IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR

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

ITA No.188/Rpr/2012
Assessment Year : 2009-2010

ACIT 1(2), Raipur.	Vs.	M/s. Iswar Ispat Industries Pvt Ltd. Plot No.168, Sector -6, Urla Industrial Area , Raipur
PAN/GIR No.AABCI 4258 C		
(Appellant)	..	(**Respondent**)

Assessee by : None
Revenue by : Mrs Shabna Parveen, DR

Date of Hearing : 09/01/ 2018
Date of Pronouncement : 15/01/ 2018

O R D E R

Per Pavan Kumar Gadale, JM

This is an appeal filed by the revenue against the order of the CIT(A)-Raipur, dated 30.7.2012 for the assessment year 2009-2010.

2. None appeared on behalf of respondent-assessee when the case was called for hearing. Therefore, we proceed to decide the appeal of the revenue qua-respondent assessee on the basis of materials available on record and after hearing ld D.R.

3. Ground No.1 of appeal is against deletion of addition of Rs.83,78,135/-made by the Assessing Officer u/s 68 of the I.T.Act on account of low yield percentage and impractical rate of burning loss.

4. The brief facts of the case are that the assessee is a private limited company deriving income from manufacturing and sale of steel item. During the course of assessment proceedings, the Assessing Officer found that the yield of finished goods was shown at 96.66% as against 97.76% shown in the preceding assessment year and 97.84% prior to the preceding assessment year. The GP is shown at 2.52% as against 4.12% shown in the preceding assessment year. The burning loss was shown at 3.34% which is much higher than that shown at 2.24% in the preceding assessment year and before that at 2.16% only. The assessee did not give particulars of quality of raw material purchased during the year and also in the preceding assessment year to establish his contention. The assessee has filed a chart furnishing consumption of electricity units with reference to production, which also shows fluctuation and the consumption power is found to be as low as 63 /MT to as high as 69 units / MT, The Assessing Officer observed that in the month of April 2008 , 1650.282 MT was put to production and per MT electricity consumption was shown at 68 units and the furnace oil consumption was shown at 5 Ltrs. per MT. In the month of December'2008 against finished products of 3521.367 / MT, the power consumption was 69

units per NT. The furnace oil consumption during the relevant period was 53 Ltrs. Per MT and that considering the past consistent record of burning loss oscillating around 2.25%, the burning loss for this year is reasonably accepted at 2.25% and balance 1% of claim of excess burning loss is disallowed. Therefore, adopting the rate of closing stock of finished goods i.e. @ Rs.26637/- per MT, the Assessing Officer worked out the quantum of inflated burning loss at Rs. 83,78,135/-.

5. Before the CIT(A), the assessee submitted that the yield depends on various factors and it cannot be constant. If the quality of ingots purchased is not to the mark i.e. having more carbon content then the yield of steel rolled product would be los and that the appearance of all ingots would be same and one cannot judge the quality by appearance; that it is an accepted position in trade that average burning loss varies between 2,5% to 4% and such burning loss is considered reasonable. The Excise Department which is more concerned with the production and removal of goods for the purpose of levy of excise duty has accepted the production and burning loss shown by the assessee. It was submitted that under central excise rules the assessee is required to maintain register in Form No.IV Rule 173-G; that R.G. 1 register is also required to be maintained; that the Sales Tax Department has also accepted the trading results and sales as declared by the assessee

company; that in assessment year 2007-08 the Assessing Officer had made addition of Rs.5,00,000/- to the trading account on the grounds that G.P. rate of 0.13% was very low and the consumption of furnace oil per metric ton of finished goods was very high i.e. about 102 litres per MT. No defects or discrepancy is found in the account books and that as compared to assessment year 2007-08 the result in the present assessment year 2009-10 are better. It was sub mitted tht the Assessing Officer was not jsutsified in assuming that the burning loss should be only 2.25% and on that basis disallowing burning loss to extent of 1% and further assuming the assessee must have produced 314.530 MT (i.e. 1% of total sale of 31453 MT) over and above what is declared and must have sold the same out of books and that too for Rs.83,78,135/- and thereby the assessee suppressed the income of Rs.83,78,135/- that this is day to day quantitative account of raw material purchased, put to production, goods manufactured and finished products sold and that there is no evidence or material about the suppression of production or sale. The assessing Officer has made some observation about the fluctuation of electric consumption and furnace oil consumption as under:

Month	Power consumption	Oil Furnace consumption
April April 2008	68 Units	55 litres
December, 2008	69 units	53 litres
March 2009	63 units	52 litres

It was further submitted that the so called fluctuation is normal and within reasonable limit and there is nothing abnormal about it. The power consumption in assessment year 2007-08 has varied between 102 to 191 while in assessment year 2008-09 the same has varied between 70 to 103 units. The furnace oil consumption in assessment year 2007-08 has varied between 97 to 113 Litres per ton while in assessment year 2008-09 the same has varied between 45 to 50 litres per ton production as compared to earlier years the variation is not that much fluctuating.

6. The Id CIT(A) after considering the submission of the assessee deleted the addition by observing as under:

> " I have carefully gone through the assessment order, and submissions of the appellant. It is a matter on record that the appellant has maintained quantitative records of raw material consumed and finished product produced. The books of accounts were subject to tax audit which was produced before the A.O. together with bills and vouchers and the same was examined by lest check. The A.O. has not come across any material defect in account so as to hold that any profit has been suppressed. The appellant has satisfactorily explained the reasons for decrease in gross profit and the yield and also variation in consumption. The A.O. has not brought any material on record to disbelieve the book result shown by the appellant. If there is no suppression of material facts, the authority cannot embark upon a speculative assessment of notional profits. The assessment should be based on cogent facts and there should be no vindictiveness or arbitrariness in passing the assessment order, Before rejecting the books of accounts, the department has to prove that the accounts are unreliable, incorrect or incomplete. Accounts

regularly maintained in course of business, duly audited under provisions of the act and free from any qualification by auditors, should be taken as correct unless there are strong and sufficient reason to indicate that they are unreliable. The estimated addition made by the A.O. do not bear any relationship with the specific defects in books of accounts and the A.O. cannot be permitted to make arbitrary addition. I find that the books of accounts are audited. It is seen that the A.O has not pointed out any suppression of production based on any cogent and incriminating material against the appellant. The addition has been made merely on account of variation in percentage of burning loss, It is not the case of the A.O that the Excise Department or the Sales Tax Department has pointed out any suppression of production or sales by the appellant. The A.O has not brought on record any instance of undisclosed production. I am of the considered opinion that the variation in percentage of burning loss or consumption could be a ground for suspicion of the A.O, however, the same alone lacks evidentiary value to hold adversity against the appellant.

8. It is seen that the appellant had explained the reasons for variation in percentage of burning loss and consumption pattern. In my opinion, the reasons mentioned by the appellant are convincing and the same have not been proved as false by the A.O by bringing on record cogent and substantive evidences. 1 find that, the A.O 'has not pointed out any discrepancy in the books of a/cs, bills/vouchers, nor did the A.O opine that the books of accounts were incomplete. It is settled principle of law that no addition can be made on the ground of lower GP rate, until and unless, the books of accounts have been rejected by the A.O. by invoking the provisions of Section 145. after giving the appellant a reasonable opportunity of being heard. Further, it is equally settled legal position that the books of accounts cannot be rejected merely on the ground of low OP rate. Rather, the A.O has to bring on record specific defect in the books of accounts of the appellant as a result of which reasonable profits cannot be deduced. I find that the decision of the Hon'ble Kerala High

Court in the case of St. Teresa's Oil Mill Vs. State of Kerala (1970) 76 1TR 365 (Ker) is providing strength to the case of the appellant in which 'it has been held that strong and sufficient reasons must be given to indicate that they are unreliable-mere disparity in consumption of electricity in certain months cannot be the reason for rejection of accounts-such variation can be due to various factors beyond the control of assessee-rejection, therefore, not justified. The A.O examined the audited books of account but had not pointed out any specific discrepancy nor has he detected any suppression in sales or inflation in purchases/expenses. No evidence whatsoever was brought on record to prove that, the appellant, in fact, earned more than that returned as per the books of account kept in the regular course of business. The assessment order is evidence to the fact that there was no specific finding given by the A.O to the effect that the method employed by the appellant was such that correct profits could not be deduced there from. It is also not the case of the appellant that it has not followed the mercantile system of accounting. It is also not the case of the appellant that it has not followed any particular accounting standards which are notified by the Central Government.

9. It is also not in dispute that the appellant has maintained books of account regularly and these are duly audited u/s 44AB of the IT. Act and the quantitative details were prepared and were duly audited. The variation in percentage of burning loss, In the absence any cogent reasons could not. by itself, have been a ground to hold that proper income of the appellant cannot be deduced from the accounts maintained by it and consequently, could not have been a ground to reject the accounts invoking section 145(3) of the Act, There is no finding in the assessment order of the A.O that the actual cost of finished goods purchased by the appellant was less than what was declared in the account books, There is no finding by the A.O that actual quantity of finished goods sold by the appellant was more than what it was shown in the accounts books, There is no finding by the that the finished goods were sold by the appellant at a price higher than what was declared in the account books. From the Tax Audit Report, it is discernible that

the appellant' did maintain stock records and the A.O has not pointed out any incorrectness in the same.

10, As assessment has to be completed on the basis of records and material available before the AO and personal knowledge and excitement on events arid extraneous facts should nor lead the AO to a State of affairs where the salient/primary/direct evidences are overlooked and should not influence the AO for resorting to adhoc additions/disallowances.

11. In a case where the transactions of the appellant have been accounted, documented and supported by the material evidences for deriving logical conclusions, without proving falsity of the same, adhoc additions/disallowances should not be made by the AO in a routine manner merely on presumption, probabilities, suspicion and surmises since the same action of the AO degenerates the spirit for which the quality assessments were emphasized by the Board, (Mukesh R Marolia v. Add!. CIT [2006] 6 SOT 247 Mumbai).

12. If general/casual/routine observations of the AO are to be considered as material evidence for the purpose of framing an assessment, the AO shall have blanket and arbitrary powers to dispose of the scrutiny assessments according to his whims and fancies which is not the spirit of the circulars issued by the Board on scrutiny assessment. An assessment cannot be made arbitrarily and in order that an assessment can be sustained, it must have nexus to the material on record. (CIT v. Mahesh Chand [1983] 199 ITR247, 249 (All.).

13. It is the settled position that, though the AO has very wide powers and is not fettered by technical rules of evidence and pleadings, there is one over-riding restriction on his judgement and that is, that, he must act honestly and diligently on the material, howsoever, inadequate it was, and not vindictively, capriciously or arbitrarily. "Probability cannot be construed as material evidence to form .an opinion by-the AO to conclude an assessment and for drawing adverse inference against the appellant unless there is evidence to substantiate such probable inference.".

14. Assessment has to be made based on the real income theory, i.e., income to be determined t**ax**ation must invariably be proved to have been the correct quantum of income earned by the appellant during the relevant previous year and the one presumed to have been earned.

15. The presumptions and hypothetical estimations and observations made by the A.O. for making the impugned estimated addition, were extraneous, irrelevant and opposed to the facts obtaining from the record. The fate of the appellant could not be decided by the A.O. on mere surmises or probabilities (Northern Bengal Jute Mills Trading Co. Ltd- v. CIT (1968) 70 1TR 407 (Cal). The mere existence of reasons for suspicion would not tantamount to evidence (Cal. HC in Narayan Chandra Baidya v. CIT (1951) 20 ITR 287 (Cal.). The AO was not entitled to make pure guess and make the impugned assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the same. The rule of Law on this subject has been fairly and rightly stated by the Lahore HC in Seth Gurmukh Singh v. CIT (1944) 12 ITR 393 (Lah.) [Dhakeshwari Cotton Mills Ltd. v. CIT (1954) 26 ITR 775, 782 (SC). It was observed by the SC in Dy, Commissioner of Agricultural Income Tax and Sales Tax v. Travancore Rubber and Tea Co. (1967) 20 STC 520 that "in all cases of taxation the burden of proving necessary ingredient laid down by law to justify taxation is upon the authorities." Since this was not proved against the appellant on the strength of evidence, the AO's action in this regard is opposed to the legal standards enumerated above.

16. 1 find that there is no dispute with regard to the fact that the appellant has maintained quantitative details. In the case of CIT vs. Smt Poonam Rani 326 ITR 223 (Delhi) it was held that where an addition was made because of mere fail in gross profit without any defect in the accounts except for the. absence of stock register- deletion of addition was upheld by the High Court In Ashok Refractories Pvt Ltd. Vs. CIT (2005) 148 Taxman 635 (Cal.) it was held that the rejection of the books of account only in the absence of stock register having regard to the availability

of the other materials from-which the income could be deduced; was contrary to the proviso to section 145 unless there was a finding or opinion either that the records were incorrect and incomplete or that the method of accounting applied was such that the income could not be deduced from the accounts so maintained by the appellant. The ground that the item wise stock register was not maintained, and, therefore, the accounts were-sought to be rejected, was absolutely perverse and could not be sustained in the absence of any opinion expressed or any finding arrived at to the effect that the accounts maintained were incorrect or that the method of accounting plied was such that the income could not be deduced. In the absence any such finding, the account books could not be rejected merely on the ground that item wise stock was not maintained in the stock register. Thus, the rejection of account books was not justified. In ITO v. Bothra International (2008) 117 TTJ (Jd.) 672, it was held that where the A.O laid no material on record to suggest that there had been any suppression of income nor that the appellant carried any activity outside the hooks, merely because of decline in GP rate, books of account could not be rejected. In Delhi Securities Printers v. Dy. CIT [2007] 15 SOT 353 (Delhi) it was held that rejection of books of account merely because appellant has not maintained stock .register,, without pointing out any specific defects in books of account of any nature whatsoever, could not be said to be justified. Such adhoc addition is also unsustainable in view of the decision of the Hon'ble High Court of Gujarat in CIT Vs. Sanjay Oil Cake Industries (2005) 197 CTR (Guj) 520 wherein it was held that the A.O having not pointed out any specific omission or suppression in the assessee's books of account nor the excise or sales tax authorities having found any discrepancy or irregularity in the maintenance of stock and records, addition made on account of suppressed production and sales could not be sustained. Considering the facts and circumstances of the case, as also decisions relied upon by the appellant and those cited above, I am of the view that there was no finding to the extent

> that the accounts were not correct and complete or that the A.O was of the opinion that the income could not be deduced from the_ accounts maintained by the appellant. In the absence of such conclusions, such estimated addition, particularly without bringing on record any instance of undervaluation of closing stock or suppression in sales or inflation in purchases or expenses, cannot be made to the income returned based on audited account, Hence, the estimated addition-being without any evidence- is deleted."

7. Ld D.R. vehemently opposed the findings of the CIT(A) in deleting the addition and submitted that since the assessee did not furnish any particulars of quality of raw materials purchased during the year and also in the preceding year, the claim of excess burning loss was rightly disallowed by the Assessing Officer.

8. We have heard Id D.R. and perused the materials available on record. The undisputed facts of the case are that the Assessing Officer disallowed the burning loss on the ground that the burning loss was shown at 3.34% which is much higher than that shown in the preceding assessment year and that the assessee did not give any particulars of quality of raw material purchased during the year and also in the preceding assessment year. It was explained by the assessee that yield depends on various factors and it cannot be constant, The assessee has maintained quantitative records of raw material consumed and finished product produced. The books of account were subject to tax audit which was produced before the Assessing Officer.

The assessee has explained the reasons for variation in percentage of burning loss and consumption pattern. The observation of the CIT(A) that there is no finding by the Assessing Officer that the accounts were not correct and complete or income could not be deduced from the accounts maintained by the assessee was not controverted by the Id DR. In view of above, we do not find any reason to interfere with the order of the CIT(A), which is hereby confirmed and ground of appeal of revenue is dismissed.

9. Ground No.2 of appeal relates to deletion of addition of Rs.50,62,705/- made by the Assessing Office on account of commission paid on purchase.

10. The Assessing Officer found that the assessee has claimed an amount of Rs.50,62,705/- as commission paid to different persons. Therefore, the Assessing Officer required the assessee to explain the genuineness of the claim alongwith basis on which the commission was worked out, details of relation of the recipients, relatives, friends, employees and associates concerns, complete address, copy of ledger account to whom the commission was paid. The assessee only submitted that the expenditure was incurred for the business purposes but did not submit the details to substantiate the commission payment. From the details filed before the Assessing Officer by the assessee, it was observed that most of the persons are relatives of members/directors of the assessee company staying on the same address and that the name of Shri Harish Chouhan, who happened to

be accountant of the company also appears in the list of purchase commission receipts. It is also seen that the payment were paid in one go and that though TDS was made allegedly on the date of payment, the same was paid in the month of April.. In view of above, the Assessing Officer was of the opinion that the payment of commission was conclusively substantiated and, therefore, he disallowed Rs.50,62,705/- treating it as colorable device.

10. On appeal, the CIT(A) observed that the assessee deducted TDS from the payments made to the parties and deposited the same through banking channel. The Assessing Officer had doubted the payment of commission as the most of the parties to whom the commission was paid were residing in the same locality. They have filed their income tax returns in which they have shown the commission payment as their income. Therefore, it is proved that all such payments have been made for the services rendered by them.

11. The CIT(A) **in** the impugned order has observed that the assessee has submitted all bills issued by all such persons, wherein, it is abundantly clear that the bills contained the name of the parties in respect of whom commission was paid, quantity and rate. He also observed that the persons had offered the commission income received from the assessee for taxation in the return of income. Thus, the CIT(A) was convinced that there is no

such irregularities in payment of commission to the parties and, accordingly, deleted the addition made by the Assessing Officer.

12. Ld D.R. submitted that the assessee has furnished the bills for the first time before the CIT(A) and not produced before the Assessing Officer.

13. We, after considering the submission of Id D.R. and materials available on record, find that the copies of bills which were furnished before the CIT(A), were not furnished before the Assessing Officer to take a view that the commission payment was actually paid to them. As regards to the findings of the Assessing Officer that most of the parties were relatives to the assessee, the CIT(A) was of the view that the Assessing Officer has not properly enquired into the matter to prove that commission payment made to the parties, ultimately flown to the assessee. Looking into the facts and circumstances of the case, we set aside the order of the CIT(A) and restore the matter back to the file of the Assessing Officer to re-adjudicate the payment of commission after conducting a thorough enquiry into the matter. The assessee is directed to produce all bills and documents to substantiate its claim before the Assessing Officer, who will decide the matter after affording proper opportunity of being heard to the assessee. This ground of appeal of the revenue is allowed for statistical purposes.

14. Ground No.3 of appeal relates to deletion of disallowance of Rs.3,32,885/- made by the Assessing Officer u/s. 40A(3) of the Act.

15. The Assessing Officer observed that the assessee has made freight payments to different parties exceeding Rs.20,0007- in a day. Therefore, by invoking the provisions of section 40A(3) of the Act, the Assessing Officer disallowed Rs,3,32,887- and added the same to the income of the assessee.

16. Before the CIT(A), the assessee submitted that the Freight Payable Account is for the preceding year. Freight Liability provided in the accounts and paid during the year under consideration by debiting Freight Liability Account. The payments are not expenditure for the year. The payments of freight on raw materials are made bill wise or transaction wise and the payments were separate. The freight advance is not expenditure for the assessee company and the customer subsequently reimburses the freight advance.

17. The CTT(A) deleted the addition mainly on the ground that the bill revealed that expenditure on account of freight did not exceed Rs.20,000/-in a single case and the payment is an advance.

18. After considering the submissions of Id D.R. and perusing the materials available on record, we find that the freight payment is an advance which is subsequently reimbursed to the assessee company. Hence, the provisions of section 40A(3) are not applicable in this case. Hence, we

confirm the order of the CIT(A) and dismiss this ground of appeal of the revenue.

19. Ground No.4 of appeal relates to deletion of addition of Rs.27,05,756/- on account of under valuation of closing stock.

20. The relevant facts of the case are that the Assessing Officer, on verification of the valuation of closing stock of finished goods and raw material, found that the same were undervalued. The Assessing Officer required the assessee to explain the same. The assessee submitted that valuation of closing stock has been made at the cost or market price whichever is less as per regular practice. In respect of finished products, it was submitted that the market rate as on 31.3.2009 was Rs.24,100/- per MT and per MT production cost was Rs.29,901/-. Therefore, the valuation of finished goods was made on the basis of market rate. In support of market price, the assessee has filed copy of sale invoice dated 1.4.2009. On verification of the same, the Assessing Officer found that the sale rate was worked out excluding excise duty, VAT, cess, etc, therefore, the valuation is against the provisions of section 145A of the Act. After analyzing the valuation of closing stock at the cost or market price, purchase value of raw materials and closing stock of other consumables, the Assessing Officer worked out the under valuation of finished goods, raw material and furnace oil at Rs.27,05,756/- and added the same to the income of the assessee.

21. On appeal, the CIT(A) deleted the addition by observing as under:

" I have carefully gone through the assessment order and submission of the appellant. I am of the considered opinion that liability to pay excise duty arises immediately after production of goods and not on sale of goods. Only for administrative purposes, the payment of excise duty is made subject to removal of goods. Thus, there is no merit in the argument of the appellant as regards incurrence of liability towards excise duty. Therefore, it was obligatory on the part of the appellant to include excise duty while valuing closing stock of finished goods. However, at the same time, the appellant was entitled to claim deduction in respect of provision for excise duty. Thus, I am of the considered opinion that the default on the part of the appellant is revenue neutral. Hence, no addition is warranted on account of non inclusion of excise duty in the value of inventory. Accordingly, the addition made by the AO is deleted.

It is seen that, the A.O has computed the value of inventory of raw materials and furnace oil based on average purchase cost. It is not the case of the A.O that the appellant has changed the method of valuation of inventory. As per Accounting Standard -*2* "Valuation of Inventory" which has also been notified by the Central Government for the purposes of Section 145, inventory can be valued at lower of cost or net realizable value. It is the prerogative of the appellant to decide the method to be adopted for determination of cost. Furthermore, the method adopted by the appellant i.e. FIFO method is very much recognised under the said accounting standard. In the instant case, the appellant has valued the inventory at cost being lower than the net realizable value. It is equally settled that the A.O does not have the power to recompute the cost using any other method in disregard to the method adopted by the appellant which is not only recognised but also consistently followed by the appellant. It is not the case of the A.O that the appellant has undervalued the cost to reduce the value of closing stock. As the valuation has been made as per the prescribed norms, there is no merit in the addition made by the AO. Hence, the additions are deleted.

22. We have heard ld D.R. and perused the record of the case. We have gone through the findings of the CIT(A) on this issue. Before us, ld D.R. could not bring any material on record to show any good reason to interfere with the order of the CIT(A), which is hereby confirmed and ground of appeal of revenue is dismissed.

23. In the result, appeal of the revenue is partly allowed for statistical purposes.

Order pronounced on 15/01/2018.

Sd/- sd/-

(N.S Saini) (**Pavan Kumar Gadale)**
ACCOUNTANT MEMBER **JUDICIALMEMBER**

Raipur; Dated 15 /01/2018
B.K.Parida, SPS

Copy of the Order forwarded to :

1.	The appellant: ACIT 1(2), Raipur.
2.	The Respondent. M/s. Iswar Ispat Industries Pvt Ltd. Plot No.168, Sector -6, Urla Industrial Area , Raipur
3.	The CIT(A)- Raipur
4.	Pr.CIT- Raipur
5.	DR, ITAT, Raipur
6.	Guard file. //True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Raipur