

आयकर अपीलीय अधिकरण,सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT

BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A. No's.1288 & 1289/AHD/2013

निर्धारण वर्ष/Assessment Year : 2006-07

R.S.Tradelinks Pvt. Ltd., C/o.Bombay Way Bridge, Magdalla Port Road, Magdalla, Surat. [PAN: AABCR 6607 A	Vs.	Assistant Commissioner of Income Tax, Circle-4, Surat.
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से /Assessee by	Shri Rasesh Shah - CA
राजस्व की ओर से /Revenue by	Shri R.P.Rastogi - Sr.DR

सुनवाई की तारीख/ Date of hearing:	15.07.2019
उद्घोषणा की तारीख/Pronouncement on:	18.07.2019

आदेश / O R D E R

PER O.P.MEENA, AM:

- These two appeals filed by the Assessee are directed against the separate orders of Id. Commissioner of Income Tax(Appeals)-II, Surat(in short "the CIT(A)") dated 25.02.2013 and 28.03.2013 respectively, pertaining to Assessment Year 2006-07.
- The grounds raised by the Assessee in ITA No.1288/Ahd/2013 read as under :

“[1] On the facts and in the circumstances of the case as well as law on the subject, the learned CIT-(A)-II, Surat ought to have deleted the adhoc

addition of Rs.20,72,499/- being 50% of remaining sundry creditors for goods treating it as bogus.

- [2] On the facts and in the circumstances of the case as well as law on the subject, the learned CIT-(A)-II, Surat ought to have deleted addition of Rs.1,68,423/- being 15% of outstanding creditors for expenses and Rs.4,33,587/- being 5% of the total Administrative and Selling expenses as the same is on estimate basis and without any cogent evidence.
- [3] On the facts and in the circumstances of the case as well as law on the subject, the learned CIT-(A)-II, Surat ought to have deleted the addition of Rs.26,94,613/- in respect of transportation expense for alleged non-deduction of TDS.
- [4] On the facts and in the circumstances of the case as well as law on the subject, the learned A.O. ought to have given proper opportunity of being heard on the basis of remand report sent by the learned CIT-(A)-II, Surat."

3. The grounds raised by the Assessee in ITA No.1289/Ahd/2013

read as under :

- "[1] On the facts and in the circumstances of the case as well as law on the subject, the learned CIT-(a)-II, Surat ought to have deleted the penalty levied by the A.O. to the tune of Rs.73,29,327/- but restricted it to the tune of Rs.6,21,750/- without appreciating the facts of the case.

Your appellant, therefore, prays that looking to the facts and law on the subject, the penalty levied to the tune of Rs.6,21,750/- may please be deleted."

ITA No.1288/Ahd/2013 for A.Y.2006-07:

4. Brief facts of the case are that the original assessment was completed u/s.144 of the Act wherein the Assessing Officer (AO) observed that sundry creditors of Rs.3,52,88,624/- are not verifiable, therefore taking a fair view 50% of the total amount which was worked out to Rs.1,76,44,312/- was disallowed. This addition was contested in appeal before the Id.CIT(A) wherein it was submitted that out of total sundry creditors of Rs.3,52,88,624/-, the

amount of Rs.3,11,43,626/- belongs to one party namely PEC Ltd., New Delhi. To prove the genuineness of transaction with this party additional evidences were submitted before the Id.CIT(A), but the Id.CIT(A) has refused to admit the additional evidence filed by the assessee on the ground that the case of the assessee is not covered by any exception under rule 46A of Income Tax Rules. Consequently, this ground of appeal was dismissed by the Id.CIT(A). However, on the other grounds were considered by the Id.CIT(A) on merit and decided accordingly.

5. Against the order of Id.CIT(A), the assessee carried the matter before the ITAT, the ITAT vide order dated 01.06.2012 restored the matter to the file of the Id.CIT(A) for passing the *denovo* appellate order in accordance with law.

6. In compliance thereto, the additional evidences filed by the appellant were forwarded to the Assessing Officer on which remand report was obtained on 14.02.2013. From the remand report, it was transpired that the transaction of Rs.3,11,43,626/- with the PEC Ltd., New Delhi was verifiable and genuine. However, the remaining amount of Rs.41,44,998/- out of total sundry creditors remained as

unexplained and bogus in view of the conclusions drawn by the Assessing Officer during the assessment proceedings. In view of these facts, the Id.CIT(A) upheld the addition of 50% of Rs.41,44,998/- which worked out to Rs.20,72,499/-.

7. Being aggrieved, the assessee filed this appeal before this Tribunal. The Id.Counsel for the assessee submitted that out of total sundry creditors of 3.52 crores, 3.11 crores pertains to one party which was found verifiable and same was accepted. However, with regard to balance of Rs.41.44 lakhs, evidences could not be filed as the evidence was filed in relation to one creditor i.e. PEC Ltd., New Delhi. It was submitted that the books of accounts of the assessee are audited in which sundry creditors have been duly shown, copy of which placed at page no.20. The auditor has not given any adverse comments with regard to sundry creditors. Further no addition can be made in respect of sundry creditor u/s.68 as held by the Hon'ble Allahabad High Court in the case of CIT Vs. Pancham Dass Jain (2006] 156 taxmann 507 (all) wherein it was held that provisions of section 68 are not attracted to amounts representing purchases made on credit – Tribunal has recorded a categorical finding of fact based on the appreciation of material and evidence

on record that the AO has accepted the purchases, sales as also the trading result disclosed by the assessee. It has also recorded a finding that the two amounts in question represented the purchases made by the assessee on credit. Therefore, the Id.CIT(A) was not justified in disallowing 50% of sundry creditors.

8. *Per contra*, the Id.Senior Departmental Representative(Sr.DR) relied on the Id.CIT(A) and submitted that the assessee has failed to furnish necessary evidence, hence the Id.CIT(A) has rightly disallowed 50% of bogus creditors.

9. We have heard both the parties and perused the material on record. We find that the out of 3.52 crores sundry creditors, sundry creditors amounting to Rs.3.11 crore pertaining to one party i.e. PEC Ltd., New Delhi were found verifiable and hence same was considered as genuine. With regard to balance creditors of Rs.41,44,998/- the Id.CIT(A) has disallowed 50% of the same without bringing any material on record, whereas no such disallowance u/s.68 can be made in respect of sundry creditor as held by the Hon'ble Allahabad High Court in the case of CIT Vs. Pancham Dass Jain (supra). Further, the books of accounts are

audited and there is no adverse remark regarding the sundry creditors. The books of accounts could not be produced as these were destroyed in flood of August 2006. Necessary proof in form of newspaper advertisement has been filed. Further, the Gross Profit Ratio for the year consideration is shown at 5.867% as compare to last year of 4.031%. The assessee has shown purchase of Rs.25.9 crore during the year, and same having been accepted. Therefore, payment outstanding on the same cannot be treated bogus and unexplained, unless contrary evidence is produced. Therefore, it cannot be treated as entirely non-genuine. However, considering the facts that same were not verifiable. Therefore it would be in the interest of justice to restrict the disallowance to 2% of total unverifiable sundry creditors amounting to Rs.41,44,998/-. The Assessing Officer is directed to work out accordingly. This ground of appeal is therefore partly allowed.

10. Ground No.2 relates to confirming addition of Rs.1,68,423/- being 15% out of outstanding creditor for expenses and Rs.4,33,587/- being 5% of total administrative sale of expenses as the same are estimate basis and without any cogent evidence.

11. We have heard the rival submissions and perused the material available on record. We find that the ITAT vide its order dated 01.06.2012 has set-aside the order to the file of the Id.CIT(A) for passing a *denovo* appellate order in accordance with law. However, the Id.CIT(A) has not adjudicated on this issue on the ground that these were considered in first ground of appeal by the Id.CIT(A). It is seen that the assessee has taken ground no.3 on this issue in the original appeal before the Id.CIT(A). We find that the Assessing Officer has disallowed 50% of the outstanding sundry expenses of Rs.11,22,823/- and worked out the same at Rs.5,61,411/- and similarly 5% the of administrative expenses amounting to Rs.4,33,587/-. The Id.CIT(A) has restricted the disallowance to 15% of sundry expenses and deleted 35% of such disallowance after having appreciated the rival contentions including the loss of books of accounts of the assessee is flood. Therefore, we are of the considered opinion that it would be just and fair in the interest justice to restrict the disallowance to 5% of sundry expenses amounting to Rs.11,22,823/- which comes to Rs.56,141/-, accordingly balance addition made by the Assessing Officer is deleted. The Assessing Officer is directed to calculate the

disallowance accordingly. However, disallowance @ 5% in respect of disallowance of administrative expenses are therefore also reduced to 2% of the claim. The Assessing Officer will recalculate the same, accordingly, this ground of appeal is partly allowed.

12. Ground No.3 relates to confirming disallowance of Rs.26,94,613/- in respect of transportation expenses on account of non-deduction of TDS.

13. We find that in the first round of appeal the disallowance amounting of Rs.1,40,28,500/- being the expenses directed on the basis of Revenue calculation in respect of which TDS was shown payable at the yearend u/s.40(ai)of the Act. It was explained by the Authorised Representative of the Assessee that the TDS is applicable on the outward transportation expenses of Rs.26,94,613/- only as shown in the Profit and Loss Account. He, further submitted that total office and administrative expenses are claimed to the tune of Rs.86,71,746/- in the Profit and Loss Account and therefore the addition made to the tune of Rs.1,40,28,500/- is baseless as the total expenses claimed does not exceed Rs.86,71,746/-. According to him, financial expenses amounting to

Rs.71,51,507/- pertains to bank interest and charges including L/C charges for which TDS is not even applicable. Having considered the issue and the fact and the perusal of the Profit and Loss Account, the Id.CIT(A) held that disallowance of Rs.26,94,613/- in respect of transportation only can be confirmed and the balance is required to be deleted. The Assessing Officer was directed to do accordingly.

14. Before us, the Id.Counsel for the assessee submitted that the assessment was set-aside for making *denovo*, therefore the Id.CIT(A) should adjudicated on this point. However, the Id.CIT(A) upheld the findings of his predecessors.

15. On the other hand, the Id.Sr.DR relied on the orders of the Id.CIT(A).

16. On careful consideration of the facts, we find that the disallowance of Rs.26,94,613/- were pertains in respect of transportation only. Since the books of accounts of the assessee were lost in flood, therefore same cannot be verified. Further, it appears that TDS is also not deducted thereon, however, the expenses are duly reflected in audited books of accounts. Therefore, it cannot be wholly held that entire expenses are not

verifiable. Considering the facts, we are of the considered opinion that it would be fare and reasonable to restrict disallow to 5% of total transportation expenses Rs.26,94,643/-. The Assessing Officer is directed to recalculate the same. This ground is therefore, partly allowed.

17. In view of these facts, we are not inclined to interfere with the findings recorded by the Id.CIT(A), accordingly same is upheld. This ground of appeal is therefore dismissed.

18. In the result, appeal of the assessee is partly allowed.

ITA No.1289/Ahd/2013 for A.Y. 2006-07:

19. The sole ground of appeal states that the Id.CIT(A) ought to have deleted whole penalty of Rs.73,29,327/- but restricted to Rs.6,21,750/- without appreciating facts of the case, therefore penalty levied may please be deleted.

20. The Retuned Income of Rs.9,48,744/- was assessed u/s.143(3) r.w.s. 144 of the Act by making addition of Rs.1,76,44,312/- being 50% disallowance out of the sundry creditors for goods, disallowance of Rs.5,61,411/- for creditors for

expenses, disallowance of Rs.4,33,587/- out of office and administrative expenses and disallowance of expenditure of which TDS was shown to be payable amounting to Rs.1,40,28,500/- u/s.40(a) of the Act. The above disallowance penalty proceedings u/s.271(1)(c) of the Act was also initiated.

21. The assessee has carried the matter before the Id.CIT(A), the Id.CIT(A) confirmed the addition of Rs.1,76,44,312/- being 50% disallowance out of sundry creditors for goods and restricted the disallowance to 15% of sundry creditors to Rs.1,68,423/-. The Id.CIT(A) further confirmed the disallowance out of administrative expenses of Rs.4,33,587/-. However, the Id.CIT(A) has restricted the addition made u/s.40(a) at Rs.26,94,643/-. Thereafter, the Assessing Officer giving one more opportunity of being heard held that the total addition of Rs.2,09,40,935/- i.e. [Rs.17644312/- sundry creditors + Rs.26,94,613/- disallowance u/s.40(a) + Rs.1,68,423/- disallowance restricted to 15 % + Rs.4,33,587/- office and administrative expenses] as deemed concealment of income, accordingly the Assessing officer levied penalty of Rs.73,29,327/- being 100% of tax sought to be evaded of Rs.2,09,40,935/-.

22. Being aggrieved, the assessee filed an appeal before the Id.CIT(A). The Id.CIT(A) observed that the disallowance on account of sundry creditors for goods restricted by the Id.CIT(A) to Rs.20,72,499/- as against Rs.1,76,44,312/-. Further, addition of Rs.5,61,411/- was reduced to Rs.1,68,423/- and disallowance of Rs.5,43,587/- and Rs.26,94,613/- was confirmed. However, the Id.CIT(a) deleted the penalty levied in respect of additions of Rs.1,68,423/-, Rs.,4,33,587/-, and Rs.26,94,613/- as being adhoc disallowance not amounting to concealment of income. However, the Id.CIT(A) has confirmed the penalty of Rs.6,21,750/- in respect of 50% disallowance of sundry creditors for goods at Rs.20,72,499/-.

23. Being aggrieved, the assessee has filed this appeal before this Tribunal. The Id.Counsel for the assessee submitted that the Id.CIT(A) has considered the 50% disallowance out of unverifiable sundry creditors for goods which is also in disallowance of adhoc nature, hence sundry creditors should have been deleted, accordingly the penalty on the same is not leviable on the same logic on which the penalty has been deleted by the Id.CIT(A). It was submitted that disallowance made merely on estimate basis as with the books of accounts of the assessee were not available due

to destruction of same in the flood of August 2006. However, the books of accounts are audited and auditors have not made any adverse comments in respect of books of accounts. Therefore, no penalty u/s.271(1)(c) is leviable on this account also. The Id.Counsel also supported his views by placing reliance on the decision of Hon'ble Supreme Court in the case of CIT Vs. Reliance Petro Products [2010] 322 ITR 158 (SC), Dilip N. Shroff Vs. JCIT 2746 of 2007 (SC) dated 18.05.2007, Nayan C Shah Vs. ITO, Tax Appeal No.543 of 2012 Gujarat High Court dated 29.03.2016 and others as per his case laws and paper book.

24. *Per contra*, the Id.Senior Departmental Representative relied on the orders of the Id.CIT(A).

25. We have heard the rival submissions and perused the material available on record. We find that the Id.CIT(A) has sustained penalty in respect of 50% disallowance out of sundry creditors for goods sustained at Rs.20,72,499/- by him. We have heard the quantum appeal of the assessee in earlier part of this order wherein we have reduced the disallowance to 2% of the total sundry creditors of Rs.41,44,998/-. We, find note that penalty is levied in

respect of material disclosed by the assessee during the course of assessment proceedings just because the sundry creditors for goods were not proved by through books of accounts, that does not mean that the assessee has concealed the particulars of income. The assessee has cited a case law which we have noted in the quantum of appeal wherein it was held that the addition on account of sundry creditors for goods cannot be made where the assessee has shown the purchases and same has been accepted by the Assessing Officer. Therefore, this being mere adhoc disallowance being mere estimated basis which does not amount to concealment of income. The Id.Counsel has placed reliance on the decision of Hon'ble Supreme Court in the case of CIT Vs. Reliance Petro Products(supra) wherein it was held that merely because the assessee claimed deduction of interest expenditure which has not been accepted by the Revenue, penalty u/s.271(1)(c) is not attracted. Mere making of the claim, which is no sustainable in law, by itself will not amount to concealment of particulars regarding the income of the assessee.

26. In view of the facts and circumstances above, we are of the considered opinion that no positive concealment has been established and therefore penalty on mere disallowances of sundry

creditors for goods is not justified, accordingly the penalty sustained by the Id.CIT(A) is therefore deleted.

27. In the result, appeal of the assessee is allowed.

28. In the result, appeal of the assessee in ITA No.1288/Ahd/2013 is partly allowed and in ITA No.1289/Ahd/2013 is allowed.

29. The order pronounced in the open court on 18.07.2019.

Sd/-
(H.S.SIDHU)

(न्यायिकसदस्यतथा/JUDICIAL MEMBER)

Sd/-
(O.P.MEENA)

(लेखासदस्यकेसमक्ष /ACCOUNTANT MEMBER)

सुरत/ **Surat**, दिनांक **Dated:** 18th July, 2019/S.Gangadhara Rao, Sr.PS

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / **TRUE COPY** / /

Assistant Registrar, Surat