

आयकर अपीलीय अधिकरण] पुणे न्यायपीठ “बी” पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “B”, PUNE

BEFORE MS. SUSHMA CHOWLA, JM AND
SHRI ANIL CHATURVEDI, AM

आयकर अपील सं / ITA No.957/PUN/2016

निर्धारण वर्ष / Assessment year : 2012-13

The Asst. Commissioner of Income Tax,
Central Circle – 2, Nashik.

..... अपीलार्थी /
Appellant

बनाम v/s

Chaudhary Cars Pvt. Limited,
11, ‘Swed Bindu’, Shanti Nagar,
Yawal Road, Bhusawal,
Dist. Jalgaon.

..... प्रत्यर्थी /
Respondent

PAN : AADCC7960R.

Assessee by : Shri Nikhil Pathak.

Revenue by : Shri Sudhendu Das.

सुनवाई की तारीख / Date of Hearing : 04.02.2019	घोषणा की तारीख / Date of Pronouncement: 04.04.2019
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आदेश / ORDER

PER ANIL CHATURVEDI, AM :

1. This appeal filed by the Revenue is emanating out of the order of Commissioner of Income Tax (A) – 12, Pune dt.25.02.2016 for the assessment year 2012-13.

2. The relevant facts as culled out from the material on record are as under :-

Assessee is a company stated to be a dealer in Toyato Cars. A search and seizure action u/s 132 of the Act was conducted in Chaudhari Group of cases on 04.10.2011. The assessee is a part of Chaudhari group of cases. Assessee filed its return of income for A.Y.

2012-13 on 26.09.2012 declaring total income at Rs. Nil. The case was taken up for scrutiny and assessment was framed u/s 143(3) r.w.s. 153B of the Act vide order dt.19.03.2014 and the total income was determined at Rs.1,53,89,690/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who vide order dt.25.02.2016 (in appeal No.PN/CIT(A)-12/790,791/2014-15) granted substantial relief to the assessee. Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us and has raised the following grounds :

“1. On the facts and circumstances of the case, whether the Ld.CIT(A) is justified in deleting the addition of Rs.67,903/- made by the AO on account of Reconciliation of Difference in cash balance.

2. On the facts and circumstances of the case, whether the Ld.CIT(A) is justified in deleting the addition amounting to Rs.25,00,000/- made on account of seized material found and failed to justify the transaction.

3. On the facts and circumstances of the case, whether the Ld. CIT(A) is justified in deleting the addition amounting to Rs.3,05,060/- made on account of difference in cash available and recorded in books of accounts.

4. On the facts and circumstances of the case, whether the Ld. CIT(A) is justified in restricting the addition of Rs.6,71,338/- to Rs.1,47,964/- by allowing relief to the extent of Rs.5,23,644/-

5. On the facts and circumstances of the case whether the Ld. CIT(A) is justified in deleting the addition amounting to Rs.1,06,00,000/- on account of Deemed Dividend u/s 2(22)(e) of the I-T Act.

6. On the facts and circumstances of the case, whether the Ld. CIT(A) is justified in deleting the addition of Rs.2,45,388/- made by the AO on account of Unproved Creditors.”

3. First ground is with respect to deleting the addition of Rs.67,903/- on account of reconciliation of difference in cash balance.

3.1. During the course of assessment proceedings AO noticed that the cash balance as per cash book for A.Y. 2011-12 was Rs.8,09,803/- but for A.Y. 2012-13 the opening cash balance was shown as Rs.7,41,900/-. The assessee was asked to explain the difference in cash balance. The

assessee furnished explanation which was not found acceptable to the AO. AO therefore added Rs.67,903/- to the total income of assessee being the difference in cash balance. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who deleted the addition by observing as under :

“12.2 I have gone through the assessment order and submissions filed by the appellant. Brief facts are that AO noted that as per cash book for A.Y. 2011-12, the closing cash balance was of Rs.8,09,803/- whereas opening cash balance for AY 2012-13 was of Rs.7,41,900/-. Before the AO no explanation was furnished to reconcile the difference. However, during the course of appellate proceedings it was submitted that as on 31.03.2011 as per audited books of accounts appellant had closing cash balance of Rs.8,09,8031 - as per the main cash book and of Rs.1,96,2161 - as per the Workshop cash book and total cash balance as on 31.03.2011 was Rs.10,06,019/- and not Rs.8,09,803/-. Copy of audited balance sheet which was also furnished before the AO also reflected closing cash balance of Rs.10,06,019/-. Opening cash balance of 01.04.2011 matched with the closing balance. Without going into the correctness of the reconciliation filed before me, the fact remains that the AO had not doubted the closing balance of cash as on 31.03.2011. The lesser opening cash balance as on 01.04.2011 does not call for any addition during the year under consideration as no unexplained cash was introduced in the books of accounts. Therefore, addition made by the AO of Rs.67, 903/- is deleted and ground raised by the appellant is allowed.”

Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us.

4. Before us, Ld.D.R. supported the order of AO. Ld.A.R. on the other hand, reiterated the submissions made before AO and Ld.CIT(A). He further submitted that assessee had maintained two cash books one main cash book and another cash book for Workshop. He pointed to the balance of the cash books for main and work-shop which were placed at page 99 and 100 of the paper book. He submitted that in next year though there was difference in the balance between main cash book and work-shop cash book but over-all there was no difference in cash balance and in support of which, he pointed to the summary of cash book placed in Paper Book. He therefore submitted that the

assessee has explained the discrepancies and thus no interference to the order of Ld.CIT(A) is called for.

5. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to discrepancies in cash balance. We find that Ld.CIT(A) while deciding the issue has noted that after considering the audited Balance-Sheet, opening balance and closing balance, AO had not doubted the closing balance cash as on 31.03.2011. Before us, assessee has pointed out that over all cash balance has remained the same. The submission of the assessee has not been controverted by Revenue. Further, no fallacy in the findings of Ld.CIT(A) has been pointed by Revenue. In such a situation, we find no reason to interfere with the order of Ld CIT(A). **Thus, the ground No.1 of Revenue is dismissed.**

6. **2nd ground is with respect to denial of addition of Rs.25 lakh.**

6.1. During the course of search at the residential premises of Shri Girish B. Chaudhari, documents as per Annexure-A1 Pages 6 and 7 containing certain transactions were seized. The assessee was asked to explain the transactions recorded in those documents. AO noted that since assessee has not explained the transactions with regard to the payment made to Palai Saheb in cash, he made addition of Rs.25 lakh shown in the seized documents. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who deleted the addition after considering the submissions of assessee and the remand report received from AO by observing that all the transactions found on the seized loose papers were reflected in the bank statement of Bhagwat Narayan

Chaudhary (B.N. Chaudhary) and the cash was withdrawn from the account of B.N. Chaudhary. He has further noted that assessee had received Rs.25 lakh by way of cash transfer which was returned back by bank transfers. He therefore held that the addition made by the AO on account of cash paid of Rs.25 lakh to Mr. Palai in the hands of assessee was not justified. He accordingly deleted the addition.

7. Before us, Ld.D.R. supported the order of AO. Ld.A.R. on the other hand, reiterated the submissions made before AO and Ld.CIT(A) and submitted that the entire transaction was explained and there was no basis for making addition. He thus supported the order of Ld.CIT(A).

8. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to addition of Rs.25 lakh. We find that Ld.CIT(A) after considering the submissions of assessee, remand report received from the AO has noted that credit of Rs.25 lakh from M/s Pavitra Traders was received by B.N. Chaudhary and assessee has nothing to do with and similarly the cash was withdrawn from the bank account. AO has not carried out any verification from M/s. Pavitra Traders to disprove the contention of the assessee. We further find that while deciding the issue, Ld.CIT(A) has given a finding that assessee has received Rs.25 lakh by way of bank transfer of B.N. Chaudhary on 16.07.2011 which was returned in two installments through banks. He therefore held that addition made by the AO on account of cash paid to Mr. Palai was not called for in the case of assessee. Before us, Revenue has not pointed out any fallacy in the findings of Ld.CIT(A). We therefore find no reason to interfere with

the order of Ld.CIT(A) and **thus, the ground No.2 of Revenue is dismissed.**

9. Ground No.3 is with respect to deletion of addition of Rs.3,05,060/-.

9.1. During the course of search action at the assessee's premises at Jalgaon, cash of Rs.1,810/- was found against which cash as per cash book was Rs.2,81,543/- resulting in difference of Rs.2,79,733/-. It was explained that cash was taken by the Director to his home. During the course of search at the residence of B.N. Chaudhary cash of Rs.2,38,950/- was found. Thus, there was still shortage of Rs.40,783/-, for which the assessee was called upon to explain the discrepancy. On the basis of details furnished by the assessee, it was noticed that cash balance as per main cash book as on 04.10.2011 i.e., the date of search was Rs.96,942/- and as per the work-shop cash book, the opening cash balance was Rs.4,48,878/-. The aggregate cash as per cash books was Rs.5,45,820/- against which actual cash of Rs.2,40,760/- (Rs.2,38,950/ + Rs.1,810/-) was found. The submissions made by the assessee about the difference of cash were not found acceptable to the AO. AO therefore treated the difference in cash of Rs.3,05,560/- to be not properly explained and therefore made its addition. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who deleted the addition by observing as under :

"14.2 I have gone through the assessment order and submissions filed by the appellant. Brief facts are that as per books of account prepared cash balance as per cash books (main cash book and workshop cash book) on date of search was noted by the AO at Rs.5,45,820/- as against that physical cash of Rs.2,40,760/- was found during the search. The AO sought explanation regarding the

shortage of cash. It was submitted before him that books of accounts were not completed and many vouchers of petty expenses were to be entered in cash book and remaining cash was taken by MD Mr. Mahesh Chaudhary. The AO did not accept the explanation and added the shortage of Rs.3,05,060/- as income of the appellant. In the case of shortage of cash, no addition was justified as appellant had withdrawn the explained money and might have spent the same without claiming any expenditure in the P & L account. It was not the case of excess cash found physically or there was unexplained cash found recorded in the cash book. Therefore, addition made of Rs.3,05,060/ - was not called for and stands deleted. Ground raised by the appellant is allowed.”

Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us.

10. Before us, Ld.D.R. supported the order of AO. Ld.A.R. on the other hand, reiterated the submissions made before AO and Ld.CIT(A) and further submitted that on the date of search, books of accounts were not completed and many vouchers were still to be entered in cash book and the remaining cash was taken by M.D. Mr. Mahesh Chaudhary. He further submitted that it was not the case of excess cash found physically or unexplained cash found. He thus supported the order of Ld.CIT(A)

11. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to addition of Rs.3,05,060/-. Ld.CIT(A) while granting relief has noted that it was not the case of excess cash found or there was unexplained cash found recorded in the cash books. He further held that in case of shortage of cash, no addition was justified as assessee has withdrawn the money and might have spent the same without claiming any expenditure. He accordingly deleted the addition. Before us, Revenue has not pointed out any fallacy in the findings of Ld.CIT(A). **Thus, the ground No.3 of the Revenue is dismissed.**

12. Ground No.4 is with respect to restricting the addition of Rs.6,71,338/- to Rs.1,47,964/-.

12.1. During the course of survey, at the assessee's premises at Jalna stock of spare parts of Rs.49,61,203/- was inventoried. Considering the GP rate of 22% the cost of such stock was worked out at Rs.38,69,739/- as against which the book stock was Rs.45,41,377/-. AO thus worked out the physical shortage of stock of Rs.6,71,338/- and concluded that the goods were sold out of the books. He accordingly made addition of Rs.6,71,338/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who granted partial relief by observing as under :

"15.2 I have gone through the assessment order and submissions filed by the appellant. Brief facts are that during the course of survey at the business premise of the appellant, stock of spares was inventorised with the help of CEO Shri Shankar Banai at RS.49,61,203/-. For working out cost of the spares, GP of 22% was reduced and the cost of physical stock was worked out at Rs 38,69 739/- whereas book stock was Rs.45,41,377/-. In this manner, there was shortage of physical stock by Rs.6,71,338/ - and according to AO goods costing Rs.6,71,338/ - were sold outside the books. On the other hand, appellant contended that spare parts stock was reported to the consignor Toyota Company through automated accounting system provided by them. There was no question of any difference in stock. However, AO did not accept the explanation and added entire shortage of stock of Rs.6,71,338/ - as income of the appellant. During the course of appellate proceedings, appellant contended that there could not be any difference in stock as same was maintained on Toyota software. Without prejudice to it, it was submitted that the AO had wrongly adopted GP at 22% for working out the cost of the stock whereas GP for the AY 2012-13 comes to 17.91 % and if the GP was adopted at 17.91%, the shortage would be of Rs.4,68,726/-. It was also contended that in case of shortage of stock only gross profit margin was to be taxed and accordingly, maximum addition of Rs.83,948/ - can be sustained. I find contention of the appellant partly acceptable. The AO had adopted GP rate of 22% as found at the time of survey on the basis of GP of period upto date of survey. The GP of preceding year as well as for the period 01.04.2011 to the date of survey was relevant for working out cost of stock whereas appellant is considering GP of period subsequent to date of survey. Therefore, GP of 22% adopted by the AO is justified. However, I agree with the appellant that in case of shortage of stock, cost of shortage of stock has to be replaced with sale proceeds which was not booked by the appellant meaning thereby that only gross profit rate on stock sold outside the books has to be taxed. Accordingly, unrecorded profit would work out at Rs.1 ,47,694/ - (6,71,338/ - x 0.22). Addition to

the extent of Rs.1 ,47,694/ - is upheld and appellant gets relief of Rs. 5,23,644/ -. Ground raised by the appellant is partly allowed.”

Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us.

13. Before us, Ld.D.R. supported the order of AO. Ld.A.R. on the other hand, reiterated the submissions made before AO and Ld.CIT(A) and further submitted that on the addition that has been upheld by Ld.CIT(A) assessee is not in appeal.

14. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to addition on account of alleged shortage of physical stock of goods. AO made addition by working out the G.P. at 22% being the G.P. rate upto the date of survey. Ld.CIT(A) has noted that for working out cost of the spare parts, AO had adopted the GP rate of 22% as found at the time of survey on the basis of GP period upto the date of survey. Ld.CIT(A) observed that in case of shortage of stock, the gross profit ratio on the stock sold outside the books has to be taxed. He worked out the unrecorded profits at Rs.1,47,964/- and upheld the addition to that extent. Before us, Revenue has not pointed out any fallacy in the findings of Ld.CIT(A). We therefore find no reason to interfere with the order of Ld.CIT(A). **Thus, the ground of the Revenue is dismissed.**

15. **5th ground is with respect to the deletion of addition of Rs.1,06,00,000/- on account of deemed dividend u/s 2(22)(e) of the Act.**

15.1. During the course of assessment proceedings, AO noticed that assessee had received loan of Rs.1,06,00,000/- from Associate Company namely M/s. BNC Power Projects Ltd. and Shri B.N. Chaudhary was the beneficial share holder to the extent of 98% beneficial holding in the assessee's company. AO also noted that BNC Power Projects Ltd., has accumulated profit of Rs.1125.7 lac after reducing the deemed dividend of Rs.368.27 lac taxed in A.Y. 2011-12. He also noted that a loan of Rs.1,06,00,000/- was advanced by B.N. Chaudhary to assessee during the relevant accounting period. He held that since B.N. Chaudhary beneficial shareholder was the lender of the company provisions of Sec.2(22)(e) of the Act were applicable. He accordingly made addition of Rs.1,06,00,000/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who after relying on the decision of Bombay High Court in the case of CIT Vs Universal Medicare reported in 324 ITR 263, CIT Vs. Impact Containers Pvt. Ltd., reported in 367 ITR 346 and CIT Vs. Jignesh P. Shah reported in (2015) 372 ITR 0392, gave a finding that since assessee did not held the beneficial shares in the lending company provisions of Sec.2(22)(e) of the Act were not applicable. He accordingly deleted the addition made by the AO. Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us.

16. Before us, Ld.D.R. supported the order of AO. Ld.A.R. on the other hand, reiterated the submissions made before AO and Ld.CIT(A) and further submitted that since assessee did not held any beneficial shares in BNC Power Projects Ltd., provisions of Sec.2(22)(e) of the Act are not applicable. He thus supported the order of Ld.CIT(A).

17. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to addition of Rs.1,06,00,000/- u/s 2(22)(e) of the Act. AO held that since B.N. Chaudhary was the beneficial share holder of the lending company i.e., BNC Power Projects Ltd., and had subsequently share holding in the assessee's company, provisions of Sec.2(22)(e) of the Act are applicable. We find that Ld.CIT(A) after relying on the decision of Hon'ble Bombay High Court in the case of Universal Medicare (supra) has held that the payment cannot be taxed in the hands of assessee and assessee did not held any beneficial shares in the lending company. Before us, Revenue has not pointed any contrary decision in its support nor has pointed any fallacy in the findings of Ld.CIT(A). We therefore find no reason to interfere with the order of Ld.CIT(A). **Thus, the ground of Revenue is dismissed.**

18. **Ground No.6 is with respect to addition of Rs.2,45,388/- on account of unproved sundry creditors.**

18.1. During the course of assessment proceedings, assessee was asked to file confirmations for Rs.1,11,678/- from M/s. Dhanaraj Auto Paint and Rs.1,33,710/- from M/s. Planners, Mumbai. AO noted that since assessee did not furnish any confirmations, AO treated the aggregate balance of Rs.2,45,388/- as unproved sundry creditors and made its addition. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A) who deleted the addition.

"18.3 I have gone through the assessment order and submissions filed by the appellant. In view of the facts that appellant did not get sufficient time to obtain confirmations from the trade creditors, the confirmations filed are admitted as additional evidence in the interest of substantive

justice. Perusal of the ledger account and the confirmation filed by the creditor M/s. Dhanraj Auto Paint revealed that it had opening credit balance of Rs.1,45,433/- and sold material to the appellant during the year and also received payments during the year resulting in closing credit balance of Rs.1,19,965/-. Similarly, confirmation filed by the other creditor M/s.Planners, Mumbai revealed that creditor had given consultancy and bill of Rs.3,58,475/- was raised. The appellant deducted the tax at source of Rs.37,138/- and made payments of Rs.1,87,627/- during the year through banking channel which resulted in closing credit balance of Rs.1,33,710/-. The AO had not doubted the purchases made and consultancy given during the year. Similarly, payments made to these parties were not disputed. The AO has accepted all other transactions but held closing balance as unproved. It was also not the case of the AO that liabilities at the yearend had ceased to exist. No material has been brought on record to hold that either parties were nonexistent or material services were not supplied. Facts of the issue involved and contentions raised are identical to the facts of the ground no.3 of appeal for AY 2011-12. Hence, in view of detailed discussion at para 5.5 therein, the addition made by the AO of Rs.2,45,388/- is deleted and ground raised by the appellant is allowed.”

Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us.

19. Before us, Ld.D.R. supported the order of AO. Ld.A.R. on the other hand, reiterated the submissions made before AO and Ld.CIT(A).

20. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to addition of Rs.2,45,388/- on account of unproved sundry creditors. We find that Ld.CIT(A) after considering the submissions has given a finding that during the year there were transactions with the aforesaid parties. AO had not doubted the purchases made and consultancy given and the payments made were also not disputed and that AO had accepted all other transactions but held closing balance as unproved. He has further given a finding that Revenue has not proved that the parties were not in existence or material or services were not supplied. He therefore deleted the addition. Before us, Revenue has not pointed out

any fallacy in the findings of Ld.CIT(A). We therefore find no reason to interfere with the order of Ld.CIT(A). **Thus, the ground of the Revenue is dismissed.**

21. **In the result, the appeal of Revenue is dismissed.**

Order pronounced on 4th day of April, 2019.

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(ANIL CHATURVEDI)
लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 4th April, 2019.

Yamini

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A)-12, Pune.
4. Pr. CIT, Central, Nagpur
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" / DR, ITAT, "B" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.