

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC" MUMBAI**

**BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA Nos. 242/MUM/2019
Assessment Year: 2008-09**

ACIT - 21(1)
Room No. 116, 1st Floor,
Piramal Chambers, Parel,
Mumbai-400012.

Shri Chaitanya S. Joshi
5B, 5th Floor, Hingiri Apt.,
Vs. 1277, Hatiskar Marg,
Prabhadevi,
Mumbai - 400025.

PAN No. AABPJ 0212 G

Appellant

Respondent

Revenue by : Mr. R. Bhoopathi, DR
Assessee by : Mr. Mehul Hemani, CA

Date of Hearing : 20/01/2020
Date of pronouncement : 28/01/2020

ORDER

PER N.K. PRADHAN, A.M.

The appeal by the Revenue is directed against the order of the Commissioner of Income Tax (Appeals)-48 [in short 'CIT(A)], Mumbai and arises out of the assessment order passed by the Assessing Officer (AO) u/s 143(3) r.w.s. 147 of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the Revenue read as under:

1. The learned CIT(A) erred in law and in circumstances of the case in deleting the addition on the ground that the reopening was infructuous and no addition was subsequently made on this issue.

2. The learned CIT(A) erred in law and in circumstances of the case in treating reassessment as a case of change of opinion of AO, without any new facts.
3. The learned CIT(A) erred in law and in circumstances of the case in granting relief to assessee on the ground that there is no deliberate shifting of expenses to Mumbai Unit.
4. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the AO be restored.

3. Briefly stated the facts of the case are that the assessee filed his return of income for the assessment year (AY) 2008-09 on 07.09.2008 declaring total income of Rs.39,97,760/-. The Assessing Officer (AO) completed the assessment u/s 143(3) on 29.12.2010 on a total income of Rs.40,12,576/-. Thereafter, the AO re-opened the assessment by issuing notice u/s 148 dated 31.03.2015 on the ground that the assessee has two units i.e. Mumbai and Surat, but while claiming the deduction u/s 10A, he offered only one unit i.e. Surat for turnover and the unit at Mumbai was not considered, which resulted in excess claim of deduction of Rs.72,44,389/- u/s 10A leading to under assessment and consequent levy of tax of Rs.24,62,368/- and interest u/s 234B.

During the course of re-assessment proceedings, the assessee submitted before the AO the order of the Tribunal in ITA No. 6561/Mum/2013 dated 05.06.2015 and stated that *vide* the said order the Tribunal dismissed the appeal filed by the Revenue and confirmed the calculation method of claim of deduction u/s 10A followed by the assessee. It is further stated before the AO by the assessee that the Department has not preferred further appeal against the said order of the Tribunal and therefore, the same may be accepted.

However, the AO observed that during the year under consideration, the assessee has shown business income from two units i.e. Mumbai unit and Surat unit, wherein he has shown gross profit of 35.55% and 88.41% respectively. The assessee has debited indirect expenses of Rs.14,41,265/- from Mumbai unit and Rs.88,484/- from Surat unit. The AO further observed that the assessee has claimed deduction u/s 10A for the Surat unit, wherein indirect expense is low in proportion to the Mumbai unit which is not eligible for the deduction u/s 10A of the Act. Therefore, to make just and proper profits from both the units, the AO allocated indirect expenses in the proportion of turnover i.e. 65:35 for the Surat Unit and Mumbai unit which resulted into income of Rs.9,05,854/- for the Mumbai unit. Therefore, he made an addition of Rs.9,05,854/-.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that *vide* order dated 30.10.2018, the Ld. CIT(A) observed in respect of the re-opening u/s 147 of the Act that perusal of original assessment made u/s 143(3) dated 29.12.2010 shows that the assessee had already examined the issue of eligibility of deduction u/s 10A ; the details were specifically asked at the time of hearing of original assessment regarding various expenses separately for Mumbai and Surat units ; the AO had verified specific expenses of two units and had only disallowed telephone expenses, oil and petrol expenses and depreciation on machinery. Further observing that there is a change of opinion, the Ld. CIT(A) held the re-assessment proceedings as *ab-initio* null and void.

Further, the Ld. CIT(A) held that the assessee is producing totally different products at the two units and also their sales are also to totally

different customers. Observing that very different products are being manufactured in the two units, their processes and procedures are different and also raw materials are different, the Ld. CIT(A) came to a finding that there is no deliberate shifting of expenses to the Mumbai unit.

5. Before us, the Ld. Departmental Representative (DR) relies on the order of the AO, whereas the Ld. counsel for the assessee supports the order passed by the Ld. CIT(A).

6. We have heard the rival submissions and perused the relevant materials on record. In the instant case, the AO has issued notice u/s 148 on 31.03.2015 for the AY 2008-09, which is beyond four years from the end of the relevant assessment year. The Ld. CIT(A) has rightly observed that during the course of original assessment proceedings the assessee had filed details of various expenses separately for Mumbai unit and Surat unit; the AO had verified specific expenses of the two units and had only disallowed telephone expenses, oil and petrol expenses and depreciation on machinery. Rightly it is held by the Ld. CIT(A) that it is a case of change of opinion. Further we agree with the Ld. CIT(A) that since different products are being manufactured in the two units, their processes and procedures are different, raw materials are different, there is no deliberate shifting of expenses by the assessee to the Mumbai unit. All the more one cannot allocate indirect expenses in proportion to the turnover i.e. 65:35 for the Surat unit and Mumbai unit. Therefore, we agree with the order of the Ld. CIT(A) and affirm it.

7. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on 28/01/2020.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 28/01/2020

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai