

आयकर अपील अाधिकरण, अहमदाबाद ँयायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
‘SMC’ BENCH, AHMEDABAD
BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
MS MADHUMITA ROY, JUDICIAL MEMBER
आयकर अपील सं./ITA No.1522/AHD/2015
अाधरण वष/Asstt. Year: 2009-2010

Shri Sheshdhar Dubey, Prop. Globe Carrying Corporation, E-2, Sheshtal Apartment, Nr.Utkarsh Petrol Pump, Karelibaug, Vadodara. PAN: ACSPD2320G	Vs.	ITO, Ward-5(2), Baroda.
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(Applicant)		(Respondent)
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Assessee by :	Shri Hardik Vora, A.R
Revenue by :	Shri Apoorva Bhardwaj, Sr.DR

सुनवाई का ताराख/Date of Hearing : 06/12/2018

घोषणा का ताराख /Date of Pronouncement: 01/01/2019

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals) ó 3, Vadodara [CIT(A) in short] vide appeal no.CAB(A)-3/55/14-15, dated 02/08/2013 arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 21/12/2011 relevant to assessment Year (AY) 2009-10.

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

“1. That the Learned Commissioner of Income Tax (Appeals) has erred in law by confirming 10% addition on account of freight charges without considering the submission put forward. That the addition of Rs.22,07,844 made by the Assessing Officer is without any consideration and purely on assumption basis. During the course of hearing, full details in respect of freight were submitted to the Assessing Officer as well as to the Commissioner of Income Tax (Appeals).

2. THAT the Learned Commissioner of Income Tax (Appeals) has further erred in law in confirming addition of Rs 96,773 on account of accumulated income more particularly when the said amount is already accumulated for in the books of accounts and proper explanation was submitted.

3. Any other ground that may meet at the end of justice shall be submitted at the time of hearing.”

2.1 The assessee has also raised the additional ground of appeal vide letter dated 16th December 2017 which is reproduced as under:

1. On the facts and circumstances of the case as well as law on the subject, Assessing Officer has erred in making 10% adhoc disallowance of freight expenditure without rejecting books of accounts.

3. The assessee in the additional ground of appeal has challenged the addition made by the AO on an ad-hoc basis without rejecting the books of accounts.

4. The Ld. AR before us submitted that the issue raised in the additional ground of appeal is arising from the order of the authorities below. There is no need to make any reference to any additional document. As such all the fact related to the impugned issue are available on record. Accordingly, the Ld. AR before us prayed to admit the additional ground of appeal raised vide letter dated 16th December 2017.

5. On the other hand the Ld. DR did not raise any objection on the admission of the additional ground raised by the assessee. Accordingly the Ld. DR left the issue at the discretion of the bench.

5.1 We heard both the parties and perused the materials available on record. It is a fact on records that all the information related to the rejection of the books of accounts are available in the order of the authorities below. As such, there is no need to make any reference to any additional document.

5.2 Besides the above, we also note that the issue raised by the assessee in the additional ground of appeal is legal in nature which can be admitted at any stage during the course of the proceedings. In this regard, we find support and guidance from the judgment of the Honøble Supreme Court in the case of NTPC Ltd Vs.CIT reported in 229 ITR 383 wherein it was held as under:

“Under section 254, the Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assesseein accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, there is no reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. There is no reason to restrict the power of the Tribunal under section 254 only to decide the grounds which arise from the order of the Commissioner (Appeals). Both the assessee as well as the department have a right to file an appeal/cross objections before the Tribunal. There is no reason why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.

The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner (Appeals) takes too narrow a view of the powers of the Tribunal. Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

In the instant case, therefore, the Tribunal had jurisdiction to examine a question of law which arose from the facts as found by the lower authorities and having a bearing on the tax liability of the assessee”.

5.3 Because of the above, we admit the additional ground of appeal raised by the assessee and proceed to adjudicate the same.

6. The issue raised by the assessee in the 1st ground of appeal and additional ground of appeal is interconnected. Therefore, we have clubbed them together for adjudication and convenience.

6.1 The issue raised by the assessee is that the Ld. CIT(A) erred in confirming the disallowance of the expenses on an ad-hoc basis without rejecting the books of accounts.

7. The facts of the case are that the assessee is an individual and engaged in the business of transport. The assessee has shown gross receipts from its transport business amounting to Rs. 2,35,50,759/- only. The assessee against such transport receipts has claimed freight charges of Rs. 2,20,78,441/- only. Thus the assessee has shown a gross profit of Rs. 14,14,768/- which is 6% of the total gross receipt of the assessee.

7.1 The assessee in its balance sheet has shown sundry creditors amounting to Rs. 42,95,281.00 only.

7.2 The assessee during the assessment proceedings failed to substantiate his claim of the freight expenses and sundry outstanding creditors amounting to Rs. 2,20,78,441/- and Rs. 42,95,281/- respectively by documentary evidence. Accordingly, the AO made the disallowance of 10% of the freight expenses amounting to Rs. 20,78,44/- after giving reasonable opportunity to

the assessee. Thus, the amount disallowed was added to the total income of the assessee.

7.3 The assessee carried the matter to the Ld. CIT(A) who confirmed the order of the AO.

8. Being aggrieved by the order of Id. CIT(A), the assessee is in appeal before us.

8.1 The Ld. AR before us submitted that there could not be any ad hoc disallowances without rejecting the books of accounts. The Ld. AR in support of his claim relied on the judgment of Honøble Gujarat High Court in the case of CIT Vs. Suresh scrap industries Ltd in tax appeal No. 1878 of 2008.

8.2 Without prejudice to the above, the Ld. AR also submitted that the gross profit declared by the assessee is commensurate with the gross profit rate declared in the earlier assessment years. The Ld. AR in support of his claim furnished the details of the GP declared by the assessee in the earlier years which is reproduced as under:

Disallowance out of Freight Charges Payment

During the year under consideration the assessee has attended the Gross Profit Ratio 6.00% in comparision of 6.46% of previous year. Last 3 years Gross Profit details are as under:

<i>Assessment Year</i>	<i>Receipt (inRs.)</i>	<i>Gross Profit (inRs.)</i>	<i>Gross Profit Ratio (%)</i>
<i>2009-10</i>	<i>2,35,50,759</i>	<i>14,14,767</i>	<i>6.00</i>
<i>2008-09</i>	<i>2,07,17,371</i>	<i>13,39,656</i>	<i>6.46</i>
<i>2007-08</i>	<i>1,90,59,076</i>	<i>10,14,912</i>	<i>5.32</i>

8.3 The Ld. AR further submitted that there is slightly fall in the GP ratio in comparison to the immediately preceding assessment year due to increase in the fuel price. However, the GP ratio of the assessee has strengthened in comparison to the GP ratio declared in the assessment year 2007-08.

8.4 The Ld. AR in view of the above submitted that no disallowance on ad-hoc basis in the given facts and circumstances can be made.

8.5 The Ld. AR without prejudice to the above also conceded for making the small disallowance of Rs. 5 lacs of the freight expenses.

9. On the other hand the Ld. DR vehemently supported the order of authorities below.

10. We have heard the rival contentions and perused the materials available on record. From the preceding discussion, we note that the assessee has not filed requisites details as desired by the AO to verify the genuineness of the freight expenses as well as sundry creditors shown by the assessee in its balance sheet. However, the AO fairly agreed that the possibility of freight expenses could not be ruled out as the assessee is engaged in the business of transportation. Therefore, in the absence of documentary evidence, the AO had to make the disallowance of the expenses on an ad-hoc basis. The Ld. CIT-A subsequently confirmed the view taken by the AO.

10.1 Now the 1st controversy arises for our adjudication so as to whether the AO can make the ad-hoc disallowances without rejecting the books of accounts. In this regard we find important to refer to the provisions of section 145(3) of the Act, which is reproduced as under:

“Section 145(3): Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) ⁶⁴[has not been regularly followed by the assessee, or income has not been computed in accordance with the standards notified under sub-section (2)], the Assessing Officer may make an assessment in the manner provided in section 144.]”

