

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER
AND
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER**

ITA NO. 1562/MUM/2015 : (A.Y : 2010-11)

M/s. Simplex Casting Ltd.,
601-602A, Fairlink Centre,
Off Andheri Link Road,
Andheri (W), Mumbai 400 053.
PAN : AABCS4650E (Appellant)

Vs. DCIT (OSD)-3(1),
Mumbai (Respondent)

ITA NO. 2472/MUM/2015 : (A.Y : 2010-11)

DCIT-11(2)(1), Mumbai
(Appellant)

Vs. M/s. Simplex Casting Ltd.,
601-602A, Fairlink Centre,
Off Andheri Link Road,
Andheri (W), Mumbai 400 053.
PAN : AABCS4650E (Respondent)

Assessee by : Shri S.C. Tiwari
Revenue by : Shri Narendra Kumar Chand

Date of Hearing : 09/09/2016
Date of Pronouncement : 04/11/2016

ORDER

These are cross-appeals filed by the assessee and the Revenue against the order of CIT(A)-8, Mumbai dated 30.01.2015, pertaining to the Assessment Year 2010-11, which in turn has arisen from the order

passed by the Assessing Officer dated 31.03.2013 under section 143(3) of the Income Tax Act, 1961 (in short 'the Act').

2. We may first take up appeal of assessee wherein the following Grounds have been raised :-

"1. That on the facts and in the circumstances of the case of the appellant and in law, Id. CIT(Appeal) has erred in confirming disallowance of 25% of alleged unverified purchases/expenditure.

2. Without prejudice, on the facts and in the circumstances of the case of the appellant and in law, Id. CIT(A) has erred in upholding disallowance of Rs.4,38,96,447/- whereas the aggregate amount of specified instances enumerated in paragraph 6.2 of the impugned order is Rs.1,38,45,354/-.

3. Without prejudice, on the facts and in the circumstances of the case of the appellant and in law, Id. CIT(A) has erred in not directing deduction for Assessment Year 2011-12 of the sum of Rs.1,13,58,809/- as enumerated in paragraph 6.2 of the impugned order, more so when he himself has decided the appellant's appeal bearing no. CIT(A)-8/IT-598/13-14 for assessment year 2011-12 on even date and in not directing amount of Rs.24,77,708/- for deduction for assessment year 2009-10 as held by him in the impugned order.

4. That the impugned order being contrary to law, material on record and facts of the case may kindly be set aside, amended and modified in the light of the grounds of appeal enumerated above and the appellant be granted such reliefs as is called for on the facts and in the circumstance of the case of the appellant and in law."

3. In the cross-appeal, Revenue has raised the following Grounds :-

"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in restricting the disallowance of Rs.17,55,85,788/- out of the total expenditure claimed on account of purchase, labour charges and off-loading charges to 25% without appreciating that the assessee was indulging in inflating its purchases, debiting fictitious expenses under the head 'labour charges' and 'off-loading charges' ?

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.96,96,318/- on account of

commission paid to SEFW Projects Private Limited and Rs.1,06,16,357/- on account of commission paid to bank without appreciating that he had admitted and relied upon fresh evidences which were submitted only during the course of appellate proceedings, without providing an opportunity to the Assessing Officer to examine them and to offer comments thereon and hence should not have been admitted as per Rule 46A of the I T Rules 1962 ?

3. *The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the A.O be restored."*

4. The assessee is a company incorporated under the provisions of the Companies Act, 1956 and is, *inter-alia*, engaged in the business of manufacture and supply of iron and steel castings. For the assessment year under consideration, it filed a return of income declaring a total income of Rs.14,39,17,524/- which was subject to a scrutiny assessment whereby the total income has been assessed at Rs.35,11,28,290/- after making certain additions/disallowances which were carried in appeal before the CIT(A). The CIT(A) has allowed partial relief. Against the additions sustained by the CIT(A), assessee is in appeal before us on the above stated Grounds of appeal whereas Revenue has challenged the reliefs allowed by CIT(A) in its appeal.

5. In assessee's appeal, the sustentative dispute arises from an addition of Rs.17,55,85,788/- made by the Assessing Officer on account of unexplained/inflated purchases and expenditure. The CIT(A) has since restricted the addition to Rs.4,38,96,447/- and, not being satisfied, assessee is in further appeal before us. In the cross-appeal, Revenue has contested the action of CIT(A) in restricting the disallowance to Rs. 4,38,96,447/- as against Rs.17,55,85,788/- made by

the Assessing Officer. Since the two cross-grounds arise from the same issue, both are being taken up together.

6. Briefly put, the relevant facts are that during the course of assessment proceedings, Assessing Officer carried out an exercise to verify the genuineness of the purchases and/or expenses recorded in the account books. The discussion in the assessment order reveals that notices u/s 133(6) of the Act were issued to various parties. In many cases, the notices returned un-served with the remark "party not known/left". It is also noted that in many cases notices were served but either no reply was received or if the reply was received, the figures reported by the parties did not tally with the figures presented by the assessee-company. In this background, the Assessing Officer issued a notice u/s 142(1) of the Act dated 11.3.2013 show-causing assessee the various discrepancies noticed in the course of notice u/s 133(6) of the Act.

7. The Assessing Officer notes that in response, assessee insisted that all the purchases and expenses were genuine and that the parties were regular suppliers. One pertinent point which was made by the assessee was that there was inadequacy of time inasmuch as the notice u/s 142(1) of the Act was issued on 11.3.2013 and that it was not possible to respond with all the requirements by 19.3.2013. In any case, assessee offered to produce two parties (contractors) and the Assessing Officer recorded the statements of two contractors which is detailed in para 5.3 of the assessment order. Apart therefrom, assessee also furnished reconciliations based on the entries in the books of

account vis-à-vis the information collected by Assessing Officer. After considering the submissions of assessee and the result of his exercise carried out, the Assessing Officer inferred the following *modus operandi* on the part of assessee:-

*“5.9 **MODUS OPERANDI** : From the various facts enumerated above, the modus operandi of the assessee to the extent indicated by material available on record is as under :*

- a) Purchase/expenses are being shown in name of certain parties against which cash is being received either in part of in entirety.*
- b) Additional purchase/expense bills are being booked in name of actual vendors to inflate the expenses. A corollary to the same, payments would be shown in name of those parties but actual withdrawals will be in different account/in cash.”*

In this background, the Assessing Officer concluded that assessee-company had failed to prove the genuineness of purchases made/expenses claimed and, therefore, he made disallowance of Rs.17,55,85,788/-. The party-wise details in this regard are contained in paras 5.11 & 5.12 of the assessment order and the broad categorization is as follows :-

- a) Parties where notices issued u/s 133(6) were returned un-served - Rs. 4,85,27,686
- b) Parties where notices issued u/s 133(6) were served, but no reply received - Rs. 6,52,15,644
- c) Parties where purchases as per accounts of assessee did not reconcile with details received from the parties :-
 - i) Inflated purchases - Rs. 54,19,143
 - ii) Unexplained purchases - Rs. 3,61,44,082

d) Parties relating to payment of labour charges where notices u/s 133(6) were either un-served or were not replied	-	Rs. 1,47,91,709
e) Parties relating to payment of off-loading expenses where notices issued u/s 133(6) were returned un-served/reply not received/amounts not reconciled	-	Rs. 54,87,524
	Total	- <u>Rs.17,55,85,788</u>

Against such a disallowance, assessee made detailed submissions on facts and in law before the CIT(A), a copy of which has also been placed in the Paper Book before us at pages 11 to 30 and 24 to 62 respectively.

