

आयकर अपीलीय अधिकरण "ई" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"E" BENCH, MUMBAI

माननीय श्री शक्तिजी दे, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI SAKTIJIT DEY, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

आयकर अपील सं./ I.T.A. No.3526 & 3527/Mum/2011
(निर्धारण वर्ष / Assessment Year: 2002-03)

M/s. Top Optics 1 st & 2 nd Floor, Block B Sujal Mansion, Bhangwadi Kalbadevi Road, Mumbai-400 002.	बनाम/ Vs.	ITO –Wd. 13(1)(2) Room No.419, 4 th Floor Aaykar Bhavan, M.K. Road Churchgate, Mumbai-400 020.
PAN/GIR No. AAFT-5503-B		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Vipul Joshi-Ld. AR
Revenue by	:	Ms. Leena Srivastava-Ld.CIT DR
सुनवाई की तारीख/ Date of Hearing	:	25/11/2020
घोषणा की तारीख / Date of Pronouncement	:	09/02/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals by assessee for Assessment Year [in short referred to as 'AY'] 2002-03 contest separate order for learned first appellate authority. In ITA No.3526/M/2011, the assessee is aggrieved by confirmation of certain additions whereas in ITA No.3527/Mum/2011, the assessee is aggrieved by confirmation of penalty u/s 271(1)(c). First, we take up quantum appeal which contest the order of Ld. Commissioner of Income-Tax (Appeals)-24, Mumbai, [in short referred to

as 'CIT(A)'], Appeal No.CIT(A)-24/13(1)(2)/363/Rest/06-07 dated 22/02/2011 on following precise grounds of appeal filed on 27/02/2017: -

1. The Commissioner of Income Tax (Appeals)-24, Mumbai erred in confirming the action of the Income Tax Officer, Ward-13(1)(2), Mumbai in rejecting the books of accounts and estimating gross profit of the appellant.

1.2 While doing so, the AO erred in-(i)basing his action only on surmises, suspicion and conjectures (ii)taking into account irrelevant and extraneous considerations; and (iii) ignoring relevant material and considerations as submitted by the Appellant.

1.3 It is submitted that in the facts and circumstances of the case and in law, no such action was called for.

1.4 Without prejudice to the above but not admitting that some addition was called for, it is submitted that the estimation of income made by the AO is not in accordance with the law, is arbitrary and excessive.

2.1 The Ld. CIT(A) erred in (i) confirming the action of AO in making further additions of Rs.20 Lacs. (ii)not reducing the addition by Rs.12.00 Lacs which was the amount of addition already deleted by the Hon'ble ITAT.

2. We have carefully heard the rival submissions and perused relevant material on record including documents placed in the paper-book. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

3.1 For appreciation of controversy, it would be necessary to refer to chronology of events. The assessee is stated to be a wholesaler dealer of spectacle frames, cases and lenses with customers spreading all over India. During year under consideration, the assessee was stated to be in the process of clearing its stock since it was being merged with another entity namely M/s Suvin optics which ultimately took place in subsequent years.

3.2 An assessment was framed u/s 143(3) on 27/12/2004 wherein returned income of Rs.6.21 Lacs was assessed at Rs.18.21 Lacs after certain additions on account of depreciation, disallowance out of closing stock etc. The assessee reflected sale of Rs.78.33 Lacs and its books of accounts were duly audited u/s 44AB. The closing stock was valued at

lower of cost price or market price. The quantitative details of closing stock would reveal that the assessee had closing stock of 304 pieces of frames / sunglasses and 100500 pieces of lenses pairs besides 9078 pieces of cases. There was no fresh purchase of lenses and cases during the year. The opening stock of frames was 5859 pieces, cases 12829 pieces and lenses 151784 pairs. The assessee reflected Gross Profit Rate of 6.42% whereas Net Profit Rate was 7.56%.

3.3 The assessee and its associated concern namely M/s Sunrise Optics was subjected to survey action u/s 133A on 17/01/2002 wherein combined closing stock was valued at Rs.42.43 Lacs. The combined cash of Rs.2.96 Lacs was also found on the date of survey. As per provisional Trading Account, the assessee had closing stock of Rs.21.42 Lacs with Gross Profit of 42.36% on sale of Rs.59.94 Lacs. The stock in the books of M/s Sunrise Optics was Rs.11.18 Lacs. The aggregate stock as per books of accounts was Rs.32.60 Lacs as against physical stock of Rs.42.43 Lacs and accordingly, the assessee was required to explain the difference in stock for Rs.9.83 Lacs. The stock discrepancies, in case of the assessee, arose due to difference in stock quantities of sunglasses and frames.

3.4 During survey action, the statement of husband (Shri Vijay Gogri) of one of the partner of the firm i.e. Jaya Vijay Gogri was recorded. It was admitted that no stock details were being maintained. While answering Q.No.10, Shri Vijay Gogri, with a view to meet all the discrepancies pointed out by survey team and also to meet any other likely discrepancy, declared additional amount income of Rs.20 Lacs in the name of the assessee and another Rs.8 Lacs in the case of M/s Sunrise Optics. Upon perusal of audited financial statements as placed

on record, it could be observed that the assessee honored the said admission and credited a sum of Rs.20 Lacs to its Profit & Loss Account as 'income declared u/s 133A'.

