

आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

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

श्री महावीर सिंह, उपाध्यक्ष एवं श्री राजेश कुमार, लेखा सदस्य के समक्ष ।
BEFORE SRI MAHAVIR SINGH, VP AND SRI RAJESH KUMAR, AM

आयकर अपील सं./ ITA No. 769/Mum/2015
(निर्धारण वर्ष / Assessment Year 2010-11)

The Asst. Commissioner of Income Tax, Central Circle 29(1), Room No.108, 1 st Floor, C-10. Pratyankshakar Bhavan, B.K.C, Bandra (East), Mumbai-51	बनाम/ Vs.	Shri Anand M. Shetty 1801, Odyssey1, Hiranandani Gardens, Powai, Mumbai-400 076
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AAOPS6358R		

अपीलार्थी की ओर से/ Appellant by	:	Shri Michael Jerald, Sr. DR
प्रत्यर्थी की ओर से/ Respondent by	:	Shri Chetan Karia, AR

सुनवाई की तारीख / Date of hearing:	22.07.2020
घोषणा की तारीख / Date of pronouncement:	22.07.2020

आदेश / O R D E R

महावीर सिंह, उपाध्यक्ष /

PER MAHAVIR SINGH, VP:

This appeal of Revenue is arising out of the order of the Commissioner of Income Tax (Appeals)-33, Mumbai, [in short CIT(A)], in appeal No. CIT(A)-33/IT/216/13-14 dated 07.11.2014. The assessment was framed by the Dy. Commissioner of Income Tax (in short DCIT/AO) for the A.Y.



2010-11 vide order dated 25.03.2013 under section 143(3) of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The first issue in this appeal of Revenue is against the order of CIT(A) deleting the addition made by Assessing Officer on account of suppression of sales. For this Revenue has raised the following ground No.1: -

"1. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition on account of suppression of sales of Rs.1,85,73,300/-. The CIT(A) ought to have considered the factors outlined in the assessment order which were based on scientific reasoning for making the addition of the suppressed sales."

3. Briefly stated facts are that the Assessing Officer during the course of assessment proceeding made addition of suppression of sales of undisclosed production based on the qualification details of opening and closing work-in-progress. Therefore, the Assessing Officer made addition of ₹1,35,73,300/-. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) deleted the addition after taking a remand report from the Assessing Officer vide Para 3.4 as under: -

"3.4. I have considered the' assessment order, remand report and the submissions of the appellant. During the course of appellate proceedings, the appellant has made' a



detailed submission explaining the difference in consumption as arrived at by A.O to compute the suppressed sale. Prima facie, the submission made by appellant was found to be reasonable. The matter was accordingly remanded to A.O for his examination of the matter and comments. During the remand proceedings the A.O has admitted that out of the total difference of Rs. 1,27,634 kgs., 74,087 kgs of closing stock was also not considered, and. thereby the suppressed production of 36,505 kgs. was arrived at and the,,. balance remained un reconciled. In view of the aforesaid findings of A.O in remand report• the suppressed sale as per the remand proceedings was revised by A.O at Rs.53,26,760/-. The appellant was asked to comment on the revised working. made by the A.O. in this regard the appellant has submitted that A.Q has ignored the fact that the weight of 70 ml. ALA bottle was to be taken at 0.017 kgs, as against 0.01029 kgs. Similarly, it is also explained that 100 ml embossed bottle was to be taken at 0.015 kg as against 0.01372 kg. The appellant has rebutted the A.O's finding in this regard that the certificate issued by the Indian Institute of Prekaging where A.O has stated' that the certificate did not reveal the type of embossed bottle and its capacity. However, in this regard it is categorically submitted that



while submitting the statement initially before the A.O,1200 ML ALA bottle manufactured during the year for Charak Pharma P .Ltd. and Cipla Ltd. were wrongly taken as 70 ml ALA bottle. In order to support his claim, the assessee has pointed out this fact having been reported in audit report in Sr. No.22, annexure-1 clause 28B of Form 3CD where the actual production of 2,77,552 kgs. in 4natching. It is also submitted that the entire exercise is carried out by A.O mechanically by taking arithmetic calculations without considering the fact that while converting raw material into finished goods, there are bound to be wastages in terms of evaporation) rejection, etc. and, Pre, even the amount calculated during the remand proceedings is also .not reliable and is devoid of facts and merit. I have gone through the submission and the mistakes pointed out by the appellant and find merit in his case. From the test report, it is evidence that the said agency has considered the 100 ml and 200 ml bottles for measuring average weight where the description and capacity of such bottlesr1eatiy indicated. Thus', according to the calculation, the appellant has explained the difference of 1,862.36 kgs with regard to 100 ml ALA embossed bottles and of 34,521.86 kgs with regard to 200 ALA bottles. Therefore, out of the total difference



of 36,605 kgs., the appellant has explained the difference of 36,384 kgs. The balance difference of 221 kgs is explained to be rejection/ process loss. In so far as the appellant's explanation with a regard to 36384 kgs is concerned, I have verified the details and find merit in appellant's case. However, the balance of 221 kgs is concerned, the appellant has merely given a general submission not supported by any evidence. Therefore, the suppressed sale on 221 kgs works out to Rs. 32,160/- which is liable to be confirmed. Thus out of the addition of Rs.1,85,73,300/-, a sum of Rs.32,160/- is sustained and balance amount is deleted. This ground is partly allowed."

Aggrieved, Revenue came in appeal before us.

4. We have heard rival contentions and gone through the facts and circumstances of the case. We noted that the Assessing Officer during the remand proceedings accepted that out of the total difference of 1,27,634/- kg, closing stock of 74,087/-kg was not considered and thereby suppressed production of 36,605 kg was there and the balance difference was reconciled. It means that the Assessing Officer vide his remand report dated 05.09.2014 admitted that out of the total addition of Rs.1,85,73,300/- the addition should remain at ₹53,26,760/-. The relevant remand report of the Assessing Officer read as under: -



"...During assessment proceedings, while examining: the unit wise weight of manufactured items and opening & closing stock, it was determined by the then AO that the production worth 127634 kg has been suppressed and sold out of books. In this connection the assessee has contested in appellate proceedings that the opening stock of raw material of 74087 Kg has been taken twice while determining the total opening stock. Further it has also been contested that the closing stock of WIP of 16679 Kg has not been taken into account in determining the total closing stock. On careful perusal of records and submissions it is noticed that the contention of the assessee is correct which needs to be reworked in determining the undisclosed production. Further, the assessee has submitted the revised production conversion statement in appellate proceeding against the original production conversion statement submitted during the assessment proceedings and tried to reconcile the discrepancies in production statement by giving the per unit weight of item at Sr. No.15 i.e. 70 ml ALA bottle at 0.017 Kg in place of original figure of 0.01029 Kg and the per unit weight of item at Sr. No.27 i.e. 100 ml Bottle embossed at 0.015 Kg in place of original figure of 0.01372 support of the same the assessee submitted the laboratory



test report done by the Indian institute of Packaging. On careful perusal of laboratory test report it is found that the capacity of both the ALA Bottle and

Thus the suppressed production. (1776069 kg.- 1739464 kg.) 36605 Kg.

*The value of stock, suppressed in production (36605*68)24,89,140/-*

*The value of sale of undisclosed production (2489140*2.14) 53,26,760/-*

In view of the above working, the decision on account of addition made with respect to difference in production may be taken on merits."

5. Now, short point before us is the difference of suppressed production of 36,605 kg on account of weight of LAC bottles whether it is to be taken as 70 ml or 100 ml or 200 ml. Another difference on account of wastage in term of evaporation, rejection etc. This issue, both sides agreed, can be remanded back to the file of the Assessing Officer because the CIT(A) has not given any specific finding how this difference is to be reconciled. We noted that the CIT(A), in the above reproduced Para 3.4 of CIT(A)'s order, does not made clear how this difference of 36,605 kgs is reconciled. Hence, in the interest of justice, we remand the issue of suppressed production of 36,605/- to the file of the Assessing Officer denovo. The Assessing Officer uninfluenced by the findings of the CIT(A) or



his remand report, will reconsider the issue afresh in the light of the evidences or submissions of the assessee. However, it is made clear that the addition deleted by CIT(A) being difference of 74,087 kgs, is upheld. This issue of Revenue's appeal is allowed for statistical purposes.

6. The next issue in this appeal of Revenue is against the order of CIT(A) restricting the disallowance of interest at ₹11,07,470/- as against the disallowance made by the Assessing Officer at ₹62,20,320/- by invoking the provisions of section 14A of the Act. For this, Revenue has raised the following ground No. 2 and 3: -

"2. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the disallowance u/s 14A of Rs.62,20,320/-. The CIT(A) did not appreciate the facts that the assessee had utilized the borrowed fund in a mixed manner for earning the exempt income as well as non-exempt income.

3. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in giving a finding that disallowance of interest u/s 14A worked out to Rs.11,07.470/- only without appreciating the facts on record that there was no uniformity in deployment of borrowed funds for the purpose of earning exempt and non-exempt income. "

7. Briefly stated facts are that the Assessing Officer made disallowance on interest expenses in view of the provisions of section 14A of the Act amounting to ₹11,07,470/-. The



assessee has earned dividend income of ₹1,01,000/- and claimed the same as exempt. We noted that the CIT(A) deleted the disallowance by observing that total investment made by the assessee of ₹6,59,15,000/- and assessee has interest free funds available with it at ₹7,33,65,8320/-, which is much more than the investment. According to CIT(A), the issue is covered by the decision of Hon'ble Bombay High court decision in the case of CIT vs. Reliance Utilities and Power [2009] 313 ITR 340 (Bombay). Hence, CIT(A) restricted the disallowance at ₹11,07,740/-. Aggrieved, Revenue came in appeal before Tribunal.

8. We have heard rival contentions and gone through the facts and circumstances of the case. We noted that the Revenue has not disputed the investment and availability of interest free funds and also not contested that interest free funds available with the assessee is not more. Once, the interest free funds available with the assessee for investing in the shares is more than the investment, no disallowance under section 14A of the Act can be made by the Assessing Officer in view of the decision of Hon'ble Bombay High Court in the case of CIT vs. HDFC Bank Ltd.(2014) 366 ITR 505 (Bom). Hence, we find no infirmity in the order of CIT(A) and this issue of Revenue's appeal is dismissed.

9. The next issue in this appeal of Revenue is against the order of CIT(A) deleting the addition made by Assessing Officer on account of suppression of Hotel sales receipts. For this, Revenue has raised the following ground No.4: -



"4. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs.59,24,335/- on account of suppression of Hotel Sales Receipts. The CIT(A) ought to have considered and weighed the factors outlined by the AO in the assessment order for estimating the Hotel receipts instead of accepting the assessee's version. "

10. We have heard rival contentions and gone through the facts and circumstances of the case. We noted that the Assessing Officer during the course of assessment proceedings made suppression of sales of food at ₹59,24,885/-. The assessee before Assessing Officer as well as before CIT(A) claimed that there is some portion of free food served either as complementary or as a part of the liquor sale. Hence, according to assessee this aspect is to be considered. Further, the assessee contended that there are cash sales which were not considered by the Assessing Officer and assessee has disclosed the same in the books of account. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) deleted the addition vide Para 5.5 as under: -

5.5. I have considered the assessment order, remand report and the submissions made by the appellant as well as various facts submitted and considered by A.O. After taking all the facts' into 'consideration, it is found that most of the sales of the hotel are



cash sales which cannot be overlooked. The contention of the AD to be accepted to some extent and also the submission of appellant cannot be ignored moth particularly with regard to utilization of items of food purchases which are consumed for sales of liquor aswell as for serving food to the entire staff which is a normal practice prevailing in the kind of business, the assessee is in. I am unable to accede to A.O's stand that only petty stock could have been consumed for serving liquor or for that matter consumption for staff food. On the facts and indication of the ratio of cost of liquor vis-à-vis its sale, it cannot be denied that some portion of free food should have been served either as complimentary or as a part of liquor sale and hence, there is some merit in appellant's case because of the very nature of the business.

The fact that in case of hotel business free foods is served, complimentary foods given for liquor served to customers, major part of the food items are destroyed being perishable in nature, certain part of the food items ought to have included in' the closing stock as well and all these facts have been admitted by the AO in his remand report. It is, therefore, proper to estimate the income from the said business in line with the method adopted by the A.O. The total purchase of food Items is Rs.40,07,108/-.



3.5% of the food purchases are meant to meet the above which works out to Rs.14,07,488/- and the balance remained at Rs.26,04,620/-. Further, the ratio of liquor sale to liquor purchase cannot be same in case of ratio of food sale to food purchase which AO had adopted at 2.5 times of food purchase instead it would be restricted to one time of food purchase and, therefore the total sale of food will be at Rs.52,00,240/-i.e. one time more of the food purchase of Rs.26,04,620/-/ Out of which food sale as recorded by the appellant of Rs.40,92,885/- shall be reduced leaving a balance of Rs,.11,16,355/- and hence suppressed sale is Rs.111,16,355/-, Therefore, addition made by the A.O under this ground amounting of Rs. 59,24,885/- shall be deleted and net addition shall be restricted to Rs, 11,16,335/- . This ground is partly allowed.

Aggrieved, now Revenue came in appeal before Tribunal.

11. We noted that the Assessing Officer has estimated the suppressed sale at ₹59,24,885/-, but considered the portion of free food served either as complementary or as a part of liquor sale. Further, we noted that the Assessing Officer has not considered the cash sales and discounts also. We noted that the CIT(A) estimated the suppressed sale at the base 2.5 times of the food purchased at ₹11,16,355/-. Now, before us the Sr. Departmental Representative could not point out any infirmity



in the order of CIT(A). We noted that the CIT(A) has reasonably estimated the suppressed sale at ₹11,16,335/- and hence, we confirm the same. This issue of Revenue's appeal is dismissed.

12. In the Result, the appeal of Revenue is dismissed.

Order pronounced in the open court on 22.07.2020.

Sd/-

(राजेश कुमार/ RAJESH KUMAR)

(लेखा सदस्य / ACCOUNTANT MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 22.07. 2020

सुदीप सरकार, व. निजी सचिव/ *Sudip Sarkar, Sr.PS*

Sd/-

(महावीर सिंह /MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai