

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

**BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA No. 495/CTK/2014
Assessment Year : 2010-2011

DCIT, Circle -1(1), Sambalpur	Vs.	M/s.S.C.Padhee, Balibandha, Sambalpur
PAN/GIR No.AAQFS 7009 F		
(Appellant)	..	(Respondent)

ITA No. 28/CTK/2016: Asst. Year: 2011-12

C.O.No.09/CTK/2015 (arising out of ITA No.495/CTK/2014)
Assessment Year : 2010-2011

M/s.S.C.Padhee, Balibandha, Sambalpur	Vs.	JCIT/DCIT, Circle -1(1), Sambalpur
PAN/GIR No.AAQFS 7009 F		
(Appellant)	..	(Respondent)

Assessee by : Shri N.L.Dash, AR
Revenue by : Shri Kunal Singh, CIT DR

Date of Hearing : 01/08/ 2017
Date of Pronouncement : 04/08/ 2017

ORDER

Per N.S.Saini, AM

The appeal filed by the revenue and cross objection filed by the assessee are directed against the order of the CIT(A)- II, Bhubaneswar dated 16.10.2014 for the assessment year 2010-2011. The assessee has also filed appeal for the assessment year 2011-12 against the order of the CIT(A), Cuttack dated 23.11.2015.

First, we take up the appeal of the Revenue in ITA No.495/CTK/2014 for A.Y. 2010-2011.

2. In Ground No.1 of the appeal, the grievance of the revenue is that the CIT(A) erred in deleting the disallowance of Rs.3,46,04,000/- being remuneration paid to partner.

3. The brief facts of the case are that the Assessing Officer observed that the assessee is a partnership firm having two partners namely, Shri Prashant Kumar Padhee and Shri Sushil Kumar Padhee with 50% share each in the firm. He observed that as per clause 10(II), it has been stated that the amount of remuneration payable to the working partners shall be determined in the manner laid down in Explanation 3 to Section 40(b) of the Income tax Act or any other provisions as may be in force in the Income Tax assessment of partnership firm in the relevant accounting year. It further provided that in case book profit does not exceed Rs.50,000/-, the remuneration will be claimed to the extent of such book profit only. The Assessing Officer observed that during the year under consideration, the assessee firm has paid Rs.3,46,04,080/- as remuneration to the partners. He observed that as per Explanation 3 to Section 40(b) of the Act, for the purpose of this clause, book profit means net profit as shown in the profit and loss account for the relevant previous year computed in the manner laid down in Chapter IV D as increased by the aggregate amount of the remuneration paid or payable to all the partners of the firm if such amount has been deducted while computing the net profit. According to the Assessing Officer, Explanation 3 to

Section 40(b) does not lay down any manner for determining the remuneration payable to the partners of the firm. Therefore, he held that the partnership deed does not provide for quantification of the remuneration payable to the partners and, therefore, he disallowed the remuneration paid to partners of Rs,3,46,04,080/- .

4. On appeal before the CIT(A), the assessee relied on the decision of Hon'ble H.P. High Court in the case of CIT vs. Anil Hardware Store, 323 ITR 368 (HP), wherein, it has been held that the manner of fixing the remuneration of the partners has been specified in the deed but there was nothing which debars them from claiming the maximum amount of remuneration payable in terms of the partnership deed. The method of remuneration having been laid down, the assessee firm is entitled to deduct the remuneration paid to the partners under s. 40(b)(v) of the Act. Reliance was placed on the decision of Pune Benches of the Tribunal in the case of CIT vs. Suman Constructions (2009) 34 SOT 495 (Pune), wherein, it has been held that salary to partners cannot be disallowed only on the reason that the salary is not quantified in the partnership deed.

5. The CIT(A) after considering the submissions made by the assessee held that the provisions of section 40(b) of the Act only employ the term 'authorise' and not 'quantify' in respect of the remunerations payable to partners. He held that the remunerations payable to the partners was authorized by the partnership deed and, therefore, the Assessing Officer

was not justified in disallowing the partner's remuneration paid by the partner and allowed the appeal of the assessee.

6. Ld D.R. relied on the order of the Assessing Officer whereas Id A.R. supported the order of the CIT(A).

7. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. The undisputed facts of the case are that the Assessing Officer disallowed deduction for partner's remuneration of Rs.3,46,04,080/- claimed by the assessee on the ground that the partnership deed did not provide how the remuneration to the partners is to be quantified.

8. On appeal, the CIT(A) relying on the decision of Hon'ble H.P. High Court in the case of Anil Hardware Store and the decision of the Pune Benches of the Tribunal in the case of Suman Constructions (supra) held that the remunerable payable to partners is to be authorized by the partnership deed and not quantified.

9. Ld D.R. could not point out any error in these findings of the CIT(A) by bringing any positive materials on record. Hence, we find no good reason to interfere with the order of the CIT(A), which is hereby confirmed and ground of appeal of the revenue is dismissed.

10. In Ground Nos.2 of the appeal, the grievance of the revenue is that the CIT(A) erred in deleting the disallowance of ground loss made by the Assessing Officer.

11. The brief facts of the case are that the Assessing Officer observed that the assessee has claimed deduction of Rs.9210.98 MTs of fines as ground loss. Out of this, 1050 MTs of fines purchased and placed at the LPG Railway Siding was also claimed to have been totally lost. The other, at the Port amounting to 8160.980 MTs out of the total 77230 MTs taken to the Port out of which 60870 MTs have been exported. The percentage of loss was claimed at 10.57%. The assessee was required to produce evidence in support of the same. He observed that whatever explanations and evidences have been presented do not satisfactorily explain the ground loss to the extent claimed. Accordingly, he disallowed 50% of this loss claimed and added to the income of the assessee. The value of 4605.49 MTs of fines at the Port and the LPG Railway sidings was taken to be Rs.1,10,53,176/- @ 2400/- per MT.

12. On appeal, the CIT(A) deleted the disallowance by observing as under:

"The AO's decision to disallow the ground losses during the impugned F.Y. 2009-10 on estimate basis @50% followed the ostensible logic/rationale as under:

i)	Total ground loss claimed as deduction by the Appellant	9210.98 MTs
ii)	Less: Fines purchased and placed at LPG Railway Siding claimed to be completely lost	1050.00 MTs
iii)	Fines lost in transit at the Port	8160.98 MTs

i) It may be therefore noted that there are two kinds of losses, those at the Railway Siding and those at the Port. The total percentage of ground loss claimed of 9210.98 MTs was computed by the AO as 10.57%. [NB: This computation of the AO is totally unclear and appears to be wrong. 10.57% appears to be the percentage of loss of the iron ore fines lost in transit at the Port of the total stock of

77230 MTs available and taken to the port to be sold (out of which 60870 MTs were sold as exports). The actual percentage of total ground losses is $9210.98 \text{ MTs} / 77230 \text{ MTs} = 11.93\%$. The impugned portion of the assessment order also suffers from bad drafting, being devoid of syntax and dismissive and disregarding of the importance of punctuations].

- ii) According to the AO, the Appellant could not substantiate the ground losses to the extent claimed above. Once again, the computations and the reasonings of the AO appear to be incomplete and therefore incomprehensible while arriving at the conclusions. What he means by the Appellant *"not being able to satisfactorily explain"* is unclear in the absence of any computational findings on the evidences submitted by the Appellant. The only thing that appears reasonably clear is that the AO held that the Appellant had reported 9210.98 MTs of ground losses. There is nothing new or outside the books of accounts and records of the Appellant in this information. "

13. Ld D.R. relied on the order of the Assessing Officer whereas Id A.R. supported the order of the CIT(A).

14. After hearing the rival submissions and perusing the materials available on record, we find that in the instant case, the assessee has claimed ground loss of 9210.98 MTs which comprises of fines purchased and placed at LPG Railway Siding claimed to be completely lost 1050 MTs and fines lost in transit at the Port 8160.98 MTs . The Assessing Officer disallowed 50% of the loss for the reason that the assessee has not satisfactorily explained the loss. The CIT(A) deleted the disallowance made by the Assessing Officer on the ground that the Assessing Officer has not been able to point out why the explanation submitted by the assessee with regard to loss was not acceptable to him. He vacated the disallowance as the Assessing Officer had made adhoc disallowance of 50% of the loss claimed by the assessee without assigning any justifiable reason. Before us, Id D.R. could not point out any specific defect in the

order of the CIT(A). Hence, we find no good reason to interfere with the order of the CIT(A), which is hereby confirmed and the ground of appeal of the revenue is dismissed.

15. In Ground No.3 of the appeal, the grievance of the revenue is that the CIT(A) erred in deleting the disallowance made by the Assessing Officer on suppressed sales of Rs.3,56,20,280/-.

16. The brief facts of the case are that the Assessing Officer found that 14,841.825 MTs of Iron Ore fines was not included in the sale receipts of the assessee. No explanation for the same was offered by the assessee and, therefore, he added Rs.3,56,20,380/- by valuing the same by applying the rate of 2400 per MT.

17. On appeal, the CIT(A) held that the discrepancy of 14,814.825 MTs of fines was explained by the shortage determined at 14,521.515 MTs by the principal surveyor of the Department of Mines. He held that the difference of 320.310 MTs was stated to be on account of transit losses during the trip to the Paradip Port. He further stated that this is further substantiated by the fact that the difference between the quantity despatched from the mines sites to the Port was 44777.08 MTs while the quantity received was 43,756.770 MTs, resulting in the equivalent difference being transit loss as above of 320.310 MTs and, therefore, he deleted the addition of Rs.3,56,20,280/-.

18. Ld D.R. relied on the order of the Assessing Officer and argued that report of the Principal Surveyor of Department of Mines which was filed before the CIT(A) was not produced before the Assessing Officer and, therefore, he has accepted the same in violation of Rule 46A of IT Rules without calling for a remand report from the Assessing Officer and, therefore, the matter should be restored back to the file of the Assessing officer for adjudication afresh.

19. Ld A.R supported the order of the CIT(A).

20. We have heard rival submissions, perused the orders of lower authorities and materials available on record. In the instant case, the undisputed facts are that the Assessing Officer observed that during the year under appeal, the assessee has made sales as under:

(A) Fines	:	58598.595 MTs
(B) 5-18/10/-30	:	35285.710 MTs
© Fines at Port	:	60870.000 MTs

The Assessing Officer also observed that production of 43576.770 MTs was stated to be shown at Port was included in the sales of 58598.595 MTs but in respect of rest of the fines of 14841.825 MTs, no satisfactory explanation was offered. Therefore, he opined that sales receipts of 14841.825 MTs was not reflected in the trading results and by valuing the

same @ Rs. 2400/-per MT arrived at the figure of Rs.3,56,20,380/- and added the same to the income of the assessee.

21. On appeal, the CIT(A) deleted the addition on account of suppressed sale made by the Assessing Officer on the ground that this amount was included in the loss determined by the Principal Surveyor of Department of Mines. The contention of Id D.R. is that the report of the Principal Surveyor of Department of Mines was not given to the Assessing Officer and hence, there was violation of Rule 46A of I.T.Rules as the CIT(A) has relied on the same without calling for a remand report from the Assessing Officer. Ld A.R. could not controvert this argument of Id D.R. of the assessee. In the above facts and circumstances of the case, in our considered view, in the interest of justice, the issue should be remanded back to the file of the Assessing Officer for adjudication of the same afresh after considering the report of the Principal Surveyor of Department of Mines and after allowing reasonable opportunity to the assessee. Hence, this ground of the revenue is allowed for statistical purposes.

22. In the result, appeal filed by the revenue is partly allowed for statistical purposes.

23. The cross objection filed by the assessee is in support to the order of the CIT(A). Hence, the same is infructuous, and hence dismissed.

Now we take up the appeal of the Assessee in ITA No.28/CTK/2016. AY: 2011-12

24. The sole issue involved in the appeal of the assessee is that the CIT(A) erred in confirming the action of the Assessing Officer in disallowing depreciation of Rs.57,03,909/- on plant and machinery on the ground that they were not used during the year for the business of the assessee.

25. The brief facts are the Assessing Officer disallowed depreciation on plant and machinery for Rs.57,03,909/- on the ground that they were not used during the year for the business of the assessee.

26. On appeal, the CIT(A) confirmed the action of the Assessing Officer for the reason that the assessee could not produce any evidence regarding the payment of electricity and diesel specifically and separately for operation of the crusher plant. He also observed that the assessee did not disclose where from the iron ore fines been brought. Whether the same was brought to its plant for processing or the fines have been brought at some other place and exported directly. The assessee failed to produce the evidence of processing if any of the iron ore fines purchased by it.

27. Before us, the arguments of Id A.R. is that the plant and machinery were kept ready for use for the business of the assessee and hence was entitled for depreciation.

28. We have heard rival submissions, perused the orders of lower authorities and materials available on record. In the instant case, the undisputed facts are that the Assessing Officer disallowed depreciation of Rs.57,03,909/- to the assessee on plant and machinery on the ground that they were not used for the business of the assessee during the year under consideration.

29. On appeal, the CIT(A) confirmed the action of the Assessing Officer as the assessee failed to produce any evidence for use of plant and machinery for the business of the assessee. The arguments of Id A.R. is that plant and machinery were kept ready for use for the business of the assessee and hence, the assessee was eligible for depreciation for the same. On a query by the Bench to Id A.R. as to when the plant and machinery in question were put to use by the assessee in the subsequent year, Id A.R. could not reply to the same. Hence, we find no good reason to interfere with the order of the CIT(A), which is hereby confirmed and ground of appeal of the assessee is dismissed.

30. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 04/08/2017.

Sd/-

sd/-

(Pavan Kumar Gadale)
JUDICIALMEMBER

(N.S Saini)
ACCOUNTANT MEMBER

Cuttack; Dated 04 /08/2017

B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : /Revenue: DCIT, Circle -1(1), Sambalpur
2. The Respondent. /Assessee: M/s.S.C.Padhee, Balibandha, Sambalpur
3. The CIT(A)-II, Bhubaneswar
4. Pr.CIT-11, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack