IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH "B", LUCKNOW

BEFORE SHRI. A. D. JAIN, VICE PRESIDENT
AND SHRI T. S. KAPOOR, ACCOUNTANT MEMBER

ITA No.622/LKW/2018
Assessment Year: 2013-14

ACIT-2 Kanpur	v.	M/s Mahavir Ship Breakers 123/388, Fazal Ganj Kanpur
		TAN/PAN:AABFM3820B
(Appellant)		(Respondent)

Appellant by:	Shri Ajay Kumar, D.R.		
Respondent by:	Shri A. K. Gupta, C.A.		
Date of hearing:	19	09	2019
Date of pronouncement:	20	09	2019

O R D E R

PER T.S. KAPOOR, A.M.:

This appeal has been filed by the Revenue against the order of learned CIT(A)-I, Kanpur, dated 4/6/2018 pertaining to assessment year 2013-14, taking the following grounds of appeal:

1. The Ld. Commissioner of Income Tax(Appeals)-1 has erred in law and on facts in not appreciating the fact that the assessee has not been able to substantiate his claims during assessment proceedings.

2. The Ld. Commissioner of Income Tax (Appeals)-1 has erred in law and on facts by relying on the submissions and evidences filed by the assessee u/r 46A which are not supported with proper and reliable circumstantial and documentary evidences.

3. The Ld. Commissioner of Income Tax(Appeals)-1 has erred in law and on facts in not appreciating the facts and circumstances of the case, which has been brought out in

detail by the AO during in his assessment order as well as in his Remand Report.

2. The brief facts of the case are that the assessee has e-filed its return of income on 29/9/2013, showing an income of Rs.99,57,570/-. The Assessing Officer completed the assessment under section 143(3) of the Act, and by making various additions, assessed the total income of the assessee at Rs.2,94,93,530/-.

3. Aggrieved by the order of the Assessing Officer, the assessee preferred an appeal before the ld. CIT(A), who deleted the additions so made by the Assessing Officer.

4. The only grievance of the Revenue before us is that the ld. CIT(A) has erred in law and on facts relying on the submissions and evidences filed by the assessee under rule 46A of the Income Tax Rules, which are not supported with proper and reliable circumstantial and documentary evidences. The ld. D.R. submitted that the ld. CIT(A) has erred in law and on facts in not appreciating the facts and circumstances of the case, which has been brought out in detail by the AO in his assessment order as well as in his Remand Report. He, accordingly submitted that the order of the ld. CIT(A) may be set aside and that of the Assessing Officer may be restored.

5. The ld. counsel for the assessee, on the other hand, placing reliance on the order of the ld. CIT(A), has submitted that the evidences furnished by the assessee were confronted to the Assessing Officer and the ld. CIT(A) has deleted the additions made by the Assessing Officer after obtaining remand report from the Assessing Officer and considering the submissions of the assessee. Therefore, the ld. CIT(A) has rightly deleted the additions and no interference is called for in his order.

6. We have heard the rival parties and have gone through the material placed on record. The only grievance of the Revenue is that the ld. CIT(A) had deleted the additions by relying on the submissions and evidences filed by the assessee in contravention of rule 46A of the Income Tax Rules. However, we find that the application furnished by the assessee under rule 46A of the Rules for admission of certain evidences, were confronted to the Assessing Officer and obtained remand report from him. The remand report so obtained from the Assessing Officer was furnished to the assessee for their comments. The ld. CIT(A), after considering the remand report of the Assessing Officer and the reply of the assessee, deleted the additions, observing as under:

> *"I have gone through the facts and the written submissions filed along with the details filed enclose therein; The assesses is engaged in the business of Ship Breaking and sale of iron and steel etc. obtained from the ship. During the assessment proceedings the AO observed that the assessee has sold oil and lubricants stored in various ships purchased by the assessee during the year. The rates and amount of sale of such oils were found to be lower than the rates and amount at which the custom duty was charged as per Bill of Entry. Accordingly, after giving some credit for the loss of oil during the anchoring of ship, the AO made addition in the sale of lubricating oil of Rs. 1,77,40,224/-, sale of marine gas oil of Rs. 12,00,000/- and sale of fuel oil of Rs. 1,50,000/- totaling to Rs. 1,90,90, 224/-.*
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> *During the appellate proceedings on 24.04.2017, the assessee company submitted an application under Rule 46A for admission of certain evidences which are relevant for these, three grounds of appeal. A remand report was called from the ACIT 2, Kanpur vide office letter F. No. CIT (A) - 1/03/ ACIT-2/ KNP/2016-17 /17-18/51dated 27.6.2017. The DOT -2 submitted the Remand Report vide F.No: DCIT-2/ KNP/Remand Report/ M.S.B./ AY 2013-14/2017-18/ 67 dated*

21.8.2017 objecting to the admission of additional evidence considering the factual observations, that the assessee was not prevented by any sufficient cause from producing the evidence which the AO had required it to produce. A copy of the Remand Report was furnished to the appellant for their comments, to which appellant replied and have beeh considered.

It is a fact that appellant obtained the comparable rates & invoices from various parties in Bhav Nagar and submitted the same to the ld.AO by Speed Post which reached on 31.03.2016. AO has not stated in his remand report that these documentary evidences being considered u/r 46A were not received by AO on 31.03.2016. It needs to be appreciated that the comparable rates were to be obtained from various third parties in Bhav Nagar (Gujarat) and same was send to Kanpur from Bhav Nagar. It is clear from the chain of events that there was sufficient and bonafide reasons for not submitting the comparable rates till 22.03.2016. In any case these were obtained and submitted with the Id.AO before 31.03.2016. Therefore, the evidences are admitted and considered in the appellate proceedings.

I have perused and considered the assessment order, replies and evidences submitted by the learned AR and the Remand Report submitted by the AO.

It is admitted that the assessee company produced books of accounts, bills and vouchers, which were test checked by the AO. No discrepancy is pointed by the AO and the books of accounts of the assessee are maintained as per applicable accounting standards. The AO did not reject the books of accounts of the assessee. The AO did not bring any material on record to substantiate that the assessee actually sold the lubricating and furnace oil etc. at a rate higher than the rates recorded in the bills and books of accounts. Rather assessee has furnished all the bills, vouchers etc. in support of the sale recorded in the books of accounts. On such facts, it was held, not justified for the AO to make any addition in the sales recorded in the books of accounts of the assessee, by

Hon'ble jurisdictional High Court in case of Pashupati Nath Agro Food Products Pvt. Ltd. and Gopal Dass Sarab Dayal Sons.

Hon'ble jurisdictional Allahabad High Court in the case of CIT and Another vs. M/s Pasupati Nath Agro Food Products Pvt. Ltd. Hardol in ITA No. - 165 of 2010 passed on 4.5.2017. The Hon'ble High Court held as under:

"On perusal of the impugned judgment and order of the Tribunal dated 27.10.2009 reveals that the assessee has maintained the books of accounts in accordance with the prescribed standard as per section 145 of the Act. The account books have not been rejected by the assessing officer.

In view of the above, the Tribunal formed an opinion where once the account books are expected to be maintained in the prescribed accounting standard, the assessing officer could not have made any additions towards the sale of rice treating it to be outside the books of accounts or towards investing in stock of rice and wheat outside the books of accounts.

In view of above, the controversy as raised in this appeal stands duly covered by the Tribunal and it cannot be said that any investment was done beyond the books of accounts."

Similar view is taken by Hon'ble Allahabad High Court in the case of Gopal Dass Sarab Dayal Sons reported in 221 Taxmann 18 (Mag.).

AO has made the addition on the basis of complete presumption that the oils sold by the assessee is new and rates of sale are equal to custom tariff rates mentioned in the Bill of Entry. The learned AR however, explained that the oil & lubricants is charged to custom duty at the custom tariff rates only, although the same is held for consumption and is held in open tanks or drums. It is necessary to dry up the ship and to extract all the oils before dismantling of ship and is thus sold as scrap to Kabarias etc. as this cannot be sold to authorized dealers of oil. The same is sold by them in loose

quantities, which includes used oil and therefore it fetches only nominal price. Without commenting on the veracity of these facts it is true that the entire sale is also subject to Vat an element that is borne by the customer and is verifiable. In support of its claim the learned AR furnished bills of similar oils issued by other ship breakers in the same market area as of assessee. The AO in the Remand report has agreed that, "the details of comparable rates filed by the assessee in support of his contention were found to be comparable on facts."

AO ignored the reasons given for which the Fuel Oil and Marine Gas Oil is sold less than declared, factors like the time gap is minimum two days to ten days. Few generators of the ship remain working while the ship is anchored, and the engine of the ship is shut down, capacity of the generators to use not more than one Metric Ton a day, etc. AO summarily deduced that assessee firm has suppressed the sale of Fuel Oil by Rs. 2,89,865/-, Marine Gas Oil by Rs. 14,36,597/- and Lubricating Oil by Rs. 1,77,40,224/-, without giving any reason or basis of calculation. Regarding Lubricating Oil AO made the addition purely on the reason that nowhere in the Bill of Entry or Survey Report of Ship it is mentioned that Lubricating Oil present in the ship is a used oil. AO is not entitled to make addition by simply ignoring the submissions of appellant without giving alternate basis based on cogent material collected during assessment proceedings. Such statements would not be sufficient enough to call for any addition. No disallowance can be made on mere suspicion. Keeping in view, the ratio laid down by the Hon'ble Apex Court in the case of J.J. Enterprises vs. CIT 254 ITR 216 (SC), the disallowances made by the AO cannot be sustained.

In view of aforesaid facts and case laws, I am of the opinion that the AO is not justified in making any addition to the amount of sales recorded in the books of accounts of the assessee. Accordingly, the total addition of Rs.1,90,40,224/- is deleted.

These grounds of appeal are allowed."

7. From the aforesaid findings of the ld. CIT(A), it is amply clear that he has deleted the additions after considering the remand report submitted by the Assessing Officer and the submissions made by the assessee. Moreover, he has dealt with each and every issue independently and passed a speaking order. The Assessing Officer in the remand report has admitted that comparable rates filed by the assessee were found to be comparable on facts. The relevant findings of the Assessing Officer in the remand report are reproduced, as under:

> *"Notwithstanding the fact that the assessee's additional evidence is not admissible u/r 46A as discussed above, it may be submitted on facts that the details of comparable rates filed by the assessee in support of his contention were found to be comparable on facts. However, the same cannot be considered at this stage as fresh evidence. The AO has based his addition on account of sales suppression in case of lubrication oils, marine gas oil and fuel oil on the fact that in the bill of entry or survey report of ship it is nowhere mentioned that it is used oil. Accordingly, by treating it as fresh oil and applying the prevailing market rate, the suppressed sale in respect of these items was worked out. Before arriving at his finding the AO has observed as under:-*
>
> > *"As per assessee the Fuel Oil and Marine Gas Oil is sold less than declared because it is consumed by ship in between the time when ship comes for anchorage and beached on plot. The time gap is minimum two days to ten days. Regarding this, it to say that when the ship is anchored at high sea, only one or two generators of the ship remain working and the engine of the ship is shut down. There is thus no question of using up any furnace oil since the engine is shut down. The generators can also not use more than, say, one Metric Ton a day. Thus, only some margin can, be given for the consumption of oil by generators and for traveling from anchorage to berthing.*
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> *Thus, from the facts and materials on records with reference to the assessment proceedings in this case, it appears to be a*

case where the AO has based his finding on the facts and material produced/furnished by the assessee from time to time and also, in absence of the materials/evidences which the assessee failed o produce during the course of assessment proceedings."

8. The Assessing Officer in the remand report had only objected to the admission of additional evidence which the ld. CIT(A) has rightly overruled by observing as under:

"It is a fact that appellant obtained the comparable rates & invoices from various parties in Bhav Nagar and submitted the same to the ld.AO by Speed Post which reached on 31.03.2016. AO has not stated in his remand report that these documentary evidences being considered u/r 46A were not received by AO on 31.03.2016. It needs to be appreciated that the comparable rates were to be obtained from various third parties in Bhav Nagar (Gujarat) and same was send to Kanpur from Bhav Nagar. It is clear from the chain of events that there was sufficient and bonafide reasons for not submitting the comparable rates till 22.03.2016. In any case these were obtained and submitted with the ld. AO before 31.03.2016. Therefore, the evidences are admitted and considered in the appellate proceedings."

9. Therefore, in our considered opinion, no interference is called for in the order of the ld. CIT(A), who has rightly deleted the additions. Accordingly, the grounds taken by the Revenue are rejected.

10. In the result, the appeal of the Revenue stands dismissed.

Order pronounced in the open Court on 20/09/2019.

Sd/-	Sd/-
[A. D. JAIN]	[T. S. KAPOOR]
VICE PRESIDENT	ACCOUNTANT MEMBER

DATED:20/09/2019
JJ:1909

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

Assistant Registrar