आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'आई', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "I", BENCH, MUMBAI
सर्वश्री राजेन्द्र, लेखा सदस्य, **एवं** , राम लाल नेगी न्यायिक सदस्य के समक्ष

BEFORE SHRI RAJENDRA, AM AND SHRI RAM LAL NEGI, JM
आयकर अपील सं./**ITA No. 2589/Mum/2015**
(**निर्धारण वर्ष /** Assessment Year: 2010-11)

The DCIT CIR 29(3), Room No. 402, 4th Floor, C-10, Pratyakshakar Bhavan, Bandra Kurla Complex, Bandra (E), Mumbai - 400051	Vs.	M/s Sunraj Industries, 218, Veena Indl Estate, L.B.S. Marg, Bhandup (E), Mumbai- 400083
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAOFS8367E**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

&

आयकर अपील सं./**ITA No. 1871/Mum/2015**
(**निर्धारण वर्ष /** Assessment Year: 2010-11)

M/s Sunraj Industries, 218, Veena Indl Estate, Lal Bahadur Shastri Marg, Vikhroli (West), Mumbai- 400083	Vs.	The ACIT Cir 23 (1), Room No. 402, 4th Floor, C-10, Pratyakshakar Bhavan, Bandra Kurla Complex, Bandra (E), Mumbai - 400051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAOFS8367E**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

राजस्व **की ओर से** /Revenue by : Shri Saurabh Kumar Rai (DR)
निर्धारिती **की ओर से** /Assessee by : Shri Deepak Lala (AR)

सुनवाई की तारीख **/ Date of Hearing :** **11/08/2017**
घोषणा की तारीख/**Date of Pronouncement:** **31/08/2017**

आदेश / O R D E R

PER RAM LAL NEGI, JM

These are the cross appeals filed by the revenue and the assessee against order dated 16/02/2015 passed by the Ld. CIT (A)-40, Mumbai pertaining to the Assessment Year 2010-11, whereby the Ld. CIT (A) has partly

allowed the appeal preferred by the appellant/assessee against assessment order passed u/s 143(3) of the Income Tax Act, 1961 (for short 'the Act'). Since, both the appeals have emanated from the impugned order, the same were clubbed, heard together and are being disposed of by this common order for the sake of convenience.

2. Brief facts of the case are that the assessee engaged in the business of export and import of automotive components and ferrous and non-ferrous items, filed its return of income for the assessment year under consideration declaring the total income of Rs. 51,75,820/-. The return was processed u/s 143 (1) of the Act. After scrutiny the AO determined the income of the assessee at Rs. 1,46,48,520/-, after making addition of Rs. 2,37,162/- on account of bogus purchases made from three parties during the financial year relevant to the assessment year under consideration and making addition of Rs. 90,04,340/- on account of low GP and making disallowance of Rs. 1,95,522/- u/s 40 (a)(ia) of the Act, out of the total labour charges incurred.

3. The assessee challenged the assessment order before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee deleted the addition made on account of the alleged bogus purchases made by the assessee, however, directed the AO to disallow the depreciation claimed in return of income to the tune of Rs. 11,850/-. The Ld. CIT (A) further restricted the GP at 13.13% and directed the AO to compute the income accordingly. As regards, disallowance of Rs. 1,95,522/- on account short deduction u/s 40 (ia) of the Act, the Ld. CIT (A) confirmed the disallowance.

ITA No. 2589/MUM/2015 (Assessment Year: 2010-11)

4. The revenue has raised the following effective grounds of appeal against the impugned order passed by the Ld. CIT (A):-

1. *"On the facts and in the circumstances of the case, the Ld. CIT (A) erred in deleting the addition of Rs. 83,98,540/- out of the additions made on account of low GP shown by the assessee and sustaining addition to the extent of Rs. 6,05,800/-, out of the total addition of Rs. 90,04,340/- made by the AO.*

2. *On the facts and in the circumstances of the case, the Ld. CIT (A) erred in not appreciating the fact that the AO had rightly rejected the book results of the assessee, since the assessee failed to produce the qualitative and quantitative details of sales and purchase and has also not maintained the stock register and therefore, the AO has rightly estimated the assessee's GP @ 18.74% being the GP shown in the immediate preceding assessment year.*

3. *On the facts and in the circumstances of the case, the Ld. CIT (A) erred in restricting the addition made by the Assessing Officer by estimating the GP of the assessee on average of the GP for A.Y. 2007-08 to A.Y. 2013-14 by overlooking the explicit finding of the AO that the assessee has not maintained the stock register and also failed to produce the qualitative and quantitative details of sales and purchase and the book results were rightly rejected u/s 145 (2) of the Income-Tax Act, 1961."*

5. Before us, the Ld. Departmental Representative (DR) submitted that the department does not want to press ground No. 1 of its appeal. Accordingly, we dismiss this ground of appeal of the revenue as not pressed.

6. Regarding ground 2 & 3, the Ld. DR submitted that the Ld. CIT (A) has wrongly restricted the GP to 13.13% from 18.74% estimated by AO. The Ld. DR further submitted that the AO has rightly rejected the books of account because the assessee could not produce the qualitative and quantitative details of sales and purchase. Further, the assessee had not maintained the stock register.

6.1 On the other hand, the Ld. counsel for the assessee submitted that during the AY 2009-10, the percentage of export sales was 61 and percentage of domestic sale was 39 as against the 37% and 63% respectively during the AY under consideration. The Ld. Counsel further submitted that since the margin of profit in export sales is higher, the GP came down to 12.72% during the assessment year under consideration. The Ld. counsel further submitted that in the light of the aforesaid facts, the Ld. CIT(A) has wrongly sustained the addition by taking 13.13% of the GP.

7. We have heard the rival submissions and also gone through the material on record. The Ld. CIT(A) has restricted the addition taking 13.13% GP as against 18.74% taken by the AO observing as under:

> *"4.2 I have considered the assessment order and submissions made by the appellant. The AO observing that in the preceding previous year, the appellant has shown GP margin of 18.74 per cent and since it has not maintained formal stock record, he estimated the GP for the year consideration @ 18.74% and thereby, has made an addition of Rs. 90,04,340/-. The appellant has given the details of G.P. for the period from F.Y. 2006-07 till F.Y. 2012-13 where his gross margin of profit varies between 9.7% to 14.49%. The variation is explained being percentage of export sale to total sale, the market conditions, foreign exchange rate fluctuation. According to appellant, the gross margin of profit for F.Y. 2008-09 was abnormal/ windfall and cannot be taken as benchmark for estimating an income for the year under consideration. I find force in the appellant's argument that the normal profit margin of the appellant varies from 9.75% in F.Y. 18.74%, which is abnormal and cannot be taken as a benchmark for a normal year. But the appellant has not proved the amount of G.P. offered by maintaining stock record, which is a cause for rejection of books. However, it is trite law that even in case of rejection of books or ex-parte assessment, the AO should consider past and future records to arrive at the reasonable estimation of income. Therefore, considering the overall facts and average G.P. margin shown by appellant, the estimation of G.P. at 13.13% i.e. the average of GP for A.Y. 2007-08 to A.Y. 2013-14, as against 12.72%*

shown by appellant, would be a reasonable estimate of income for the year under consideration. The AO is directed to re-compute the addition by taking 13.13% G.P. as against 18.74% considered by him. The GP addition is therefore sustained to the extent of Rs. 6,05,800/- (1,96,56,473 – 1,90,50,673) and the assessee gets relief of the balance of Rs. 83,98,540/-. This ground is partly allowed."

8. We notice that the Ld. CIT(A) has estimated the GP margin by taking average of GP for the assessment years 2007-08 to 2013-14 as against 12.72% shown by the assessee. In our considered opinion, the method followed by the Ld. CIT(A) for estimating GP appears to be reasonable as the assessee is also not in a position to work out the item wise GP as claimed by it. On the other hand the AO's action of taking GP on the basis of GP rate of 18.74 is not reasonable particularly in the light of the fact that the percentage of export sales decreased from 61% during the AY 2009-10 to 37% during the assessment year under consideration. AO has not disputed the fact that margin of profit in export sales are higher than the domestic sales. Under these circumstances, we do not find any reason to interfere with the findings of the Ld. CIT(A). Hence, we uphold the findings of the Ld. CIT(A) and dismiss these grounds of appeal of the revenue.

ITA No. 1871/MUM/2015 (Assessment Year: 2010-11)

The assessee has raised the following effective grounds of appeal against the impugned order passed by the Ld. CIT (A):-

1. *"The CIT (A) though has directed to delete the addition of Rs. 2,37,162/- made by the Assessing Officer as bogus purchases u/s 69C to the total income of the appellant, the CIT (A) has erred in disallowing depreciation at Rs. 11,850/- claimed by the assessee on the above purchases @ 5% for AY 2010-11 and also directing the Assessing Officer to consider taking similar action in subsequent years.*

2. *The CIT (A) failed to appreciate that the GP shown by the Assessee at 12.72% was proper and has erred in estimating it at 13.13% thereby keeping the addition made by the Assessing Officer restricted to Rs. 6,05,800/-.*

3. *The CIT (A) failed to appreciate that the Assessing Officer has erred in disallowing u/s 40(a)(ia), the sum of Rs. 1,95,522/- out of the total labour charges of Rs. 2,51,544/- incurred through M/s Balaji Engineering, on account of short deduction of TDS."*

2. The Ld. counsel for the assessee submitted before us that the assessee does not want to press ground No 1 of its appeal. Hence, we dismiss Ground No 1 of the assessee's appeal as not pressed.

3. So far as ground No 2 of the appeal is concerned, since we have upheld the findings of the Ld. CIT(A) in revenue's appeal and sustained the addition of Rs. 6,05,800/- computed on the basis of average GP @ 13.13%, this ground has become infructuous. Hence, we dismiss this ground of appeal as infructuous.

4. The third ground pertains to disallowance of Rs.1,95,522/-u/s 40(a)(ia) of the Act. Before us the Ld. counsel for the assessee submitted that the assessee had incurred total labour charges of s. 2,51,554/- as the assessee utilized the services of M/s Balaji Engineering for picking i.e., cleaning, polishing and shining of copper tubes and making U-band and C band from the copper and bending and sizing of brass tubes. The bill raised for labour charges pertaining to first type of work was Rs. 56,032/- on which TDS of Rs. 1,154 had been deducted @ 2.06%. In case of second type of work the bill raised was for Rs. 1,95,522/-. Since the assessee had already paid Rs.
1,17,248/- as advance till 31.03.2009, during the financial year 2009-10 payment of remaining amount was made to Balaji Engineering. Therefore, the

assessee did not deduct TDS under the impression that TDS is not required to be deducted. The Ld. counsel relying on the decision of ITAT Bench, Kolkata in DCIT vs. M/s S K Tekriwal, ITA No. 1135/Kol/2010, further submitted that it is the case of shortfall due to difference of opinion and under these circumstances the assessee can be declared to be an assessee in default u/s 201 of the Act and no disallowance can be made by invoking the provisions of section 40 (a)(ia) of the Act.

5. On the other hand the Ld. DR relying on the findings of the Ld. CIT(A) submitted that since the assessee has not deducted the TDS at the time of making payment or at the time of making credit entries in the books of account, the Ld. CIT(A) has rightly upheld the action of the AO and sustained the addition.

6. We have heard the parties also perused the material on record. Admittedly, the assessee had deducted TDS to the tune of Rs. 1,154 while making payment to M/s Balaji Engineering and the remaining TDS was also to be deducted while making payment to the said firm. Since, the assessee utilized both the services of M/s Balaji Engineering we are of the considered view that this is not the case of non deduction of TDS but it is a case of shortfall of TDS and as per the decision rendered by the Kolkata Tribunal in DCIT vs. M/s S K Tekriwal dated 21/10/2011 (supra), no deduction can be made by invoking the provision of section 40 (a) (ia) of the Act for deducting less than the due TDS. However, the assessee can be declared to be an assessee in default under 201 of the Act. We, therefore, allow this ground of appeal of the assessee.

In the result, appeal filed by the revenue stands dismissed and the assessee's appeal stands partly allowed.

Order pronounced in the open court on 31st.August, 2017.

Sd/-	*Sd/-*
(RAJENDRA)	(RAM LAL NEGI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 31/08/2017

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**