

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 3969/Del/2010 and ITA No. 224/del/2009
(Assessment Year: 2004-05)

And

ITA No. 2143/Del/2012 and ITA No. 4871/Del/2009
(Assessment Year: 2005-06)

Basti Sugar Mills Co. Ltd, (Now merged with Phenil Sugars Ltd w.e.f. 01.04.2010) 207, Essel House, 10, Asaf Ali Road, New Delhi PAN:AAACT0490Q	Vs.	ITO, Ward-16(3), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Kusr Krishna, CA Shri NK Garg, CA
Revenue by:	Shri Rajeev Kumar, Sr. DR
Date of Hearing	22/11/2017
Date of pronouncement	30/11/2017

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal for AY 2004-05 in ITA No. 224/Del/2009 against the order of the Id CIT(A)-XIX, New Delhi dated 19.11.2008 wherein, the assessee has raised 9 grounds of appeal as under:-
2. The assessee has raised the following grounds of appeal in ITA No. 224/Del/2009 for the Assessment Year 2004-05:-
 - “1. *The Id. CIT(A) has erred in law and on the facts in directing the A.O. to examine the allowability of claim of interest expenses disallowed by the A.O. of Rs. 14,28,923/- whereas he should have allowed the claim of the assessee as the interest expenses are fully allowable u/s 36(1) (iii) as the borrowed fund has been used for the purpose of assessee’s business.*
 2. *The Id. CIT(A) has failed to appreciate that the A.O. himself has mentioned in the assessment order that “as the assessee company was running its business of manufacture of sugar on borrowed funds and was also claiming a substantial interest expenses on its term loans and cash credit limits”. Therefore, having noted this finding by the A.O. the interest expenditure should have been allowed by the*

CIT(A) as normal business expenditure and the ground of the assessee should have been allowed.

3. *The CIT(A) has erred in not following the precedent in favour of the assessee in the earlier years. Therefore, also the disallowance of interest should be deleted.*
 4. *The Id. CIT(A) has erred in treating the ground relating to treatment of interest earned Rs. 1,01,13,216/- as alleged income from other sources instead of business income as not pressed. The assessee has pressed the ground which should have been accepted and adjudicated by the CIT(A).*
 5. *Without prejudice to Ground No.4, the assessee submits that details were provided to the A.O. who has reproduced in his order that the interest was on deposits which were pledged for securing bank guarantee for excess sugar realization and molasses storage fund and interest earned from Govind Nagar Sugar Factory Ltd. on running account in their regular dealings. Therefore, the interest income is extricably linked with the business activities of the assessee and should be allowed as part of business income.*
 6. *The Id CIT(A) has erred in law and on facts in confirming the order of the A.O. making the addition on account of receipt of sale of old machinery of Rs.5,98,613/-. The addition as confirmed by CIT(A) is bad and wrong in law. The assessee contends that the profit on sale of old machinery has been reduced in the computation and the fact of same has been given in the block assets by reducing the block as per law and nothing further should be done. The addition made should be deleted.*
 7. *The Ld. CIT(A) has erred in law and on facts and circumstances of the case in dismissing ground no.6 pertaining to alleged addition of Rs.6,91,64,080/- on account of valuation of closing stock has not pressed. The appellant submits that the ground was pressed and should have been adjudicated upon by the CIT(A).*
 8. *Without prejudice to the above, the appellant contends that the addition made is on conjecture and surmises merely based on banker certificate without rejecting the assessee's books of accounts without appreciation the explanation provided by the assessee duly reconciliation with excess records for the stocks available with the company and duly verified by the statutory auditors signing the accounts of the company. The addition made by the A.O. should be deleted.*
 9. *The Id. CIT(A) has erred in confirming the order of the A.O. disallowing interest of 2,37,600/-. The claim of the assessee that the advance was for the supply of machinery to M/s. S.K. Engineering and the disallowance made is arbitrary on assumption and presumption without any nexus, the disallowance should be deleted."*
3. The brief facts of the case is that assessee is a company who filed its return of income originally on 24.11.2006 declaring Nil income. Subsequently notice u/s 148 was issued on 19.12.2006 to regularize the belated return. The assessment u/s 143(3) read with section 147

was made on 31.12.2007. Certain additions were made which were contested before the Id CIT(A) and the appeal of the assessee was partly allowed. The assessee aggrieved with the order of the Id CIT(A) preferred appeal before us.

4. The ground No. 1 of the appeal is with respect to the claim of interest expenses disallowed by the Id AO of Rs. 1428923/-. Ground No. 2 and 3 are also supporting, the issue in the ground No. 1.
5. The Id AR submitted that this issue is squarely covered in favour of the assessee by the decision of the coordinate bench in its own case for AY 1999-2000.
6. The Id DR also fairly conceded the same.
7. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The assessee has submitted a copy of balance sheet of the company wherein the own fund shown by the assessee are far in excess of non-interest bearing advances given. The coordinate bench has considered this issue in assessee's own case in ITA No. 1033/Del/2014 for the Assessment Year 1999-2000, in detail and deleted the interest disallowance vide para No. 6 as under:-

“6. *We have carefully considered the rival contentions and also considered the orders of the lower authorities. The Ld. CIT A has deleted the addition holding that no interest-bearing funds have been directed towards interest free advances to the sister concerns. It was further found that loans were obtained by assessee for specific purposes and which duly represented in the value of the stock. The Ld. CIT further relying on the decision of the Hon'ble Bombay High Court in case of CIT versus Reliance utilities and Power Ltd 313 ITR 340 has deleted the addition holding that assessee has enough own funds which are interest free and which are higher than the amount of advance to the sister concerns. The Ld. departmental representative could not point out any infirmity in the order of the Ld. 1st appellate authority. In view of this, we confirm the finding the finding of the Id CIT appeal in deleting the disallowance of Rs. 15004133/- u/s 36(1)(iii) of the Act. In the result ground no. 1 of the appeal of the revenue is dismissed.*”

8. The case of the assessee further supported by the decision of the Hon'ble Bombay High Court in case of CIT Vs. Reliance Utilities and Power Ltd 313 ITR 340 wherein it has been held that if the assessee has higher noninterest bearing funds available then the non interest bearing advances, then the presumption lies in favour of the assessee that such advances are out of such interest free funds available. In the present case the total interest free shareholders fund available with the assessee is Rs. 6.16 crores whereas the total interest

free loans to the companies is Rs. 61.06. lacs, loan to suppliers is Rs. 93.83 lacs and to other is Rs. 1.18 lacs. Therefore, we direct the Id AO to delete the disallowance of Rs. 1428923/- . Therefore, ground Nos. 1 to 3 of the appeal are allowed.

9. The assessee has raised ground No. 4, 5, 7 and 8 with respect to treatment of interest income of Rs. 10113216/- as income from other sources instead of business income. The Id CIT(A) has stated that ground No. 4 before him on this issue was not pressed. Such observation is at para No. 11 of his order. However, before us the Id AR submitted that this fact have been wrongly stated. To support his contention he submitted the affidavit of Mr. Birendra Kumar Agarwal, Director.
10. He also submitted that such information was also given to the Id CIT(A) vide letter dated 21.06.2009. He further referred to the chart submitted before the 1st appellate authority.
11. The Id DR stated that this ground not pressed before the first appellate authority cannot be agitated now.
12. We have carefully considered the rival contentions and also perused the affidavit given by the assessee as well as the relevant letter filed before the Id CIT(A). It is apparent that in the chart submitted before the Id CIT(A) this issue has been raised. Even otherwise the issue needs to be decided on the merits of the case. Therefore, we set aside ground No. 4, 5,7 and 8 back to the file of the Id CIT(A) with a direction to decide the issue on merits.
13. Ground No. 6 is not pressed before us therefore, same is dismissed.
14. Ground No. 9 of the appeal is with respect to disallowance of interest of Rs. 237600/- on advance given to M/s. SK Engineering. As we have already decided ground No. 1 to 3 of the appeal wherein in the advance of Rs. 98.85 lacs this party was covered. Therefore, for the same reason we direct the Id Assessing Officer to delete the disallowance of Rs. 237600/- on advance to this party. Ground No. 9 of the appeal of the assessee is allowed.
15. In result ITA No. 224/Del/2009 is partly allowed.
16. In ITA No. 3969/Del/2009 for AY 2004-05 is against the order of the Id CIT(A)-XIX, New Delhi dated 14.06.2010 wherein, the claim of the assessee with respect to non granting of TDS credit of Rs. 1840862/- was not accepted.
17. The brief facts are that the assessee has received interest of Rs. 9623833/- which was offered for taxation but the Id Assessing Officer did not grant credit of tax deduction at source from that income of Rs. 1840862/-. The Id Assessing Officer passed Assessment

order u/s 154 rejecting the rectification application of the assessee for allowance of the above credit holding that in the original return filed the assessee has not claimed this credit and has also not filed the revised return. The Id Assessing Officer relied upon the order of the Hon'ble Supreme Court in Goetze India Ltd. Vs. CIT 157 Taxmann1. Assessee preferred appeal before the Id CIT(A), who confirmed the order of the Id Assessing Officer.

18. We have carefully considered the rival contentions and also perused the orders of the lower authorities. Admittedly, the assessee did not make the claim for TDS in the return of income though offered the income of interest from which tax is deducted for taxation. Hon'ble Delhi High Court in CIT Vs. Jai Parabolic Springs Ltd 306 ITR 42 has held that there is no prohibition on the powers of the appellate authorities to entertain the additional claim for the just decision of the case. Therefore, accordingly, we reverse the finding of the lower authorities and direct the Id AO to verify the claim of the assessee of TDS of credit for Rs. 1840862/-, and if found in accordance with the law same may be granted. In the result appeal of the assessee is allowed with above direction.

19. ITA No. 4871/Del/2009 is preferred by the assessee against the order of the Id CIT(A), New Delhi dated 21.10.2009. The assessee has raised the following grounds of appeal:-

“1. *The Id. CIT(A) has erred in directing the A.O. to verify the facts and deciding the issue on the claim of the assessee for Rs.3,13,887 being the amount of Sale of Old Machinery despite assessee 's clear representation and supported by documentary evidence that these are only stores/ spares not fixed assets , the ground of the assessee should have been allowed.*

2. *The Id. CIT(A) has erred in confirming the addition of closing stock of Rs 1,27,69,380/- despite assessee's clear representation, supported by the fact that the stocks of the assessee reflected in the books are counter checked by the other Govt Authorities, audited by Statutory Auditors and therefore the ground of the assessee should have been allowed and addition as alleged unaccounted income of stock not shown in books.*

3. *The CIT (A) has erred in confirming the order of the AO in respect of the following:-*

- | | |
|--|---------------|
| <i>a) Telephone Expenses (Adhoc Disallowed)</i> | <i>52000</i> |
| <i>b) Estimated addition of Interest on NSC (estimated Adhoc amount)</i> | <i>300000</i> |

The telephone expenses are to be allowed as they re incurred for the purpose of business. The estimated addition to income should be deleted.

4 *Without prejudice to ground no 3, if the investment in NSC s being Rs 283105, the maximum interest that is available for the last year is Rs 63416. Therefore the addition of Rs 300000/- is excessive.*

5. *The above grounds are independent and without prejudice to one and another.*”

20. The first ground of appeal is not pressed and therefore, same is dismissed.
21. Ground No. 2 of the appeal is against the addition confirmed by the Id CIT(A) on account of closing stock of Rs. 12769380/-.
22. The brief facts are narrated in para No. 6 of the order of the Id Assessing Officer. The Id Assessing Officer received an information that assessee is showing undervalued stock of sugar in its books of account as compared to stock balance declared before its bankers. It was found that assessee has pledged as at 31.03.2005, 426633 bags of sugar of one quintal. However, in the books of account closing stock was shown at 261191 bags. Therefore, assessee was put the above question, however, the reply was general. The Id Assessing Officer also obtained a certificate from the bank dated 20.03.2007 where the bank manager has also confirmed that the assessee has given the stock as at 31.03.2005 of 426633 bags. Therefore, as assessee could not reconcile the same the Id Assessing Officer made the addition of difference of 8346 bags amounting to Rs. 12769380/-. The assessee carried the matter before the Id CIT(A) who dismissed the same. Aggrieved, the assessee preferred appeal before us.
23. The Id AR submitted that this issue is squarely covered in favour of the assessee by the decision of the coordinate bench for Assessment Year 1999-2000.
24. The Id DR submitted that issue is not covered in favour of the assessee as there was no quantitative difference in that year and even otherwise it was pertaining to earlier years.
25. We have carefully considered the rival contentions and also perused the orders of the lower authorities. We fully agree with the contention of the Id Departmental Representative that the issue is not covered in favour of the assessee by the order of the coordinate bench as in that case in para No. 8 it was noted that there was negligible difference of three bags. In the present case the difference is of 8346 bags. On principle we agree with the findings of the lower authorities, that if a different stock in quantity is shown to the banker then in the books before the revenue authorities the balance difference is required to be added in the hands of the assessee as income. However, as the lower authorities has not given proper opportunity of reconciliation of the stock to the assessee the issue is set aside to the file of the Id Assessing Officer with a direction to the assessee to produce the quantitative register

- maintained before the excise authorities as stated in the reply before the Id AO before the expiry of three months from the date of the receipt of this order and reconcile the difference. The Id Assessing Officer is directed to verify the claim of the assessee and if the stock register balance with the Excise authorities and the bank are not reconciled, to that extent the addition may be made. Accordingly Ground No. 2 of the appeal of the assessee is allowed with above direction.
26. Ground No. 3 is with respect to ad hoc disallowance of Rs. 52000/- made by the Id Assessing Officer pertaining to Mr. Narang and his family out of miscellaneous expenses. The Id Assessing Officer noted that the assessee did not show that how the same have been incurred for the purpose of the business. The Id CIT(A) also upheld the disallowance. The assessee submitted that this is the telephone expense of the director for official use which was reimbursed to him. The Id DR relied on the orders of the lower authorities.
27. We have carefully considered the rival contentions and we direct the Id Assessing Officer to delete the disallowance of Rs. 52000/- out of telephone expenditure as the above expenditure was incurred by the company for the director for official use.
28. The next addition of Rs. 3 lac was made by the Id Assessing Officer on account of accrued interest on post office saving certificate and national savings certificate. The assessee has not shown any interest income during the year on this investments. It was claimed by the assessee that it would be shown when it is received as it is following mercantile system of accounting. The lower authorities confirmed the addition.
29. The Id AR submitted that the total investment of Rs. 283105/- and the addition is made of Rs. 3 lac. He stated that total accrual till date is Rs. 63416/-.
30. The Id DR relied upon the orders of the lower authorities.
31. We have carefully considered the rival contentions. We set aside this issue back to the file of the Id AO to compute the interest income accrued during the year and tax the same as only that much income can be said to have accrued to the assessee during the year. Accordingly, ground No. 3 and 4 of the appeal of the assessee are allowed with above direction.
32. In the result ITA No. 4871/Del/2009 is partly allowed.
33. ITA 2143/Del/2012 is filed by the assessee for AY 2005-06 against the order of the Id CIT(A) dated 24.02.2012, wherein, the penalty u/s 271(1)(c) of Rs. 4372630/- levied by the

Id Assessing Officer was confirmed. The assessee has raised the following grounds of appeal in ITA No. 2143/Del/2012 for the Assessment Year 2005-06:-

- “1. *The CIT(A) has erred in law and on the facts and circumstances of the case in upholding the penalty order of AO levying penalty of Rs.46,72,630/-. The penalty imposed is wrong and bad in law and deserves to be cancelled.*
 2. *The appellant contends that there is no satisfaction discernable in the quantum order, therefore, the penalty levied u/s 271(1)(c) deserves to be cancelled due to lack of jurisdiction.*
 3. *The appellant contends that penalty proceedings are independent of assessment proceedings except for relying on the findings there is nothing else which has been noted in the penalty order. There is no finding of concealment of income or furnishing of inaccurate particulars of income either by AO or by CIT(A). Therefore, the penalty levied deserves to be cancelled.*
 4. *The appellant contends that the AO has accepted the books of accounts and the stock position as per RG register of the Excise department and the cane department's records filed by the assessee to substantiate the stock of sugar declared in the books. Therefore, there is no case for concealment of income or furnishing of inaccurate particulars of income. The AO has relied upon the statement of the bank and nothing more. The penalty u/s 271(1)(c) deserves to be cancelled.*
 5. *The appellant further contends that the earlier management might have provided the information to the bank of higher stock position for obtaining higher CC limits which is a plausible explanation. However, as no fault has been found in the books of accounts or stocks declared by the assessee, the particulars provided are correct and no penalty u/s 271(1)(c) can be levied.*
 6. *The above grounds are independent and without prejudice to one another.”*
34. The issue on which penalty has been levied is on addition of Rs. 12769380/- which has already been set aside by us back to the file of the Id Assessing Officer in ITA No. 4871/Del/2009 with a direction to the assessee to submit the reconciled working of the quantitative details. As the quantum proceedings are set aside the penalty orders cannot be decided first. Therefore, we set aside the penalty orders passed by the lower authority also back to the file of the Id Assessing Officer with a direction to re-compute and levy the penalty after first deciding the issue on quantum addition. Needless to say that the assessee may be given a proper opportunity of hearing before levy of the penalty u/s 271(1)(c) of the Act. Accordingly appeal No. 2143/Del/2012 is set aside to the file of the AO and allowed for statistical purposes.

35. All the above appeals are disposed off accordingly.
Order pronounced in the open court on 30/11/2017.

-Sd/-

(H.S.SIDHU)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated:30/11/2017
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi