IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "A" BENCH, AHMEDABAD

[Coram: Pramod Kumar, VP and Ms. Madhumita Roy, JM]

ITA No. 2143/Ahd/2014 & CO No. 262/Ahd/2014
Assessment Year : 2009-10

The Income-Tax Officer **.....Appellant**
Ward-4(1), Ahmedabad

Vs.

G-2 International Exports Ltd **.....Respondent &**
(Now: Vaibhavlaxmi International Ltd.) ***Cross-Objector***
B/44, Aryamann Bunglows,
Thaltej, Ahmedabad-380054
[PAN : AABCA 6690 G]

Appearances by:

Lalit P. Jain, *for the appellant*
Gaurav Nahta, *for the respondent & Cross-objector*

Date of concluding the hearing : 30.07.2018
Date of pronouncing the order : 22.10.2018

O R D E R

Per Pramod Kumar, Vice-President :-

1. This set of appeal and cross-objection are directed against the order dated 9th May 2014 passed by the CIT(A) in the matter of assessment under section 144 of the Income-tax Act, 1961, for the assessment year 2009-10.

2. We will first take up the appeal filed by the Assessing Officer.

3. In ground no.1, the Assessing Officer has raised the following grievance:-

> *"The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.1,19,680/- made u/s 69C of the Act, after admitting additional evidence in violation of Rule 46A of IT Rules."*

4. During the course of assessment proceedings, the Assessing Officer noticed that while the assessee had debited Rs.33,54,293/- under the head stitching and cutting charges, the break-up showed the payment of Rs.34,73,973/-. Accordingly, he made an addition of Rs.1,19,680/- as unexplained expenditure under section 69C. Aggrieved, assessee carried the matter in appeal before the CIT(A). Learned CIT(A) noted the assessee's explanation that a sum of Rs.1,19,680/- paid to BVC & Co was wrongly debited to process charges, and deleted the addition. The Assessing Officer is aggrieved and in appeal before us.

5. Having heard the rival contentions and having perused the material on record, we find no reasons to interfere in the matter. The appellant has not even faulted the explanation on merits but confirmed the plea to inadmissibility of additional evidence by the CIT(A). We are not inclined to uphold this plea, particularly looking to the fact that explanation is not challenged and that amount involved is a small amount. We approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter.

6. Ground no.1 is dismissed.

7. In ground no.2, the Assessing Officer has raised the following grievance:-

> *"The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.23,96,563/- made on account of disallowance u/s.40(a)(i) of the Act, without properly appreciating the facts of the case and the material brought on record that the payments made were governed by clause(b) to Sub section(2) of Section 5 of the IT Act and not u/s.9(2) of IT Act."*

8. Learned representatives fairly agree that this issue in appeal is now squarely covered, in favour of the assessee, by a series of decisions of this Tribunal including in the cases of ITO vs. Excel Chemicals India Ltd [(2017) 184 TTJ 114 (Ahd)] and DCIT vs. Welspun Corporation Ltd [(2017) 55 ITR (Trib) 405 (Ahd)]. Learned Departmental Representative, however, relies upon the stand of the Assessing Officer.

9. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

10. As we have noted above, the issue about taxability of commission earnings by non-resident, for work done outside India, is now decided in favour of the assessee by a large number of judicial precedents. That precisely is the issue in this case, and we must, therefore, uphold the relief granted by the CIT(A) on this point. As we do so, and dealing with the specific issue referred to in the ground of appeal, we may refer to the following observations made by a co-ordinate bench in the case of Welspun Corp. Ltd (supra):-

> *"31. The scheme of taxability in India, so far as the non-residents, are concerned, is like this. Section 5 (2), which deals with the taxability of income in the hands of a non-resident, provides that "the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which— (a) is received or is deemed to be received in India in such year by or on behalf of such person; or (b) accrues or arises or is deemed to accrue or arise to him in India during such year". There is no dispute that since no part of the operations of the recipient non-residents is carried out in India, no income accrues to these non-residents in India. The case of the revenue hinges on income which is "deemed to accrue or arise in India". Coming to the deeming provisions, which are set out in Section 9, we find that the following statutory provisions are relevant in this context:*

'Section 9- Incomes deemed to accrue or arise in India

(1) The following incomes will be deemed to accrue or arise in India:

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India,
Explanation: For the purpose of this clause [i.e. 9(1)(i)],

(a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;

*(b) (c) (d)** ** **"*

(vii) income by way of fees for technical services payable by-
*(a)** ** **"*

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or
*(c)** ** **"*

*Explanation 1-……..**

Explanation 2.- For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head" Salaries".'
** Not relevant for our purposes*

32. So far as deeming fiction under section 9(1)(i) is concerned, it cannot be invoked in the present case since no part of the operations of the recipient's business, as commission agent, was carried out in India. Even though deeming fiction under section 9(1)(i) is triggered on the facts of this case, on account of commission agent's business connection in India, it has no impact on taxability in the hands of commission agent because admittedly no business operations were carried out in India, and, therefore, Explanation 1 to Section 9(1)(i) comes into play.

33. There are a couple of rulings by the Authority for Advance Ruling, which support taxability of commission paid to non-residents under section 9(1)(i), but, neither these rulings are binding precedents for us nor are we

persuaded by the line of reasoning adopted in these rulings. As for the AAR ruling in the case of SKF Boilers & Driers (P.) Ltd. In re [2012] 343 ITR 385/206 Taxman 19/18 taxmann.com 325 (AAR - New Delhi), we find that this decision merely follows the earlier ruling in the case of Rajiv Malhotra, In re [2006] 284 ITR 564/155 Taxman 101 (AAR - New Delhi) which, in our considered view, does not take into account the impact of Explanation 1 to Section 9(1)(i) properly. That was a case in which the non-resident commission agent worked for procuring participation by other non-resident entities in a food and wine show in India, and the claim of the assessee was that since the agent has not carried out any business operations in India, the commission agent was not chargeable to tax in India, and, accordingly, the assessee had no obligation to deduct tax at source from such commission payments to the non-resident agent. On these facts, the Authority for Advance Ruling, inter alia, opined that "no doubt the agent renders services abroad and pursues and solicits exhibitors there in the territory allotted to him, but the right to receive the commission arises in India only when exhibitor participates in the India International Food & Wine Show (to be held in India), and makes full and final payment to the applicant in India" and that "the commission income would, therefore, be taxable under section 5(2)(b) read with section 9(1)(i) of the Act". The Authority for Advance Ruling also held that "the fact that the agent renders services abroad in the form of pursuing and soliciting participants and that the commission is remitted to him abroad are wholly irrelevant for the purpose of determining situs of his income". We do not consider this approach to be correct. When no operations of the business of commission agent is carried on in India, the Explanation 1 to Section 9(1)(i) takes the entire commission income from outside the ambit of deeming fiction under section 9(1)(i), and, in effect, outside the ambit of income 'deemed to accrue or arise in India' for the purpose of Section 5(2)(b). The point of time when commission agent's right to receive the commission fructifies is irrelevant to decide the scope of Explanation 1 to Section 9(1)(i), which is what is material in the context of the situation that we are in seisin of. The revenue's case before us hinges on the applicability of Section 9(1)(i) and, it is, therefore. important to ascertain as to what extent would the rigour of Section 9(1)(i) be relaxed by Explanation 1 to Section 9(1)(i). When we examine things from this perspective, the inevitable conclusion is that since no part of the operations of the business of the commission agent is carried out in India, no part of the income of the commission agent can be brought to tax in India. In this view of the matter, views expressed by the Hon'ble AAR, which do not fetter our independent opinion anyway in view of its limited binding force under s. 245S of the Act, do not impress us, and we decline to be guided by the same. The stand of the revenue, however, is that these rulings, being from such a high quasi-judicial forum, even if not binding, cannot simply be brushed aside either, and that these rulings at least have persuasive value. We have no quarrel with this proposition. We have, with utmost care and deepest respect, perused the above rulings rendered by the Hon'ble Authority for Advance Ruling. With greatest respect, but without slightest hesitation, we humbly come to the conclusion that we are not persuaded by these rulings."

11. Ground no.2 is thus also dismissed.

12. On ground no.3, the Assessing Officer has raised the following grievance:-

> *"3 The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs. 1,49,18,219/- in respect of estimation of gross profit, without properly appreciating the facts of the case and the material brought on record when assessee had failed to satisfactorily explain the discrepancy in stocks."*

13. So far as this ground of appeal is concerned, relevant material facts are like this. During the course of assessment proceedings, the Assessing Officer pointed out certain stock discrepancies in the respect of sale of made ups, shortage of closing stock and variations in figures of packing and folding material but the assessee did not clarify the position. The assessee also did not comply with the Assessing Officer's requisition to furnish month-wise purchase, consumption, production and sale's quantitative records. It was in this backdrop that the Assessing Officer made an addition of Rs.1,49,18,219/- on the basis of following reasoning:-

> *"From the forgoing discussions, the following irresistible conclusion can be reached:-*
>
> *(i) The assessee failed to produce the books of account, stock register and other documents for the verification of the A.O. inspite of numerous opportunities afforded to it without any reasonable cause.*
>
> *(ii) In the audited account furnished during the course of assessment proceedings, it is seen that there are stock variations in respect of fabric local, fabric export and made-ups etc.*
>
> *(iii) The assessee failed to reconcile the discrepancies in the audited account as pointed out above with books of account, stock register and other documents.*
>
> *6.4 In view of the above, the book results declared by the assessee cannot be considered as a gospel one. As the assessee failed to produce the books of account, stock register etc. the defect in the audited account filed along with the balance sheet and P & L A/c. cannot be verified. As such, the book result shown by the assessee is rejected. During the year under consideration, the assessee has shown a meager gross profit at 4%, It is also seen that the assessee has shown a better gross profit at 12% in the previous year relevant to A.Y. 2006-07 and thereafter, its gross profit nose-dived to 1.18% in A.Y. 03-09. After considering the totality of the assessee's case, I consider it reasonable to estimate the G.P. of the assessee at 8% for A.Y. 2009-10. Accordingly, the G.P. of the assessee is worked out to Rs.3,77,19,856/-, The assessee has shown the G.P, of Rs. 2,28,01,637/-, therefore, the difference of Rs. 1,49,18,2197- [37719856 - 22801637] is added to the total income of the assessee. Penalty proceeding u/s. 27l(l)(c) are separately initiated for furnishing inaccurate particulars of income."*

14. Aggrieved, assessee carried the matter in appeal before the CIT(A). Learned CIT(A) took note of the explanation of the assessee, confronted the Assessing Officer with the same, and finally deleted the impugned addition by observing as follows:-

> *"6.1 Before me the A.R. argued that the addition made is arbitrary and has given following written submission :-*
>
> *5.1 The appellant respectfully submits that the gross profit additions made by the A.O. being contrary to the facts and provision of law in not tenable in the eyes of law. It is stated that the books of account of the appellant was got audited under the provision of the Companies Act as well as necessary report was also obtained under the provision of Income Tax Act. As regards month-wise details, it is stated that the appellant was dealing in number of quality/products and therefore it was submitted that product wise month wise details of purchases, consumption was not feasible.*
>
> *As regards alleged difference in Audit report and Tax audit report we have to submit that there were some typing errors in Audit reports, which are as under :-*
>
> *(i) The appellant had got processed 145416 Mtr of cloth from the consumption of Grey cloth of 144775 Mtrs, however in 3CD report, it was wrongly stated as purchased Meters 145416.*
>
> *(ii) The appellant had purchased 2704 ready sets during the year however, the same was shown as opening stock in the 3 CD report.*
>
> *(iii) The appellant had got manufactured 403712 ready sets and by product being Fents and Rags of 52498 Mtrs from the grey cloth consumption of 2059296 Mtrs, however, in the audit report, it was shown as purchases of ready sets.*
>
> *The appellant further submits that if these errors are rectified then there will not be any difference. The appellant enclose herewith complete details in the matter. The appellant further submits that all the purchases and sales are vouched and verifiable therefore no adverse inference was required to be drawn. As regards lower gross profit margin as compared to assessment year 2006-07 for ih-e year, it is stated that appellant is mainly engaged in exports of goods and the profit margin depends upon various factors, moreover, all the purchases and sales are vouched and the transaction are taken place through banking channel and therefore no presumption is required to be made that the appellant had earned more profit over and above shown in books of account. The appellant further submits that the G.P rate for the preceding assessment year was 1.19% as against G.P. rate of 4.83% for the year under consideration and therefore the appellant had shown better G.P. rate and therefore the*

A.O. was not correct to adopt G. P. rate of 8%. Therefore, the additions made by the A.O. are not justified and deserves to be deleted.

The appellant further submits that in the informative section of Audit report, the auditors had incorrectly stated the packing material expenses at Rs. 9379688/- as against correct purchases of Rs.7863240/- It appears that the auditors had copied figures related to other party inadvertently as the schedule 19 clearly show packing material purchases was Rs.7863240/-.

Considering the above facts, it is submitted that all the purchases and sales are vouched, difference in quantity was due to taking of incorrect figure and the difference stands reconciled, books of account are audited and there in no qualification made by auditors. Hence, the addition made by the A.O. of Rs.14918219/-"

The A.R. had claimed that there were certain arithmetical / presentation error and which were made basis for making huge additions. Accordingly, it was thought fit to call for remand report from the A.O. in the matter. The A,O. was accordingly provided a copy of the paper book and asked to look into matter afresh and give his report. However, the A.O. did not submit the report in the time and was again requested to send the report. The A.O. sent his remand report wherein he has reiterated that there were discrepancies in Audit report and therefore the addition made was in order. The A.R was provided a copy of the remand report for its comments. The A.R. submitted as under :-

In continuation to the earlier submission, the appellant in response to the remand report of the A.O., submits as under :-

As regards G.P. Addition, the A.O. has stated that he had proved the discrepancy in stock in the assessment order, which is factually incorrect in view of the complete quantitative details furnished vide page 71 of the paper book. It is stated that the A.O. has not appreciated that without consumption of 2059296 Mtrs, the appellant would not have produced made ups of 403712 Nos. Therefore, according to A.O. there was negative stock of made ups of 403712. Likewise, there is no separation of fabric in local and export. It is the bifurcation of sales of the common fabric into local sales and exports sales and therefore there cannot be any sale of exports fabric more than stock. The A.O. has misunderstood the fads and has not rebutted the quantity data as shown on page 71 of the paper book. The entire quantity data are reconciled which is evident from the following:

As per A.O.

Fabric Local	*2549530 (Shortage)*
Fabric exports	*-635650 (Excess)*

Made ups -403712 (Excess)

Reconciliation

Fabric Local	*2549530*
Exports	*- 635650*
	1913880
Production not considered by A. 0.	*145416*
Consumption of fabric as per page 71	*2059296*

Made ups

The difference of 403712 nos of made ups are due to not considering the production of 403712 out of the consumption of 2059296 Mts.

Therefore, nothing is remained to be reconciled. In view of the above facts and submission made by the appellant, there is no quantity difference which was calculated by the A.O. and accordingly G.P. addition made based thereon deserves to be deleted.

The A.R. also stated that no opportunity was given to explain the alleged difference according to the A.O. since actually there was quantitative tallied and no difference was there. Accordingly, the A.O. was further requested to send remand report after verifying the submission of the appellant with the facts of the case. However, again no hearing was done and the remand report dated 15/10/2013 was received stating that action taken in original assessment proceeding was correct as according to the A.O. there were discrepancy. The A.R. was provided a copy of the report and asked to submit his reply, if any. The A.R. in the second remand report stated as under:-

In continuation to the earlier submission, the appellant in response to the remand report dated 15/10/2013 of the A.O., submits as under:-

The appellant company had submitted a letter to the Income Tax Officer on 02/08/2013 attaching a copy of letter dated 15/03/2013 as received from statutory auditors Nimesh M. Shah & Co A copy of the said letter submitted to the A. 0. is enclosed herewith for your honour's kind perusal. It is added that the auditor had accepted the typographical mistakes occurred due to his team and accordingly the A.O. should have taken into consideration before sending the remand report to your honour. The said letter was filed on 02/08/2013 and the remand report was given by him on 15/10/2013. Had the A.O. considered the contents of the letter, there will not have been any discrepancy. It is submitted that the additions were made by the A.O. based on the comparison of data given in Audit Report

as prepared under the Companies Act and with that of report u/s 44AB of Income Tax Act. The A.O. has relied upon the remand report as sent by his ld predecessor. However, he failed to consider the reply submitted by the appellant. It is again reiterated that :-

1. As regards G.P. Addition , the A.O. has stated that he had proved the discrepancy in stock in the assessment order, which is factually incorrect in view of the complete quantitative details furnished vide page 71 of the paper book. It is stated that the A.O. has not appreciated that without consumption of 2059296 Mtrs, the appellant would not have produced made ups of 403712 Nos. Therefore, according to A.O. there was negative stock of made ups of 403712. Likewise, there is no separation of fabric in local and export. It is the bifurcation of sales of the common fabric into local sales and exports sales and therefore there can not be any sale of exports fabric more than stock. The A.O. has misunderstood the facts and has not rebutted the quantity data as shown on page 71 of the paper book. The entire quantity data are reconciled which is evident from the following:

As per A.O.

Fabric Local	*2549530 (Shortage)*
Fabric exports	*-635650 (Excess)*
Made ups	*-403712 (Excess)*

Reconciliation

Fabric exports	*2549530*
Exports	*- 635650*
	1913880
Production not considered by A. O.	*145416*
Consumption of fabric as per page 71	*2059296*

Made ups
The difference of 403712 nos of made ups are due to not considering the production of 403712 out of the consumption of 2059296 Mts.

Therefore, nothing is remained to be reconciled. In view of the above facts and submission made by the appellant, there is no quantity difference which was calculated by the A.O. and accordingly G.P. addition made based thereon deserves to be deleted-"

The A.R. stated that in view of the facts addition deserves to be deleted.

6.2 I have considered the, facts, assessment order, remand report as well as written and oral submission made by the A.R. on behalf of the

appellant. I find that there were some mistake done by auditor in his report but the same were rectified by him in a letter addressed to The Board of Directors dated 15/03/2013 wherein he has accepted the typographical mistake and stated correct amount of quantity. The A.O. had calculated the discrepancy and that was rebutted by the A.R. by reconciling it with the figures given in the audit report itself. I also agree with the appellant that cloth cannot be produced as bifurcated in export as well as local. It is the sales which are bifurcated in local and export sales. Similarly, there were sale of made up but the A.O. did not accept that consumption of cloth had resulted in production of made up. The appellant in the paper book has given detailed quantitative tallied which was also sent to the A.O. and no contrary view was received from the A.O. and accordingly I am satisfied that there remains no difference as calculated by the A.O. in the light of reconciliation and letter placed of Auditors wherein he has accepted the mistake and rectified. Secondly, the A.O. has not made addition based on quantity differences as calculated by him. He has made basis for rejecting book result by stating these errors. I also find that G.P. rate for the year was better as compared to the immediately preceding year and therefore the A.O. was not correct to adopt the G.P. rate relevant to assessment year 2006-07 and not considering the G.P. of other period i.e. 2007-08, 2008-09. As the alleged difference stands reconciled and G.P. rate is better, there is no point in keeping addition without any reason. I therefore direct to delete the addition of Rs. 14918219/-."

15. The Assessing Officer is aggrieved of the relief so granted by the CIT(A).

16. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

17. We have noted that when Assessing Officer was confronted with the explanation of the assessee, he did not have anything to say beyond that "*action taken in the original assessment proceedings was correct*" as, according to the Assessing Officer, "*there were discrepancies*". These findings of the CIT(A) are not claimed to be perverse or factually incorrect. When an Assessing Officer declines to meet the specific points raised by the assessee in first appellate proceedings, there is obviously no point in challenging the conclusions arrived at in the first appellate proceedings based on vague generalities. No specific issues are raised in appeal before us. We have also noted that the learned CIT(A) has granted impugned relief on the basis of specific explanations of the assessee which have remained uncontroverted. In the light of these discussions as also bearing in mind entirety of the case, we approve well reasoned conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

18. Ground no.3 is thus dismissed.

19. In ground no. 4, the Assessing Officer has raised the following grievance:-

"4. The Ld.CIT(A) has erred in. law and on facts in deleting- the disallowance of administrative expenses of Rs.1,63,485/- made u/s 14A of the Act, without properly appreciating the facts of the case and the material brought on record."

20. As far as this grievance is concerned, it is sufficient to take note of the fact that learned CIT(A) has deleted entire disallowance of Rs.19,10,816/- under section 14A r.w.r. 8D on the short ground that the assessee did not use any borrowed funds in making investments yielding tax exempt income. What he, however, overlooked was the fact that out of disallowance of Rs.19,10,816/-, the disallowance of Rs.17,47,331/- was on account of interest expenses and Rs.1,63,485/- on account of administrative expenses being 0.5% of average investments. Learned counsel for the assessee has nothing to say on this factual aspect. Clearly, there was no cause and effect relationship between findings of the CIT(A) and deletion of disallowance to the extent of Rs.1,63,485/-. We, therefore, restore the disallowance to this extent.

21. Ground no.3 is thus allowed.

22. The appeal of the Assessing Officer is thus partly allowed.

23. Grievances raised in the cross-objection are as follows:-

> *"1) The Ld. CIT{A) has erred in law and on facts in confirming the addition of Rs. 399000/- on account of sales promotion expenses. The same was in relation to gold coins purchased from bank of baroda. The same were related to the business of the appellant and therefore AO ought to have allowed the expenses.*
>
> *2) The Ld CIT(A) has erred in law and on facts in confirming the addition of Rs. 530347/- on account of commission expenses paid to Smt. Tarbinidevi Nathani. The appellant had submitted all the details including the confirmations, therefore Ld. CIT(A) ought to have deleted the addition."*

24. Learned counsel fairly accepts that while there is evidence about purchase of gold coins, he is not in a position to furnish any contemporaneous evidence about the services rendered and specific details. The mere purchase of gold coins obviously does not entitle the assessee to deduction, in respect of the same, as business expenses. When it was so pointed out to the learned counsel, he did not press point further. Cross-objection is thus dismissed.

25. To sum up, while appeal of the Assessing Officer is partly allowed, the Cross-Objection of the assessee is dismissed. Pronounced in the open court today on the 22nd October, 2018

Sd/-	Sd/-
Ms. Madhumita Roy	**Pramod Kumar**
(Judicial Member)	(Vice-President)

Ahmedabad, the 22nd day of October, 2018

***bt*

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *Commissioner*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

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Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad