

**IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT**

**BEFORE
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER**

**ITA No. 2419/AHD/2015
Assessment year: 2011-12**

Income Tax Officer, Wd 2(1)(4), Room No. 219, Aayakar Bhavan, Majura Gate, Surat.	vs	M/s Valentine Cine Vision Limited, Dumas Road, Distt. Surat. (PAN: AAACV3889R)
Appellant		Respondent

**C.O. NO. 181/AHD/2015
(IN ITA No. 2419/AHD/2015)
Assessment year: 2011-12**

M/s Valentine Cine Vision Limited, Dumas Road, Distt. Surat. (PAN: AAACV3889R)	vs	Income Tax Officer, Wd 2(1)(4), Room No. 219, Aayakar Bhavan, Majura Gate, Surat.
Appellant		Respondent

**ITA No. 2438/AHD/2015
Assessment year: 2011-12**

M/s Valentine Cine Vision Limited, Dumas Road, Distt. Surat. (PAN: AAACV3889R)	vs	Income Tax Officer, Wd 2(1)(4), Room No. 219, Aayakar Bhavan, Majura Gate, Surat.
Appellant		Respondent

**Department by : Shri B.P.K. Panda, Sr. DR
Assessee by: Shri Rasesh Shah, CA**

**Date of hearing : 09.05.2019
Date of pronouncement : 31.07.2019**

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.

ITA 2419/AHD/2015 is the appeal preferred by the department against the order dated 6.5.2015 passed by the Ld. CIT(A)-II, Surat {CIT (A)} and pertains to assessment year 2011-12 and ITA 2438/AHD/2015 is the cross appeal by the assessee. The Cross Objections (CO) is also preferred by the assessee.

2.0 Brief facts of the case are that during the year under consideration, the assessee company was engaged in the running/operation of multiplex. The return of income was filed declaring total income at NIL. The total turnover for the year under consideration was Rs. 5,28,28,050/- and the gross profit was shown at Rs. 2,54,87,758/- being 48.2% of the turnover. The case was selected for scrutiny and during the course of assessment proceedings, the assessee was required to furnish tax audit report, audited profit and loss account along with computation of income. On verification of the same, the Assessing Officer noticed that the assessee had filed two audit reports dated 5.9.2011, two profit and loss accounts and two computations of income. The Assessing Officer also noticed that

there was difference in the figures reported in the two sets of documents. In one of the computations, profit was shown at Rs. 3,16,23,061/- whereas in the other computation, the assessee had shown a loss of Rs. 44,40,362/-. The Assessing Officer also noted some other discrepancies which have been incorporated in the assessment order. The assessee was required to explain the difference and it was the submission of the assessee before the Assessing Officer that there were typing errors while keying in a few figures in the income tax return by the clerk in the Chartered Accountant's office. The assessee also enclosed another income tax return stating that this revised return carried the correct figures. The assessee also enclosed a certificate from the Chartered Accountant certifying the correct figures. The Assessing Officer further noted that in the original return of income, the assessee did not claim entertainment tax as a deduction to the tune of Rs. 3,93,32,262/- whereas in the revised return of income, the assessee had claimed that an amount of Rs. 80,10,188/- was payable/paid towards the current year's entertainment tax. The Assessing Officer observed that since the entertainment tax had not been routed through the profit and loss account, the assessee could not be given the benefit of

deduction in view of section 43B of the Act. An addition of Rs. 3,18,66,883/- was made on this account. Further, the Assessing Officer proceeded to reject the books of accounts of the assessee and worked out the average gross profit for three years at 56.25% and made an addition of Rs. 1,53,48,584/- on this account. Apart from this, an amount of Rs. 3,60,000/- was disallowed on account of excess interest paid. The Assessing Officer also made a disallowance of depreciation on building to the tune of Rs. 1,72,952/- on the ground that the building was used for less than 180 days and accordingly, depreciation at only half of the applicable rate was to be allowed. The Assessing Officer also made an addition of Rs. 1,29,837/- on account of unexplained premium towards Key man insurance policy. The assessment was completed at Nil after giving the benefit of set off of brought forward losses to the tune of Rs. 4,78,78,260/-.

2.1 The assessee's appeal before the Ld. CIT (A) was partly allowed wherein the Ld. CIT (A) deleted the addition of Rs. 1,53,48,584/- on account of gross profit difference and Rs. 3,60,000/- on account of excess interest payment. The Ld. CIT (A) also held that the rejection of books of accounts was not correct. The Ld. CIT (A), however, upheld the addition pertaining

to disallowance of Rs. 3,93,32,262/- on account of entertainment tax. Now, the department as well the assessee is in appeal before this Tribunal (ITAT) raising the following grounds of appeal:-

ITA 2419/AHD/2015 (Department's Appeal):

"1. On the facts and circumstances of the case and in Law, the Ld. CIT(A) has erred in deleting the addition of Rs.1,53,48,584/- on account of Gross Profit & Rs. 3,60,000/- on account of excess interest payment.