8. Before the CIT(A), assessee pointed out that assessee was required to produce 59 parties in a short span of time during the fag end of assessment proceedings. In spite of the short period, assessee had furnished considerable information which has not been properly appreciated by the Assessing Officer. Assessee also pointed out that it was engaged in the business of manufacture of heavy and light engineering iron & steel castings (Jobbing industry) as per requirements of its customers and also takes part in tenders issued by Public Sector Undertakings and that the books of account of assessee depict correct position. It was also pointed out that the action of Assessing Officer was not justified in view of judgment of Hon'ble Bombay High Court in the case of Nikunj Eximp Enterprises Pvt. Ltd. in ITA No. 5604 of 2010 dated 17.12.2012, which prescribes that no disallowance of expenditure can be made merely because the notices u/s 133(6) remained un-served or remained un-complied with. Before the CIT(A), assessee also pointed out that it had further obtained confirmations from few other

parties also, which were produced before him, as the same could not be produced due to inadequacy of time during assessment proceedings. It was also pointed out that some of the non-reconciled balances were on account of mismatch of the accounting year in which amounts were recorded by the supplier and the assessee-company.

9. In particular, assessee assailed the addition of Rs.3,61,44,082/- regarding purchases alleged not to have been disclosed by the assessee, but appearing in the ledger of third parties. In this context, it was asserted that there was no justification to make such a disallowance because no deduction in this respect was claimed and that the same could not be treated as undisclosed purchases merely because the amounts were appearing in the ledger account of suppliers.

10. As regards the labour contractor expenses disallowed, assessee pointed out that in the process of manufacturing, substantial labour was involved and most of the labour being casual and the rate of turnover of such labour being high, assessee had outsourced the requirement of labour to small-time contractors having 8-15 workers each with them. The assessee used to deposit the entire labour charges in the account of contractor who would make timely payments to workers in the presence of assessee's staff. Assessee referred to the fact that it had furnished the name of contractors, address, PAN, etc. alongwith copies of contractors' bills which completely prove the expenditure. Regarding non-production of such contractors, it was pointed out that out of 14 contractors, 3 contractors discontinued dealing with assessee, few of the contractors were either not available

on account of hospitalization, etc., whereas two persons appeared before the Assessing Officer. Even with regard to the addition of Rs.54,87,524/- out of off-loading expenses, assessee pointed out that complete details alongwith PAN and copies of bills were produced and that non-production of parties was not fatal so as to result in disallowance.

11. The CIT(A) considered the varied submissions put forth by the assessee and even directed the Assessing Officer to make further inquiries and send a report u/s 250(4) of the Act. The Remand report furnished by Assessing Officer was confronted to the assessee and the rejoinder by assessee has also been considered by the CIT(A).

12. In this context, CIT(A) has, in-principle, upheld the stand of Assessing Officer that assessee had failed to discharge its burden with regard to the amounts in question. CIT(A) has also noted in para 6.2 of the order some of the discrepancies in date of recording of the purchases by assessee on one hand and by the supplier on the other hand. On that basis, CIT(A) records that certain payments have not been recorded in the relevant year by the assessee. The CIT(A) thereafter goes on to say that the aforesaid shows non-compliance with the mercantile system of accounting, which is otherwise adopted by the assessee. Be that as it may, CIT(A) restricted the disallowance to 25% of Rs.17,55,85,788/- which came to Rs.4,38,96,447/-.

13. In this background, the learned representative for the assessee vehemently pointed out that there was no justification for making the

impugned addition because there is no specific failure on the part of assessee to furnish the relevant details. The learned representative pointed out that the Assessing Officer had issued notices to a large number of parties and that in a fair number of cases, replies were received and reconciliations were prepared by the assessee. It was pointed out that the reconciliations showed that the suppliers had recorded the purchases as per the date of bills issued, whereas the assessee had recorded the purchases as and when the material was received. It was also pointed out that certain differences arose on account of short-receipt of material or rejections, which the suppliers had accounted for fully whereas assessee had recorded the purchases of a lesser amount. The learned representative pointed out that insofar as the burden on assessee is concerned, it was fully discharged inasmuch as assessee had furnished complete details of purchases as well as expenses alongwith the ledger accounts of parties and no falsity in the same has been established. The learned representative pointed out that the CIT(A) erred in concluding that the burden of proof shifted to the assessee because of issuance of notice u/s 133(6) of the Act. In this context, assessee pointed out that in cases where replies were received, assessee had furnished the reconciliation and in other cases where no notice u/s 133(6) was served, burden does not shift to the assessee because it was for the Assessing Officer to ensure the attendance of parties. In this context, the learned representative for the assessee referred to the judgment of the Hon'ble Bombay High Court in the case of *CIT Vs. U.M. Shah, 90 ITR 396 (Bom)* where it has been observed that if the ITO issues summons and the witness does not appear, assessee could not be blamed for it. The learned

representative asserted that so far as the purchases by the assessee is concerned, there was no falsity proved and, therefore, the version of assessee has been merely disbelieved without any adverse evidence. In the course of hearing, reliance has been placed on the following judgments :-

- (1) CIT vs. Daulat Ram Rawatmull , 87 ITR 349 (SC)
- (2) Anis Ahmad & Sons v. CIT & Anr.,297 ITR 441(SC)
- (3) Jethabhai Hirji & Jethabhai Ramdas v. CIT, 120 ITR 792 (Bom)
- (4) CIT v. M/s. Nikunj Eximp Enterprises Pvt. Ltd., ITXA No.5604 of 2010

14. On the other hand, the Id. DR appearing for the Revenue has supported the order of Assessing Officer and in particular, has referred to the Remand report furnished by the Assessing Officer to CIT(A), copy of which has been placed in the Paper Book of assessee at page 31-44. It was pointed out that even during the Remand proceedings, though assessee had furnished its ledger account, but with regard to the discrepancies in the replies noted by the Assessing Officer, the reconciliations were not complete. It was, therefore, pointed out that the addition made by Assessing Officer on account of non-reconciliation of balances of the parties is quite justified.

15. We have carefully considered the rival submissions. The crux of the controversy before us arises from the action of the Assessing Officer in holding that amount of certain purchases and expenses debited in the books of accounts could not be properly verified and, therefore, he added a sum of Rs.17,55,85,788/- to the returned income. The CIT(A),

on the other hand, has restricted the disallowance to 25% of Rs.17,55,85,788/- , which came to Rs.4,38,96,447/-. This action of the CIT(A) implies that he was not fully convinced with the stand of the Assessing Officer that the amount of purchases/expenses amounting to Rs.17,55,85,788/- could be construed as unverifiable in toto. The reasoning of the CIT(A) is revealed from the discussion in Para 6.1 of his order whereby, it is recorded by him that even in the *“remand report submitted by the AO and the reply to the said report filed by the learned AR during the course of appellate proceedings”*, the assessee could not file complete details with regard to the aforesaid amount. Thereafter, in Para 6.2 the CIT(A) has enumerated 20 cases where bills issued by the suppliers were not found in the relevant financial year. On the aforesaid twin basis, the CIT(A) has proceeded to restrict the disallowance at 25% of Rs.17,55,85,788/-, i.e., Rs.4,38,96,447/-.

15.1 In our considered opinion, the CIT(A) has made bald assertion of the assessee not having filed *“the complete details”* without specifically enumerating such details. In any case, even the instances where bills were not found recorded in the relevant financial year is concerned, the same does not ipso-facto show any unexplained purchases/expenses. The variation in the year of recording of purchase/expense was explained by the assessee consistently before the Assessing Officer as well as before the CIT(A), which is evident from the copy of written submissions made to the lower authorities dated 15/1/2014 and 24/02/2014, which have been placed in the Paper Book at pages 11 to 24 and 25 to 30 respectively. The assessee had explained that in

respect of purchase bills issued the suppliers in the month of March, 2009, the same were booked as sales in financial year 2008-09 by the suppliers, whereas the said material was received by the assessee in April, 2009 i.e. in the year under consideration and such entry of purchase was passed in the year under consideration. Apart there from, assessee had explained that the differences may be due to certain deductions made by the assessee on account of short receipt of material or rejections, which the suppliers may not have accounted for. Another aspect of which addition was made of Rs.3,61,44,082/- was in the case where purchases are said not to have been disclosed by the assessee, but it was appearing in the ledger of other parties as found by the Assessing Officer. In this context, the plea of the assessee has been that it had not claimed any deduction with respect to the above amount against income of the year under consideration and, therefore, any disallowance thereof is untenable. We find that the aforesaid plea has been simply glossed over by the CIT(A). In fact, the entire edifice of the addition of Rs.17,55,85,788/- is based on the verification exercise carried out with certain parties with whom assessee has incurred expenditure by way of purchases or other expenses. In the assessment order the Assessing Officer has enumerated in para 5.11(b) a list of cases where purchases as per audited annual accounts of the assessee did not reconcile with the details received from the parties. In the said tabulation an amount of Rs.3,61,41,082/- has been tabulated of cases where the parties have claimed sales made to the assessee more than the amount of purchases recorded by the assessee. In this context, we find that the assessee has been consistently explaining that the purchases recorded by it are based on the purchase invoices, which

were available on record. It has also been explained that the instances noted by the Assessing Officer could not ipso-facto show that assessee had indeed effected any unrecorded purchases. At pages 45 to 62 of the Paper Book is placed a copy of the reply filed by the assessee with regard to the remand report submitted by the Assessing Officer during the appellate proceedings. At pages 50 to 62 of the paper book is placed the explanation of the assessee with regard to 24 such parties regarding the variation found by the Assessing Officer in cases where purchases recorded by assessee were of different amounts. In this regard, we may refer to one item of Simplex Engineering & FDR Works Pvt. Ltd. in whose case a sum of Rs.7,83,247/- has been considered as unexplained purchases because the reply received from the suppliers showed that sales effected to the assessee has been shown as Rs.37,99,042/-, whereas as the amount of purchase as per assessee was Rs.30,15,795/-. In this context assessee had explained that the bill of the said supplier was of last year but assessee had accounted for the same in the instant year and relevant invoices of the party was also placed on record. The assessee had also furnished confirmed ledger account of the party of the earlier assessment years highlighting the bills which reconciled the difference. We find that there is no rebuttal to any of such explanation furnished and the entire amount has been added as unexplained purchases by the Assessing Officer, while the CIT(A) effected an overall scaling down of the disallowance. Considering the manner in which the replies/reconciliation filed by the assessee have been considered, in our view, the addition of Rs.3,61,44,082/- is not at all justified. Even

addition of Rs.54,19,143/- on account of variation in the year of recording is also not justified at all.

15.2 Now we may see the instances of additions, whether notices issued under section 133(6) of the Act were either returned unserved or no replies were received. In this context, there is no denying the fact that the assessee had furnished the primary material in the shape of its party-wise ledger accounts, which brought out the purchases effected and the payments made. The assessee had brought out before the CIT(A) and also before us that it was only in the month of March, 2013 that assessee was confronted with the result of verification exercise relating to 59 parties and was asked to produce the parties or furnish reconciliation statements. The assessee also pointed out that there was a pertinent unreasonableness of requiring the assessee to produce 59 such parties in short span of time as assessment was getting time barred on 31/3/2013. Apart there-from, the appellant company pointed out to the CIT(A) that considerable information was furnished to the Assessing Officer on various dates. It is also pointed out before the CIT(A) that assessee was registered with Excise, Sales Tax and Service Tax Department, etc. and that the products are manufactured by the assessee as per the requirements of its customers and there was no open market for sale of products manufactured by it. It was pointed out that the assessee manufactured and supplied products as per the drawings of the customers, which are users specific in nature. It was, therefore, pointed out that there was no reason to doubt the purchases effected by the assessee in a wholesale manner. In our considered opinion, the verification exercise carried out by the Assessing Officer

does not result in unearthing of any falsity in the claims made by the assessee and thus, no addition is merited. Absence of receipt of any reply from the suppliers cannot by itself demonstrate any bogus claim by the assessee unless any of the attendant facts bear out any bogus nature of the claim of expenditure by the assessee. Under these circumstances, in our considered opinion, additions amounting to Rs.4,85,27,686/- and Rs. 6,52,15,644/- enumerated in para -7 of the instant order are also not justified.

15.3 Now, we may come to the additions made of Rs. 1,47,91,709/- and Rs.54,87,524/- with respect to the payment of labour charges and off-loading expenses respectively. In so far as, the payment of labour charges is concerned, the plea of the assessee is that most of the labour being casual in nature, there is a high rate of turnover and therefore, assessee outsources the requirement of labour from small contractors having 8-15 workers with them. It has been explained before the lower authorities that assessee had 14 such contractors and being asked to produce them only two persons appeared. In this context, the Assessing Officer had recorded statement of Shri Hriday Ram Sahu, a copy of which has been placed as annexure to the assessment order. A perusal of the statement reveals that though the contractor admitted of having arrangement with the assessee for providing labour but he has also tendered that a portion of the amount was refunded back to the assessee company. Because of such statement and for the fact that other contractors could not be produced, the amount of Rs.1,47,91,709/- has been disallowed. Even disallowance out of off-loading expenses have also been made in the cases of five parties,

because the amount could not be verified at all. On this two elements of expenditure, in our view, the approach of the Assessing Officer in principle is justified in principle. The contractor examined by the Assessing Officer reveals inherent discrepancy in the claim of expenses by the assessee. Under these circumstances, in our view, certain addition deserves to be made even though specific discrepancy is available only with respect to the one of the parties. Considering the entirety of facts and circumstances, some amount of unverifiability in the claim of the expenses cannot be ruled out and, therefore, on this aspect of the matter we find no reason to interfere with the conclusion of the CIT(A) that 25% of such expenses of labour charges Rs.1,47,91,709/- and out of off-loading expenses of Rs.54,87,524/-, deserve to be disallowed.

15.4 In the result, out of total addition of Rs.17,55,85,788/- sustained by the CIT(A), 25% of expense of Rs. 1,47,91,709/- out of labour charges and 25% of Rs.54,87,524/- towards off-loading expenses are sustained and the balance of the additions made by the Assessing Officer is directed to be deleted. Resultantly, whereas the stand of the Revenue on this aspect is dismissed, that of the assessee is partly allowed.

16. The only other issue remaining in the appeal of the Revenue is relating to the disallowance of Rs.96,96,318/- and Rs.1,06,16,357/- representing marketing commission payment to M/s.SEFW Projects Pvt. Limited and to the bank respectively.

16.1 In this regard, the brief facts are that the commission paid to M/s.SEFW Projects Pvt. Limited was disallowed by the Assessing Officer on the ground that assessee could not prove the purpose of such commission payment. Similarly, commission paid to bank was disallowed, as according to the Assessing Officer, the identity of the bank and the purpose of the payment could not be proved by the assessee. Accordingly, a disallowance of Rs.2,03,12,675 was made. The CIT(A) has since deleted the disallowance, against which the Revenue is in appeal before us.

16.2 In this context, it is noticeable that CIT(A) has deleted the disallowance holding that similar disallowance in assessment year 2009-10 was deleted by the CIT(A) and Revenue's appeal against which was pending before the Tribunal.

16.3 Before us, the parties could not state the outcome of the appeal of the Revenue on similar issue before the Tribunal for assessment year 2009-10. Ld. Representative for the assessee submitted that assessee has no objection if the matter is remanded back to the file of CIT(A) to be decided, in the light of the decision of the Tribunal for assessment year 2009-10.

16.4 In view of the said submission of the Ld. Representative for the assessee, we set-aside the order of the CIT(A) on this aspect and restore the matter back to his file for a decision afresh in consonance with the decision of the Tribunal for assessment year 2009-10. Thus, on this aspect Revenue succeeds for statistical purposes.

17. Resultantly, appeals of the assessee as well as Revenue are partly allowed, as above.

Order pronounced in the open court on 04/11/2016

Sd/-

Sd/-

(SANDEEP GOSAIN)
JUDICIAL MEMBER
Mumbai, Dated 04/11/2016

(G.S. PANNU)
ACCOUNTANT MEMBER

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

VM, Sr. PS

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai