

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI**

BEFORE SHRI RAJESH KUMAR (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 4170/MUM/2015
Assessment Year: 2011-12**

The Dy. Commissioner of Income tax -32(2), Pratyaksha Kar Bhavan, Room No. 308, C-10, 3 rd Floor, Bandra Kurla Complex, Bandra (East), Mumbai - 400051	Vs.	M/s Metcraft Engg. Corporation, 601-602, Siddharth Arcace, Factory Lane, L.T. Road, Borivali (West), Mumbai - 400092 PAN: AAAFM1677M
(Appellant)		(Respondent)

Revenue by : Shri M. Naveen (DR)

Assessee by : Shri M. Subramanian (AR)

Date of Hearing: 06/06/2019

Date of Pronouncement: 28/06/2019

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue against the order dated 23.04.2015 passed by the Commissioner of Income Tax (Appeals)-44 (for short 'the CIT(A), Mumbai, for the assessment year 2011-12, whereby the Ld. CIT(A) has partly allowed the appeal filed by the assessee against the assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

Brief facts of the case are that the assessee filed its return of income for the assessment year under consideration declaring the total income of Rs. 58,63,213/-. The AO completed the assessment u/s 143 (3) of the Act and determined the total income of the assessee at Rs. 1,78, 85,270/- after making addition of Rs. 1,14,40,407/- towards unaccounted sale, Rs. 2,75,198/- as unexplained expenditure u/s 69C and Rs. 3,06,452/- u/s 14A read with rule 8D. The assessee challenged the assessment order before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee partly allowed the appeal of the assessee

and deleted the addition made on account of unaccounted sales, unexplained expenditure u/s 69C and addition made on account of disallowance u/s 14A. The revenue is in appeal against the said order passed by the Ld. CIT (A).

2. The revenue has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

1. *“On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in deleting addition made by the AO on account of unaccounted sales amounting to Rs. 1,14,40,407/- and thereby overlooked the fact that apparently there is no loss of raw material in manufacturing process employed by the assessee and hence, there is no reason why the production of the finished goods should be lesser than the raw material used by the assessee.*

2. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in deleting addition made by the AO on account of unaccounted sales amounting to Rs. 1,14,40,407/- by not taking note of the fact that the assessee has also not collected and paid any tax on the scrap sales as per the provisions of Section 206C and also the assessee failed to furnish the form No. 27C from all the parties to whom the scrap has been sold.*

3. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in deleting addition of unexplained expenditure of Rs. 2,75,198/- on account of bogus purchases u/s 69C of the I.T. Act.*

4. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in relying upon judgment in the case of CIT vs. Nikunj Eximp Enterprises Pvt. Ltd. without appreciating that the facts involved in the appellant's case are different from the facts of the above case law.”*

5. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in not appreciating that the assessee has not produced any cogent evidence to*

substantiate the fact that it had taken actual delivery of goods purchased from these parties.

6. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) grossly erred in not appreciating the fact that the notices under 133 (6) issued to the parties from whom alleged bills were received were returned undelivered by the postal authorities with the remark 'not available at this address' and the assessee has also failed to produce the parties before the AO.*

7. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in deleting the disallowance made by the AO overlooking the statement given by the parties and explicit finding of the investigation carried out by the Sales Tax Department and corroborated by the enquiries of the AO.*

8. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in deleting the addition of Rs. 2,83,602/- as against Rs. 3,06,452/- made by the AO on account of disallowance of expenditure relating to exempt income u/s 14A of the I.T. Act."*

3. Ground No. 1 and 2 pertain to addition made by the AO on account of unaccounted sale in respect of scrap. The AO made addition of Rs. 1,14,40,407/-, holding that no scrap was sold by the assessee. In the first appeal the Ld. CIT(A) deleted the addition. The Ld. Departmental Representative (DR) relying on the assessment order submitted that since there was no evidence of sale of scrap, the AO had rightly rejected the claim of the assessee. The assessee had not paid any tax on the scrap sales as per the provisions of section 206C and further failed to furnish the Form No. 27C from the parties to whom the scrap had been sold, the Ld. CIT (A) has wrongly deleted the addition made by the AO.

4. On the other hand, the Ld. counsel for the assessee submitted that the assessee is a manufacturer of M.S. Galvanized Structural Sections, Aluminum Sections and panels. During the previous year the total item manufactured was 6293.57 metric tons of scrap was generated which comes to 5.58%. The scrap

was sold for Rs. 59,23,439/- to four parties. Since, the said parties were manufacturers, no TCS was collected u/s 206C except one party M/s Torane Ispat Udyog Pvt. Ltd., which was submitted during the assessment proceedings. The Ld. counsel further submitted that a complete detail of scrap sales showing date, invoice number, customers name, product name, quantity of scrap, value of scrap, excise duty/VAT charge were submitted before the AO. The Ld. counsel further pointed out that in the assessment year 2009-10 and 2010-11, then Ld. Commissioner (Appeals) deleted the addition made by the AO on account of unaccounted sales. The Ld. counsel further pointed out that the ITAT has upheld the findings of the Ld. CIT (A) in assessee's own case for the AY 2009-10 and 2010-11. Since, the findings of the Ld. CIT (A) in the present case are based on the decision of the ITAT, rendered in the assessee's own case, there is no merit in the contention of the revenue.

5. We have heard the rival submissions of the parties and gone through the material on record in the light of the rival contentions of the parties. The Ld. CIT (A) has deleted the addition made by the AO after taking into consideration, the entire evidence on record. The findings of the Ld. CIT (A) read as under:-

"I have gone through the facts of the case and I find that the facts of the issue are identical to the issue as dealt by my predecessor in A.Y.2009-10 and 2010-11. Some part of the order of A.Y.2010-11 of my predecessor is reproduced hereunder for easy reference.

5.3. I have considered the stand of the Assessing Officer and the submissions of the appellant. It is also noted that there is no dispute over the generation of scrap at the rate of 2.59 % equivalent to 124.89 metric tons. As per the appellant's representative, the said quantity was generated as scrap & sold at Ps. 25,02,4281-. which was reflected in the sales. Therefore the question of any addition

did not arise. While the Assessing Officer has assumed that the sale of scrap shown by the appellant was in fact sale of finished goods P5.47,2941- per metric ton, total amounting to Ps.59,06,5481- out of which the sale of scrap shown by the appellant amounting to Ps. 25,02,4281- was reduced & thereafter made the addition of Rs. 34,04,120/- on account of the difference in the value of sale of scrap.

On going through the submission and record; it is found that similar type of scrap were generated in earlier years and the sale value have been accepted by the department. The Assessing Officer has not given any reason for taking the value of the scrap sale at the price on which goods were sold, since the appellant agreed that there is no dispute over quantity of scrap sold which is already appearing in the sales. Therefore, it was argued that there is no reason to make any addition in respect of sale of scrap which is already accounted. The appellant has also submitted that the scrap generated is usual as per norms prescribed by the Director General of Foreign Trade, Standard Input/Output Norms as per Si. No. C692 as notified by DGFT in the handbook (Vol. 2) 2002-07. The relevant portion of item no. C692 of DGFT handbook is reproduced hereunder: -

SI No.	Export Item	Quantity	Import Item	Qty Allowed
1	Items Manufactured out of GP Sheets	1Kg	GP Sheets/Coils/S econdary	1.050 Kg.

On the basis of above it was submitted that, the normal scrap allowed is 5%, while the scrap of the appellant was 2.59%, which is within the limit as mentioned above.

It was further submitted that in respect of sale of scrap the appellant is required to maintain proper records in RG 1

*which is verified by the Excise Department. Considering all the above facts, more particularly the fact that the sales of scrap have already been accounted by the appellant, the addition made is not justified. Similar issue arose before me in the assessment year 2009-2010 where after careful consideration of the facts, I found that there is no justification for the additions made, following the reasons, stated in the Appeal Order for the assessment year 2009-2010, I therefore delete the addition of Rs.34,04,1201- on account of unaccounted sales.
In the result this Ground of Appeal is Allowed."*

5. Considering the facts are identical to the earlier two years, I respectfully follow the decision taken by my predecessor in the two appeals and allow the ground for this year also."

6. We notice that the Ld. CIT (A) has deleted the addition made by the AO on account of unaccounted sales by following the orders of his predecessors passed in the assessee's own case pertaining to the AY 2009-10 and 2010-11 respectively. As pointed out by the Ld. counsel, the coordinate Bench has upheld the findings of the Ld. CIT (A) in related case ITA No. 6233/Mum/2012 and deleted the similar addition made by the AO. We further notice that the coordinate Bench has decided the identical issue in favour of the assessee in assessee's own case ITA No. 5293/Mum/2013 for the AY 2010-11. Since, the findings of the Ld. CIT (A) in the present case are in accordance with the decision of the Co-ordinate Bench rendered in related case for the AY 2009-10 and assessee's own case for the AY 2010-11 aforesaid, we do not find any infirmity in the findings of the Ld. CIT (A) to interfere with. Hence, respectfully following the decision of the coordinate Bench rendered discussed above, we uphold the findings of the Ld. CIT (A) and dismiss this ground of appeal of the revenue.

7. Vide Ground No. 3 to 7 the revenue has challenged the action of the Ld. CIT (A) in deleting the addition of unexplained expenditure amounting to Rs.

2,75,198/- on account of bogus purchases u/s 69 of the Act. Before us, the Ld. DR submitted that the Ld. CIT (A) has erred in not appreciating the fact that the assessee has failed to produce cogent and convincing evidence to substantiate the purchases in question. The Ld. DR further pointed out that the notices sent u/s 133 (6) to the concerned parties were received back undelivered. Further, the Ld. CIT (A) has overlooked the statement given by the parties during the investigation carried out by the Sales Tax Department while deciding the said issue. Since, the decision of the Ld. CIT (A) is contrary to the evidence on record, the same is liable to be set aside.

8. On the other hand, the Ld. counsel for the assessee submitted that the Ld. CIT (A) has rightly deleted the addition made by the AO by following the decision of his predecessor in assessee's own case for the AY 2010-11. Since, there is no change in the facts of the present case, there is no infirmity in the order of the said case.

9. We have perused the material on record in the light of the rival submissions of the parties. The Ld. CIT (A) has deleted the addition made by the AO u/s 69C of the Act holding as under:-

The A.O. has disallowed a sum of Rs.2,75,198/- as unexplained expenditure u/s.69C on a/c of purchases made from M/s.Siddhivinayak Steel. The said addition has been made on the basis of information received from the Sales Tax Department, Government of Maharashtra. From the appeal order in the case of the appellant for the A.Y.2010-11, I find that the A.O. had made a similar addition. The appellant has filed a similar reply as filed in the earlier year. There being no difference in the facts and legal position in this regard. I am guided by the decision of my predecessor and for this year also as for the earlier year the addition is hereby deleted. The ground is allowed.

10. We further notice that, the coordinate Bench has dealt with the identical issue in relate appeal ITA No. 5292/M/2013 pertaining to the AY 2010-11 and

after hearing the parties, the Tribunal restricted the addition to 12.5% of the said unexplained expenditure. The findings of the Tribunal read as under:-

“4. After hearing both the parties and on perusal of the record, we find that the assessee obtained bogus bills of purchases of capital goods to the tune of Rs. 1,37,875/- which could not be proved before the AO with necessary evidences regarding movement of goods, delivery challan, transportation details and further corroborated by non-service of notice u/s 133(6) of the Act. Finally the AO came to the conclusion that the purchases were bogus and added the same to the total income of the assessee as unexplained expenditure. The ld. CIT (A) deleted the total addition on the basis that the expenditure cannot be treated as unexplained expenditure merely on the basis of the statement of Shri Promod Kumar Singh, Proprietor of M/s Siddhivinayak Steel recorded before the Sales Tax Department. Under the identical facts and circumstances case, we find that the coordinate benches of the Tribunal have been taking a consistent view while making sustaining the part addition ranging from 5% to 12.50% or a reasonable percentage of the bogus purchases depending upon the facts of the case in order to tax the savings which the assessee might have made by purchasing the material from gray market by way nonpayment of VAT and other incidental taxes. Taking the consistent view with the decision of the Co-ordinate Benches of the Tribunal, we are also of the view that 100% addition is not sustainable but only profit on the said purchases could be assessed. We are therefore of the considered view it would be fair and reasonable to make addition at the rate of 12.5% of the said unexplained expenditure. As a result, the appeal of the department is partly allowed. The AO is directed to make the addition at the rate of 12.5% of such purchases.”

11. Since, there is no material change in the facts of the present case, we respectfully following the findings of the co-ordinate Bench modify the order

passed by the Ld. CIT (A) and restrict the addition to 12.5% of the total amount of bogus purchases determined by the AO. Hence, we partly allow this ground of appeal of the revenue.

12. Vide Ground No. 8, the revenue has challenged the action of the Ld. CIT (A) in deleting the addition of Rs. 2,83,602/-u/s 14A as against the disallowance of Rs. 3,06,452/- made by the AO. The Ld. DR submitted before us that since the AO had computed the disallowance as per the provisions of Income Tax Act and Rules, the Ld. CIT (A) has wrongly restricted the addition to 22,850/- offered by the assessee.

13. On the other hand, the Ld. counsel for the assessee submitted that the Ld. CIT (A) has restricted the addition to Rs. 22,850/- by following the order of his predecessor pertaining to the AY 2010-11. The Ld. counsel further pointed out that the Tribunal has upheld the findings of the Ld. CIT (A) passed in the assessee's own case for the AY 2010-11. The Ld. counsel further submitted that since there is no change of material facts in the present case, the Ld. CIT (A) has rightly decided the issue in favour of the assessee by restricting the addition to the amount offered by the assessee.

14. We have heard the rival submissions of the parties and also perused the relevant material on record including the order passed by the coordinate Bench in the assessee's case ITA No. 5292/Mum/2013 for the AY 2010-11. The Ld. CIT (A) has decided the issued in question holding as under:-

“On this ground also I have gone through the appeal order for AY 2010-11 in the case of the appellant itself and I find that my predecessor has restricted the disallowance to Rs. 24,200/- thereby implying that the payment of interest has not been considered in working of disallowance u/s 14A. For the present year also following the principle adopted by my predecessor in the appellate order for A.Y. 2010-11 is disallowance is directed to be restricted to Rs. 6,750/-. In the result the appeal is partly allowed.”

15. We notice that the Ld. CIT (A) has decided the issue in question by following the decision of his predecessor in the assessee's own case ITA No. 5293/Mum/2013 for the AY 2010-11. As pointed out by the Ld. counsel, the coordinate Bench has upheld the decision of the Ld. CIT (A) passed in the assessee's own case for the AY 2010-11 holding as under:-

“12. We have considered rival contentions and found from record that disallowance u/s 14A has been dealt by the AO at para 8.1 to 8.4 Disallowance of interest was deleted by CIT (A) after observing that assessee has its own capital and accumulated profits of Rs. 2,49,43,402.10 as on 31.03.2009 and the 'total investment in shares of the two Private Limited Companies were Rs. 48,40,000/-. The said investments were not made from any borrowed funds. Whatever funds borrowed were utilized for business purpose. During the year under reference the total interest paid on borrowed funds of Rs. 1,30,10,812/- while disallowing the expenses u/s 14A the Assessing Officer under Rule 8D(2) has considered disallowance of Rs. 3,25,224/- under Sub-rule (ii) and Rs. 24,200/- under sub rule (iii). We found that no expenses were incurred on the Investment made in shares. Therefore no expenses is disallowable particularly the interest payment on borrowed funds have no link with investments made at para 703 CIT (A) has given detailed finding and restricted the disallowance of other expenditure to the extent of Rs. 24,200/-. The detailed finding so given at para 7.3 by the CIT (A) has not been controverted by learned DR by bringing any positive material on record, accordingly, we do not find any reason to interfere in the order of CIT (A) for restricting the disallowance u/s 14A to the extent of Rs. 24,200/-. We hold accordingly.”

16. Since, the facts and the issue involved in the present case is identical to the facts and the issue involved in the present case and since the order passed by the Ld. CIT (A) is in accordance with the order passed by the coordinate

Bench in the assessee's own case for the AY 2010-11, we do not find any infirmity in the order of the Ld. CIT (A). Hence, respectfully following the decision of the coordinate Bench, we uphold the findings of the Ld. CIT (A) and dismiss this ground of appeal of the revenue.

In the result, appeal filed by the revenue for assessment year 2011-2012 is partly allowed.

Order pronounced in the open court on 28th June, 2019.

Sd/-

(RAJESH KUMAR)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 28/06/2019

Sd/-

(RAM LAL NEGI)

JUDICIAL MEMBER

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai