IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. N. K. CHOUDHRY, JUDICIAL MEMBER

I.T.A. No. 65/Asr/2016
Assessment Year: 2006-07

PMS International Pvt. Ltd., Village: Jamalpur, G.T. Road, Phagwara [PAN: AACCP 1274G]	Vs.	Addl. Commissioner of Income Tax, Phagwara Range, Phagwara
(Appellant)		**(Respondent)**

Appellant by : Sh. Tarun Bansal (Adv.)
Respondent by: Sh. Rajeev K. Gubgotra, (D.R.)

Date of Hearing: 04.07.2018
Date of Pronouncement: 31.07.2018

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee arising out of the Order by the Commissioner of Income Tax (Appeals)-2, Jalandhar ('CIT(A)' for short) dated 20.11.2015, partly allowing the assessee's appeal contesting its assessment u/s. 143(3) r/w s. 142(2A) of the Income Tax Act, 1961 ('the Act' hereinafter) dated 10.07.2009 for the Assessment Year (AY) 2006-07.

2. The appeal raises seven grounds, which we shall take up in seritiam, with ground 1 being general in nature, warranting no adjudication.

3. Ground 2 impugns the disallowance u/s. 40(a)(ia) at Rs.5,81,978/- on account of non-deduction of tax at source (TDS) on the following sums:

(a) Shipping expenses : Rs.3,52,434/-

(b) Job work expenses : Rs. 91,620/-

(c) Freight expenses : Rs.1,37,924/-

Qua the first amount, the assessee relies on the order by the tribunal in its' own case for the same year (AY 2006-07), i.e., in appeal against a demand raised by the Revenue u/s. 201 and 201(1A) of the Act *qua* the said sum (in ITA No. 257/Asr/2014, dated 22.03.2016/PB pgs. 22-31). The ld. AR, the assessee's counsel, Sh. Tarun Bansal, Advocate, would toward this take us through the relevant part of the said order. The tribunal vide para 17 thereof has cancelled the demand aforesaid, i.e., *qua* the impugned sum of Rs.3,52,434/- claimed as shipping expenses. The ld. DR would object, stating that the payments are, firstly, not to a non-resident, as apparent from the fact that the Assessing Officer (AO) had invoked section 40(a)(ia) and not section 40(a)(i). Two, the expenditure, though classified as shipping expenses in accounts, is in the nature of clearing and forwarding expenses, covered u/s. 194C, as rightly applied by the Revenue. As observed by the Bench during hearing, even as we agree that a dichotomy attends the adjudication with reference to the facts on record, the fact of the matter is that the assessee has been held as not in default *qua* the TDS on the impugned sum. How could, then, one may ask, section 40(a)(ia) be regarded as applicable? The order by the tribunal, as apparent from the applicable monetary limits u/s. 268A of the Act, precluding the Revenue from challenging the same in further appeal, has attained finality. The impugned disallowance is accordingly deleted.

For the next two sums (as noted at (b) and (c) above), the assessee's only case before us was that the matter be restored back to the file of the AO for examination as to if the tax liability thereon stands discharged by the concerned payees, i.e., in view of the decision by the Apex Court in *Hindustan Coca Cola*

Beverage (P.) Ltd. v. CIT [2007] 293 ITR 226 (SC). We find that the issue raised before and adjudicated by the Revenue authorities is *qua* the admissibility of the impugned payments to tax deduction at source provisions of Chapter XVII-B of the Act. The assessee's plea is, under the circumstances, reasonable, to which the ld. DR also fairly did not dispute. The burden to prove its' claim, i.e., establish or show that the tax liability on the impugned sums has been since discharged by the concerned payees is, we may clarify, on the assessee, for which the AO – who is entitled to make any verification in the matter he deems fit, shall extend a reasonable opportunity to the assessee. Needless to add, failure to establish the same would result in confirmation of the disallowance u/s. 40(a)(ia) to that extent.

4. Ground 3 disputes the disallowance of expenditure claimed by the assessee toward various expenses, viz. books and periodicals; colour labour expenses; engine fitting/testing labour; repair and renewals; printing & stationery; travel expenditure; foreign travel (refer para 9.3D of the assessment order). The same were disallowed for want of proper evidences and inference of lack of genuineness arrived at on the basis of the examination of the cash vouchers produced. The ld. CIT(A), in appeal, while upholding the impugned order in principle, reduced the quantum to 50% in-as-much as it could not be said that the entire of it is non-genuine, i.e., that no expenditure at all had been incurred by the assessee. The ld. AR did not seriously dispute the disallowance, stating that the impugned expenditure, on account of lapse of considerable time, could not be got verified, so that the remand for the purpose would be of no help. And, is accordingly left to the estimation of the tribunal. The ld. DR would rely on the orders by the Revenue authorities. The finding as to the absence of supporting evidences vouching the impugned expenditure is not disputed at any stage. The disallowance/s, in fact, emanate from the observations by the auditor per his report u/s. 142(2A). The

assessee has both before the special auditor as well as the AO, whose remarks at para 9.3 (pg. 19) of his order are telling and undisputed, failed to rebut these findings, or even otherwise improve its' case in any manner, i.e., even in the appellate proceedings. The ld. CIT(A) has allowed substantial relief. We accordingly find no reason for interference.

5. Ground 4 was not pressed during hearing, with the ld. counsel making an endorsement to that effect on the memo of grounds of appeal. The same is accordingly dismissed as not pressed.

6. Ground 5 agitates a trading addition of Rs.3,64,637, which stands discussed at para 12 (pgs. 25-31) and para 12 (pgs. 87-108) of the assessment and the impugned order respectively. The assessee's legal plea before us was that the addition is not sustainable as the books of account have not been rejected. The same, as a reading of the assessment order (para 12.4D/pg. 13) and impugned order (para 12.2/pg. 107) would show, is factually incorrect. The AO has issued a categorical finding, rendered after considering the auditors' report u/s. 142(2A), and duly show causing the assessee in the matter (vide his letter dated 21.05.2009), that the assessee's trading results, for the detailed reasons mentioned therein, are not verifiable. He, accordingly, after noting the gross profit (GP) rates on various products as worked out by the Auditor – and which range from a low of 24.15% (Nozzles) to 73.17% (on Extension Shaft TV), estimated the assessee's gross profit at 19.75%, i.e., as stated as obtaining for AY 2005-06, the immediately preceding year, as against at 18.24% disclosed for the current year. The same stands endorsed by the ld. CIT(A), holding as under:

'12.2 I have considered the observations of the Assessing Officer as made by him in the assessment order. I have also considered written submissions filed by the assessee vide letter

dated 28.02.2014. I have further considered various judicial pronouncements relied upon by the assessee as well as other material placed by the assessee on record. On careful consideration of the rival contentions, *I am of the opinion that the Assessing Officer has discussed the issue with regard to rejection of books of account in detail in the assessment order.* As the assessee has neither maintained stock records nor produced inventory of closing stock and opening stock, the authenticity of trading results declared by the assessee cannot be verified. Moreover, the opening and closing stock are essential ingredients of the trading results and in the absence of details of closing and opening stock and method of valuation adopted in valuing the opening and closing stock, the authenticity of trading results declared by the assessee can always be doubled. 1 am, therefore, of the opinion that the Assessing Officer is fully justified in rejecting the trading results. I also fully agree with the findings of the Assessing Officer and special auditors with regard to rejection of trading results declared by the assessee company. 1 am further of the opinion that the Assessing Officer is also justified in applying gross profit rate of 19.25% (*) to make trading addition of Rs.3,64,637/-.' [emphasis, ours]

[(*) the correct figure is 19.75%]

How, then, we wonder, could it be contended, as before us, for and on behalf of the assessee, that there has been no rejection of the assessee's accounts? Why, in fact, the assessee's relevant ground (Gd. 5) by the assessee itself states of the addition as having been made after rejecting the books of account.

On merits, the ld. counsel would argue that the addition made is only *qua* the sale of the Rajkot unit in-as-much as the turnover of the only other (Phagwara) unit is at Rs.503.97 lacs, and a differential addition of 1.51% (19.75% - 18.24%) would work to a higher amount if the sale of both the units is taken into account. Further, the bulk of the goods sold at the Rajkot Unit are that transferred from the Phagwara Unit (i.e., Rs.218.62 lacs). The same stand sold at Rs.241.48 lacs, on which therefore a GP addition of Rs.3.64 lacs (at the rate of 1.51%) has been made. How could the sale of goods transferred from the Phagwara Unit, whose trading results

have been accepted, could be made? Two, no addition should be made for the Rajkot Unit for which gross profit rate for the immediate preceding year was, in fact, at 11.25%, much lower.

Even as clarified at the outset during hearing, no fresh plea *qua* facts could be admitted. There is firstly no finding on the record that the sale of the Rajkot Unit for the current year is at Rs.241.48 lacs, as claimed. There is nothing to show that the trading addition has been made only with reference to the sale of the Rajkot Unit (sale of which appears to be domestic sales, as against predominantly (99.69%) export sale of the Phagwara Unit), or with reference to the sale of only one of the two units. The findings as regards the rejection of accounts, is with reference to the books of account maintained for both the units, including the valuation of inventories thereat. The estimation of GP is again *qua* different products, and not with reference to their place of manufacture. The products, by own admission, are the same (or nearly the same) for both the units. The value of the goods transferred from Phagwara Unit to Rajkot Unit is in fact at Rs.21.86 lacs and not Rs.218.62 lacs, as stated by the ld. counsel, who though would admit his mistake on this being pointed out. Further still, there is no finding that the gross profit of the Rajkot Unit for AY 2005-06 is at, as claimed, 11.25%.

The AO, as apparent, has applied the GP rate across the assessee's sales, and not for a particular segment thereof. Rather, as apparent from the findings by the Auditors, *qua* which the assessee was duly show-caused, the AO has been extremely reasonable in applying a GP rate of 19.75%; the same being much below even the minimum gross margin computed by the Auditor for different products, and whose findings have not been rebutted. In fact, the very fact that the assessee has disclosed a uniform gross profit rate (of 18.24%) for both the units, selling various items, which may not necessarily be the same, bearing different GP rates, to customers located at different places, with sales of one unit being predominantly

in the export market, is a clear pointer to the GP rate as returned being contrived. That is, apart from the defects pointed out by the Revenue, leading to the accounts being rejected. The assessee's case is wholly without merit. Rather, and equally, if not more probable inference is that there has been a calculation mistake by the AO. We are, however, as stated during hearing, not inclined to disturb the addition on quantum, which, going by the sales, is apparently much lower than the impugned sum of Rs.3.64 lacs. The findings, both *qua* rejection as well as on merits, remaining unrebutted, we find no scope for interference. We decide accordingly.

7. Vide Grounds 6 and 7, the assessee claims that its' trading results having been estimated, no separate disallowance *qua* expenditure, i.e., to the extent it relates to the trading account, could be made. The argument is unexceptional in-as-much as there can be no double disallowance. A perusal of the said expenditure, being the subject matter of the assessee's Gd. 3 before us, clearly shows the same to be in the nature of indirect expenditure, forming part of the profit and loss account, even as explicitly stated at para 9.1 (pg. 16) of the assessment order. The assessee's claim, therefore, valid in principle, fails on facts. Even so, if and to the extent the assessee can, during the appeal giving-effect proceedings, show the AO that a part of such expenditure stands in fact debited to the trading account, he shall, subject to his verification, allow expenditure as disallowed by him, i.e., to that extent. That leaves us with freight expenditure and job work expenses, again stated to be claimed as trading/manufacturing expenses. The assessee shall, therefore, have to show the said expenditure to be forming part of the trading account. Two, the disallowance in their respect, where so (as we have restored the matter for examining if the tax liability thereon stands already discharged by the payee/s, so that the disallowance may not obtain, in whole or in part), would obtain only u/s. 40(a)(ia). The principle of non double disallowance would equally apply

for such disallowance. If the gross profit computed by excluding such expenditure falls below that estimated, this expenditure stands disallowed to the extent of the difference. Where not so, this expenditure stands in effect allowed, so that there is no double jeopardy, and the statutory disallowance u/s. 40(a)(ia) shall obtain. We decide accordingly.

8. In the result, the assessee's appeal is partly allowed.

Order pronounced in the open court on July 31, 2018

Sd/-	Sd/-
(N. K. Choudhry)	(Sanjay Arora)
Judicial Member	Accountant Member

Date: 31.07.2018
/GP/Sr. Ps.
Copy of the order forwarded to:

(1) The Appellant: PMS International Pvt. Ltd., Village: Jamalpur, G.T. Road, Phagwara
(2) The Respondent: Addl. Commissioner of Income Tax, Phagwara Range, Phagwara
(3) The CIT(Appeals)-2, Jalandhar
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T

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By Order