10.2 A plain reading of the above provisions reveals that the books can be rejected if these are incomplete or incorrect. On perusal of the order of the AO, we note that it was nowhere alleged that the books of accounts of the assessee are incomplete or incorrect. The AO alleged that the assessee failed to substantiate the freight expenses claimed in the profit and loss account. In such a situation we are of the view that the books of accounts of the assessee are not liable to be rejected. In this regard, we find support and guidance from the judgment of Honøble Allahabad High Court in the case of Dr. Prabhu Dayal Yadav Vs. CIT reported in 89 taxmann.com 126 wherein it was held as under:

“Thus, it appears that the books of account of the assessee have been rejected merely because the assessee did not produce the vouchers. Though, such vouchers may have been maintained, however, in the entirety of the facts found in this case the assessee had maintained his accounts and recorded his professional receipts therein. No evidence exists to doubt the correctness or completeness of the books of account of the assessee. In the instant case, books of account of the assessee were rejected on unfounded suspicion. Absence of vouchers, in the peculiar facts of this case did not give rise to any presumption that there was any non-disclosure of income inasmuch as there was no evidence to doubt the correctness of the entries made in the OPD register as also Indoor Patient register. A bare perusal of the aforesaid chart indicates that for the assessment year 2008-09 the assessee had been assessed under section 143(3) at a total income of Rs. 2,84,371. In that assessment the books of account of the assessee were also accepted. It clearly appears that the income disclosed by the assessee in the present year is similar or comparable to the income which the department assessed at the hands of the assessee five years later. This fact itself indicates that the rejection of books of account and the consequential best judgment assessment made by the Assessing Officer in the present year is wholly excessive, arbitrary and unfounded.”

10.3 We also find support and guidance from the judgment of Honøble Kerala High Court in the case of C.M.Francis& Co. Vs. CIT reported in 77 ITR 449 wherein it was held as under:

“The only ground on which the Tribunal held that the proviso to section 13/145 would apply to the case was that the assessee's purchases were supported only by its own bought notes in respect of arecanut. The sellers were agriculturists from whom it was not possible in the ordinary course of business to have vouchers and that maintenance of bought notes by the purchasers was the common feature in this line of business. Therefore, the fact that the assessee did not obtain bought notes from the sellers was not a defect by itself, or something which the assessee could had helped in the ordinary course of its business. It was not the case that purchases were inflated or bogus purchases had gone into the accounts. Admittedly, the accounts were properly and regularly maintained; and they had been accepted in respect of three out of the four commodities in which the assessee dealt. In these circumstances, the unavoidable fact that the purchases of arecanut, were supported only by the assessee's bought notes was no ground for the application of the proviso to section 13 of the 1922 Act, or the proviso to section 145 of the 1961 Act.

As regards contention on behalf of revenue that the Court was not entitled to interfere with the finding of fact, it was to be held that if the finding cannot be sustained on any material, or if the facts stated in support of the finding have no relevancy to the conclusion of the Tribunal, it raises a question of law; and this Court is entitled to examine whether the said finding can be sustained. In the instant case, the assessee's accounts relating to arecanut business were rejected on the sole ground that the purchases were supported only by its own bought notes, which by itself did not constitute a valid ground for rejection of the accounts. In view of the above, Tribunal was not justified in applying the proviso to section 13/145.”

10.4 On the strength of the above judgments we hold that the books of account of the assessee cannot be rejected in the given facts and circumstances.

10.5 The case law cited by the Id. counsel for the assessee Suresh scrap industries Ltd (*supra*), we note that the facts are different from the case on hand. In that case the issue was related to the GP ratio whereas the issue in the instant case relates to the disallowance of the expenses. Therefore, we are reluctant to place our reliance on the judgement cited by the Ld. Counsel for the assessee.

11. Now the next controversy arises for adjudication so as to whether the AO can make the ad-hoc disallowances. In this regard, we note that the onus lies on the assessee to substantiate the claim made in its financial statements. In the case on hand, the assessee has not produced sufficient documentary evidence in support of his claim. Therefore, there was no alternative to the AO except to make the disallowance on an estimated basis. But in our considered view such ad hoc/estimated disallowances should be made on some scientific basis.

11.2 In such a case the history of the assessee becomes very relevant in the sense that the ratio of the similar expenses should be adopted for calculating the reasonableness of the expenses. Besides this, the AO should have referred to the comparable cases to determine the reasonableness of the expenses claimed by the assessee. But we note that the AO has not made any reference either to the earlier years expenses of the assessee or the comparable cases wherein similar expenses were claimed and allowed.

11.3 Accordingly we hold that there was no basis adopted by the AO for determining the disallowance at the rate of 10%.

11.4 We also note that if such disallowance is made than the GP ratio of the assessee will go very high, i.e. 15.38% which appears to be very abnormal in the line of transport business.

11.5 However, the requirement of making the disallowance of the expenses on estimated basis cannot be ruled out in the instant case as the assessee has not filed the sufficient documentary evidence in support of his claim. Therefore, in the interest of justice and fair play we are inclined to restrict the

disallowance of transport expenses to 2.5% of the total freight expenses claimed by the assessee. Hence the ground of appeal of the assessee is partly allowed.

12. The 2nd issue raised by the assessee is that Ld. CIT(A) erred in confirming the addition of Rs. 96,773/- on account of unaccounted income.

13. The AO during the assessment proceedings observed that the assessee had received certain income amounting to Rs. 96,773/- from the parties which were not disclosed in its income tax return. The details of such parties read as under:

Sr.No.	Name of the Party	Amount (Rs.)
1.	Pritam Singh (Bawa Trading Co.)	72,333
2.	Plastene India Ltd	4,850
3.	Speciality Minerals Ltd	13,00
4.	Laakoona Reaction-Unit-I, Ahmedabad	6,590
	Total	96,773

13.1 On the question by the AO, the assessee claims that he has already shown the above income in its books of accounts. But the AO observed that the assessee failed to substantiate his claim on the basis of documentary evidence. Therefore, the AO treated the above income as unaccounted income of the assessee and added to the total income of the assessee.

14. Aggrieved assessee preferred an appeal to the Ld. CIT(A). The assessee before the Ld. CIT(A) submitted that the above amount has already been shown in the profit and loss account under the head *to pay freight received* of Rs.18,10,332/-. Therefore, the same cannot be added to the total income of the assessee.

15. However, the Ld. CIT(A) disregarded the contention of the assessee on the ground that the assessee has shown credit balance in the individual ledgers of the parties as discussed above. Thus the Ld. CIT(A) was of the view that the amount received by the assessee from the parties as mentioned earlier has not been offered as income in the profit and loss accounted under the head to pay freight received.

16. Being aggrieved by the order of the Ld. CIT(A) assessee is in appeal before us.

17. The Ld. AR before us reiterated the submissions as made before the Ld. CIT(A).

18. On the other hand the ld. DR vehemently supported the order of authorities below.

19. We have heard the rival contentions and perused the materials available on record. The issue in the instant case relates whether the assessee has already disclosed the income of Rs. 96,773/- in its financial statements. As per the order of the ld. CIT (A) such income was not disclosed in the financial statements of the assessee. Therefore, the addition made by the AO was confirmed.

19.1 The learned AR before us claimed that the assessee has already shown income of 96,773/- in its profit and loss account under the head to pay freight receipt. However, we note that the assessee has not given the breakup of the income shown under the head to pay freight receipt amounting to

18,10,236/-. Thus in the absence of the necessary details of the income, we find difficult to rely the statement furnished by the assessee.

19.2 Besides the above we note that the assessee has placed individual ledgers of 3 parties wherein the credit balance has been shown. In our considered view, the credit balance shown does not represent the income of the assessee. As such the credit balance shown in the ledger of these parties suggests that the assessee has shown advances in the financial statements. There was no information filed by the assessee for his fourth party from whom the income was claimed to have received.

19.3 Thus, we do not find any infirmity in the order of authorities below. Hence the ground of appeal of the assessee is dismissed.

20. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the Court on 01/01/2019 at Ahmedabad.

**-Sd-
(MS MADHUMITA ROY)
JUDICIAL MEMBER**

**-Sd-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

True Copy
Ahmedabad; Dated 01/01/2019
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आदेश क० त्तलम ढे षत/Copy of the Order forwarded to :

1. अपीलाथ / The Appellant
2. ढयथ / The Respondent.
3. संबंढत आयकर आयुत / Concerned CIT
4. आयकर आयुत(अपील) / The CIT(A)
5. ढभागीय ढतनाध, आयकर अपीलाय अधकरण / DR, ITAT,
6. गाडफाईल / Guard file.

आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलाय अधकरण, अहमदाबाद / ITAT, Ahmedabad