2. Ld. CIT (A) has erred in law and on facts in holding that the AO has not pointed out any defects in the books of account to reject it u/s 145(3) of the Act; whereas rejected of books of account by the AO is based on sound footing.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in relying on the submission of the assessee which was not made available before the AO., in contravention of Rule 46A, without even remanding it to the AO.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT (A), Surat ought to have upheld the order of the Assessing Officer. It is, therefore, prayed that the order of the Ld. CIT(A)-I Surat may be set-aside and that of the Assessing Officer's order may be restored."

ITA 2438/AHD/2015 (Assessee's Appeal) :

"1. That the Learned Appellate Authority (Commissioner of Income-Tax (Appeal)-II) has erred on the facts of the case in -

Disallowing Rs.3,93,32,262/- on account of Entertainment Tax payment.

2. The appellant prays that

Disallowance of Rs.3,93,32,262/- on account of Entertainment Tax payment, be deleted.

3. The appellant prays for the appropriate relief.

4. The appellant craves for leave to add, alter or amend in or other ground of appeal at or before the time of hearing.”

3.0 At the outset, the Ld. Authorised Representative (AR) submitted that the C.O. filed by the assessee was not being pressed. Accordingly, the C.O. filed by the assessee is dismissed as not pressed.

4.0 With respect to the assessee's appeal, the Ld. AR submitted that the original return of income was filed at NIL after setting off of unabsorbed loss against the business income of current year to the tune of Rs. 3,18,66,883/-. However, while filing the return of income, there were many data entry errors in putting the figures in the electronic return of income which were not based on the actual financial statements as per the audited books of accounts. One of the data entry errors was that in the return of income, the entertainment tax paid by the assessee was incorrectly shown under 'advances' instead of debiting the same in the profit and loss account. It was further submitted that apart from this, an amount of Rs. 3,93,32,262/- was incorrectly

disallowed u/s 43B of the Act. The Ld. AR submitted that there was no reason to make a disallowance u/s 43B as the assessee had already made the payment of entertainment tax to the tune of Rs. 3,93,32,262/- during the year under consideration. To highlight this, the Ld. AR drew our attention to the certificate from the Entertainment Tax Department placed at page 96 of the Paper Book certifying that the impugned amount had been paid within the financial year itself. It was further submitted that the Assessing Officer disallowed entertainment tax to the tune of Rs. 3,93,32,262/- and since the assessee had disallowed the same amount u/s 43B, this resulted in a total disallowance of Rs. 7,86,64,524/- which was rectified in the revised return filed by the assessee but was not considered by the Assessing Officer. The Ld. AR submitted that the facts of the case did not fall within the ratio of judgment laid down by the Hon'ble Apex Court in the case of Goetze India Ltd. vs. C.I.T. reported in 289 ITR 323 (SC) as had been relied upon by the Assessing Officer but rather the assessee's case was covered in its favour by the judgment of the Hon'ble Bombay High Court in the case of C.I.T. Mumbai vs. Pruthvi Brokers & Shareholders reported in (2012) 23 taxman.com 23(Bom).

5.0 With respect to the department's appeal, the Ld. AR submitted that the Assessing Officer had wrongly rejected the books of accounts on the ground that the assessee had made wrong data entries in the original return of income. It was submitted that although there was a mistake while keying in the data in the return of income, the revised return of income showing the correct figures had been filed and in support of the same, the assessee had also filed a certificate from the auditors and, therefore, taking these facts in account, the Ld. CIT (A) had rightly deleted the addition on account of gross profit variation.

5.1 With respect to the disallowance of Rs. 3,60,000/- pertaining to interest payment which had been deleted by the Ld. CIT (A), the Ld. AR submitted that the Assessing Officer had noted that the assessee had shown interest payment of Rs. 59,60,550/- in the return of income whereas as per submission, the actual interest payment was only Rs. 56,00,550/-. It was submitted that before the Assessing Officer the assessee had clarified that the differential amount was towards the upfront fees paid by the assessee for sanctioning of loan which had been shown under the head 'miscellaneous expenses' in the schedule to profit and loss account whereas in the income tax return, it

was shown under 'interest and finance charges'. It was further submitted that the assessee had filed the statement of Allahabad Bank during the course of appellate proceedings which was admitted by the Ld. CIT (A). However, it was fairly accepted by the Ld. AR that the provisions of Rule 46A of the Income Tax Rules, 1962 were not followed. The Ld. AR submitted that the assessee has no objection if this issue is set aside to the Assessing Officer for proper verification.

6.0 In response to the assessee's arguments in the assessee's appeal, the Ld. Senior Departmental Representative (Sr. DR) placed reliance on the findings and observations of both the lower authorities and submitted that it was the assessee in the first place who had made wrong entries in the return of income and, therefore, the disallowance had been rightly made. The Ld. Sr. DR also submitted that the fact remained that the assessee had filed two returns of income and that the Assessing Officer was within his rights to have taken the original return of income as the correct return of income.

7.0 On the issues raised in the department's appeal, the Ld. Sr. DR submitted that the Assessing Officer was acting well within the law to disregard the gross profit shown by the assessee

and re-compute the gross profit by taking the average of three years gross profit because the figures in the return of income were at variance with the figures reported in the audited profit and loss account. The Ld. Sr. DR submitted that in such a circumstance the rejection of books of accounts was entirely justified.

7.1 With respect to the disallowance of interest deleted by the Ld. CIT (A), the Ld. Sr. DR emphasised that the provisions of Rule 46A were not followed by the Ld. CIT (A).

8.0.0 We have heard the rival submissions and have perused the material available on record. As far as the department's appeal is concerned, it is seen that the department has raised two issues. The first issue is the deletion of addition of Rs. 1,53,48,584/- on account of gross profit. In this regard, a perusal of the assessment order shows that the Assessing Officer has not pointed out any defects in the books of accounts which would justify rejection of books of account. The Assessing Officer has proceeded to reject the books of accounts only for the reason that there was difference in the profit and loss account as per the audited books of accounts and the profit and loss account which was keyed in the return of income. The Ld. CIT (A) has also

noted that the Assessing Officer has not pointed out any defects in the books of accounts and we are in agreement with his observations. Further, the Ld. CIT (A) has also taken note of the fact that the main reason for the fall in the gross profit was the reduction in the direct income and reduction in sale of theatre tickets compounded with the closure of one screen in the multiplex theatre for 3-4 months due to fire. The Ld. CIT (A) has noted that the books of accounts were rejected in an *ad hoc* manner and no consideration had been given to the claim of the assessee regarding fire and decrease in revenue. Before us, the Ld. Sr. DR has vehemently supported the findings and observations of the Assessing Officer but he could not point out any factual inaccuracy in the findings of the Ld. CIT (A) while deleting the disallowance. It is settled law that the books of accounts cannot be rejected without pointing out specific defects in the same. In the case of CIT vs. Vikram Plastics (1999) 239 ITR 161 (Guj.) it was found there was no discrepancy or defects in books of account maintained by assessee and further, the books of account maintained by assessee were not found to be incorrect or incomplete and that no material was brought on record by the revenue to prove that purchases and expenses had been inflated

or sales had been suppressed. In this context the Hon'ble High Court held that,

“In our opinion, in view of the finding reached by the Tribunal that there were no discrepancies or defects pointed out in the books of account and further that they were regularly maintained and also on the finding that there was no material brought on record to establish that purchases or expenses were inflated or sales suppressed and also in view of the finding that this was not a case that there was no method of regular accounting employed, the Tribunal was fully justified in coming to the conclusion that the provisions of section 145(2) could not be invoked.”

8.0.1 Reliance is further placed on the decision in the case of ITO vs. Abbey Chemicals Pvt. Ltd. (ITA no. 2875/Ahd/2004) wherein the Ahmedabad Bench of the Tribunal held that there lies no justification for the rejection of books of accounts on pure guess. The Ahmedabad Bench held as under:

“Undisputedly and as observed by the ld. CIT(A) in the impugned order the AO did not point out any defects in the books of account while ignoring the book results...The ratio of the judgments in Dhakeswari Cotton Mills Ltd. v. CIT [1954] 26 ITR 775 (SC); Raghubir Mandal Harihar Mandal v. State of Bihar [1957] 8 STC 770 (SC); State of Kerala v. C. Velukutty [1966] 60 ITR 239 (SC); State of Orissa v. Maharaja Shri B.P. Singh Deo [1970] 76 ITR 690 (SC); Brij Bhusan Lal Parduman

Kumar v. CIT [1978] 115 ITR 524 (SC); Chouthmal Agarwalla v. CIT [1962] 46 ITR 262 (Assam); R.V.S. and Sons Dairy Farm v. CIT [2002] 257 ITR 764 (Mad); International Forest Co. v. CIT [1975] 101 ITR 721 (J & K) ; M. Durai Raj v. CIT [1972] 83 ITR 484 (Ker); Ramchandra Ramnivas v. State of Orissa [1970] 25 STC 501 (Orissa); Action Electricals v. Deputy CIT [2002] 258 ITR 188 (Delhi) and Kamal Kumar Saharia v. CIT [1995] 216 ITR 217 (Gauhati) indicate that the AO is not fettered by any technical rules of evidence and pleadings, and he is entitled to act on material which are not acceptable in evidence in a court of law, but while making the assessment under the principles of best judgment, the Income-tax Officer is not entitled to make a pure guess without reference to any evidence or material. There must be something more than a mere suspicion to support the assessment”

8.0.2 Therefore, in view of the fact that the AO has not pointed out any specific defect in the books of account and respectfully following the judicial precedents as referred to above, we dismiss the department’s challenge to deletion of addition of Rs. 1,53,48,584/- on account of gross profit. We also dismiss department’s ground no. 2 challenging the action of the Ld. CIT (A) in holding that the Assessing Officer was incorrect in rejecting the books of accounts.

8.1 As far as the second issue pertaining to impugned excess interest payment of Rs. 3,60,000/- is concerned, the Ld. AR has fairly accepted that the issue may be re-examined by the Assessing Officer. Accordingly, this issue is restored to the file of the Assessing Officer for adjudicating it afresh after duly considering the bank statement of Allahabad Bank and other relevant documents which the assessee may file in this regard and after giving due opportunity to the assessee to present its case.

9.0 In the result, the appeal of the department stands partly allowed for statistical purposes.

10.0 Coming to the appeal filed by the assessee, the only issue under challenge is the disallowance of Rs. 3,93,32,262/- on account of entertainment tax. It is the assessee's submission that this amount was not debited by the assessee in the profit & loss account in the first place but was shown under the head 'advances'. It has been further submitted that all the payments pertaining to entertainment tax have been made within the financial year itself and, therefore, the provisions of section 43B were not attracted. It has also been submitted that disallowance u/s 43B has resulted in a double disallowance totalling to Rs.

7,86,64,524/-. The assessee has also pleaded that the AO was incorrect in placing reliance on the judgment of the Hon'ble Apex Court in the case of Goetze India Ltd. vs. C.I.T. reported in 289 ITR 323 (SC) and we agree with this contention. We find that the assessee's case is covered in favour of the assessee by the judgment of the Hon'ble Bombay High Court in the case of C.I.T. Mumbai vs. Pruthvi Brokers & Shareholders (supra) wherein the Hon'ble High Court answered the question as to whether the assessee can amend the return filed by him for making additional claim for deduction other than filing the revised return in assessee's favour. The Hon'ble Bombay High Court while making a reference to the judgment of the Hon'ble Apex Court in the case of Goetze India Ltd. vs C.I.T. (supra) observed that the Hon'ble Apex Court did not hold anything contrary to what was held in the previous judgments to the effect that even if the claim is not made before the Assessing Officer, it can be made before the appellate authorities. The Hon'ble Bombay High Court went on to observe that the jurisdiction of the appellate authority to entertain such a claim has not been negated by the Hon'ble Supreme Court in this judgment and that the Hon'ble Apex Court had made it clear that the issue in that case was limited to the

power of the assessing authority and further that the said judgment did not impinge on the power of the Tribunal u/s 254 of the Act. The Hon'ble Delhi High Court in the case of C.I.T. vs. Jai Parabolic Springs Ltd. (2008) 306 ITR 42 held that there was no prohibition on the power of the Tribunal to entertain additional ground which according to the Tribunal arises in the matter. Coming to the facts of the case, we observe that although there were clerical errors by the assessee while keying in figures in the return of income as well as there being an error while showing entertainment tax under the head 'advances' in the balance sheet, it cannot be said that the assessee has lost its right to make the claim. It is also observed that the lower authorities have not gone into verification of the claim at all. Since the Assessing Officer has not gone into the claim of the assessee, we are of the considered view that this issue has to go back to the Assessing Officer for proper verification of details and, thereafter, the Assessing Officer is directed to allow the claim of the assessee if it is in accordance with law. Thus, we restore this issue to the file of the Assessing Officer for *de novo* consideration and the Assessing Officer shall provide due

opportunity to the assessee and adjudicate the issue in accordance with law.

11.0 In the result, the appeal of the assessee stands allowed for statistical purposes.

12.0 In the final result, ITA 2419/Ahd/2015 preferred by the department is partly allowed for statistical purposes, ITA 2438/Ahd/2015 preferred by the assessee is allowed for statistical purposes and C.O. 181/Ahd/2015 filed by the assessee is dismissed as not pressed.

Order pronounced in the open court on 31st July, 2019.

Sd/-
(VIKRAM SINGH YADAV)
ACCOUNTANT MEMBER

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 31st JULY, 2019
'GS'

Copy forwarded to: -

- 1) Appellant
 - 2) Respondent
 - 3) CIT(A)
 - 4) CIT
 - 5) DR
- True Copy

By Order

ASSTT. REGISTRAR