



**IN THE INCOME TAX APPELLATE TRIBUNAL,
RANCHI ' SMC' BENCH, RANCHI**

BEFORE SHRI N.S SAINI, ACCOUNTANT MEMBER

ITA No.240/Ran/2017
Assessment Year : 2013-14

M/s. Kozy Sweets, B-17, City Center, Sector-4, Bokaro Steel City, Jharkhand	Vs.	ITO, Ward 3(3), Bokaro
PAN/GIR No.AAGFK 0969 A		
(Appellant)	..	(Respondent)

Assessee by : Shri Nitin Pasari, Adv
Revenue by : Shri A.K.Mohanty, JCIT

Date of Hearing : 26/11/ 2018
Date of Pronouncement : 27/11/ 2018

ORDER

This is an appeal filed by the assessee against the order of the CIT(A), Hazaribag, dated 15.6.2017 for the assessment year 2013-14.

2. The assessee has raised the following grounds of appeal:

'A FOR THAT the Learned Appellate Authority failed to take into consideration that the addition has been made by the Ld. Assessing Officer by averaging the sales of the entire year on the basis of sales declared as per P & L Account as also the difference on averaging basis for 20.02.2013 to 31.03.2013.

The said averaging has no force of law and has been derived on the assumption & presumption, without there being any

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cogent evidence inasmuch as all through the year, the sale of sweets are not the same, since the same depends upon weather conditions as well.

In summers & rainy season, the sale of sweets is marginal, as compared to the sales in winters, which is comparatively much and averaging the sales for the period 20.02.2013 to 31.03.2013 with that of the entire year is absolutely baseless.

B) FOR THAT, while rejecting the Profit & Loss Account of the Appellant, reference has been made of a judgment rendered by the Hon'ble Apex Court in the matter of *Md. Kale Khan* as also *HM Esuflai*, for invoking the powers of best judgment assessment,

However the procedure and formula adopted by the Learned Assessing Officer, upheld by the Appellate Authority does not have in force of law, inasmuch as the instant is not a case where the return has not been furnished or the notice under section 142(1) has not been complied or the provisions as contained under Section 143(2) has not been complied, rather it cannot be suggested in any eventuality, either by the Assessing Officer or by the Appellate Authority, that the claim of expenses (retail trade of sweets) since not supported by any voucher/bill would not be allowed as expenses, even if some amount of guess work is involved.

C) FOR THAT, the enhancement of turnover by invoking the powers under Section 144, by carrying out best judgment assessment on average sale is absolutely without any reasonable basis.

D) FOR THAT, the Learned Appellate Authority, as also the Learned Assessing Officer failed to take into consideration that the estimate of income invoking powers under Section 144 of the Income Tax Act is not uncanalized & unfettered, rather the same puts reasonable restriction, while exercising such powers and while discharging powers under section 144, the past history of the Assessee, ought to be considered.

E) FOR THAT, the comparable profit sharing ration shown by the Assessee in the past assessment orders has been completely overlooked, while exercising the powers under Section 144.

F) FOR THAT, without rejecting the books of accounts and without assigning any reason therefore, as to what anomaly or what wrong has been found in the returns furnished ought to be spelt out while carrying out an assessment under section 144 and even if, the books of account are sought to be rejected, reasons are to be assigned as to why the books of accounts are being rejected.

G) FOR THAT, the Learned Appellate Authority as also the Assessing Officer failed to take into consideration that the recommendation of initiating penalty proceedings in terms of Section 271(l)(c) of the Income Tax Act is directly in conflict with the ratio laid down by the Hon'ble Supreme Court in the matter of Dilip N Shroff v. Joint Commissioner of Income Tax reported in (2007) 6 SCC 329.

H) FOR THAT, the Learned Appellate Authority as also the Assessing Officer failed to take into consideration that the recommendation to initiate penalty proceeding is bad in law and is in conflict, since the question of levying penalty has been tested before the Hon'ble Supreme Court in catena of cases the recent being *M/s. Reliance Petro Products*, wherein the Hon'ble Court taking into consideration the earlier judicial pronouncements on the issue of penalty has been pleased to hold that the penalty can be levied only if, it is proved that there is presence of guilty, dishonest and wilful intent either to defraud revenue or evade the payment of duty on our part. In other words, there has to be positive act on part of Appellant to evade duty.

I) FOR THAT the other & further grounds of appeal, if any, shall be urged at the time of hearing of this appeal."

3. At the outset, Id A.R. of the assessee submitted that the assessee did not produce the books of account before the

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Assessing Officer as there was dispute between the partners. He submitted that if one more opportunity is granted to the assessee, then he undertakes to produce books of account and relevant documents before the Assessing Officer.

4. Ld D.R. vehemently objected to the above submission of Id A.R. of the assessee and submitted that where the assessee has failed to avail the opportunities provided by the Assessing Officer as well as the CIT(A), no mercy should be shown to the assessee.

5. In the facts of the case, I am of the considered opinion that in order to render substantial justice, one more opportunity should be granted to the assessee as prayed for by Id A.R. of the assessee to produce the books of account and relevant details before the Assessing Officer for making the assessment. However, considering the conduct of the assessee, I am of the considered view that the assessee should pay a cost of ₹5,000/- within 30 days from the date of this order and file proof of payment before the Assessing Officer as well as the Tribunal. The assessee is further directed to *suo-moto* appear before the Assessing Officer within 30 days from the date of this order to fix the date of hearing of the case. The assessee is further directed to fully co-operate with the Assessing Officer by filing all the



necessary evidences/documents as and when called upon to do so for completion of the assessment. The Assessing Officer is directed to complete the assessment expeditiously. With these directions, the appeal is restored back to the file of the Assessing Officer.

6. In the result, appeal of the assessee is allowed for statistical purposes.

Order pronounced on 27 /11/2018.

Sd/-

(N.S Saini)
ACCOUNTANT MEMBER

Ranchi; Dated 27/11/2018
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : M/s. Kozy Sweets, B-17,
City Center, Sector-4, Bokaro Steel City,
Jharkhand
2. The Respondent. ITO, Ward 3(3), Bokaro
3. The CIT(A)- Hazaribag
4. Pr.CIT- Hazaribag
5. DR, ITAT, Ranchi
6. Guard file.
//True Copy//

By order

Sr.Pvt.Secretary,
ITAT, Ranchi
on tour