

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

**BEFORE SHRI P. K. BANSAL, VICE PRESIDENT AND
SHRI GEORGE GEORGE K., JUDICIAL MEMBER**

ITA Nos.299 to 301/COCH/2015
Assessment Years:2006-07 to 2008-09

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| Dy.C.I.T., Central Circle, Trivandrum. | Vs | M/s M. S. Steels, Sreenikatan, Palachira, Varkala, Trivandrum. PAN:AADFM 9241 J |
| (Appellant) | | (Respondent) |

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| Appellant by | Shri Sudhanshu Shekhar, CIT, D.R. |
| Respondent by | None |
| Date of hearing | 26/09/2017 |
| Date of pronouncement | 26/09/2017 |

ORDER

PER P. K. BANSAL, V.P.

All these appeals have been filed by the Revenue against the separate orders of CIT(A) all dated 20/02/2015. In all these appeals the Revenue has taken the common ground relating to estimating the gross profit by the CIT(A) in assessment years 2006-07 and 2007-08 @2.19% and in assessment year 2008-09 @2.83% in place of 4% taken by the Assessing Officer.

2. None appeared on behalf of the assessee, even though an application for adjournment was filed. The only reason for seeking the adjournment was that the Chartered Accountant has informed that due

to some domestic engagement he will not be able to appear before the Tribunal on the date fixed for hearing. We noted that all these appeals were fixed for hearing on 15/09/2015 and 07/01/2016 but on both the dates, the appeals were adjourned on the request of the assessee. Subsequently, these appeals were fixed on 08/02/2016 and 30/08/2016 but nobody appeared on behalf of the assessee. Therefore, the appeals were adjourned from time to time and ultimately the appeals have been fixed for today. Today also neither the assessee nor anybody on his behalf has appeared, even though the notice of duty sent. We, therefore, in the absence of any plausible reason, reject the adjournment application and dispose of all these appeals after hearing Learned D. R. on merit.

3. So far I.T.A.No.300/COCH/2015 and 301/COCH/2015 for the assessment year 2007-08 and 2008-09 are concerned, we noted that in these cases the tax effect on the income under dispute is less than Rs.10 lac. We further noted that the Central Board of Direct Taxes vide Circular No. 21/2015 dated 10th December, 2015 file no.279 of Misc. 142/2007 – ITJ (PT) has issued the direction in supersession of the Instruction No.5/2014 dated 10/07/2014 in pursuance with the power interested u/s. 268A of the Income Tax Act that no appeal should be filed before this Tribunal in case tax effect does not exceed Rs.10 lac. The "tax effect" in this regard means the difference between the tax on the total income assessed and the tax that what have been chargeable had such total income been reduced by the amount of income in respect of issues against which appeal is intended to be filed. This circular further states that tax will not include any interest thereon the chargeability of interest itself is in dispute. We further noted that under

paragraph 10 which is reproduced as under, it has been mentioned in the circular that this instruction will apply even to the pending appeals.

"10. This instruction will apply retrospectively to pending appeals and appeals to be filed henceforth in High Courts/Tribunals. Pending appeals below the specified tax limits in para 3 above may be withdrawn/not pressed. Appeals before the Supreme Court will be governed by the instructions on this subject, operative at the time when such appeal was filed."

4. In the impugned cases, we noted that the tax effect on the issue under dispute does not exceed Rs.10 lac. In view of this fact as per the instruction, the Revenue is not supposed to press these appeals. We, therefore, dismiss the appeals filed by the Revenue in limine without going into the merits of the cases as in our opinion the circulars issued by CBDT are binding on the departmental officers in view of the provision of Section 268A(1) of the Act. The said view has been taken by Hon'ble Supreme Court in the case of Navneet Lal Zaveri Vs. AAC 56 ITR 198 (SC). We accordingly dismiss both these appeals filed by the Revenue.

5. Now coming to the appeal for assessment year 2006-07 i.e. I.T.A.No.299/COCH/2015. We have heard Learned D. R. and carefully considered the submissions made by him along with the orders of the authorities below. We noted that the main issue involved in this appeal relates to restricting the gross profit rate to 2.19%.

6. The facts of the case, in brief, are that the Assessing Officer made an addition of Rs.77,50,090/- towards the undisclosed income out of the unaccounted sales by applying 4% income on estimated sales amounting to Rs.19,37,52,000/-. When the matter went before the CIT(A), the CIT(A) found that during the course of the search

estimated sale slips were available for 21 days in the month of March, which were quantified at Rs.1,35,62,662/-. On the basis of these slip, the Assessing Officer estimated the sales for the whole of the year at Rs.19,37,52,000/- and applied thereto gross profit @4% and thus made an addition of Rs.77,50,000/-. The CIT(A) estimated the sales at Rs.8,13,75,972/- following the decision of Hon'ble High Court in the case of Rajnik & Co. vs. ACIT [2001] 251 ITR 561 (AP) by estimating the sales six times of these slips found for 21 days and directed the Assessing Officer to estimate the income thereon @2.19% being an average of the gross profit for the three years i.e. the assessment year 2006-07, 2007-08 and 2008-09. Learned D. R. even though vehemently contended that the estimation of the suppression six times of the sales slips seized for 21 days is not correct but could not produce before us any cogent material or evidence which may prove how the estimate made by the CIT(A) in respect of the suppressed sales in accordance with the decision of non Jurisdictional High Court is not correct. No decision of the Jurisdictional High Court or any other High Court was brought to our knowledge. No doubt, the decision of the non Jurisdictional High Court is not binding on this Tribunal but in our view, the decision of non Jurisdictional High Court, if the decision of any other High Court is not there on the same issue, has a persuasive value and this Tribunal being an statutory authority not being the one which has been created under the Constitution of India, is bound to follow the decision of High Court. Thus, we dismiss the ground taken by the Revenue in this appeal regarding the estimation of the unaccounted suppressed sales.

7. Now coming to the ground regarding the estimation on the profit. We noted that the Assessing Officer has estimated the unaccounted

sales in the case of the assessee for 300 days for the year at Rs.19,37,52,000/- by taking the sales of the assessee to be Rs.6,45,841/- per day on the basis of sales slips found at the place of the assessee for 21 days for the month of March and added only the income estimated on these sales by applying a gross profit rate @4%. The Assessing Officer applied rate of 4% by observing as under:

"The assessee has admitted a gross profit at 1.85% in this year. This is very low when compared with other competitors in the same trade. The Indian Veneer Company which is doing only wholesale business has admitted a gross profit @ 3%. The assessee is doing wholesale as well as retail business. After the search took place, the assessee firm itself admitted a higher gross profit @2.83% in the financial year 2007-08. Considering that the assessee is doing both wholesale as well as retail business and the admitted gross profit ratio is very low when compared with the other trader in the same line of business and also the unaccounted sales are not subjected to the payment of sales tax, etc., the assessee's gross profit ratio is reasonably fixed at 4% and the unaccounted income is calculated accordingly."

7.1 While estimating a rate of 4%, we noted that the Assessing Officer has relied on the comparative instance of Indian Veneer Company which is also doing the same business as the assessee does but are in wholesale business. This company has admitted a gross profit @3%. In the case of the assessee it is a fact that the assessee is doing wholesale as well as retail business. The CIT(A) has reduced the rate of 4% to 2.19% because in the case of the assessee a gross profit rate @2.83% was accepted by the assessee during the assessment year 2008-09. We do not agree with the finding of the CIT(A) as relied by Learned D. R. that the gross profit has to be estimated @2.19% of the estimated unaccounted sales. When there is unaccounted sales, the natural inference is that the assessee would have also made

unaccounted purchases. It is fact that in case of a wholesale business, the gross profit is always less as compared to retail business. The assessee in the present case was involved in wholesales as well as retail sales therefore, the gross profit earned by the assessee must have been higher than the gross profit as has been earned by the Indian Veneer Company, on which the Assessing Officer has relied. This is also a fact that while making the sales outside the books of account, the assessee would have saved the sales tax on such sales. The rate of the sales tax on the commodity dealt with by the assessee has not been brought on record so that we could have confirmed the addition to that extent. We do not agree with the finding of the CIT(A) that the Assessing Officer has not brought out the facts of the case where gross profit rate of 3% in identical business have been shown. The correct facts, which we found, are that the Assessing Officer has brought out the fact and given a comparative instance of Indian Veneer Company, which was doing the wholesale business and has admitted a gross profit @3%. In our view, estimation of the profit @2.19% as directed by the CIT(A) is not justified keeping in view the facts and circumstances of the case. The Assessing Officer has also not given the facts at what rate the assessee would have saved the sales tax while making the sales outside the books of account. In our opinion, to end the controversy under the surrounding circumstances, it is appropriate to estimate the profit @3.2%. We accordingly set aside the order of the Assessing Officer and direct the Assessing Officer to estimate the profit @3.2% on the unaccounted sales as has been estimated by the CIT(A) as in our opinion, the estimation of the profit on the basis of the average of the gross profit for the three years derived by the assessee in respect of the accounted sales cannot be the basis for estimating the profit in respect of the unaccounted sales. In respect of the accounted

sales, the assessee would have not saved the sales tax, even though the part of the benefit the assessee might have passed over to the customers. Thus, this ground taken by the Revenue is partly allowed.

8. In the result, the appeals of the Revenue in I.T.A. No. 300/COCH/2015 and 301/COCH/2015 are dismissed whereas appeal in I.T.A.No.299/COCH/2015 is partly allowed.

(Order pronounced in the open court on 26/09/2017)

Sd/.
(GEORGE GEORGE K.)
Judicial Member

Sd/.
(P. K. BANSAL)
Vice President

Dated:26/09/2017
***Singh**

Copy of the order forwarded to :

- 1.The Appellant
- 2.The Respondent.
- 3.Concerned CIT
- 4.The CIT(A)
5. D.R., I.T.A.T., Cochin

Asstt. Registrar