

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "B" KOLKATA**

Before **Shri N.V. Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.2229/Kol/2010
Assessment Year :2004-05

Income Tax Officer, Ward-11(2), P7, Chowringhee Square, 6 th Floor, Kolkata-69	V/s.	M/s Santhal Multicast Pvt. Ltd., 11/B, Maharshi Devendra Road, Room No.11, 2 nd Floor, Kolkata-001 [PAN No.AAJCS 1215K]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Sanjay Mukherjee, JCIT-SR-DR
प्रत्यर्थी की ओर से/By Respondent	None
सुनवाई की तारीख/Date of Hearing	16-11-2015
घोषणा की तारीख/Date of Pronouncement	04-12-2015

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the Revenue is arising out of order of Commissioner of Income Tax (Appeals)-I, Kolkata in appeal No.128/CIT(A)-1/Ward-1(2)/06-07 dated 15.05.2007. Assessment was framed by ITO Ward-45(2), Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 26.10.2006 for assessment year 2004-05.

2. At the time of hearing none appeared on behalf of assessee even though notice of hearing was issued to assessee through registered post.

However, we find that it is a Revenue appeal and the issue raised in this appeal by the Revenue can be adjudicated without the appearance of the assessee. Hence, we proceed to take up this appeal after hearing, Shri Sanjay Mukherjee, Ld. Departmental Representative appearing on behalf of Revenue.

3. The first issue raised by Revenue in this appeal is that Ld. CIT(A) has erred in deleting the application u/s145 of the Act.

4. Briefly stated facts are that assessee is a Private Limited Company engaged in business of manufacturing of ingots and cement. The assessee filed return of income for the relevant assessment year declaring the loss of Rs. (-) 338876.61 under the head of business income. During the course of assessment proceedings, AO found several discrepancies from the audit report filed by assessee which were as follows:-

- i) Auditor's report states that assessee has not yet adequate internal data commensurate with the nature of assessee's business;
- ii) The comment of auditor that details examination of cost records u/s. 209(1)(D) of the Companies Act, 1956 has not been carried out with a view to determine whether they are accurate or complete;
- iii) As per audit report, the assessee has earned speculative profit in dealing of shares but the assessee does not maintain proper records of the transaction involved;
- iv) During the course of hearing it was found that vouchers connecting to revenue expenditure are mostly self made. Some expenditure were supported with the bills and some were just signed/ having thump impression without supporting bills.
- v) Notices were issued to the various parties under section 133(6) of the Act and the differences were observed between the records of the assessee and replies submitted by those parties.

vi) The assessee failed to provide the stock register for verification. The assessee just claimed that the accounts have been audited by an independent auditor and according to his report the accounts are maintained in accordance with the companies Act.

vii) The AO observed the discrepancy between the TDS certificate issued by the TATA Motors and submission made by the assessee.

In view of above the AO rejected the books of accounts and framed the assessment under section 144 of the Act.

Aggrieved assessee preferred an appeal to CIT(A) who allowed this ground in favour of the assessee by observing as under :

"I have gone through the submission of Ld. AR as well as the assessment order passed by Assessing Officer and find that books of account were maintained as per Accounting Standard as well as by excise law. It is showing the accounts are incorrect or incomplete is a revenue. The facts as narrated by AR remained the question of rejection of books of account cannot be justified. This ground is therefore allowed."

Aggrieved, Revenue is in appeal before us on the following ground :

"1. On the facts and in the circumstances of the case, Ld. CIT(A) has erred in deleting the application of sec. 145 of the I.T. Act denying the comment of auditor's report."

5. We find from the aforesaid discussion that the AO has not brought sufficient reasons for rejecting the books of accounts. The AO formed the opinion for the rejecting the books on account of some procedural lapses highlighted by the Auditor of the company in his report. While rejecting the books of the assessee, Income-tax Officer has to consider the following aspects :

(i) Whether the assessee has regularly employed a method of accounting?

(ii) Even if regular adoption of a method of accounting is there whether the annual profits can properly be deduced from the method employed?

(iii) Whether the accounts are correctly maintained?

(iv) Whether the accounts maintained are complete in the sense that there is no significant omission therein?

If the answers to above four questions are in the affirmative, assessee's profits are to be computed on the basis of his accounts. In such cases, proviso to section 145(1) or section 145(2) cannot be invoked.

The Patna High Court has delivered a very important ruling in *Md. Umer vs. CIT 1975 CTR (Pat) 13 : (1975) 101 ITR 525 (Pat)*. In that case, the assessee was individual, who derived income from sale of country liquor in assessment year 1966-67. Tribunal gave five reasons for the purpose of rejection of book profits as follows:-

- (1) The sales were not verifiable.
- (2) From the point of drawing of the liquor from the barrels, no account was maintained and even the normal leakage in the process of drawing and filling in the bottles was not shown.
- (3) Year to year, the book results shown have been rejected and profit invariably estimated by the Department.
- (4) The percentage of profit shown was low.
- (5) Drawings for expenses were inadequate.

However, assessee had produced all his books of accounts before the Income-tax Officer and only two defects were found by him : (1) absence of cash memos which means sales are not verifiable, and (2) certain transactions were noted in lump sums.

5.1 But no finding has been recorded by either of the authorities below as to the unacceptability of the method and irregularity of the accounts kept by the assessee. It is well settled that in the absence of such a finding recorded by the authorities, the book results cannot be ignored or brushed aside [See *R.B.*

Bansilal Abirchand Spinning & Weaving Mills vs. CIT (1970) 75 ITR 260 (Bom)].

As held by the Supreme Court in *CIT vs. A Krishnaswami Mudaliar (1964) 53 ITR 122 (SC)*, this proviso imposes a statutory duty on the Income-tax Officer to examine in every case, the method of accounting employed by the assessee and to see whether or not it has been regularly employed and to determine whether the income, profits and gains of the assessee could properly be deduced there from. Very important principle of law is laid down by Patna High Court in the following words:-

"There is no finding in the present case that any of the entries in the books of account was not correct; there is no finding that the assessee is not employing a method of accounting; and there is no finding that such a method of accounting has been irregularly employed by the assessee. In the absence of any such finding, there being no reason germane to the unacceptability of the book results, it must be held that the Tribunal as well as the Revenue authorities below had no materials before them, on the basis of which it could be said that the trading results were not verifiable and that, therefore, they should not be accepted, nor is it their case that the trading results could not be deducible from the entries of the books of accounts regularly employed." [See also C. Arumugaswami Nadar vs. CIT (1961) 42 ITR 237 (Mad)]."

The Patna High Court, therefore, held that—"the finding of the Tribunal upholding the rejection of the book profit shown by the assessee *was vitiated* by reason of its reliance upon suspicion, surmises as also *irrelevant material*. The finding that sales were unverifiable is not based on the materials on record and is *an arbitrary finding*."

In view of above, the ground raised by the Revenue regarding rejection of books of accounts is dismissed.

6. Next two ground raised by the Revenue reads as under:-

“2. On the facts and in the circumstances of the case, Ld. CIT(A) has erred in deleting the disallowance of loss of Rs.84,40,567/- on the basis of some fresh evidence violating the provision of Rule-46A(3) of I.T. Rules.

3. On the facts and in the circumstances of the case, Ld. CIT(A) has erred in deleting the disallowance of loss of Rs.84,40,567/- which was made due to the variation of the amounts furnished by the assessee u/s 142(1) & collected by the A.O u/s. 133(6).”

7. The common issue raised by Revenue is that Ld. CIT(A) has erred in deleting the disallowance of Rs.84,40,567/- on the basis of fresh evidence without following the provisions of Rule-46A of the I.T. Rules, 1962.

During the year under consideration, assessee has shown manufacturing expenses of Rs.5,23,32,438/- in relation to sale shown in the financial statement of the assessee for Rs.4,38,91,871/-. From the above, AO found a loss of Rs.84,40,567/- is arising out of trading account of assessee. The AO called upon the assessee to justify the trading loss but according to the AO the assessee did not offer any explanation. Therefore the AO rejected the loss claimed by assessee. So AO disallowed the loss claim by assessee and added it to the income of assessee.

8. Aggrieved assessee preferred appeal before Ld. CIT(A) who has allowed the claim of assessee by observing as under:-

“Taking into the account the circumstance and facts as narrated above, it is apparent that no difference in the amount between manufacturing cost and sale plus closing stock could be added to the Net Profit of the Appellant as the Appellant had maintained his Books of Accounts as per the provisions of law and further the assessing officer had not found any discrepancy relating to the purchase and sale. While it is unusual for the sale price to be less than the cost price it is not an essential ‘sine qua non’ of business enterprise. There has been and will be situations when this may be the case. The crucial fulcrum for this to be tested on is evidence and a proper enucleating and marshalling of facts. This unfortunately is woefully lacking in this case. Further, the AO has not brought any evidence on record in support of his contention. Therefore,

this addition deserves to be deleted and on merits as stated above this ground is allowed.”

Being aggrieved by this order of Ld. CIT(A) Revenue is in appeal before us.

9. We have heard Ld. DR and perused the materials available on record. Before us, Ld. DR vehemently relied on the order of AO. We find that during the appellate proceedings before Ld. CIT(A) Ld. AR of assessee submitted the arguments, which extracted from the order of Ld. CIT(A) is reproduced below:-

“It is wrong to assume that sale price cannot be less than cost price. In a manufacturing, cost exceeds sales price due to various reasons such as purchase of raw material at high rate, lack of quality control High cost of production due to wrong calculation, over consumption of electrically or power where quality is not stabilized in the first year, use of Finally techniques etc. In this case, the appellant also incurred high cost of production due to following reasons:

- 1) *Assessee was engaged in the business of manufacture of steel ingots from scrap. Low gross profit was due to decrease in sale price of finished goods and increase in cost of raw materials and also the very high outgo on account of electricity. This being the first year of manufacturing there were teething problems which took time to stabilize.*
- 2) *As may be seen from the following comparative chart the cost of electricity per metric ton for this year was much higher compared to next year:*

<i>Year</i>	<i>2003-04</i>	<i>2004-05</i>
<i>Production (M.ton)</i>	<i>4007.68</i>	<i>4129.95</i>
<i>Electricity consumed (Rs)</i>	<i>1,54,78,738</i>	<i>1,18,12,249</i>
<i>Consumption per M.Ton</i>	<i>3862</i>	<i>2860</i>

- 3) *The company’s manufacturing unit was not working smoothly throughout the year despite assessee’s best efforts. Just to keep the business running and to increase production manufacturing expenses were incurred. Due to several problems like electricity, labour, etc., the manufacturing unit was ultimately shut down on 03/11/2006.*

In concluding, we submit the following:

1. *The Assessing Officer has not detected any discrepancy in the amounts of purchases, sales, closing stock or any other item of expenditure. The alleged defects raised by the Assessing Officer were all explained in course of the assessment proceedings.*

2. *The accounts of the company were properly audited and the same were followed by tax audit, a report of which in Form No. 3CD was filed along with the return. In annexure to Form No. 3CD information in respect of quantity of purchases, consumption, closing stock and production were given and those have not been disputed by the Assessing Officer.*
3. *During the course of the assessment proceedings, details of the manufacturing process, issue of raw materials and as to how the raw material, finished goods, etc., were accounted for in the books of accounts were furnished and the Assessing Officer had not found any fault with such details.*
4. *The Assessing Officer had not found any evidence that the assessee had made purchase or sales outside the books of account. The items manufactured by the assessee being excisable goods, the manufacturing and related records were also subjected to periodical checking by the Central Excise Authorities. Such authorities have never given any adverse finding against the records maintained by the company.*
5. *The rejection of the books of account by the Assessing Officer is not based on any cogent reason.*
6. *The reason for the high cost of production which ultimately resulted in a loss under the manufacturing and trading account was mainly due to the high expenditure on account of electricity as have been explained in detail above. Considering the facts and circumstances as submitted above, it is humbly prayed that the addition of Rs.84,40,567/- may kindly be deleted."*

From the aforesaid discussion, we find that AO has nowhere rejected the sales or purchase of assessee vis-à-vis other manufacturing expenses incurred by assessee during the year. We find that AO, after rejecting the books of accounts, had presumed that no prudent business man would sell the goods less than the manufacturing cost. However, there is no restriction under any law that assessee cannot sale the product less than its manufacturing cost. Moreover, it was the first year of its business of the assessee and assessee was not having expert knowledge of its business intricacies. We further find that AO has disallowed the loss incurred by assessee without any rational ground. Whereas the AO had not pointed out any material defect in the books of accounts of the assessee, the mere fact that for certain reason, the assessee could not earn better margin of profit,

cannot be the reason to believe that the assessee returned less profit than what it actually earned. Possibility of unstable market condition cannot be ruled out. The Tribunal, therefore, deleted the trading additions. We do not find any additional evidence having been admitted by the Ld. CIT(A) except comparative chart of expenses. The Ld. DR was unable to point out as to what was the fresh evidence on the basis of which the Ld. CIT(A) allowed relief to the assessee. Even the ground of appeal of the Revenue in this regard is very vague. In view of the above, we incline not to interfere in the order of Ld. CIT(A) and this ground of Revenue's appeal is dismissed.

10. In the result, Revenue's appeal is dismissed.

Order pronounced in the open court 04/12/2015

Sd/-
(N.V.Vasudevan)
(Judicial Member)
Kolkata,

Sd/-
(Waseem Ahmed)
(Accountant Member)

*Dkp

दिनांक:- 04/12/2015 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-ITO, Ward-11(2), P7, Chowringhee Sq, 6th Fl, Kol-69
2. प्रत्यर्थी/Respondent-M/s Santhal Multicast Pvt. Ltd. 11/B, Maharshi Devendra Road
Room No 11, 2nd Floor, Kolkata-001
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,
उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।