

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकरअपीलसं./ITA No.2386/AHD/2014

(निर्धारणवर्ष / Assessment Year: (2005-06)

(Virtual Court Hearing)

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| Shailesh Laxmilal Bafna, Prop. M/s. Vimal Steel Traders, A-4, Chandanvan Society, Near South Zone Office, Udhna, Surat-394210. | Vs. | Assistant Commissioner of Income Tax, Circle-9, Surat |
| स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ABPPB3916D | | |
| (Assessee) | | (Respondent) |

Assessee by : Shri Hiren Vepari - CA

Respondent by : Shri B K Panda – Sr. DR

सुनवाईकीतारीख/ Date of Hearing : 10/11/2020

घोषणाकीतारीख/Date of Pronouncement: 24/11/2020

आदेश / O R D E R

PER DR. A. L. SAINI, ACCOUNTANT MEMBER:

Captioned appeal, filed by the assessee, is directed against the order dated 12.06.2014, passed by the CIT(A), as a result of the appeal having been remanded to Assessing Officer in the matter of assessment under section 143(3) of the Income Tax Act, 1961 (in short ‘the Act’) for the assessment year 2005-06, for fresh adjudication, vide order dated 08.07.2011 of a Coordinate Bench of this Tribunal. Now, the assessee is in second round before this Tribunal on the same issues which were remanded back to the file of Assessing Officer by this Tribunal. The grievances raised by the assessee are as follows:-

(I). Validity of addition:

The learned Commissioner of Income-tax (Appeals) erred in holding that (a) issue of show cause notice was not required for making addition (b) no notice u/s.143(2) was required in case of set aside assessment.

(II). Rejection of book result:

On the facts and circumstances of the case and as per law, the learned Commissioner of Income-tax (Appeals) erred in rejecting book result.

(III).Gross profit addition:

While the learned Commissioner of Income-tax (Appeals) has deleted gross profit addition of Rs.15,10,886 by telescoping with other additions, the appellant submits that on the facts and circumstances of the case and as per law, the learned Commissioner of Income-tax (Appeals) was not otherwise justified in upholding the addition of Rs.15,10,886.

(IV).Addition u/s.68:

On the basis of the evidence furnished and on the facts and circumstances of the case and as per law, the learned Commissioner of Income-tax (Appeals) was not justified in confirming the addition of Rs.7,95,000 as under:-

| | |
|------------------------------|-----------------|
| Pyarchand Ranglal Shah (HUF) | 45,000 |
| Vipul M. Bafna | 2,50,000 |
| Niesh Jugraj Kothari | <u>5,00,000</u> |
| | 7,95,000 |

(V).Undervaluation of the stock:

(a) On the facts and circumstances of the case and as per law and as per the evidence produced, the learned Commissioner of Income-tax (Appeals) ought to have deleted the additions made as undervaluation of closing stock.

| | |
|---------------|-------------|
| Cement sheets | Rs. 40,896 |
| Angles | Rs.1,23,341 |

(b) The appellant submits that the Assessing Officer has valued all the material taking value of higher grade material.

(VI). Miscellaneous:

The appellant craves leave to add, alter or vary any of the grounds of appeal.”

2. At the outset, Shri Hiren Vepari, the Learned Counsel for the assessee, informs the Bench that the assessee does not want to press ground no. 3 to which Ld. Departmental Representative did not raise any objection, therefore we dismiss ground no.3 raised by the assessee. Ground no.6 raised by the assessee is general in nature therefore does not require adjudication.

3. By way of ground no.1, assessee has raised legal issue contending that no notice under section 143(2) was issued by assessing officer when this Tribunal has remanded the matter back (the same issues) to the file of Assessing Officer, and show cause notice should be issued for making addition.

4. Shri Hiren Vepari, contends that ld CIT(A) ought to have appreciated that when the matter is set aside by the Tribunal, the proceedings before the Assessing

Officer becomes de novo, and that notice under section 143(2) is mandated. Since, in the assessee's case, the assessing officer has not issued show cause notice/notice under section 143(2) of the Act, therefore, on this ground itself, the assessee's appeal is required to be allowed. He relied on various judgments of High Courts which relate to section 292B and section 292BB of the Act. All these judgments cited by Id Counsel spell that section 292B and section 292BB do not cure the defect if notice under section 143(2) is not issued. Therefore at this juncture, we do not discuss these judgments as these judgments do not directly relate to the issue under consideration.

