

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER**

ITA No.6287/Del/2018
Asstt. Year: 2014-15

M/s. Zebra Innovations Pvt. Ltd. 509, 5 th Floor, Palm Springs Plaza, Sector-54, Gurgaon, Haryana 122 002 PAN AACCC3817C	Vs.	Addl. CIT, Range-27, New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Ajay Vohra, Sr. Adv. Smt. Meenal Goyal, CA
Department by :	Smt. Rinku Singh, Addl. CIT(DR)
Date of Hearing	09/05/2019
Date of pronouncement	07/ 08/2019

ORDER

PER AMIT SHUKLA, J.M.:

The aforesaid appeal has been filed by the assessee against impugned order dated 05.07.2018, passed by Ld. CIT (Appeals) 9, New Delhi for the quantum of assessment passed u/s 143(3) for the assessment year 2014-15. In the grounds of appeal assessee has raised following grounds:-

- “1. That the Commissioner of Income Tax (Appeals) [‘CIT(A)’] erred on facts and in law in upholding the invocation of the provisions of

section 145(3) of the Income Tax Act,1961 ('the Act'), without satisfying condition(s) prescribed therein.

- 1.1 That the CIT(A)/ assessing officer erred on facts and in law in holding that the profit and loss did not give true and fair status of the financial affairs of the appellant.*
- 1.2 That the CIT(A) erred on facts and in law in considering low rate of gross/ net profit as one of the valid reason under section 145 of the Act for rejection of books of accounts.*
- 1.3 That the CIT(A) erred on fact -in upholding the allegation of the assessing officer with respect to discrepancies in figures appearing in tax audit report vis-a-vis audited financial statements.*
- 1.4 That the CIT(A) erred of facts and in law in upholding addition of Rs.3,17,46,970 (being estimated net profit @ 4.89%) made by the assessing officer by rejecting books of accounts of the appellant.*
- 1.5 That the CIT(A) erred on facts and in law in not expelling the various baseless allegations of the assessing officer levelled in the assessment order.*
- 2. That the CIT(A) erred on facts and in law in upholding disallowance of aggregate expenditure of Rs.198,001 comprising of, - (i) club expenses of Rs.16,854; and (ii) car repair expenses of Rs.181,147.*
 - 2.1 Without prejudice, that the CIT(A)/ assessing officer failed to appreciate that no separate disallowance of expenses could be made where income is assessed on basis of estimation of profits.*
- 3. That the assessing officer erred on facts and in law in levying/ computing interest under section 234B/ 234C of the Act.”*

2. The facts in brief are that assessee is a private limited company which was engaged in the business of Commercial Refrigeration and food service products comprised of promoting, selling, distributing and servicing ice machines, coffee machines and equipment to be used in this connection and also engaged in the business of Security system and Prigel. The assessee has filed return of income on 29.11.2014 declaring income at Rs. 22,78,21,820/-. Ld. AO observed that assessee has claimed business loss set off, which needs to be examined. From the details, he worked out the assessee's gross profit, net profit and the turnover as compared to the earlier years and found that there was abnormal fall during the year. The figures as noted by the AO for making the comparison from the earlier year were as under:-

S.No.	Particulars	Previous year			Preceding previous year		
a	Total Turnover of the assessee	87,99,33,045			1,12,37,12,190		
b	Gross Profit Turnover	12,86,06,620	87,99,33,045	14.62%	31,77,85,887	1,12,37,12,190	28.28%
c	Net Profit Turnover	41,30,26,540	87,99,33,045	46.94%	5,38,91,934	1,12,37,12,190	4.80%

3. After noting the fact that gross profit and net profit figures were at huge variance, AO further asked the assessee to explain the turnover mismatch as per column 40 of Tax Audit Report and ITR; month wise sales/purchases/expenses vis-a-vis the earlier years. In response, assessee submitted that turn over under clause 40 of Form 3CD includes sales during the year amount of Rs.62,10,02,675/- and amount of slump sale of stock of Rs. 25,89,30,370/-. Assessee also gave the comparison of correct gross profit ratio and net profit ratio for the three preceding financial year in the following manner:-

<i>Previous year</i>	<i>P.Y. 10-11</i>	<i>P.Y. 11-12</i>	<i>P.Y. 12-13</i>
<i>Turnover</i>	<i>701081940.5</i>	<i>901727018</i>	<i>1094730523</i>
<i>Add: Other income</i>	<i>29283392.34</i>	<i>35306556</i>	<i>30060244</i>
<i>A</i>	<i>730365332.8</i>	<i>937033574</i>	<i>1124790767</i>
<i>Less: Cost of sales</i>			
<i>Opening stock</i>	<i>80910559</i>	<i>134608512</i>	<i>173402311</i>
<i>Add: Purchases</i>	<i>559426569.5</i>	<i>692141289</i>	<i>884008130</i>
	<i>640337128.27</i>	<i>826749801</i>	<i>1057410441</i>
<i>Less: Closing stock</i>	<i>134608512</i>	<i>173402311</i>	<i>252578837</i>
	<i>505728616.3</i>	<i>653347490</i>	<i>804831604</i>
<i>Less; Direct expenses</i>	<i>13407385</i>	<i>13719218</i>	<i>15622073</i>
<i>B</i>	<i>519736001.3</i>	<i>667066708</i>	<i>820453677</i>
<i>Gross Profit (A-B)</i>	<i>21122933.5</i>	<i>269966866</i>	<i>304337090</i>
<i>GP Ratio</i>	<i>28.92%</i>	<i>28.81%</i>	<i>27.06%</i>
<i>Less: Expenditure C</i>	<i>173368636.86</i> <i>></i>	<i>218189250.83</i>	<i>249348538.81</i>
<i>Net Profit (B-C)</i>	<i>37860694.66</i>	<i>51777615.17</i>	<i>54988551.19</i>
<i>N.P. Ratio</i>	<i>5.18%</i>	<i>5.53%</i>	<i>4.89%</i>

4. The assessee has also explained that there was no increase in various expenses and in support of which, copy of ledger account and copy of bank charges etc. were also filed. However, the AO made following observations to draw adverse inference :-

“However, the assessee failed to submit month wise figures of sale, purchases, and expenses inspite of seeking 15 days time to file. During the course of discussion, the assessee was asked to specifically show as to what business was being conducted after 15.10.2013 when the business was sold lock stock and barrel on slump sale basis as a going concern. It was then that the assessee revealed that only the business relating to commercial refrigeration was sold. However, he has another business of security system and pregel on small scale basis which was continued by the company. This fact had never emerged before in this assessment proceedings from the documents submitted by

the assessee or during any of the earlier assessment proceedings as is evident from the assessment orders of earlier years submitted by the assessee, Therefore, the assessee was asked to file a P&L A/c from 01.04.2013 to 15.10.2013 and another P&L A/c from 16.10.2013 to 31.03.2014.

The assessee filed the requisite details on 22.12.2016, On examination of the details, it was found that post 15.10.2013 a business loss of Rs. 1.38 cr. was being reflected while in respect of pre 15.10.2013 a loss of Rs. 83 lacs (approx) was being shown.”

5. In response, the assessee has submitted detailed reply which has been incorporated by him in the assessment order. However, Ld. AO rejected the same and held that assessee had tried to bring down its tax liability in respect of long term long term capital gain on slump sale by setting off business loss and thereafter rejecting the books of accounts and applying the provisions of section 145(3), he made the addition in the following manner :-

“It was further seen from the audit report that there is contradiction in Clause 26 and Clause 34(a) and also the figures of rent interest and fee for professional services, salary, contractual payments as reflected in Clause 34 and as mentioned in the P&L A/c. While Clause 26 mentions that TDS of Rs. 5,05,965/- has not been deposited before the due date of filing return while in Clause 34 amount of TDS not deposited is mentioned as “O” against all payments. (Since, no details are available as to against which expenditure the TDS has not been deposited, no addition is being made u/s 40(a)(ia) as the books are being rejected and estimation of profits is proposed). Further, while rent payment is shown as Rs. 87,42,059/- in the P& L A/c, it is shown as Rs. 1,13,03,630/- in

Clause 34(a). Same is the case with all other payments shown in Clause 34(a). They are not matching with the figures of P & L a/c.

In view of above facts and the consistent net profit being shown in the range of 5% over the past three years, the books of account of the assessee are hereby rejected u/s 145(3) of the Income Tax Act, 1961. Net profit @ 4.89% as last year is applied on the turnover of Rs. 62,10,02,675/- and other income of Rs. 2,81,99,153/- as reflected in the P & L A/c in keeping with the past practice of the assessee

Accordingly, an amount of Rs. 3,17,46,970/- is estimated to be the business income of the assessee and added to the income of the assessee, thereby ignoring the business loss shown by the assessee. Penalty proceedings u/s 271(1)(c) are to be initiated separately for furnishing inaccurate particulars of income.”

Besides this, he also made disallowance of certain expenses for sums aggregating to Rs. 1,90,001/-, comprising of club expenses and car repair expenses.

6. Ld. CIT (A) has confirmed the addition by and large on the same footing and reasoning. During the appellate proceedings, he has further asked for details of interest expense related to borrowed fund for making the investment in mutual fund from the assessee and on examination of the same, he noticed that interest paid or incurred on the borrowed /loan amount on investment in mutual fund has not been considered in the profit and loss account and therefore, additionally he observed that statement of accounts does not given true and fair status of financial affairs of the assessee and therefore, AO was justified in rejecting the books of account and estimating the income.

7. We have heard the rival submissions and also perused the relevant finding given in the impugned orders as well as material referred to before us at the time of hearing. Ld. Sr. Counsel, Shri Ajay Vohra, first of all pointed out that one of the reason of the AO to hold that assessee has tried to bring down its tax liability in respect of long term capital gain on slump sale by setting-off of the business loss is not correct at all, because no setting off such long term capital gain from business loss was ever claimed. Thus, this finding is incorrect. He submitted that during the year, one part of the business was transferred as on the closing date 15th October, 2013 as a going concern on slump sale basis. But the same does not affect the going concern of the company, because other activities were continued to be carried out. This vital thing was not only stated before the AO in the reply but also was given as a note in the audit report in the following manner:-

“2. During the year, the business of Commercial Refrigeration and food service products comprised of promoting, selling, distributing and servicing ice machines, coffee machines and equipment to be used in connection with storing (including but not limited to cooling, refrigerating and freezing),’ preparing (including but not limited to blending, microwaving, heating, boiling, steaming, grilling, toasting, frying and baking) and service (including but not limited to displaying and dispensing) food, beverage and other products, as well as products and accessories related thereto, including but not limited to dishwashers have been transferred as on the closing date 15th October, 2013 as a going concern on slump sale basis. However, the same does not affect the going concern of the company.”

8. The sale consideration received from slump sale was Rs.74,74,33,755/- for which a detailed working along with various clauses of business transfer agreement was filed before the AO vide letter dated 16.12.2016, which was as under :-

Serial No.	Particulars		Amount
01	Lump sum consideration (Clause No, 2.1 of BTA)		66,50,00,000.00
02	Add. Deferred Payments (Clause No. 2.2 of BTA)	2,16,66,667.00	
		2,16,66,667.00	
		2,16,66,667.00	6,50,00,001.00
03	Add. Hold Back Amounts (Clause No. 2.1 of BTA)		2,00,00,000.00
04	Less.		
	Working Capital Adjustment (Clause 2.3 (b) of BTA)		25,66,246.00
	Total (Seventy Four Crores Seventy Four Lakhs Thirty Three Thousand Seven Fifty Five)		74,74,33,755.00

9. Thus, he submitted that it was erroneous on part of the AO to compare the turnover or the profit rate from the earlier years. In the profit and loss account, the assessee has shown revenue from operations at Rs. 62.10 crores and other income at Rs. 2,81,99,153/- and has also disclosed extraordinary items. He also drew our attention to the schedule of fixed assets that asset gone out has been reduced. All the discrepancies as pointed out by the AO were duly replied and rebutted and a comparative chart was also given. Nowhere the AO has pointed out any defect in the books of accounts in his entire order nor has rebutted the assessee's explanation. Regarding explanation on business loss incurred for Rs. 1.38 crores from 6.10.2013 to 31.3.2013, the assessee before the AO has replied it in the following manner:-

“After the sale of unit of refrigeration as slump sale, the other business segment comprising of Security system and prigel was continued by the company but as the market saleable value of stock of prigel was reduced and therefore for valuations as on 31st

March the value of stock has been reduced by Rs. 39 lacs approximately. Further we had to write off the SAD refundable amount of Rs. 11.50 lacs approximately as the same was not receivable from department. Thus the gross loss of Amount Rs. 42 lacs approximately was incurred on trading activity.

Further the company had to pay the commissions on prior commitments on sales made prior to slump sales. Also the company had to incur sales tax liability of Rs. 9 lac approximately for non submission of statutory forms, further day to day expenses including salaries, travelling and other expenses for promotion the business was incurred which resulted the said business loss of INR 1.38 crores.”

10. There has been no single rebuttal on the explanation given by the assessee either by AO or by the Ld. CIT (A). Lastly, on account of observation of interest cost made by the Ld. CIT (A), he clarified that the interest was also taken into account on sale of investment, that is interest on borrowed fund used for purchase of Mutual Funds were capitalised to the cost and accordingly LTCG was declared. Thus, there was no occasion to debit those interest cost in the profit and loss account. Thus, the entire reasoning of the authorities below are incorrect.

11. On the other hand, Ld. DR strongly relied upon the order of the AO and Ld. CIT (A).

12. From the perusal of replies filed before the AO and the reasoning given by the authorities below, we find that assessee after explaining the entire nature of business had categorically pointed out that during the year assessee had sold one of its businesses on slump sale basis and it was for this reason there could not have been any

comparison of the trading result from the earlier year, neither the turnover nor the gross profit or net profit rate. If these factors are removed then there is not much discrepancy as pointed out by the assessee before the AO. The entire premise of the AO was based on, firstly, assessee has tried to set off the business loss from the capital gain; secondly, there was abnormal fall in G.P and N.P. rate compared to earlier years; and lastly, there is mismatch of figures of turnover. First point has already been clarified by the Ld. Sr. Counsel that no such set off was claimed, so this presumption is incorrect. Secondly, merely because there is a fall in GP rate or NP rate for which cogent and detailed reasoning has been given due to extraordinary event, then that cannot be the sole basis for rejecting the books of accounts or invoking the provisions u/s 145(3). The assessee had also explained that in the nature of business of the assessee no month wise details of sale and purchase can be made evenly, because assessee's business is a seasonal business and therefore month wise figures of sale and purchase has no relevance. The assessee has another business of security system and pregel on small scale basis which was continued by the company and therefore, the GP on the sale of this business should have been compared. Lastly, the discrepancies in the figures in profit and loss account and tax audit report has already been explained before the AO and also by the Senior Counsel which are self explanatory that income from slump sale of stocks was shown separately and no adverse inference can be drawn. One additional factor pointed out by the Ld. CIT (A) regarding non debiting of the interest cost in the profit and loss account relating to investment. This aspect has already been explained by the Ld. Sr. Counsel that nothing was debited to the profit and loss account with regard to the interest cost on borrowed fund invested in mutual fund, because same has already been taken in to account while computing the sale of

investment and long term capital gain. Thus, we are of the opinion that on any of the reasons cited by the AO and Ld. CIT (A) neither the books of accounts nor the trading result could have been rejected which requires any estimation of income. The trading result and profit shown by the assessee are thus accepted. Accordingly, the additions made by the AO and confirmed by the Ld. CIT (A) cannot be sustained and consequently the addition is directed to be deleted.

13. In so far as adhoc disallowance of club expenses is concerned, we do not find any reason to tinker with the finding of the AO as the nature has not been explained. Regarding disallowance of car maintenance expenses is concerned the AO has observed that, assessee has transferred the business during the year and no vehicles are appearing in block of and some of the expenditures pertain to after that period. No rebuttal has been given qua this issue, therefore, the reasoning given by the AO and Ld. CIT (A) appears to be correct based on facts mentioned. The disallowance is accordingly confirmed.

14. In the result appeal of the assessee is partly allowed.

Order Pronounced in the open court on 7th August, 2019.

sd/-

(L.P. SAHU)
ACCOUNTANT MEMBER

sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 07/08/2019

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi