, the third member concurred with the view of the Judicial Member and also held that the appellant had not established that expenditure had in fact been incurred for the purposes of business. In any view, the third member also held that the same would be hit by the Explanation to Section 37(1) of the Act.

(c) Mr. Joshi, the learned Counsel for the revenue challenges the addition of Rs.1.82 crores on being disallowed as expenditure on the following grounds:-

(i) No undisclosed assets of the value of Rs.1.82 crores have been found with the appellant. Therefore the natural presumption would be that this amount has been spent for the purposes as reflected in the seized documents. It was submitted that once the receipt of amount in cash was accepted, the payment in cash should also be accepted. In support, reliance was placed upon the decision of Kerala High Court in ***CIT Vs. P.D. Abraham @ Appachand***[1].

(ii) In any view of the matter, Section 292 of the Act, which was introduced by the Finance Act, 2007 with retrospective effect from 1 October 1975, raise a presumption that any document found during the course of a search would be presumed to correctly reflect the facts. Thus, the onus to establish the expenditure referred to in the loose documents found is not correct is on the revenue. The Tribunal proceeded to disallow the expenditure on the

1. 349 ITR 452

basis that the appellants have been unable to prove the expenditure. The basis of the above finding is not correct in view of Section 292C of the Act which has been introduced with retrospecive effect from 1 October 1975. In the above view, it is submitted that the appeal be restored to the Tribunal to reconsider this issue on application of Section 292C of the Act.

(iii) In any case, the disallowance of the expenditure in terms of Explanation to Section 37(1) of the Act is concerned, it would only be applicable if the purposes of the expenditure was an offence or if it was prohibited by law. The impugned order does not establish that the purposes for which the expenditure was incurred in cash was an offence or it was prohibited by law, but disallows it only on being opposed to public policy. Accordingly, the application of Explanation 1 to Section 37 of the Act to the present facts was unwarranted.

(d) As against the above, Mr.Suresh Kumar submits as under:

(i) Both the Assessing Officers as well as the impugned order of the Tribunal holds that the appellant-

assessee has not been able to establish that expenditure was incurred as claimed by them. The documents seized during the course of the search don't contain the names of the recipients nor their addresses. The findings of the Assessing Officer have also been corroborated by the impugned order of the Tribunal. Each of them separately hold that the appellant has not been able to establish that any expenditure was in fact incurred as claimed.

(ii) The finding of the Assessing Officer as well as of the Tribunal in the impugned order that no payment having been made by the appellant so as to claim deduction on account of expenditure, is a finding of fact. This finding of fact has not been challenged on the ground that it is perverse. Consequently, the impugned order of the Tribunal cannot be found fault with.

(iii) The occasion to examine the application of the Explanation 1 to Section 37 of the Act would not arise in the present facts. This for the reason that it would arise for examination only after the appellant-assessee has been able to satisfy the basic requisites of Section 37 of the Act

viz. that expenditure as claimed has been incurred and also that the expenditure has been incurred for the purposes of business. It is only thereafter that the occasion to examine the explanation to Section 37(1) of the Act would arise. It is therefore submitted that in the facts of this case the examination of Explanation to Section 37(1) of the Act is not warranted.

(iv) The retrospective amendment to Section 292C of the Act would not come to the aid of the appellant as the same only gives discretion to the revenue authorities, to presume that the documents found during the course of the search are true. Besides, the presumption in Section 292C of the Act is a discretionary presumption. Therefore it is to be invoked by the Authorities under the Act. In any case these documents don't establish the fact of payments being made.

(e) We have considered the rival submissions. We find that before the expenditure can be allowed as deduction under Section 37 of the Act, the expenditure should have in fact been incurred and

that also wholly and exclusively for the purposes of business. The Assessing Officer on detailed examination of the facts has held that the appellants were unable to establish that payments had in fact been made. This on the basis that the identity of the recipients and their addresses is not forthcoming nor is the identity of the persons who made the payment of such huge amounts is forthcoming. Besides the loose papers do not indicate clearly whether or not the money has been paid. The documents indicated seeking of funds and/or reimbursement of funds. This by itself cannot establish that the money has been actually expended. The Assessment Order also records the fact that the appellant had also not produced the individuals who had made said payments and/or produced their details. If the person alleged to have made payments were produced, the cross examination would have possibly thrown light on the genuineness of such claims.

(f) We further note that the aforesaid findings of the Assessing Officer has been reiterated independently by the Accountant Member that no concrete evidence has been produced by the appellants so as to establish that the payments as claimed by

them had in fact been made. Notwithstanding the above, the Accountant Member did allow deduction 25% of the total expenditure claimed on the ground that it may have been incurred for business purposes. This after holding that the exact quantification is not possible.

(g) On the other hand, we find that the Judicial member on consideration of the facts held that there is no evidence led by the appellant to establish that expenditure claimed by them had been incurred. Deduction of expenses merely on the basis of noting on piece of papers would not be a sufficient proof for allowability of deduction. After giving the aforesaid finding, the Judicial Member further goes on to examine that even if one assumes that such payment has in fact been made, the deduction of such payments was not permissible in view of Explanation to Section 37(1) of the Act. Similarly, the third member to whom the issue of allowablity of the expenditure as deduction was referred to has held that the appellants had not furnished any evidence what so ever to prove the expenditure was incurred and that it was incurred for the purposes of business.

(h) Therefore we notice that the impugned order of the Tribunal has come to a conclusion that there is no evidence produced to prove that the expenditure claimed as deduction was in fact incurred by the appellant-assessee. Albiet the Accountant Member (minority view) after holding that the appellant has not been able to substantiate the expenditure does allow deduction to the extent of 25% of Rs.1.82 crores. Therefore, the primary requirement of satisfaction of Section 37(1) of the Act has not been met by the appellant-assessee. This finding of the authorities under the Act as well as the Tribunal are undisputedly findings of fact. On the basis of available evidence before the authorities and the Tribunal, the findings arrived at cannot be said to be perverse and/or arbitrary. In fact there is no challenge to the aforesaid finding on the ground that it is perverse. It is a plausible view on the basis of the evidence available.

(i) The appellants contended that once the authorities have accepted that amounts were received in cash, it must necessarily also accept that expenditure has been incurred in cash. The reliance is placed upon the decision of the Kerala High Court in P.D.

Abrahim (supra) by the appellant in that behalf. In that case, the unaccounted payments and unaccounted receipts were recorded in the same books of account and acceptance of receipts in that account would have to be followed by acceptance of payments as recorded in the same books of accounts. This is not so in the present facts. The payments and receipts of are not recorded in the same documents or the same books of accounts. Thus the decision of the Kerala High Court in P.D. Abrahim (supra) would have no application to the present facts.

(j) The reliance is placed on Section 292C of the Act which was introduced by the Finance Act, 2007 with retrospective effect from 1 October 1975 by the appellant to submit that the documents found during the course of search are presumed to correctly reflect the facts. It is on the basis of the documents found during the course of search that the Assessing Officer had classified them into three different categories indicating the alleged heads of expenditure. This evidence is submitted in view of the retrospective amendment of the Act by Section 292C of the Act be accepted and

the onus to establish that the expenditure referred to in documents is not correct is on the revenue.

(k) In the present facts, we find that the documents found during the course of the search are inchoate. It does not indicate the person to whom the payment has been made, the address of the recipient, the person by whom the payment is made and the documents itself indicates that it is prepared for either seeking of funds or reimbursement of funds. Therefore even if the presumption is to be applied and the documents are accepted as true, it would not lead to the conclusion that payments have been made in cash so as to claim the expenditure. Thus no purpose would be served in remanding the issue to the Tribunal. Further Section 292 of the Act provides that where any documents are found in possession or control of any person in the course of search under Section 132 of the Act, then it may be presumed in any proceedings under this Act that the contents of such documents are true and correct. It will be noted that the section uses the word 'may presume' and not 'shall presume' or 'conclusively presume'. The words 'may presume' are in the nature of discretionary

presumption different from a compulsory presumption. Therefore this presumption has to be invoked by the authorities passing an order under the Act particularly when the invocation of such presumption is discretionary on the authorities. During the course of the assessment proceedings, the appellant-assessee sought to explain the fact that these expenses on which the deduction is claimed had in fact been incurred. This was in response to the show cause notice issued to the appellant. Thereafter Explanation offered by the appellant was not found satisfactory on the basis of the evidence available before the authorities and the Tribunal. In this view of the matter, the amendment to Section 292C of the Act even though with retrospective effect would not bring about any material change in the conclusion arrived at upon the existing facts.

(l) The appellants placed great emphasis on the non-applicability of the Explanation to Section 37(1) of the Act. It was contended that the payment made in this case was neither an offence nor prohibited by law, thus the occasion to apply the Explanation to Section 37(1) of the Act would not arise. In support reliance was placed upon numerous decisions. However, in the

facts of the present case, this would arise for examination only if we were come to the conclusion that amounts claimed as expenditure had in fact been incurred by the appellant-assessee. Therefore in the present facts, we have not examined the issue of applicability of Explanation to Section 37(1) of the Act to the payments made. Consequently, the numerous case laws cited at the bar also not examined.

(m) The finding of facts recorded by the authorities under the Act on the issue of payment not being made is a possible view. The same is not shown to be perverse on arbitrary.

(n) In the above view, Question No.(3) is answered in the negative i.e. in favour of the revenue and against the appellant-assessee.

7. Regarding Question No.4:-

(a) During the course of the search, various loose papers were seized. Perusal of these loose papers indicate proof of small amounts of money received. In each of these papers there is a

detailed description of material, corresponding weight per kg. and the rate applied. Besides at the bottom of each of the loose pages, there is a signature below the words 'received' with date also thereon. Some of the chits which were recovered also indicates truck numbers. The Assessing Officer was of the prima-facie view that these indicated sale proceeds of scrap material which have not been accounted in the regular books of accounts. Consequently, the Assessing Officer issued notice to the appellant to show cause why the receipts of amounts indicated in these chits should not be considered as receipt on account of sale of scrap.

(b) The appellant-assessee responded to notice pointing out that the loose papers seized in fact reflect purchase of scrap by the appellants and not sale. These purchases were out of receipt of 'on money' received on sale of Stenter machines and therefore could not be added as undisclosed income for the block period.

(c) The Assessing Officer did not accept the contentions of the appellant-assessee and on facts held that in the course of manufacture of Stenter machines, scrap would be generated and it

is this scrap which is sold by the appellant-assessee. The Assessing Officer held that scrap is not produced/manufactured, but in the course of manufacturing of finished product, scrap is generated. Thus on facts the Assessing Officer concluded that the amounts indicated in the loose papers aggregating to Rs.8.78 lakhs was nothing but sale proceeds of the scrap material and therefore added to the income of the appellants as income from undisclosed sources. In appeal, the members of the Regular Bench did not agree amongst themselves. The Accountant Member deleted the addition of Rs.8.78 lakhs on the ground that the very fact that the documents in the possession of the appellant would indicate that the amounts have been received by the supplier/seller of scrap purchased by the appellant. This is the only acceptable explanation for the appellant being in possession of the signed document. The Judicial Member on the other hand on preponderance of probability came to the conclusion that in the normal course of human conduct, purchase of scrap if utilized in manufacturing activity would have been recorded in the normal books of accounts as deduction would be available. In these circumstances, he was of the view that purchase of scrap is ruled out and it has to be considered as sale of scrap. The third

member on a reference of the President agreed with the view of the Judicial Member and on finding of facts concluded that it seems likely that the appellant-assessee had sold scrap and not purchased scrap and therefore the addition made by the Assessing Officer ought not to be disturbed.

8. Mr. Joshi, in support of his submission held that the amount of Rs.8.78 crores represents not consideration received on sale of scrap but is in fact consideration paid for purchase of scrap. The very fact that the documents acknowledging the receipt of money was found in the possession of the appellant is indicative of the fact that the amount would have been paid on purchase of scrap and seller of scrap would have knowledge of the receipt of the same. This receipt is what is found during the course of the search. Thus, the finding of the Judicial Member and the third member is not only erroneous but also perverse. Thus the same has to be deleted.

9. On the other hand, Mr. Suresh Kumar points out that these findings of fact arrived at by the majority members of the

Tribunal confirming the view of the Assessing Officer cannot be interfered with as questions of law. These findings of fact are not perverse as the conduct of the appellant of receiving money outside the books of accounts has been accepted by them for the period 1989-1996. Thus this Court should not interfere with the order of the Tribunal.

10. We are of the view that the conclusion reached by the majority members of the Tribunal that there was in fact sale of scrap is a possible view. This is particularly so as in normal course of human conduct any purchase of raw material even scrap would be shown in regular books of accounts as the same would be entitled to deduction so as to reduce the taxable profit. No person carrying on business would in the usual course of its activity, deny itself the benefit of any deduction available to it in determining the taxable profit. Further the reasoning of the authorities that there is a sale of scrap viz. that one normally does not manufacture final products out of scrap, but scrap is certainly generated during the course of manufacturing final products, cannot be faulted. The appellant-assessee was manufacturing Stenter machines and in the normal

course there would have been scrap generated in the manufacturing Stenter machines. It is the scrap which is likely to be sold in the open market for the consideration received by the appellant. Moreover, the appellant has not produced any evidence before the authorities to indicate who the suppliers of the scrap was or filed their evidence to indicate that they had sold scrap to the appellant. In these circumstances, the finding of facts arrived at by the majority members of the Tribunal upholding the order of the Assessing Officer is a plausible view. The same cannot be said to be perverse and/or arbitrary. Accordingly, Question No.(4) as raised is answered in the negative i.e. in favour of the revenue and against the appellant-assessee.

11. Accordingly, all the above questions are answered in favour of the revenue and against the appellant-assessee.

12. Accordingly, appeal dismissed. No order as to costs.

[G.S. KULKARNI, J] **[M.S. SANKLECHA, J.]**