5. On the other hand, Shri B.K. Panda, Departmental Representative, for the Revenue, submitted before the Bench that there is no need to issue show cause notice in case of set aside proceedings by the Tribunal, as the Tribunal has set-aside the order of the Id. CIT(A) and remitted the issue back to the file of the Assessing Officer for *de novo* adjudication only on four issues which were there in the original assessment order. There were no new issues during the assessment proceedings and the assessee was aware about these issues which were remitted back by the Tribunal to the file of the Assessing Officer. In fact, the Tribunal in its order specially mention about the issue which is to be examined by the Assessing Officer and the assessee was supposed to make the compliance. Therefore, it is not necessary to issue the statutory notice under section 143(2) of the Act. It is only necessary to provide the opportunity to plead the case and the same has been provided by the Assessing Officer. Therefore, the principle of natural justice has been observed by the Assessing Officer. The Id. Departmental Representative has also relied on the judgment of the Hon'ble Karnataka High Court, (113 taxmann.com 513) wherein it was held that if the show cause notice had not been issued by the Assessing Officer then the matter should go back to the file of the Assessing Officer with the direction to the Assessing Officer to issue the notice to the assessee and complete the assessment in accordance with law. Therefore, Id. Departmental Representative submits before the Bench that if this Tribunal considers the issue of show cause notice then assessee's matter may be remitted

back to the file of the Assessing Officer to issue the notice to the assessee and then complete the assessment in accordance with law.

6. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the Id. CIT(A) and other material brought on record. The issue before us is that Tribunal has remanded the matter back (the same issues which were there during the original assessment proceedings before the assessing officer) to the file of Assessing Officer, with direction to the Assessing Officer and Assessee- whether notice under section 143(2) of the Act is required be issued to the assessee?

We note that Id. CIT(A), during the appellate proceedings, held as follows:-

“8.2 As regards ground no.5, it raises a procedural issue that no addition can be made without issuing show cause notice. As regards this ground, there is no specific provision in the Act for issue of show cause notice, informing the assessee about the additions proposed to be made. It is sufficient compliance with law, if principles of natural justice have been complied with.

8.3 Moreover, in this present case, the assessment proceedings were initiated on the basis of the order of the Hon'ble ITAT. The Hon'ble ITAT had given specific directions while setting-aside and restoring certain issues to the file of the Assessing Officer. The assessee was asked to furnish evidence and explanation on those issues in view of the directions of the Hon'ble ITAT and the assessment order has been passed after discussing the details furnished by the assessee. Therefore, there is no infirmity in the assessment order on this ground. Consequently, ground no. 5 of the amended grounds of appeal is dismissed.”

Having gone through the order of Id. CIT(A), we noticed that the Tribunal had given specific direction while setting aside and restoring the matter back to the file of the Assessing Officer and the assessee was also asked to furnish documents and explanation on those issues in view of the directions of the Tribunal. The assessment order is to be passed after discussing the details/documents furnished by the assessee therefore, the assessing officer and assessee both were aware about the details/documents and directions of the Tribunal. Hence, there is no need to issue notice under section 143(2) of the Act, as the necessary instructions were given by

the Tribunal in its order. Therefore, the requirement to issue the notice under section 143(2) of the Act does not arise. We note that the judgements on which Ld. Counsel has relied do not apply to the facts of the assessee under consideration.

7. We note that the sub-section (2) of section 143 does not state that notice to be issued when Tribunal has remanded the matter back to the file of the Assessing Officer. It is relevant to quote the provisions of section 143(2) of the Act which reads as follows:-

“(2) Where a return has been furnished under section 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer or the prescribed income-tax authority, as the case may be, if, considers it necessary or expedients to ensure that the assessee has not understand the income or has not computed excessive loss or has not under-paid the tax in any manner, shall serve on the assessee a notice requiring him, on a date to be specified therein, either to attend the office of the Assessing Officer or to produce, or cause to be produced before the Assessing Officer any evidence on which the assessee may rely in support of the return:

***Provided** that no notice under this sub-section shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished.]”*

This, we note that notice under section 143(2) is required when assessee has furnished his return of income under section 139 or in response to a notice under section 142(1) of the Act. Therefore, notice under section 143(2) is not required when the Tribunal has remanded the matter back to the file of Assessing Officer, with certain direction to assessee and Assessing Officer.

8. We also note that assessee has requested the Tribunal to provide him one more opportunity to plead his case before Assessing Officer. This is evident from para 31 of Tribunal's order in assessee's case in ITA No.3258 & 3279/AHD/2008 for AY. 2005-06 order dated 08.07.2011, which read as follows:-

“31. At the time of hearing before us Ld. Counsel for the assessee reiterated the same submission as made before lower authorities and further submitted that if one more opportunity is give to assessee he will be able to establish the identity and creditworthiness of the creditors/donor by producing them before Assessing Officer. Since Ld. DR did not seriously object to this prayer of the assessee, the matter is restored back to the file

of Assessing Officer for such exercise. This ground of assessee's appeal is allowed for statistical purpose."

From the above order of the Tribunal, it is abundantly clear that assessee had himself taken the responsibility to produce creditors to establish identity and creditworthiness, hence the question to issue notice under section 143(2) does not arise.

9. We note that while passing order under section 143(3) r.w.s. 254 of the Act, the Assessing Officer has issued letter on 13.02.2012 to furnish books of accounts, bank statements etc. and the same were furnished by the assessee *vide* para 4 & 5 of assessment order, which are reproduced below:-

"4. In the light of the above decision, letter was issued on 13.02.2012 and duly served upon the assessee asking it to furnish the books of accounts, bank accounts for verification.

5. In response, the assessee vide letter dated 23.02.2012 furnished the submission issue-wise. The same are discussed in the foregoing paras."

Thus, it is clear that during the assessment proceedings (second round) under section 143(3) r.w.s. 254 of the Act, the Assessing Officer has issued letter on 13.02.2012 to the assessee to furnish books of accounts, bank statements etc. In response to the said letter the assessee has filed documents and submissions, therefore, the principle of natural justice has been observed during the assessment stage. Therefore, the requirement to issue notice under section 143(2) does not arise. Hence, we dismiss the ground no.1 raised by the assessee.

10. Regarding ground no.2 which relates to rejection of books of accounts. Learned Counsel submits before us that Id. CIT(A) has erred in rejecting the books of accounts. We note that during the appellate proceedings, Id. CIT(A) held as follows:-

"4.1 As regards addition for unaccounted cash credit, the said addition also gets telescoped against the gross profit addition. The total additions contested from sub ground nos. 1 (a) to (d) of the present appeal are of Rs.11,21,317/-. In view of these specific additions, which are the reasons for Gross Profit addition, it is held that separate addition for GP need not be made, even though in principle the rejection of books of accounts is upheld. Consequently, the addition of Rs.15,10,880/- made by the assessing

officer is deleted and the amended ground no. 1 (e) is decided in that manner.”

From the above findings, we noticed that Id. CIT(A) deleted gross profit addition and upheld the rejection of books of accounts. When the books of accounts are rejected then only option available before the Income Tax Officer is to make addition based on estimation, that is, gross profit addition/net profit addition etc, and item-wise addition are not made. We note that Id CIT(A) deleted the addition based on gross profit (GP). Thus, we note that Id CIT(A) has not rejected the books of accounts. We note that it is only a passing reference and contradictory statement made by Id. CIT(A) in his order, as the item-wise additions were upheld by the Id. CIT(A), therefore, books of accounts were not rejected. Based on this factual position, ground no.2 raised by the assessee is dismissed.

11. Ground No.4 raised by the assessee, on merit, is reproduced below for ready reference:-

“Addition u/s.68:

On the basis of the evidence furnished and on the facts and circumstances of the case and as per law, the learned Commissioner of Income-tax (Appeals) was not justified in confirming the addition of Rs.7,95,000 as under:-

| | |
|-------------------------------------|------------------------|
| <i>Pyarchand Ranglal Shah (HUF)</i> | <i>45,000</i> |
| <i>Vipul M. Bafna</i> | <i>2,50,000</i> |
| <i>Niesh Jugraj Kothari</i> | <i><u>5,00,000</u></i> |
| | <i>7,95,000”</i> |

12. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee. Learned Counsel reiterated the submissions made during the appellate proceedings. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. We note that assessee has discharged his burden by furnishing the following evidences and explanations:

(i) Gift received from Nileshe Kothari of Rs.5,00,000. The assessee submitted before us, Gift declaration (Page No.40-41 of the paper book-I), Copy of return of income (Page No.42 to 44 of the paper book-I), Copy of trading account, P. & L.Account, Capital Account and Balance sheet clearly showing gift being debited

in favour of the appellant (Page No.45 to 48 of the paper book-1), Copy of PAN of Nilesh Kothari (Page No.49 of the paper book-I) and Copy of bank statement of the donor (Page No.50 of the paper book-1)

(ii) Loan received from Vipul M. Bafna of Rs.2.50.000. The assessee submitted before us, Copy of account from the books of the assessee showing account of Vipul M. Bafna for F.Y.2004-05 (Page No. 56 and 57 of the paper book-1) showing loan received through account payee cheque. Copy of account from the books of the assessee showing account of Vipul M. Bafna for F.Y.2005-06, F.Y.2006-07 and F.Y.2007-08 (Page No, 58 to 61 of the paper book-1). The ledger accounts show that not only interest was paid but tax was deducted and amount of loan eventually repaid by cheque. Copy of return of income of Vipul M. Bafna (Shah) (Page No.62 & 63 of the paper book-1) was also filed.

(iii) Loan received from Pyarchand Ranglal Shah (HUF) of Rs.45.000. The assessee submitted before us, copy of account from the books of the assessee showing account of Pyarchand Ranglal Shah (HUF) (Page No.51 of the paper book-1) showing loan received through account payee cheque, Copy of cash book of Pyarchand Ranglal Shah (HUF) showing cash deposit into bank before advancing to the assessee (Page No.51 of the paper book-1).

We note that assessee has discharged his burden by establishing identity, genuineness as well a creditworthiness. In fact, it was up to the department to make further inquiries in the matter based on the documents and evidences submitted by the assessee, as noted above, but no such exercise has been done by the department. Hence, we delete the addition of Rs.7,95,000/-.

13. Ground No.5 relates to undervaluation of the stock, of Cement sheets Rs.40896/- and Angles Rs.1,23,341/-.

14. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee. Learned Counsel reiterated the submissions made during the appellate proceedings. On the other hand, the Ld. DR for the

Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. We note that assessee is dealer in iron and steel and other building materials. The Assessee has maintained regular books of account, day-to-day stock register, bill wise quantity and quality of material, both for inward and outward. There are two elements of undervaluation against which the assessee is in appeal before this Tribunal.

(i) The first element is undervaluation of corrugated cement sheets of Rs.40,896/-. Ld. Counsel submits before us that the assessee has valued the inventories of 902 corrugated cement sheets as per the LIFO basis of valuing inventories and as such has valued it at Rs.180 per sheet, however, the assessing officer has adopted higher rate of Rs.225.34 per sheet out of two invoices of Rs.180.27 and Rs.225.34 as per the last bills produced before him. The assessee has maintained quantity wise and quality wise day-to-day register which is not disputed by the assessing officer. The assessee has adopted LIFO mode of valuation because these sheets when typically are piled over each other say 50-60 sheets, it results in only the last sheet inwarded as first to be taken out. These sheets were valued at Rs. 180 per sheet considering the fact that they result in unavoidable damage due to fragile nature of the sheets, sheets damaged in transit and it loses some merchandise value.

(ii) The second element is Undervaluation of M.S. angle channels of Rs.1,23,341/-. So far as undervaluation of Rs.1,23,341 is concerned, the ld Counsel submits before us that the assessee maintains quality-wise and quantity-wise day-to-day register, which is accepted by the assessing officer. Reference is invited to page No.28 of the paper book, which states that how clearly valuation was made by the assessee against the arbitrary value adopted by the assessing officer. The valuation adopted by the assessing officer has been based on the last bill of purchases without specifying to which quality it applied. Hence there is no any undervaluation of the stock therefore we delete both the addition in respect of Cement sheets Rs.40896/- and Angles Rs.1,23,341/-. We have taken into account the peculiar facts and circumstances of the assessee's case under consideration

therefore the instant adjudication shall not be treated as a precedent in any preceding or succeeding assessment year.

15. In the result, the appeal filed by the assessee is partly allowed.

Order is pronounced on 24/11/2020, as per Rule 34 of Income Tax Appellate Tribunal, Rule 1963.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

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

सुरत /Surat

दिनांक/ Date: 24/11/2020

Samanta, PS

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

// True Copy //

By Order

Assistant Registrar/Sr. PS/PS
ITAT, Surat