

IN THE INCOME TAX APPELLATE TRIBUNAL "A", BENCH KOLKATA

BEFORE SHRI S.S.GODARA, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.482/Kol/2018

(निर्धारणवर्ष / Assessment Year:2010-11)

DCIT, Circle-14(2), Kolkata	Vs.	M/s Mankasia Steel Pvt. Ltd. NH6, Jalam Industrial Park, Dhulaghar, Sankaril, Howrah- 711302.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AADCM 8933 C		
(Appellant)	..	(Respondent)

Appellant by : Shri Dhruvajyoti Roy, JCIT

Respondent by :Shri Miraj D Shah, AR

सुनवाईकीतारीख/ Date of Hearing : 14/01/2020

घोषणाकीतारीख/Date of Pronouncement : 12/06/2020

आदेश / O R D E R

Per Dr. A.L. Saini, AM:

The captioned appeal filed by the revenue, pertaining to assessment year 2010-11, is directed against the order passed by the Commissioner of Income Tax (Appeal)-5, Kolkata, in appeal no. N19/CIT(A)-5/Circle-14(2)/16-17, which in turn arises out of an assessment order passed by the Assessing Officer u/s 147 of the Income Tax Act, 1961 (in short the "Act") dated 30/03/2016.

2. The grounds of appeal raised by the Revenue are as follows:

- 1. Whether on the basis of facts and circumstances of the case and in law ld. CIT(A), Kolkata erred in restricting the addition of Rs. 2,65,30,653/- u/s 69C of I.T. Act, to Rs. 22,10,887/-, without considering the findings and observations of the A.O.*

2. That the department craves leave to add, modify or alter any of the grounds of appeal and / or adduce additional evidence at the time of hearing of the case.

3. Brief facts qua the issue are that the assessee's case was reopened u/s 147 of the Act on the basis of reason to believe that there was undisclosed sales detected during the course of search operation by the office of Directorate General of Central Excise intelligence. The AO noticed that the assessee company has made the unrecorded sale and it has conceded that the said sale was made out of unaccounted purchases. So, during the course of hearing the A/R of the assessee company was asked to furnish the details of purchase and also to explain as to why adverse view should not be drawn in respect of source of purchases which remained unexplained. In response, the AR of the assessee company submitted written submission before the AO which is reproduced below:

“In this connection we would further submit that since we have admitted that sales and purchases both are not recorded in our regular books of accounts, how only sales be treated as profit. It goes against the accounting norms. Every sale has corresponding purchase. In no circumstance, the sale proceeds can be taxed as income. Further, the purchase was made out of sale proceeds. It is fact that in business the money is rotated. ”

In connection and consequence to the above referred submission, the assessee company was requested to furnish evidence on the claim that the source of purchase were made out of sale proceeds with date wise cash flow details. In response to the above query, the A/R of the assessee company submitted as under:

“no details of purchase were found by the Excise Department during course of survey made by them. The details of undisclosed sales was only found and on the basis of the undisclosed sales we have disclose the estimated profit on such sales. Thus, we have also not claimed any deduction in respect of unaccounted sales on account of undisclosed purchase. Out of common sense and based on the business of the assessee it is presumed that the assessee has earned some profit on such sales and as such average gross profit rate of 3.90% over a period of last three years was applied by the assessee. Hence there is no need for furnishing cash flow statement and source of purchase as there is no need to look into the provisions of the section 40A(3) of the Income Tax Act, 1961. ”

The AO has gone through the above submission of the assessee company and noticed that the assessee has failed to furnish the sources of purchase by failing to provide the rotation of cash flow as asked for. When a deduction by way of purchase is claimed it should be ascertained whether the payment was genuine and

whether it was made out of undisclosed source. The assessee company has failed to prove that the relevant purchases corresponding to the undisclosed sales have been made by way of rotating the sale proceeds. The Revenue must be permitted to enquire and ascertain that the payment relating to the purchase is reflected in the books of the recipient payee. Since the assessee company could not furnish any details of purchase and the source of it, so the corresponding purchase i.e. the undisclosed sale minus the gross profit i.e. Rs.2,65,30,653/- was treated as unexplained expenditure and added back to the total income u/s 69C of the I.T.Act,1961. The Assessing Officer added Rs. 10,76,686/- being gross profit @ 3.90%.

4. Aggrieved by the order of the A.O. the assessee carried the matter in appeal before the Id. CIT(A) who has restricted the addition of Rs. 2,76,07,339/- to Rs. 32,87,573/- observing the followings:

“ I have considered the submission of the appellant and also perused the assessment records. The appellant has challenged the assessment on technical grounds as the guidelines laid down by the Hon'ble Supreme Court in the case of GKN Driveshafts 259 ITR 19, had not been complied with by the AO. On going through the assessment records, the following facts come to light:

(i) *Notice u/s 148 of the Act dated 12.03.2015 was issued to the appellant for the A.Y. 2010-11*

(ii) *The appellant vide letter dated 23.03.2015 has requested for submission of the reasons for reopening of the assessment for A.Y. 2010-11. The appellant had also informed that the return of income filed on 27.09.2010 should be treated as a return in compliance to notice u/s 148.* ^u

(iii) *The AO vide letter dated 19/23.06.2015 and again on 18.09.2015 had submitted the reasons for reopening the case and also enclosed the copies and evidence forwarded by the office of the Directorate General of Central Excise Intelligence.*

(iv) *The appellant vide letter dated 10.09.2015 filed objection against the reasons for reopening. However, though the AO had not disposed off the objection through an order.*

Even though, the AO had not disposed off the written objection filed by the appellant against the reopening assessment u/s 148, the A/R of the appellant had appeared before the AO during assessment proceeding. The A/R of the appellant had not denied that the appellant had undisclosed sales amounting to Rs.2,76,07,339/- and also submitted that gross profit represented the income on undisclosed sales. The same submission was made during the appellate stage. Therefore, the admission of the appellant during the Assessment and also appellate proceedings, fortifies "the Assessing Officer has reason to believe" that

income chargeable to tax had escaped assessment. The notice issued u/s 148 was as per law. A minor procedure lapse on the part of the AO cannot vitiate the entire assessment proceedings keeping in view the fact that discrepancies were found after raid on the appellant's premises by the Directorate General of Central Excise Intelligence. The Bombay High Court in the Case of M/s Amaya Infrastructure Pvt Ltd vs I.T.O. [WP no. 787 of 2006] has held "In this case, we find that the petitioners have filed detailed information called for by the Assessing Officer under Section 142(1) and 143(2) of the Act and thus participated in the assessment proceedings. This having been done, it is not open for the petitioners to now contend that this Court should exercise its extraordinary jurisdiction and prohibit the Authorities from proceeding further with the impugned notice." Therefore, the objections of the appellant for reopening of assessment u/s 148 are dismissed.

The AO had added back Rs.10,76,686/- on the basis of GP of 3.90% (average GP of last three years as disclosed by the appellant in return) as undisclosed income from undisclosed sales amounting to Rs.2,76,07,339/-. The A/R of the appellant during assessment proceedings has submitted that entire sales should not be treated as undisclosed income and only GP earned out of such unaccounted sales can be treated unaccounted income. As the A/R of the appellant had admitted the GP on undisclosed sales represented undisclosed income, the addition of Rs.10,76,686/- is confirmed.

The Assessing Officer had added back Rs. 2,65,30,653/- as unexplained expenditure on undisclosed purchase. This amount was arrived by deducting GP from undisclosed sales. In other words, the entire undisclosed sales have been added back as the undisclosed income of the appellant. The A/R of the appellant had cited the decisions of the Gujarat High Court in the case of CIT vs President Industries Ltd 258 ITR 654 (supra) in support of his contention that the entire sale cannot be added back as undisclosed income. The operating part of the judgment in the case reads as follows:

"The sales only represented the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realization of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that investment by way of incurring cost in acquiring goods which have been sold have been made by the assessee and that has also not been disclosed. In the absence of such finding of fact the question whether entire sum of undisclosed sale proceeds can be treated income of the relevant assessment year answers by itself in negative. The record goes to show that there is no finding nor any material has been referred about the suppression of investment in acquiring the goods which have been found subject of undisclosed sales". The facts of the case cited by the appellant is distinguished. In the case cited by the A/R of the appellant, there was nothing on record that investment by way of incurring cost in acquiring goods which have been sold have been made by the assessee and that has also not been disclosed. However, in the case under appeal, there is no iota of doubt that purchases have been suppressed. The A/R of the appellant in his written submission page 3 dated 25.09.2017 has admitted that "it was further submitted that the appellant had not shown the corresponding purchases in its books of account". In the assessment order also, the appellant in his written submission dated 09.10.2015 in response to show cause dated 03.09.2015 had submitted that

"Therefore, it is evident that entire sale should not be treated as undisclosed income as the purchases was also unaccounted. In such circumstances, the gross profit earned out of such unaccounted sales can be treated as unaccounted income. We would like to mention that average gross profit of last three years should be taken into account for calculation of concealed income". As mentioned aforesaid, there is no iota of doubt as regards undisclosed purchases. The appellant has admitted making undisclosed sales out of undisclosed purchase. In light of the admission of the appellant, GP alone cannot constitute undisclosed income of the appellant. The A/R of the appellant during assessment proceedings has also not explained the source of such expenditure on purchases made. GP addition can only be made if the purchases are accounted for in the books of account. Similar view was held by the Bombay High Court in the case of CIT vs. Shri Hariram Bhambhani in ITA No. 313 of 2013 that only the profit attributable on the total unrecorded sales consideration which alone can be subject to income tax if the purchases have been recorded and only some of the sales are unaccounted. In the instant case, both sales/purchases were unrecorded in the books. In such a scenario the profit element alone cannot be the income from undisclosed sales. However, the entire unaccounted sales of Rs.2,65,30,653/- cannot by any yardstick constitutes undisclosed income. In this regard, reference may be made to the decision of the Delhi High Court in CIT vs Ajay Kapoor, Income Tax Act, 1961 155/2011 where it has held that "However, on the next issue whether any addition should have been made on account of unaccounted investment, we are unable to comprehend the reasoning and logic given by the tribunal. They have recorded that the respondent-assessee did not maintain day-to-day stock record register and, therefore, it cannot be said that unrecorded sales could not have been of accounted stock, which was later on replenished from the sale proceeds of unrecorded sales. Thus, the respondent-assessee had not made any investment for the unrecorded transactions. It is held that no evidence of unaccounted investment was found at the time of search. Once the stock register was not there as recorded by the tribunal in its order, the said finding itself apparently is contradictory. The finding that no incriminating document regarding investment was found is contradictory because the tribunal has accepted and admitted that the assessee had himself confirmed that he had made sales of Rs.9.73 crores outside the books of accounts. These were unaccounted sales. Thereafter, it was for the assessee to explain and state the source / funds for conducting and entering into the said transaction. In other words, the assessee had unaccounted turnover of approximately Rs.5 lacs per day during the period 1st April to 6th November, 2001. Transactions of such value do require investment. Plea of the assessee that existing or available investment in the books was sufficient, has to be made good with material and proof by the assessee. The assessee had to explain that purchases recorded in the books were sufficient after adjustment of the recorded sales. In cases of unaccounted sales and purchases all documents may not be available and certain amount of guess work is always required as noticed earlier but a realistic and common sense approach is required. To say that there was no evidence to show that the assessee had made unexplained investment would be to write off and erase the earlier finding of the tribunal that the assessee had made unaccounted sales of Rs.9.73 crores. Unrecorded purchases as mentioned in the seized document were more than Rs.4.50 crores. We also do not agree with the finding recorded by the tribunal that proof of unaccounted purchases did not prima facie indicate or show that unaccounted investment was made, as there was other Apparent evidence to the contrary. Onus, in such cases, is on the assessee to show that unaccounted

investment was made out of accounted stock. There cannot be any assumption or presumption that unaccounted sales must be from accounted purchases. Unaccounted sales may result and can contribute towards the investment, but there has to be initial investment. Profits and income earned are also used for personal needs and are taken out of business."

The appellant as per his own admission had made the undisclosed sale from undisclosed purchase. In business, there is rotation of purchase and sales. The initial investment in the purchase gets rotated throughout the year in the form of purchase and sales resulting in the total turnover. The initial investment in the undisclosed sales would constitute undisclosed investment in undisclosed sales. The A/R of the appellant during appeal hearings could not provide any details of this undisclosed investment. Therefore, in the absence of any material on record, the entire undisclosed investment in undisclosed sales has to be estimated. His undisclosed sales as detected during search and seizure operations carried out by the Officers of the Directorate General of Central Excise Intelligence amounts to Rs.2,76,07,339/- during the assessment year 2010-11. The average sales per month amounts to Rs.23,00,611/-. The average GP on sales as disclosed in the returns is 3.90% which amounts to Rs.89,724/-. The average purchase per month amounts to Rs.22,10,887/-. The undisclosed investment is, therefore, estimated at Rs.22,10,887/- (Rs.23,00,611/- -89,724/-) on undisclosed sales of Rs.2,76,07,339/-

Further, the A/R of the appellant in his submission during assessment proceedings has stated that the average gross profit of last three years should be taken to account for calculation of concealed income. The average GP is 3.90%. Therefore, the profit on undisclosed sales of Rs.2,76,07,339/- is calculated at Rs.10,76,686/-. The addition is restricted to Rs.32,87,573/- (Rs.22,10,887/- plus Rs.10,76,686/-) instead of Rs.2,76,07,339/- as undisclosed income on undisclosed investment in sales and profit on undisclosed sales. Therefore, this ground of appeal partly succeeds, and is partly allowed. The A.O. is directed accordingly."

5. Aggrieved the order of Id. CIT(A) the revenue is in appeal before us.

6. The Id. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer which we have already noted in our earlier para and the same is not being repeated for the sake of brevity and on the other hand, the Id. Counsel for the assessee has relied on the order of Id CIT(A).

7. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id CIT(A) and other materials available on record. We note that the assessee as per

his own admission had made the undisclosed sales from undisclosed purchases. In business, there is rotation of purchase and sales. The initial investment in the purchase gets rotated throughout the year in the form of purchase and sales resulting in the total turnover. The initial investment in the undisclosed sales would constitute undisclosed investment in undisclosed sales. The A/R of the assessee during appellate proceedings could not provide any details of this undisclosed investment. Therefore, Id CIT(A) in the absence of any material on record, the entire undisclosed investment in undisclosed sales had been estimated. The Id CIT(A) noticed that assessee`s undisclosed sales as detected during search and seizure operations carried out by the Officers of the Directorate General of Central Excise Intelligence amounts to Rs.2,76,07,339/- during the assessment year 2010-11. The average sales per month amounts to Rs.23,00,611/-. The average GP on sales as disclosed in the returns is 3.90% which amounts to Rs.89,724/-. The average purchase per month amounts to Rs.22,10,887/-. The undisclosed investment was, therefore, estimated at Rs.22,10,887/- (Rs.23,00,611/- -89,724/-) on undisclosed sales of Rs.2,76,07,339/-. The Id CIT(A) also computed the profit on undisclosed sales of Rs.2,76,07,339/- at the rate of 3.90% at Rs.10,76,686/- [3.90% of Rs.2,76,07,339]. Therefore, addition was restricted to Rs.32,87,573/- (Rs.22,10,887/- plus Rs.10,76,686/-) instead of Rs.2,76,07,339/- as undisclosed income on undisclosed investment in sales and profit on undisclosed sales. The conclusions arrived at by the CIT(A) are, therefore, correct and admit no interference by us. We, approve and confirm the order of the CIT(A).

8. Before parting, it is noted that the order is being pronounced after 90 days of hearing. However, taking note of the extraordinary situation in the light of the Covid-19 pandemic and lockdown, the period of lockdown days need to be excluded. For coming to such a conclusion, we rely upon the decision of the Coordinate Bench of the Mumbai Tribunal in the case of DCIT vs. JCB Limited in ITA No. 6264/Mum/2018 and ITA No. 6103/Mum/2018 for A.Y. 2013-14 order dated 14.05.2020.

9. In the result, the appeal of the revenue is dismissed.

Order pronounced in the Court on 12.06.2020

Sd/-
(S.S.GODARA)
न्यायिकसदस्य / JUDICIAL MEMBER

Sd/-
(A.L.SAINI)
लेखासदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata;

दिनांक/ Date: 12/06/2020

(SB, Sr.PS)

Copy of the order forwarded to:

1. DCIT, Circle-14(2), Kolkata
2. M/s Mankasia Steel Pvt. Ltd.
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches