

IN THE INCOME TAX APPELLATE TRIBUNAL**DELHI BENCH: 'D' NEW DELHI****BEFORE SHRI R. S. SYAL, ACCOUNTANT MEMBER
AND
SMT SUCHITRA KAMBLE, JUDICIAL MEMBER****I.T.A .No.-3561/Del/2007 (A.Y 2004-05)**

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| DCIT Circle I Muzaffarnagar (APPELLANT) | vs | M/S Tikaula Sugar Mills Ltd, Muzaffarnagar (RESPONDENT) |
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I.T.A .No.-2817/Del/2008 (A.Y 2005-06)

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| DCIT Circle I Muzaffarnagar (APPELLANT) | vs | M/S Tikaula Sugar Mills Ltd, Muzaffarnagar (RESPONDENT) |
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C.O No. 144/Del/2008 (A.Y 2005-06)

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| M/S Tikaula Sugar Mills Ltd, Muzaffarnagar (APPELLANT) | vs | DCIT, Circle I Muzaffarnagar (RESPONDENT) |
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ITA No. 3598/Del/2011 (A.Y 2005-06)

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| DCIT, Circle I Muzaffarnagar (APPELLANT) | vs | M/S Tikaula Sugar Mills Ltd, Muzaffarnagar (RESPONDENT) |
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| Appellant by | Sh. Umesh Chand Dubey, SR. DR |
| Respondent by | Sh. Akhilesh Kumar, Adv |

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| Date of Hearing | 27.10.2016 |
| Date of Pronouncement | 15.12.2016 |

ORDER**PER SUCHITRA KAMBLE, JM****(ITA No. 3561/DEL/2007 A.Y. 2004-05)**

This appeal is filed against the order dated 21/6/2007 passed by CIT(A)-Muzaffarnagar.

2. The grounds of appeal are as follows:-

- “1. On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in deleting the addition made by A.O on account of noninclusion of Excise duty amounting to Rs.5,82,54,040/- in the closing stock of alcohol ignoring the provision of Section 145A of the Income Tax Act, 1961 and down observations in Para 4.4 of the appellate order “that the assessee should have included the Excise duty in the value of closing stock of alcohol by calculating the same on the basis of Excise duty paid on sales during the year.”
2. That the Ld.CIT(A) has erred in law in deleting the additions of Rs.5,71,81,580/- made by the Assessing Officer for under valuation of closing stock of sugar without appreciating facts of the case that the assessee failed to justify the rates as per A.S 2 (Revised) method as prescribed by the institute of Chartered Accountants of India which are mandatory in nature.
3. That the Ld.CIT(A) erred in law in deleting the addition of Rs.4,58,161/- made by the Assessing Officer on account of disallowance of depreciation claimed on old machinery ignoring the fact that the machinery was old and discarded and assessee failed to prove its use.
4. On the facts and in the circumstances of the case, the order of Ld.CIT(A) deserves to be set aside and that of A.O be restored.”

3. Assessee is a Limited Company and filed its return declaring Nil income on 27/10/2004 which was processed u/s 143(1) of the I.T. Act, 1961, on 20/12/2004. However, company paid taxes as per provisions of Section 115JB of the Income Tax Act, 1961 on the book profit shown at Rs.13,42,424/-. Assessee company's case was selected for scrutiny. Accordingly, notice u/s 143(2) of the Act was issued on 3/8/2005 and was duly served upon the assessee company on 5/8/2005. In response to notices u/s 142(1) issued along with detailed questionnaire, Authorized Representative of the assessee company appeared from time to time, filed various replies and details which are on record. The return of income was accompanied with Audit Report and audited copies of accounts. As per computation of income attached with the return of income company declared net profit as per P & L account at Rs.31,10,792/- and after making various adjustments, net income worked out at Rs.1,35,79,895/- which was set off against the brought forward losses of earlier years and income was declared Nil.

4. During the course of assessment proceedings, assessee company filed comparative figures of sales and GP as under:

| | <u>A. Y 2004-05</u> | <u>2003-04</u> | <u>2002-03</u> |
|------------|---------------------|----------------|----------------|
| Turnover | 663937548 | 776017416 | 756646207 |
| GP | 154133865 | 137282131 | 180125447 |
| Percentage | 23.22% | 17.69% | 23.81% |

The Assessing Officer observed that the GP rates in assessment year was much better than earlier year therefore, accepted the same by the Assessee. Reply filed by the assessee company was considered. Though the GP was better as compare to last year but there was down fall in sales as compare to earlier years for which no reasons was given. The Assessing Officer further noticed that Excises Duty was included in the closing stock of sugar and molasses but element of ED has not been included in the closing stock of

alcohol. Assessee company filed reply stating that no provisions for excise duty in the closing stock of alcohol was made as it depended on nature of sale. Reasons given by the assessee company was not accepted by the Assessing Officer. The Assessing Officer held that the valuation of stock only at the actual cost of raw material/finished goods and not taking into account the overhead charges is not correct mode of valuation. Excise Duty payable by the manufacturer are manufacturing expenses and should go into calculation of production cost and closing stock should include an element of such duties as held by the Hon'ble Apex Court in the case of CIT(A) Vs. V/S British Paints Ltd. 188 ITR 44 (S.C). The position was also reaffirmed by the Board. The Assessing Officer held that due to non inclusion of ED in the closing stock of alcohol, assessee company suppressed its gross profit which is worked out to Rs.5,82,54,040 (i.e 830504 @ Rs. 70.14) and added to the income of the company assessee.

5. The Assessing Officer further observed that valuation of Rs.465919/-. Qtls Sugar was shown at Rs.52,52,17,170/- which gives a rate of Rs.1,127/- per quintal. Assessee company was asked to justify rate of sugar per quintal and its working and basis. Assessee company filed reply stating that working of closing stock has been made as per a-2 and value of closing stock has been shown @ 1,127/- per qtls being cost price. The Assessing Officer further observed that on verification from other sugar mills, the rate found to be on much lower side, M/s Mansurpur Sugar Mills valued its closing stock of sugar @1,285/- per qtls and has given complete working. Assessee company was therefore further required to explain as to why addition on account of under valuation of closing stock be not made. Assessee company filed reply stating that all the sales have been made in the open market. It was further mentioned that rates of sugar varied from time to time as per market conditions. Assessee company requested for supply of working of cost of sugar by the Mansurpur Sugar Mills, which was denied and assessee was asked to submit its own working as per AS-2 (Revised) method as prescribed by the

Institute of Chartered Accountants of India which is mandatory in nature. Assessee company again filed reply on 4/12/2006 stating that working of cost depends on various factors as under:-

(i) Recovery percentage of Sugar, Expenditure on salary/wages, Number of bags purchased, Sugar cane cost etc.

It further mentioned that cost worked out as per AS-2 method and cost differs unit to unit and cost shown may be accepted.

The Assessing Officer held that there is no force in assessee's contention because the rates of sugar cane are decided by the Govt. and sugar mills had to purchase sugar cane at the rates prescribed by the Govt. therefore, there will be no effect on cost. So far as recovery percentage and other expenses are concerned, the recovery shown by the assessee company cannot be considered as more. Similarly other reasons given by the assessee company in support of low cost of production is not much convincing and rejected. There is a vast difference in the costing. The Mansurpur Sugar Mills has valued its stock of levy free sugar @ 1285/- whereas the assessee company valued @ 1,127/-. The difference worked out to Rs.158/- per quintals. Considering the reply and reasons given by the assessee company, cost of closing stock of sugar of the assessee company reasonably valued @1250/-per quintal which is worked out to Rs.58,23,98,750/- (i.e. 465919x 1250) as against Rs.52,52,17,170/- shown by the assessee company. Hence difference of Rs.5,71,81,580/- was added to the income of the assessee company on account of under valuation of closing stock of sugar.

6. The assessee furnished a list of all the assets which was purchased and put to use for more than 180 days and also less than 180 days. During the year the assessee has shown addition in P & M, which inter alia includes a machinery at a cost of Rs.34,29,510/-. The assessee was required to furnish copy of bills in this regard. As perusal of examination of aforesaid bill reveals that the machine is old & discarded. For the purpose claiming of depreciation,

assessee has shown its value at Rs.36,65,290/- on 31/10/2003 under the category of P & M put to use for less than 180 days. The assessee claimed depreciation of Rs.4,58,161/- @ 12.5% i.e. the half rate of normal rate of depreciation on the aforesaid Machinery. The aforesaid depreciation of Rs.4,58,161/- claimed by the company was disallowed as the machinery was not put to use for purposes of business as the same being old and discarded. Moreover, the assessee has not proved its use.

7. Being aggrieved by the order the Assessee filed appeal before the CIT(A). The CIT(A) allowed the assessee's appeal.

8. As regards to Ground No. 1, the Ld. DR submitted that the excise duty on closing stock of Alcohol was rightly added by the Assessing Officer.

9. The Ld. AR submitted two case laws i.e. SVP Industries Ltd. Vs. CIT 2014 50 Taxman.com 229 Delhi wherein it is held that when neither excise duty was paid nor duty was incurred under Sub-Section 1 of Section 145 A is not applicable. The assessee relied on the Hon'ble Supreme Court Judgment in the case of Dina Vision which is for Assessment Year 1987-88. The Ld. AR submitted that CIT(A) is right in allowing the assessee's contentions.

10. We have heard both the parties it can be seen that the assessee neither excise duty was paid by the assessee nor the duty was incurred. Therefore, Section 145A will not be applicable, but as regards the basis of accounting concept the assessee has not followed proper procedure as excise duty was not mentioned in closing stock of alcohol. While excise duty payable should be compared of production cost, closing stock should include element of such duties. This matter needs to be taken into consideration and is remanded back to the Assessing Officer. Proper opportunity and hearing may be given to the assessee.

11. In respect of ground No. 2, the Ld. DR submitted that the CIT(A) was not right in allowing the ground as relates to valuation of closing stock. The rate which was taken into consideration by the Assessing Officer was correct.

12. The Ld. AR submitted that working of closing stock valuation of Sugar was furnished to Assessing Officer as per AS to issued by ICAR which works out to be Rs.1,127/- per quintal which is consistently follow by the assessee company and was accepted. The CIT(A) has rightly allowed the claim of the assessee.

13. We have heard both the parties and in any case no adjustment can be made the only closing stock without any adjustment in opening stock cost of the earlier season was Rs.1,122 per quintal against current seasons Rs.1,127/- is duly accepted by the lower authorities. Besides the said closing stock to current year is opening stock of subsequent year and hence the same was verified properly by the CIT(A). There is no need to interfere with the same. This ground of the Revenue is dismissed.

14. In result, Ground No. 2 is dismissed.

15. As relates to disallowance of depreciation, the Ld. DR relied upon the Assessment Order. The Ld. AR submitted that the same was rightly rejected by the CIT(A).

16. We have heard both the parties and perused the records. The Assessing Officer has not disputed the purchase of machinery and also verified the purchase with reference to purchase bills issued by Seller Company. Mere presumption by the Assessing Officer that since the machinery was old it could not be put to use without major repairs does not sustain. Thus the contention of the assessee that the machinery installed was open to verification and that if the AO had any doubt spot enquires could have been made. Thus, the CIT(A) rightly deleted this addition.

17. In result, Ground No. 3 is dismissed.

18. The appeal of the Revenue being ITA NO. 3561/DEL/2007 is partly allowed for statistical purpose.

(ITA No. 3561/DEL/2007 A.Y. 2004-05)

This appeal is filed against the order dated 26/6/2008 passed by CIT(A)-Muzaffarnagar.

20. The grounds of appeal are as follows:-

- “1. On the facts and in the circumstances of the case, the Ld.CIT(A) erred in deleting the addition of Rs.1,11,92,000/- made by the Assessing Officer on account of treating the incentive of Rs.1,11,92,000/- on sale of levy sugar as revenue receipts as against capital receipts claimed by the assessee.
2. On the facts and in the circumstances of the case, the Ld.CIT(A) erred in deleting the addition of Rs.3,34,413/- made by the Assessing Officer on account of provision made for storage fund claimed as revenue expenditure by the assessee.
3. On the facts and in the circumstances of the case, the Ld.CIT(A) erred in deleting the addition of miscellaneous expenses of Rs.1,25,000/- made by the Assessing Officer .
4. The order of the Ld.CIT(A) be set aside and that of the A.O be restored.”

21. As regards first ground, the same is covered by assessee's own case for Assessment Year 2000-01 being ITA No. 86/Del/2006 relevant portion is as follows:-

“ The first reason taken by the A.O for initiating reassessment is treating the sale of additional quota of sugar in free market amounting to Rs.35,11,976/- as revenue receipt against the assessee's claim of capital receipt. The assessee earned profit of Rs.35.11 lac from the sale of additional free sugar under Incentive scheme of the Government of India, which amount was not offered for taxation on the ground that it was a receipt of capital nature. The assessee was called upon to show cause as to why this amount be not treated as a revenue receipt in the light of the judgment of the Hon'ble High Court in the case of KCP Ltd. 245

ITR 421 (S.C). The assessee submitted that the facts of the case of KCP Ltd (Supra) were distinguishable. It was further explained that the said amount of Rs.35.11 lac was in the nature of incentive given by the Government for repayment of term loans. The assessee relied on certain judgments in support of its contention that the amount was not a revenue receipt. Not convinced with the assessee's contentions, the A.O came to hold that since the said receipt was to be used for the running of business and hence, constituted a trading receipt. The Ld.CIT(A) upheld the action of the A.O by noticing that the assessee did not produce any evidence to show that the amount of Rs.35.11 lac was utilized for repayment of loan during the year."

22. We have heard both the parties and perused the order passed in assessee's own case in ITA No. 86/Del/2006. The issue herein is squarely covered. Rs.1,11,92,000/- made by the Assessing Officer on account of treating the incentive of Rs.1,11,92,000/- on sale of levy sugar as revenue receipts as against capital receipts claimed by the assessee is not correct. It is capital receipt.

23. In result, Ground No. 1 is dismissed.

24. As regards Ground No. 2 the same is also covered by assessee's own case being ITA No. 86/Del/2006 relevant paragraph of the judgment is as follows:-

"We have heard the rival submissions and perused the relevant material on record. The undisputed facts are that the assessee created Molasses reserve fund for construction of molasses storage tank by crediting a sum of Rs.1,30,625/- to this account in accordance with UP Sheera Niyamtran Niyamavali. The Hon'ble Calcutta High Court in CIT Vs. Upper Ganges Sugar Mills Ltd (1994) 206 ITR 215 (Cal) has held that contribution towards Molasses Storage Fund is eligible for deduction as business expenditure. Similar view has been taken by the Hon'ble Madras High Court in certain decisions including CIT Vs. Salem Cooperative Sugar Mills Ltd., 229 (Mad). In view of several decisions taken note of by the Ld.CIT(A)

in the impugned order supporting the assessee's contention, which have not been controverted by the Ld. Dr with any contrary decision, we are of the considered opinion that the ld. First Appellate Authority has taken an unimpeachable view on this issue. We, therefore, uphold the impugned order on this score."

25. We have heard both the parties and perused the order passed in assessee's own case in ITA No. 86/Del/2006. The issue herein is squarely covered.

26. In result, Ground No. 2 is dismissed.

27. As regards Ground No. 3 is concerned, the Ld. DR relied upon the order of Assessing Officer. The Ld. AR submitted that disallowances are only on ad-hoc basis without a single instant of doubt. The miscellaneous expenses were properly dealt by the CIT(A). Hence no interference is required.

28. We have heard both the parties. The disallowance in respect of miscellaneous expenses was made purely on estimated basis by the Assessing Officer. The CIT(A) has rightly deleted this addition partly. There is no need to interfere with the order of the CIT(A).

29. In result, Ground No. 3 of the Revenue's appeal is dismissed.

30. As regards Ground No. 1 of the Cross-objection of filed by the assessee is submitted that the same is covered by the amendment to Finance Act 2006 to Explanation 3C with retrospective effect this position will not have any change for this particular Assessment Year.

31. In result, Ground No. 1 of the assessee's the Cross Objection is dismissed.

32. As relates to other two grounds of the cross objection of the assessee the same are dismissed accordingly.

33. In result, Appeal of the Revenue being ITA No. 2817/DEL/2008 and C.O. No. 144/DEL/2008 stands dismissed.

(I.T.A. No. 3598/DEL/2011 A.Y. 2005-06)

34. This appeal is filed by the Revenue against the order dated 07.04.2011 passed by the CIT(A), Muzaffarnagar.

35. The grounds of appeal are as follows:

“1. On the facts and in the circumstances of the case the Ld. CIT (A) has erred in deleting the penalty imposed by the AO under Section 271(1)(c) of the I.T. Act, 1961 in respect of addition of Rs. 7,95,42,474/- of secured loans which has been sustained by the CIT(A).

2. On the facts and in the circumstances of the case ld. CIT(A) erred in law in holding that the AO is not justified in imposing the penalty under Section 271(1)(c) of the I.T. Act, 1961 even after the insertion of explanation 1 to Section 271 w.e.f. 01.04.1976.

3. The order of the Ld. CIT(A) be set aside and that of AO be restored.”

36. Proceedings u/s 271(1)(c) of the Act was initiated and the Assessing Officer held that the benefit of doubt could be given as pertaining to penalty u/s. 271 (1)(c) of the Act in case of additions on account of incentive on sale of sugar and disallowance of expenses debited under the head ‘miscellaneous’. However, the same view could not taken in the case of addition made on account of unpaid interest in respect of term loan amounting to Rs. 7,95,42,474/-. In this case interest paid to financial institution was converted into term loan but was claimed as actual payment within the ambit of Section 43B of the Act.

37. Aggrieved by this the assessee filed appeal before the CIT(A). The CIT(A) allowed the appeal of the assessee.

38. The Ld. DR relied upon the Penalty order. The Ld. AR submitted that CIT(A) has rightly considered the issue and deleted the penalty.

39. We have heard both the parties. The assessee has not concealed any particulars of income or furnished any inaccurate particulars of income. The Assessing Officer was incorrect in holding that the assessee furnished inaccurate particulars of income on account of interest to Financial Institutions by conversion of same into Term Loan and by issue of Zero Coupon Bonds. The assessee has furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the Assessing Officer made addition on account of unpaid interest in respect of term loan amounting to Rs. 7,95,42,474/- as interest paid to financial institution was converted into term loan but was claimed as actual payment within the ambit of Section 43B of the Act by the assessee. This cannot be termed as concealment of income or furnishing of inaccurate particulars of income and will not attract the provisions of Section 271(1)(c) of the Act. The Explanation 1 of Section 271(1)(c) of the Act will not be applicable in the present case.

40. In result, Appeal of the Revenue being ITA No. 3598/DEL/11 is dismissed.

Order pronounced in the Open Court on 15th December, 2016.

Sd/-

(R. S. SYAL)
ACCOUNTANT MEMBER

Dated: 15/12/2016

*R. Naheed **

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

| | | Date | |
|----|--|------------|-------|
| 1. | Draft dictated on | 27/10/2016 | PS |
| 2. | Draft placed before author | 27/10/2016 | PS |
| 3. | Draft proposed & placed before the second member | .2016 | JM/AM |
| 4. | Draft discussed/approved by Second Member. | | JM/AM |

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|-----|--|------------|-------|
| 5. | Approved Draft comes to the Sr.PS/PS | 15.12.2016 | PS/PS |
| 6. | Kept for pronouncement on | | PS |
| 7. | File sent to the Bench Clerk | 15.12.2016 | PS |
| 8. | Date on which file goes to the AR | | |
| 9. | Date on which file goes to the Head Clerk. | | |
| 10. | Date of dispatch of Order. | | |