

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'C' NEW DELHI**

**BEFORE SHRI G. D. AGRAWAL, VICE PRESIDENT  
AND  
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**I.T.A. No. 5532/DEL/2016 (A.Y 2012-13)**

Punjab Stainless Steel Inds. B-61, Wazirpur Industrial Area New Delhi AAAFP4223G <b>(APPELLANT)</b>	Vs	ACIT Circle-34(1) New Delhi  <b>(RESPONDENT)</b>
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**I.T.A. No. 1107/DEL/2016 (A.Y 2011-12)**

ACIT Circle-34(1), Room No. 804, 8 <sup>th</sup> Floor, E-2 Block, S. P. Mukherjee Bhawan New Delhi <b>(APPELLANT)</b>	Vs	Punjab Stainless Steel Inds. B-61, Wazirpur Industrial Area New Delhi AAAFP4223G <b>(RESPONDENT)</b>
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**I.T.A. No. 1147/DEL/2016 (A.Y 2011-12)**

Punjab Stainless Steel Inds. B-61, Wazirpur Industrial Area New Delhi AAAFP4223G <b>(APPELLANT)</b>	Vs	ACIT Circle-19(1) New Delhi  <b>(RESPONDENT)</b>
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**I.T.A. No. 6036/DEL/2016 (A.Y 2012-13)**

ACIT Circle-34(1), Room No. 804, 8 <sup>th</sup> Floor, E-2 Block, Minto Road, New Delhi <b>(APPELLANT)</b>	Vs	Punjab Stainless Steel Inds. B-61, Wazirpur Industrial Area New Delhi AAAFP4223G <b>(RESPONDENT)</b>
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Appellant by	Sh. Ved Jain, Adv , Sh. Ashish Goe & Sh. Rishabh Jain, CAs.
Respondent by	Sh. Amit Katoch, Sr. DR

Date of Hearing	28.05.2019
Date of Pronouncement	04.06.2019

## **ORDER**

### **PER SUCHITRA KAMBLE, JM**

These four appeals are filed by the assessee and Revenue against the orders dated 31/12/2015 & 23/08/2016 for Assessment Year 2011-12 & 2012-13 passed by CIT(A)-12, New Delhi.

2. The grounds of appeal are as under:-

#### **I.T.A. No. 5532/DEL/2016 (A.Y 2012-13)**

*"1. That on the facts and in law, the Id. Commissioner (Appeals) has erred in sustaining estimated disallowance of Rs. 3,87,932/- @ 2.17% of the total payments of polishing of Rs. 1,78,76,711/-. The disallowance is entirely base less, whimsical and unstainable for the reasons:-*

*(a) the appellant has admitted produced all the necessary and required evidence including their PANS, Names and addresses of the contractors and their bills containing full particulars of quantities, rates etc.*

*(b) all the payments has been made to them by means of account payee cheques after deduction of TDS in all the cases.*

*(c) the evidence filed has not been assailed by the id. A.O. is there any rebutted of the facts or evidence. No tangible materials.*

*2. That on facts and in law, the id. Commissioner (Appeals) has erred in confirming disallowance of Rs. 38,968/- by reducing the rate of depreciation*

*on some Electrical equipments and fittings for installing Plant and Machinery in the A.Y. 2002-03 as forming part of the block of assets entitled to 15% and depreciation allowed till the A.Y. 2009-10i*

*(a) There being no change facts and the W.D.V of the assets being brought forward by the Revenue since the A.Y. 2009-10, there was no justification for disturbing the W.D.V. of the block of assets by isolating these items on different perception by the Id. A.O. of the nature of these items and also violating the Rule of estoppel.*

*(3) On the facts and in law, the id. Commissioner (Appeal) has erred in confirming on addition of Rs. 2,14,220/- an account on notional interest on interest free advances to eight parties aggregating to Rs. 17,85,158/- on the ground that these interest free advances has no business nexus and if they had not been made the appellant had to pay lower interest on his interest carrying borrowings. The Ld. Commissioner (Appeal) erred in overlooking the following facts:-*

*(a) these advance are made in the earlier years mostly much prior to the A.Y. 2010-11 and no notional interest was assessed.*

*(b) the fact that these allegedly interest free advances were made out of interest carrying borrowed funds has not been denied by the A.O.*

*(c) the appellants own interest free funds lying in interest free current accounts of the parties alone amounted to Rs. 22.55 crores at the being of the year and Rs. 22.22 crores at the end of year against the interest free advances of Rs. 25,97,038/- at the being of the year and Rs. 17,85,158/- at the end of the year. The same position prevailed during the earlier years.*

*(d) that it was well settled that unless there was a direct nexus between the borrowed funds and the net interest free advances which were from common*

*pool of funds and the interest free funds available with the assessee far exceeding the assessee's own interest free advances, no disallowance of interest on addition of notional interest could be made."*

**I.T.A. No. 1107/DEL/2016 (A.Y 2011-12)**

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*"1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 61,31,446/- made on account of disallowance of commission paid to non residents without properly appreciating explanation 2 to sec. 9(1)(vii) and explanation 2 to sec. 195 of the IT Act, 1961 while deciding the TDS provision u/s 195, that it is not applicable to nonresident commission agent?*

*2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 61,31,446/- made on account of disallowance of commission paid to non residents while ignoring the merits of the case i.e. assessee has not produced any contract or agreement regarding commission thereby raising a doubt over the payment of commission itself?*

*3. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the addition of Rs.25,74,432/- made by disallowing 15% of polishing charges, to Rs.3,73,469/-, while ignoring the fact that in the earlier years CIT(A) has itself allowed disallowance of 15% which was upheld by ITAT and for the AY 2009-10 the disallowance in respect of polishing charges was made by AO @15% against which assessee has not gone on for appeal.?*

**I.T.A. No. 1147/DEL/2016 (A.Y 2011-12)**

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**Ground of Appeal No. 1**

*“That on the facts and the evidence of the case, the Id. CIT (Appeals) has erred in sustaining disallowance out of the total polishing charges payments of Rs. 1, 71, 62, 870/-, a sum of Rs. 3, 69, 479/- representing petty payments aggregating to Rs. 3, 73, 469/- to five petty job workers who at the time of assessment were either not found at their old address or did not comply with the notices U/s 133 (6) though the payment were duly supported by their bills specifying the quantities of the work done and the further fact that in accordance with the general practice of the appellant, the payments were made to them by means of account payee cheques.*

**Ground of Appeal No. 2**

*That the Id. CIT (Appeals) has erred in conforming the allowance of depreciation @ 10% instead of 15% on the W.D.V. of installed electrical panels, switch boards, pvc wire and conductors and also some payments made to the electricity department for lying transmission lines for the production and plant and machinery of the appellant. The authorities below failed to appreciate that this items were not in the category of normal "furniture/fittings including electrical fittings"*

**Ground of Appeal No. 3**

*That on the facts of the case the Id. CIT (Appeals) has erred in conforming the addition of Rs. 1, 91, 465/- been the notional interest of interest free advances aggregating to Rs. 15, 97, 038/-. She failed to appreciate that:-*

- (a) As the appellant had its own interest free funds far exceeding the sum of Rs. 15, 97, 038/-:-*
- (b) No disallowance had been made in the earlier years with reference to these advances:-*
- (c) There was no direct nexus between these advances and borrowed funds."*

*"1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.79,88,239/- made on account of disallowance of commission paid to non residents without properly appreciating explanation 2 to sec. 9(l)(vii) and explanation 2 to sec. 195 of the IT Act, 1961 while deciding the TDS provision u/s 195, that it is not applicable to non- resident commission agent?*

*2. Whether on the facts and circumstances of the case and in law. the Ld. CIT(A) has erred in deleting the addition of Rs. 79,88,239/- made on account of disallowance of commission paid to non residents while ignoring the merits of the case i.e. assessee has not produced any contract or agreement regarding commission thereby raising a doubt over the payment of commission itself?*

*3. Whether on facts and circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the addition of Rs.26,81,506/- made by disallowing 15% of polishing charges, to Rs.3,87,925/-, while ignoring the fact that in the earlier years CIT(A) has itself allowed disallowance of 15% which was upheld by ITAT and for the A.Y. 2009-10 the disallowance in respect of polishing charges was made by A.O. @15% against which assessee has not gone on for appeal?*

*4. Whether on the facts and circumstance of the case and in law, the Ld. CIT(A) has erred in restricting the addition of Rs.26,81,506/- made by disallowing 15% of polishing charges, to Rs.3,87,925/-, without giving any basis for arriving at the figure of Rs.3,87,925/-, resulting in arbitrary deletion of Rs.22,93,581/-?*

3. We are first taking appeals for Assessment Year 2011-12 as the facts for A.Y. 2012-13 is identical. The assessee firm consists of five partners namely M/s Harvinder Singh & Sons, HUF, Preet Pal Singh, Paramjeet Singh, Harpal

Singh and Prabhjeet Singh , sharing equal profit sharing ratio and is engaged in the business of manufacturing and export of stainless steel utensils, wares, cutlery etc. and trading of S.S. Shelter etc. During the year, the assessee declared gross profit of Rs. 9,81,83,341/- against total sales of Rs. 56,37,53,725/- yielding a GP rate of 17.41% as compared to immediate preceding years GP rate of 20.47% against the total sales of Rs. 40,52,75,216/- . Return of income declaring an income of Rs. 1,65,86,630/- was filed by the assessee on 30/09/2011. The case was selected for scrutiny and notice u/s 143(2) was issued on 9/8/2012 and was duly served upon the assessee. Subsequently notice u/s 142(1) along with questionnaire were also issued to the assessee. In response to the above notices CA and Accounts Manager duly authorized by the assessee in the case appeared from time to time and filed requisite details as called for. The Assessing Officer observed that there is decline in the GP rate as compared to immediate preceding year. The assessee was specifically asked to furnish the reasons for declining in the GP rate. The assessee vide submission dated 3/1/2014 submitted a note on comparative gross profit chart. The assessee also furnished books of accounts which were examined by the Assessing Officer during the assessment proceedings. The Assessing Officer made addition in respect of foreign commission expenses amounting to Rs. 61,31,446/-. The Assessing Officer also made addition in respect of polishing charges amounting to Rs. 45,845/- thereby taking into account rate of depreciation at 10% per annum. The Assessing Officer also made disallowance of interest amounting to Rs. 1, 91,645/-.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT (A). The CIT (A) partly allowed the appeal of the assessee.

5. As regards Ground No. 1 & 2 of Revenue's appeal relating to disallowance of commission paid to non-residence the Ld. DR submitted that the source from which the assessee derived income was within India from the activity carried in Indian. But the payments for technical consultancy were made

outside India. The Assessing Officer further held that in view of the Board Circular No. 7/2009, Commission paid to 3 parties situated in middle-east by the assessee deemed to accrue or arise in India. The Ld. DR further submitted that payment of commission to foreign agent neither comes in the purview of Section 9 of the Act as the same is not fee for technical services nor such payment of commission comes u/s 195 of Income Tax Act, 1961. The Ld. DR further submitted that TDS provisions are not applicable. Thus, no disallowance u/s 40(a)(ia) has to be made by the Assessing Officer. The Ld. DR submitted that this issue is squarely covered in assessee's own case being ITA No. 6043/Del/2014 dated 9/4/2018.

6. The Ld. AR further submitted that during the year under consideration, the assessee has claimed an expenditure of Rs. 61,31,446/- as foreign commission. The assessee submitted party wise details of commission paid during the year with their address and since the commission was paid to foreign parties PAN was not applicable. The Ld. AR submitted that that the assessee has appointed foreign agents for procuring expert orders. They render services outside India and have no establishment of business connection in India. The Assessing Officer disallowed the commission paid to the foreign agent on the ground that the assessee has not deducted tax relying upon CBDT Circular No. 23 dated 23/7/1969 & CBDT Circular No. 786, dated 7/2/2000. However, these circulars have been withdrawn by CBDT. The Assessing Officer also relied upon the decision of authority of advance reading in case of SKF Boiler & Driers Pvt. Ltd. wherein it was held that withholding of tax is mandatory u/s 95 on export commission paid to non resident agent. The Assessing Officer held that since, commission is due to accrue or arise in India, the sources from which the assessee had earned income were, therefore, inside India as the income earning activity that the payments for technical consultancy has been made outside India. The Ld. AR further submitted that payment to non-resident have been made for provision of consultancy services for earning income from the ultimate source in India and hence, even under

DTAAs, these payments would be taxable in India. The Ld. AR further submitted that the CIT(A) deleted the disallowance made by the Assessing Officer by holding that the commission written by the non-residents agents did not arise on account of 'business connection' of the commission agents in India and, therefore, cannot be deemed to accrue or arise in India u/s 9(1)(i) of the Act. The Ld. AR relied upon the decision of the Bangalore Tribunal in case of Exotic Fruits Pvt. Ltd. Vs. ITO being ITA No. 1008 to 1013/Bang/2012 as well as Welspring Universal Vs. JCIT being ITA No. 4761/Del/2014 dated 12/1/2015 wherein this issue of allowability of deduction u/s 40 a (ia) of the Act has been dealt. The Ld. AR further submitted that CIT(A) rightly deleted the disallowance made by the Assessing Officer on account of foreign commission expenses for which the Ld. AR relied upon the Hon'ble Delhi High Court decisions in case of CIT(A) vs Eon Technology Pvt. Ltd. 343 ITR 366. The Ld. AR also relied upon the withdrawal of earlier Circular No. 23 dated 23/7/1969 and Circular No. 786 dated 7/2/2000 by CBDT.

7. We have heard both the parties and perused the material available on record. The CIT(A) has rightly deleted this addition as the commission paid to non-resident cannot be treated as assessee's income from other sources as the assessee had earned income, the said income outside India and also the payment was made to non-resident which cannot be taxable in India when the parameters of DTAAs are applied to such transactions. Besides this in assessee's own case for A.Y. 2010-11, the Tribunal has dismissed this ground taken by the Revenue and no contrary or distinguishing facts were pointed out during the hearing in the present assessment by the Ld. DR. Therefore, Ground Nos. 1 & 2 of Department's appeal are dismissed.

8. As regards Ground No. 3 of the Revenue's Appeal and Ground No. 1 of the assessee's appeal, relating to disallowance of polishing charges amounting to Rs. 25,74,432/-, the Ld. DR submitted that the Assessing Officer has rightly made this disallowance and relied upon the assessment order.

9. The Ld. AR submitted that during the year under consideration, the assessee claimed polishing charges of Rs. 1,71,62,871/- in trading account. During the assessment proceedings, the assessee submitted the complete details of polishing charges paid to 18 parties. The Assessing Officer issued notice u/s 133(6) to 18 parties out of which 17 parties has not complied. Thereafter, the assessee furnish confirmations from 8 parties to whom payment aggregating Rs. 1,63,87,62/- have been made out of total polishing charges of Rs. 1,71,62,877/-. The assessee also furnished the photo copies of bills of copies and ledger account in respect of remaining parties. However, the Assessing Officer ignored the said facts and evidences furnished by the assessee and made an ad-hoc disallowance of Rs. 25,74,432/- being 15% of total polishing charges at Rs. 1,71,62,877/-. The Ld. AR further submitted that the CIT(A) has deleted the addition of Rs. 22,00,963/- on the basis that assessee has established the claim of Rs. 1,67,89,408/- in respect of polishing charges as the Assessing Officer did not state anything in case of remaining 12 parties. The Ld. AR further submitted that the Assessing Officer has alleged that the assessee failed to furnish the requisite information in respect of payment made to 5 parties amounting to Rs.3,73,469/- without appreciating the fact that during assessment proceedings assessee duly furnish the copies of bills in respect of claim of Rs. 3,73,469/-. The Ld. AR further submitted that the Tribunal in assessee's own case for Assessment Year 2009-10 restricted the disallowance to 5%. The Ld. AR further submitted that the company has been regularly maintaining books of account and the same are duly audited. These books of account were examined by the Assessing Officer during the assessment proceedings and there is no adverse finding of the Assessing Officer in relation to these documents. The Ld. AR submitted that it is a well settled law that the ad-hoc additions cannot be made. The Ld. AR relied upon the decision of the Tribunal in case of ACIT Vs. Modi Rubber Ltd. (ITA NO. 1952/Del/2014 order dated 15/5/2018). The Ld. AR also relied upon the following decisions:-

- ❖ Nitin Sales Corporation Vs. ITO (Delhi High Court) ITA NO. 1809/2005 order dated 11/7/2008.
- ❖ Shri Devendra Kumar Vs. ITO ITA No. 3239/del/2014 order dated 30/08/2016 (ITAT, Delhi).
- ❖ ACIT Vs Amtek Auto Ltd. 2006 112 TTJ 455 (ITAT, Delhi).
- ❖ Shri Gagan Goyal Vs. JCIT ITA No. 1514/Del/2015 order dated 2/8/2016 (ITAT, Delhi).

10. We have heard both the parties and perused the material available on record. The CIT(A) has rightly allowed the expenses of Rs. 22,963/- and upheld the disallowance of Rs. 3,73,469/-. Therefore, there is no need to interfere with the findings of the CIT(A). Ground No. 3 of Revenue's appeal and Ground No. 1 of assessee's appeal is dismissed.

11. As regards Ground No. 2 of assessee's appeal, relating to addition of excess claim of depreciation amounting to Rs. 45,845/- on electrical fitting. The Ld. AR submitted that during the year under consideration, the assessee has claimed depreciation on electrical fittings at 15% per annum amounting to Rs. 1,37,534/- because they are forming part of plant and machinery and as per Income Tax Act and Rules, depreciation is available at 15% per annum. The Assessing Officer allowed the depreciation on electrical fitting at 10% and disallowed the excess claim of 5% holding that electrical fitting falls in the furniture and fittings and rate of depreciation on furniture and fitting is at 10% per annum. The CIT(A) upheld the disallowance made by the Assessing Officer on the basis that furniture and fitting including electrical fitting as per table of rates of depreciation as per Income Tax Rules. In this regard, the Ld. AR submitted that Assessing Officer as well as CIT(A) has not appreciated nature and application of electrical installation items and such electrical installations form an integral part of assessee plant used for manufacturing steel utensils. Therefore, the Ld. AR submitted that depreciation was allowable at the rate applicable to plant and machinery. The Ld. AR relied upon the decisions of

the Tribunal in case of DCIT Vs. Nalwa Steels and Power Limited ITA No. 4559/Del/2010 order dated 9/8/2016. Thus, the Ld. AR submitted that the depreciation on electrical fittings has been rightly claimed by the assessee at 15% by treating it as part of plant and machinery, and not as furniture and fixtures. Thus, the Ld. AR submitted that the addition made by the Assessing Officer as well as CIT(A) amounting of excess claim of depreciation is not justified.

12. The Ld. DR relied upon the order of the Assessing Officer and the order of the CIT(A).

13. We have heard both the parties and perused the material available on record. The depreciation on electrical fittings has rightly been claimed by the assessee at 15% by treating it as part of plant and machinery and not as furniture and fixtures. It is necessary to have electrical fittings for the power supply to the machineries and plant without electrical fittings and power supply, there is no use of plant and machinery. Therefore, Ground No. 2 of assessee's appeal is allowed.

14. As regards Ground No. 3 of assessee's appeal, the Ld. AR submitted that during the year under consideration, the assessee has given interest free advances aggregating to Rs. 15,97,038/-. The Assessing Officer has made disallowance of Rs.1,91,645/- notional interest at 12% on interest free advances of Rs. 15,97,38/- holding that assessee has paid interest free advances and has nothing to do with the business of the assessee. The CIT(A) upheld the said disallowance made by the Assessing Officer. The Ld. AR submitted that assessee has its own funds which amount to Rs.22.54 crores as on 31/3/2011 and Rs. 23.84 crores as on 31/3/2010. Therefore, advances were given out of the own funds only and thus no addition on account of notional interest should have been made by the Assessing Officer. The Ld. AR submitted that it is well settled law that the assessee is free to use its own fund

the way it wants and the revenue cannot compel the assessee to do or perform or use its fund in a particular manner. It is also settled law that when own funds are more than the funds utilized towards interest free advances there cannot be any disallowance. The Ld. AR relied upon the decision of the Hon'ble Supreme Court in case of CIT(A) Vs. Reliance Industries Ltd. Civil Appeal No. 10 of 19 order dated 2/1/2019 and Hero Cycles Pvt. Ltd. Vs. CIT(A) 379 ITR 347 (SC).

15. We have heard both the parties and perused the material available on record. The addition in respect of notional interest on interest free advances cannot sustain as assessee has its own funds which amount to Rs. 22.54 crores as on 31/3/2011 and Rs. 23.84 crores as on 31/03/2010. Therefore, advances were given out of its own funds only. Thus, in light of the decision of the Hon'ble Apex Court, no addition on account of notional interest can be made by the Assessing Officer. Ground No. 3 of the assessee's appeal is allowed.

16. In result, ITA No. 1147/del/2016 and 1107/Del/2016 are partly allowed for statistical purpose.

17. As regards ITA No. 5532/Del/2016 & 6036/Del/2016 for Assessment Year 2012-13, the facts are identical and the grounds are also identical. Therefore, the same are partly allowed for statistical purpose.

18. In result, ITA No. 5532/Del/2016 & 6036/Del/2016 are partly allowed for statistical purpose.

**Order pronounced in the Open Court on 04<sup>th</sup> June, 2019.**

Sd/-

**(G. D. AGRAWAL)**  
**VICE PRESIDENT**  
Dated: 04/06/2019  
*R. Naheed \**

Sd/-

**(SUCHITRA KAMBLE)**  
**JUDICIAL MEMBER**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	28.05.2019
Date on which the typed draft is placed before the dictating Member	28.05.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date of pronouncement:	04/06/2019
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	