

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

**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**ITA Nos. 554 to 557/VIZ/2014
(Asst. Years : 2006-07 to 2009-10)**

Kolluri Rama Swamy,
Prop. M/s. K.K. Enterprises,
47-7-44/1, Dwaraka Nagar,
Visakhapatnam.

v. DCIT, Circle-1(1),
Visakhapatnam.

PAN No. ACOPK 0638 G
(Appellant)

(Respondent)

Assessee by : Shri G.V.N. Hari, Advocate.
Department By : Shri Deba Kumar Sonawal, CIT DR

Date of hearing : 17/07/2018.
Date of pronouncement : 25/07/2018.

ORDER

PER V. DURGA RAO, JUDICIAL MEMBER

These are the appeals filed by the assessee against common order of the Commissioner of Income Tax (Appeals), Visakhapatnam, dated 18/08/2013 for the Assessment Years 2006-07 to 2009-10. By a common order dated 10/04/2017, this Tribunal has disposed of all the appeals. Subsequently, assessee filed Misc. Application Nos. 37 to 40/VIZ/2017 to recall the order passed by the Tribunal on the ground that while passing the order,

Tribunal has not adjudicated ground Nos.5 & 6 raised by the assessee. The Tribunal vide order dated 18/04/2018, has recalled the common order passed in these appeals to adjudicate ground Nos. 5 & 6. For the sake of convenience, ground Nos. 5 & 6 raised in ITA No.556/VIZ/2014 for Assessment Year 2008-09 are taken up for hearing, which are as follows:-

- "5. The Commissioner of Income Tax (Appeals), Visakhapatnam, ought to have at least considered the alternative grounds raised by the appellant instead of relying on the information furnished by the DRI Department of Customs Authorities, which were re-produced by the Assessing Authority in his order, which was again re-iterated by the learned Commissioner of Income Tax (Appeals), Visakhapatnam. The Assessing Authority ought to have made independent enquiries when the appellant had vehemently contested the allegations made by the DRI Department of Customs Authorities as the Income Tax proceedings are entirely different from the proceedings of the Customs Department even though it has some evidentiary value for the statement sent by the Customs Authorities. Hence, the appellant prays the Hon'ble Bench to grant relief.*
- 6. The Assessing Authority was also not justified in invoking the Provisions under Section 69C of the I.T. Act in respect of alleged under invoicing instead of recasting the Profit and Loss Account as contested by the appellant in this regard. Hence, the action of the Assessing Authority, which action was confirmed by the learned Commissioner of Income Tax (Appeals) in this regard may kindly be dismissed.*

3. Facts of the case, in brief, are that the assessee is an individual, engaged in the business of selling imported used excavators, bulldozers, graders and also spare parts through his proprietary concern M/s. K.K. Enterprises. For the Assessment Year 2008-09, assessee filed his return of income on 29/10/2008

declaring total income of Rs. 91,71,680/-. There was a search conducted by the Directorate of Revenue Intelligence (for short, 'DRI') Chennai unit and Hyderabad unit on 10/12/2008 on the business and residential premises of the assessee. During the course of search, imported goods & equipments worth Rs. 8.28 crores were seized. Apart from, laptops, hard disc drives, mobile handsets and incriminating documents were also seized. The statements of assessee, his wife, his employees and associates were recorded. One of the overseas supplier Shri Lim Eng Bee, Managing Director of M/s. EB Me Sun Pte Ltd., Singapore was also examined. Statements of Shri Girish Hindelkar, proprietor of Mamta Exim Services (MES), CG International (CGI), the concerns which were utilized for import of equipment / machinery by the assessee were recorded. The DRI authorities after the scrutiny of the documents seized and analysis of GEQD reports and after inquiries with the assessee and his associates on these documents, came to the conclusion that the assessee was involved in under valuing of imported goods, it has declared lesser value, than the actual value of the goods imported from the invoices submitted for customs to avoid customs duty and the difference between the invoice value and the actual value paid to the overseas suppliers through non-banking channels. The

assessee has admitted before the DRI that he had involved in undervaluation of the goods imported and paid an amount of Rs.150 lakhs towards differential duties. In the backdrop of the facts and circumstances of the case, we would like to adjudicate the above ground Nos. 5 & 6 raised by the assessee.

4. The sum and substance of the ground No.5 raised by the assessee is that the Assessing Officer and the Id. CIT(A) have not passed the orders independently and it only passed on the information furnished by the DRI, Department of Customs Authorities and submitted that the report furnished by the DRI cannot be considered as a sole information to make the addition.

5. On the other hand, Id Departmental Representative has submitted that the assessee has not furnished any material neither before the Assessing Officer nor before the Id. CIT(A). Therefore, both the authorities below decided the case based on the information furnished by the DRI and requested that the orders passed by the authorities below should be upheld and the grounds raised by the assessee may be dismissed.

6. We have heard both the sides, perused the material available on record and orders of the authorities below.

7. The assessee has not filed any information neither before the Assessing Officer nor before the Id. CIT(A), even before the ITAT also. Therefore, under these facts and circumstances of the case, the Assessing Officer has considered the information furnished by the DRI, Department of Customs Authorities and assessment is passed, which was confirmed by the Id. CIT(A). Even before us, the assessee has not filed any independent information in respect of addition made by the authorities below. Therefore, we find no reason to interfere with the order passed by the Id. CIT(A). Thus, this ground of appeal raised by the assessee is dismissed.

8. Insofar as ground No.6 is concerned, Id. counsel for the assessee has submitted that the provisions of section 69C have no application to the assessee's case. Alternatively, it was submitted that Assessing Officer and the Id. CIT(A) only considered 'under invoicing' and not considered 'under invoicing sales'. Therefore, it is submitted that only profit element has to be subjected to addition and not the entire amount. To support the above proposition, Id. counsel has relied on the assessment order passed in Assessment Year 2008-09 at page No. 19 & 20, para 7.3 & 7.3.1, which is the statement given by Shri A. Viswanadham, sales head of M/s. K.K. Enterprises on 10/12/2008 and submitted that only profit may be estimated.

9. On the other hand, Id. Departmental Representative has pointed out from the order of the Id. CIT(A) at page No. 9 & 10, para No. 10.3, wherein assessee himself admitted that he sold the imported machinery at the rates at which they were recorded in the books of account. Therefore, under invoicing the sales does not arise and the statement given by Shri A. Viswanadham, dated 10/12/2008 has no relevancy. Id. Departmental Representative further submitted that the entire case of the department is under invoicing the imported goods and declaring the lesser value than the actual value for goods imported. The invoices submitted for the customs to avoid customs duty on the difference between the invoice value and the actual purchase value paid to the overseas supplies through non-banking channels. He also pointed out that before the Assessing Officer assessee himself admitted in reply to a query that he has not under invoicing the sales. The admission made is only a creation by the DRI, but not made any statement in respect of under invoicing. As the issue under invoicing sales does not arise in this appeal, therefore the alternative plea raised by the assessee may be dismissed.

10. We have heard both the sides, perused the material available on record and orders of the authorities below.

11. The first argument raised by the Authorised Representative for the assessee of the assessee is section 69C has no application. The assessee has raised a similar argument before the Id. CIT(A). The Id. CIT(A) considered the same and passed the order which is as follows (page No. 27 & 28):- *“a plain reading of the proviso to section 69C would shows that section becomes applicable where the assessee has incurred any expenditure and offers no explanation about the source or the explanation offered by him was not satisfactory. The seized materials, GEQD reports and the statements of the assessee and various persons clearly go to show that the assessee has incurred certain expenditure more than what is stated in the invoices, and the assessee also failed to explain the source for such expenditure. Therefore, I am of the view that the Assessing Officer has rightly invoked and applied section 69C of the Act. The provisions of section 69C do not lay any pre-condition that the books of account should be rejected before invoking the section.”* The Id. CIT(A) has considered section 69C of the Act and gave a finding that the assessee has incurred expenditure more than what is stated in the invoice; assessee failed to explain the source for the expenditure. Therefore, Assessing Officer has rightly invoked section 69C of the Act and confirmed his order by the Id.CIT(A). In view of the

above, we find no infirmity in the order passed by the Id. CIT(A). Thus, this plea raised by the assessee is rejected.

12. Insofar as alternative plea raised by the assessee is that the Assessing Officer has only considered under invoicing of imported goods and not considered under valuation of sales and submitted that the only profit element has to be subjected to addition and not the entire amount. Insofar as this plea is concerned, the DRI authorities after scrutiny of the documents seized and analysis of GEQD reports and after inquiries with the assessee and his associates and relevant documents, came to the conclusion that the assessee was involved in under valuing of imported goods, it has declared lesser value, than the actual value of the goods imported from the invoices submitted for customs to avoid customs duty and the difference between the invoice value and the actual value paid to the overseas suppliers through non-banking channels. The assessee has admitted before the DRI that he had involved in undervaluation of the goods imported and paid an amount of Rs.150 lakhs towards differential duties. The assessee has not produced any evidence with regard to under invoice the sales neither before the Assessing Officer nor before the Id. CIT(A) even before us also. There is no merit in the plea

raised by the assessee, therefore, it has to be rejected. That apart has pointed out by the Id. Departmental Representative at page Nos. 51 to 53 of the assessment order, a statement given by the assessee before the DRI on 24/03/2010 particularly, Assessing Officer has raised question No.7 thereafter the Assessing Officer specifically asked that how you are selling the machines, by cash or cheque, the assessee submitted that by cheque and some by cash. The Assessing Officer further asked that in your statement to DRI you have stated that machines are sold and amounts are taken in 60% in cheques and 40% in cash and that 60% price is shown in the books of accounts, is it correct, the assessee submitted that it is DRI's creation only, they have dictated me to write the statement like that. Before the Id. CIT(A), the assessee has filed an additional evidence dated 10/10/2013 which was forwarded to the Assessing Officer for his comments. In the remand report dated 29/10/2013, the Assessing Officer specifically made a mention that the Assessing Officer has taken a stand that the invoices provided by these parties were undervalued and therefore cannot be taken as a genuine and it may not be out of place to mention that the assessee has admitted the under valuation of the goods before the DRI, Hyderabad unit and paid an amount of Rs.150 lakhs towards

differential duties. The remand report received by the Id. CIT(A) has been forwarded to the assessee vide letter dated 21/11/2013. The assessee submitted his explanation dated 31/01/2014 to the remand report stating that there is nothing to comment. Now raising the issue of under invoicing the sales, cannot be considered. In his letter dated 10/10/2013, which was reproduced at page No.10 (para3) of the Id. CIT(A)'s order, wherein assessee has submitted that the imported machinery was sold at the rates at which they were recorded in the books of account. Therefore, it has to be concluded that as per the assessee himself, imported goods only sold as its recorded rates in the books of account and therefore, it cannot be presumed based on the submissions by the Id counsel for the assessee that the assessee is undervalued the sales also. The assessee has not filed any evidence in this regard. In view of the above facts, the statement given by Shri A. Viswanadham, sales head of M/s. K.K. Enterprises, dated 10/12/2008 has no relevancy, the same cannot be considered. Therefore, there is no merit in the plea raised by the assessee and the same is deserves to be rejected. Accordingly, we reject the same. The same plea has been raised before the Id. CIT(A), the Id. CIT(A) considered the same and observed that assessee has not given any explanation for the

source of impugned expenditure incurred. It was only argued that the assessee has not indulged and no explanation was given on indiscriminating material noticed. It was also argued that sales admitted by the assessee was correct. Therefore, Id. CIT(A) has rejected the alternative plea raised by the assessee. In view of our above finding and also considering the order passed by the Id.CIT(A) in respect of alternative plea with regard to profit element, we find no merit in the plea raised by the assessee, the same is dismissed.

13. Since facts involved in ITA Nos. 554, 555 & 557/VIZ/2014 are similar to the facts involved in ITA No.556/VIZ/2014, our findings in preceding paragraphs shall apply *mutatis mutandis* to ITA Nos. 554, 555 & 557/VIZ/2014 also.

14. In the result, in all the appeals ground Nos. 5 & 6 raised by the assessee are dismissed.

Order Pronounced in the open Court on this 25th day of July, 2018.

Sd/-
(D.S. SUNDER SINGH)
Accountant Member

sd/-
(V. DURGA RAO)
Judicial Member

Dated : 25th July, 2018.

vr/-

Copy to:

1. *The Assessee - Kolluri Rama Swamy, Prop. M/s. K.K. Enterprises, 47-7-44/1, Dwaraka Nagar, Visakhapatnam.*
2. *The Revenue - DCIT, Circle-1(1), Visakhapatnam.*
3. *The CIT-1, Visakhapatnam.*
4. *The CIT(A), Visakhapatnam*
5. *The D.R.*
6. *Guard file.*

By order