

आयकर अपीलीय अधिकरण ,इन्दौर न्यायपीठ ,इन्दौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

श्री कुल भारत, न्यायिक सदस्य

तथा

श्री मनीष बोरड, लेखा सदस्य के समक्ष

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A. Nos. 529 & 530/Ind/2015		
निर्धारणवर्ष/ Assessment Years: 2010-11 & 2011-12		
Shri Dilip Kumar Jain, S/o Shri Samrathmal Jain, Prop. M/s. Shree Kshemkari Steel, 559, Ushanagar Extn., Indore	vs.	Dy. CIT, Indore.
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent
स्था.ले.सं./PAN: ABRJ8096M		

अपीलार्थी की ओर से/Appellant by	:	Shri Rajesh Mehta, CA
प्रत्यर्थी की ओर से/Respondent by	:	Shri K. G. Goyal, Sr. DR

सुनवाई की तारीख/Date of hearing	:	05.06.2018.
उद्घोषणा की तारीख/Date of pronouncement	:	08.06.2018

आदेश / O R D E R

PER KUL BHARAT, J.M. :

These two appeals filed by the assessee are directed against the separate orders of Ld. CIT(A)-I, Indore, both dated 28.01.2015 and pertain to assessment year 2010-11.

2. First, we will take appeal in I.T.A.No. 529/Ind/2015.

3. This appeal is barred by time by 29 days. The Ld. Counsel for the assessee has submitted an application seeking condonation of delay stating that due to death of his brother, the assessee could not file the appeal in time. The assessee has also submitted a death certificate alongwith paper cutting as evidence. To this effect, the assessee has filed an affidavit also.

4. We have perused the application and affidavit alongwith death certificate. The reasons as stated in the application demonstrates a reasonable cause. We,

therefore, condone the delay and admit the appeal for adjudication.

5. Briefly stated, the facts of the case are that the assessee is engaged in the business of Trading of ferrous and non-ferrous metals. During the previous year 2009-10 relevant to assessment year 2010-11, the assessee had shown gross profit of Rs. 27,97,918/- on the gross turnover of Rs. 19,99,28,840/- @ 1.39% as against gross profit of Rs. 14,76,041/- @ 1.34 % on the gross turnover of Rs. 10,95,86,336/- declared in the immediately preceding assessment year. The AO on examination of profit and loss account found that the assessee had shown a meager net profit ,of Rs. 13,43,733/- on the gross turnover of Rs. 19,99,28,840/- @ 0.67 %. The AO found that the ,opening and closing stock was shown at Rs. 2,43,34,974/- and Rs. 2,19,67,500/- respectively. On examination from Audit Report, the AO further found that the assessee had shown

huge quantity of various items. The AO found that the assessee had no godown and had not debited any expenditure under the head Godown Rent. The found that the assessee's purchase goods was kept in a godown situated at Navdurga Compound Village Wall Bhiwandi Distt. Thane. On enquiry from C.A. ,the AO came to know that the premises was taken by the assessee on rent. No details regarding rent paid were submitted. The assessee was asked specifically the particulars such owner of the godown, rent of the godown per month, size of the godown, the date from which godown was taken on rent, mode of payment of the rent of the godown, amount of rent paid during the previous year 2009-10 relevant to assessment year 2010-11 and the amount of rent remained outstanding on 31.03.2010. No details were furnished by the assessee inspite of opportunity given to the assessee and CA. The AO in absence of details formed an opinion

that the assessee had not accounted for the expenditure incurred on taken the godown on rent and the assessee had incurred expenses out of the books of account. The AO rejected the books of account of the assessee u/s 145 of the Income-tax Act, 1961. The AO estimated the net profit of the assessee at 3% of the gross turnover of the assessee. The assessee preferred the appeal before the Ld. CIT(A), who after considering the submissions confirmed the same. Aggrieved by this, the assessee is before this Tribunal.

6. The Ld. Counsel for the assessee reiterated the submissions made in the written submissions submitted, which is on record. We are reproducing below the same for the clarity :

SUBMISSION

Facts of the case:

That the assessee is an individual derives income from the business of trading of ferrous and non ferrous metals and rental income. The

assessee had submitted his income tax return vide ack. No. 167318210071010 for assessment year 2010-11 alongwith audit report, declaring total income of Rs. 13,73,899/-.

2. Assessment and CIT(A) Proceedings :

The Deputy Commissioner of Income Tax passed the assessment order u/s 143(3) by making an addition of Rs. 46,54,132/- without affording opportunity of hearing and without looking facts of the case, and the Hon'ble CIT (A)-I confirmed the same by dismissal of appeal.

3. Lump sum addition in Net Profit of Rs. 46,54,132 -:-

That the Assessing Officer has passed order u/s 143(3) by making estimation of profit @ 3 % of the gross turnover i.e. Rs. 59,97,865/- on the gross turnover of Rs. 19,99,28,840/-. The estimation of such profit is quite wrong in the line of wholesale business in which Assessee deals, such estimation is wrong, arbitrary and unlawful, hence needs to be deleted. The CIT(A) erred in

confirming the addition, Assessee has showed net profit at the rate of 1.39 % on total turnover during the year which was better than net profit rate of 1.34 % shown by them in preceding previous year. In the case of CHANDI MARBLES PVT. LTD. vs. ASSISTANT COMMISSIONER OF INCOME TAX ITA No. 355/Jodh/2014 (2014) 41 CCH 0094 Jodhpur Tribunal held that no addition can be made when gross profit rate of assessee was better in comparison to immediately preceding year, even if books of accounts were rejected. Thus CIT (A) was not justified in confirming the increase in the rate of net profit

In the case of ASHOK KUMAR & COMPANY vs. INCOME TAX OFFICER, ITAT, AMRITSAR 'SMC' BENCH (2003) 22 CCH 0332 Asr Trib, (2004) 90 TTJ 0666 : (2004) 2 SOT 0518, it was held that AO was not justified in rejecting the books and making addition by applying a higher NP rate where, inter alia, no specific defects were pointed out in the audited books of account.

Further in the case of INCOME TAX OFFICER vs.

BHARAT INT UDHYOG, ITAT, JODHPUR TRIBUNAL (2013) 37 CCH 0462 Jodh Trib,(2014) 159 TTJ 0001 (Jd)(UO) : (2015) 152 ITD 0001 (Jodhpur) it was held that CIT(A) without looking at past record of assessee & without mentioning any comparable cases applied G.P. rate at 22 % instead at rate of 18 %. Hence, addition made without any basis cannot be sustained.

That the pre-condition for estimating business income of the assessee, where an assessee keeps accounts is that the assessee's books should have been found to be unreliable or otherwise not capable of proving the assessee's income.

The estimate of turnover and fixation of gross profit rate are two important parameters which affect the assessment. If these are fixed or calculated in such a way that they adversely affect the assessee's case, then he is entitled to know the basis and to be given an opportunity to rebut the same. The rule of law on this subject has been well settled that estimates framed without giving the basis for their fixation or

without furnishing to the assessee the material on which the rate of gross profit is arrived at or without giving an opportunity to the assessee to rebut it are bad. Therefore, CIT (A) was not justified in confirming the addition.

3.Rejection of books of Accounts:

The Assessing Officer rejected the books of Accounts and the CIT(A) confirmed the same. The books were rejected on account of bogus purchases as after issuing 133(6) to the suppliers, the letters were returned unserved; ignoring the fact that all the purchases are made through bank route. Thus, We would like to draw the attention of your honour, towards following:- In Gujarat HC case of CIT versus MK Brothers dated 25/10/1985, it was held in favour of the assessee that "the transactions in the question were normal business transactions and the assessee has made payments by cheques. The parties did not come forward and if they did not come, the assessee should not suffer. However, on behalf of revenue, it was urged that detail However, on behalf of the Revenue, it was urged

that detailed inquiries were made and thereafter the conclusion was reached. The Tribunal found that there was no evidence anywhere that these concerns gave bogus vouchers to the assessee. No doubt, there were certain doubtful features, but the evidence was not adequate to conclude that the purchases made by the assessee from the said parties were bogus. The Tribunal accordingly, did not sustain the addition retained by the Appellate Assistant Commissioner. Hence, at the instance of the Revenue aforesaid question has been referred to this court for opinion. On a perusal of the order of the Tribunal, it clearly appears that whether the said transactions were bogus or not was a question of fact. The Tribunal has also pointed out that nothing is shown to indicate that any part of the fund given by the assessee to these parties came back to the assessee in any form. It is further observed by the Tribunal that there is no evidence anywhere that these concerns gave vouchers to the assessee. Even the two

statements do not implicate the transactions with the assessee in any way. With these observations, the Tribunal ultimately has observed that there are certain doubtful features, but the evidence is not adequate to conclude that the purchases made by the assessee from these parties were bogus. It may be stated that the assessee was given credit facilities for a short duration and the payments were given by cheques. When that is so, it cannot be said that the entries for the purchases of the goods made in the books of account were bogus entries. We, therefore, do not find that the conclusion arrived at by the Tribunal is against the weight of evidence. In that view of the matter, we answer the question in the affirmative, that is, in favour of the assessee and against the Revenue. "

Also, In case of Gujarat High Court versus M/s Jhawar International, it was held that the "The Tribunal, therefore, observed that the assessee had discharged his duty. He was, thereafter, not expected to prove the source of his suppliers. The Tribunal, relying on the decision of this Court

in the case of CIT v. M.K Brothers, reported in 163 ITR 249 (Guj), upheld the claim of the assessee. Additionally, the Tribunal also found that the payments were made through Account Payee Cheques. The Tribunal, therefore, held and observed that - "We find that the assessee's case is covered by decision of Hon'ble Gujarat High Court in the case of CIT v. M.K Brothers 163 ITR 249 (Guj). In the assessment order, the A.O. has presumed that the payments made by the appellant for job work expenses might have been back interest form of cross cheques, etc. This is just a presumption without any finding the A.O. could have very well checked the payments made by job parties. There is no finding at all that any portion of these payments have come back to the assessee. Merely by arbitrary presumptions it cannot be said that the amounts might have come back to the assessee. There is no such finding at all. There is no basis at all for this presumption. The A.O. must have checked the payments made by this job party and if at all there was any finding against assessee then he

could have clearly brought out the same on record. But there is Page 3 of 4 HC-NIC Page 3 of 4 Created On Wed Jul 06 16: 15: 32 IST 2016 O/TAXAP /1342/2010 JUDGMENT no such finding at all. This renders the arbitrary presumption of the A.O to be completely baseless and unsustainable. In the absence of any such finding, the genuine expenditure incurred by the assessee for value addition job work paid by A/c Payee cheque cannot be disallowed. This issue is clearly covered by the judgment of Hon'ble High Court of Gujarat in above case law. " From the above discussion, it can be clearly seen that the entire issue has been decided by the Tribunal on the basis of evidence on record. The assessee had made payments for job work done through account payee cheques. There were other corroborative evidences to prove such evidence. The Assessing Officer has committed error in disallowing such claim. In addition to having made payments through A/c Payee cheques, the assessee had also produced TDS Certificate in support of its claim. The Assessing Officer

observing that such cheque payments could have been withdrawn and reverted back to the assessee were not based on evidence. We find no infirmity in the order of the Tribunal. Accordingly, Tax Appeal stands dismissed. " 4. Since there is no dispute with regard to the fact that the issue involved in these appeals is covered by the aforesaid decision of this Court, we dismiss both these appeals and the questions posed for our consideration are answered in favour of the assessee and against the revenue."

As regards addition for bogus purchases from the material available on record, it appeared that the Tax Audit Report and books of account were accepted by the Assessing Officer without pointing out any defect, Accordingly, the sale was accepted by the department. The sale could not be made without making purchase, in other words, when there was a sale, certainly there was a purchase. Sale was accepted by the department but not the purchase: The payments were made through account payee cheques which were duly shown in the books of account

and balance sheet, etc. In the subsequent assessment year, the purchase from the same parties were accepted by the department which proved that the parties were in existence during the assessment year under consideration. This was not the case of the department that there was suppression of profit by showing low gross profit rate. The disallowance was made for the reason only that the parties did not appear and were not produced before the Assessing Officer, for which the assessee could not be punished.

That the Ld. AO has himself passed the assessment order u/s 143(3) of the act whereas when book result are rejected u/s 145 then the order is to be passed u/s 144 of the act. Hence, order passed by AO himself is wrong.

Further according to VAT assessment order in assessee's own case for the current F.Y. under Maharashtra Vat Act, there is a refund of Rs. 16,03,5701- in F.Y. 2009-10 as per assessment order of Maharashtra VAT officer, which shows that sales and purchases are genuine.

As per the above view the rejection of books of

accounts & addition in net profit by increasing the net profit rate, Even though the same was shown already at an increasing trend in comparison to preceding year, is baseless, arbitrary and wrong. Hence, unwarranted, unjustified, baseless rejection of books needs to be cancelled and also book results should be accepted. "

The Ld. Authorized Representative of the assessee concluded that the rejection of books needs to be cancelled and book result should be accepted.

7. The Ld. Departmental Representative relied on the orders of the lower authorities.

8. We have considered the facts, rival submissions and perused the material available on record. We have also gone through the case laws relied upon by the Ld. Counsel for the assessee in his written submissions. We find that the profit has been estimated by the AO by applying net profit rate at 3 %. The AO has not given any reasons for

rejection of books of account. The AO ought to have taken the past history. We, therefore, direct the AO to adopt net profit rate at 1.75 % in place of 3 %. The AO shall recompute the addition after applying the net profit @ 1.75 %. We direct accordingly.

9. In the result, the appeal filed by the assessee is partly allowed.

10. Now, we shall take up I.T.A.No. 530/Ind/2015.

11. This appeal by the assessee has been filed against the levy of penalty of Rs. 15,81,940/- u/s 271(1)(c) of the Income-tax Act, 1961

12. This appeal is also barred by time by 29 days. The Ld. Counsel for the assessee has submitted an application seeking condonation of delay stating that due to death of his brother, the assessee could not file the appeal in time. The assessee has also submitted a death certificate

alongwith paper cutting as evidence. To this effect, the assessee has filed an affidavit also.

13. We have perused the application and affidavit alongwith death certificate. The reasons as stated in the application demonstrates a reasonable cause. We, therefore, condone the delay and admit the appeal for adjudication.

14. The Ld. Counsel for the assessee contended that the assessee got audited the books of account by a Chartered Accountant and the auditors had not given any adverse comments in respect of maintenance of books of account of the assessee. Further the assessee filed his return of income on the basis of audited books of account. Thus, there was no concealment of income and inaccurate particulars was furnished by the assessee. He further contended that the penalty u/s 271(1)(c) can be levied only if the AO is satisfied that any person has concealed the

particulars of his income or furnished inaccurate particulars of such income. Hence, levy of penalty is wrong. The Ld. Counsel for the assessee further contended that the levy of penalty by AO and confirmation by CIT(A) was entirely based on estimation and not on evidences. The Ld. Counsel for the assessee relied on the decision of I.T.A.T. Agra Bench in the case of Jugendra Singh & Co. vs. Dy. CIT, (2013) 37 CCH 0189 (Agra Trib.). The I.T.A.T. Agra Bench has held that penalty is not leviable on mere estimate of income or mere revising income to higher figure. The Ld. Counsel for the assessee contended that the penalty u/s 271(1)(c) of the Act on account of trading addition and rejection of the books of account by the Department is not valid. He also relied on the decision of I.T.A.T. Ahmadabad Bench 'A', (2012) 33 CCH 0009 (Ahd.Tri), on the same lines. The Ld. Counsel for the

assessee concluded that the penalty of Rs. 15,81,940/- is wrong and without any basis and needs to be deleted.

15. The Ld. Departmental Representative supported the orders of the lower authorities.

16. We have considered the facts, rival submissions and perused the material available on record. We have also gone through the case laws cited by the Ld. Counsel for the assessee. We find that the penalty needs to be cancelled on the ground that the AO did not specify the charge. Further, the addition has been made on the basis of estimation. We, therefore, cancel the penalty of Rs. 15,81,940/- levied u/s 271(1)(c) of the Income-tax Act, 1961.

17. In the result, the appeal filed by the assessee is allowed.

Shri Dilip Kumar Jain, Indore.

-: 21 :-

18. Consequently, the appeals of the assessee filed in I.T.A.No. 529/Ind/2015 is partly allowed and I.T.A.No. 530/Ind/2015 is allowed.

The order pronounced in the open court on 08.06.2018.

Sd/-

(मनीष बोरड)

लेखा सदस्य

(MANISH BORAD)

ACCOUNTANT MEMBER

Sd/-

(कुल भारत)

न्यायिक सदस्य

(KUL BHARAT)

JUDICIAL MEMBER

Indore; दिनांक Dated : 08/06/2018

CPU/SPS*

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Private Secretary/DDO, Indore