3.5 However, during the course of assessment proceedings, Ld. AO opined that stock having cost of Rs.22.20 Lacs was valued at market price of Rs.10.19 Lacs and accordingly, show-caused the assessee as to why the market value be not adopted to value the closing stock. The assessee defended by submitting that rough lenses were imported in FY 1997-98 in two shipments. The cost of 141945 pairs of imported lenses was Rs.17/- per pair. After import, only 3840 pair could be sold since the color of lenses went out of fashion. Since assessee held large stock of rough lenses, it reduced the prices and was able to sell 51734 more pairs during the year. The remaining 100500 pairs lying in stock were valued at Rs.5/- per pair, being approx. market value likely to be fetched. There was no purchase of fresh lenses during the year. The aforesaid facts led to decrease in overall Gross Profits to 6.42%. However, rejecting the same, Ld. AO added the differential amount of Rs.12 Lacs to the income of the assessee and determined total income of Rs.18.21 Lacs. The stand of Ld. AO was confirmed by learned first appellate authority vide order dated 25/08/2005.

3.6 In the meanwhile, Ld. Commissioner of Income Tax-13, invoking revisional jurisdiction u/s 263 vide order dated 27/03/2006, alleged that the profit & loss account was drawn in such a way so as to nullify the declaration made during survey action since the assessee declared income of Rs.6.21 Lacs only which include additional income of Rs.20 Lacs declared during survey. Since Ld. AO failed to take note of the

same during assessment proceedings, the assessment order was set-aside and Ld. AO was directed to consider this discrepancy.

Though the assessee challenged the validity of revisional jurisdiction before this Tribunal vide ITA No. No.2363/Mum/2006, however, it withdrew the same vide letter dated 06/03/2007, a copy of which is on record. The assessee sought withdrawal of the appeal in view of the fact that order u/s 143(3) r.w.s. 263 was already passed by Ld. AO and the same was already under challenge before Ld. CIT(A). Accordingly, the appeal was dismissed by the Tribunal vide order dated 21/03/2007.

3.7 Pursuant to directions u/s 263, fresh order u/s 143(3) r.w.s. 263 was passed by Ld. AO on 26/12/2006. In the said order, Ld. AO divided the financial year into two parts i.e. period-1 (up-to the date of survey) and period-2 (period after the date of survey). The GP rate of 42.36% as shown by assessee in provisional trading account on the date of survey was applied to post-survey period sales. In other words, the books were rejected u/s 145 and GP rate of 42.36% was applied for whole of the year which was further increased by amount of TDS debited in Profit & Loss Account. Finally, the income was determined at Rs.27.87 Lacs in an assessment framed u/s 143(3) r.w.s. 263 on 26/12/2006. This order was rectified u/s 154 on 26/05/2008 to rectify the figures of profits shown in the provisional trading account. The said rectification re-determined the total income at Rs.31.84 Lacs.

Upon further appeal, Ld. CIT(A) dismissed the appeal vide order dated 06/08/2007 by observing that since Ld. CIT had given specific findings in order passed u/s 263, he had no jurisdiction to adjudicate the issues. The action of Ld. CIT(A) was turned down by Tribunal vide ITA

No.6770/Mum/2007 order dated 30/03/2009 wherein vide para-10 of the order, Ld. CIT(A) was directed to adjudicate the issue on merits.

Pursuant to aforesaid directions of the Tribunal, a fresh appellate order has been passed by Ld. CIT(Appeals)-24, Mumbai on 22/02/2011 which is subject matter of challenge before us.

3.8 At this juncture, it would be relevant to note that appellate order dated 25/08/2005 arising out of the original assessment framed u/s 143(3) (as elaborated in para 3.5 above) came up for challenge by the assessee before this Tribunal vide ITA No.6191/Mum/2005 order dated 26/06/2008. In the said proceedings, the assessee challenged the addition of Rs.12 Lacs as made by Ld. AO on account of closing stock while framing assessment u/s 143(3) on 27/12/2004. The Tribunal, in para-7 of the order, held that the assessee was entitled to value its closing stock at market price which was lower than the cost. It was also observed that in other years, the sale of the material @Rs.5/- was accepted by the revenue. Further, the value of opening stock in subsequent year was also accepted. When the assessee followed regular method of valuation of closing stock, the addition of Rs.12 Lacs deserve to be deleted. Accordingly, the appeal was allowed by deleting the addition of Rs.12 Lacs.

3.9 This decision was brought to the notice of Ld. CIT(A) by the assessee during set-aside appellate proceedings pursuant to the directions of Tribunal in ITA No. 6770/Mum/2007 order dated 30/03/2009 in the matter of assessment framed u/s 143(3) r.w.s. 263 as elaborated in preceding para 3.7. However, Ld. CIT(A) observed that by withdrawing the appeal challenging jurisdiction u/s 263 before Tribunal, the assessee accepted the directions given by Ld. CIT-13 in order passed u/s 263 on

27/03/2006 and therefore, the plea that the valuation of closing stock was to be done as per the order of Tribunal dated 26/06/2008 could not be accepted. The other pleas raised by the assessee were also dismissed and the action of Ld. AO in re-determining the income was upheld. Aggrieved, as aforesaid the assessee is in further appeal before us.

Our findings and Adjudication

4. After going through the factual matrix as elaborated by us, it could be observed that the assessee's premises was subjected to survey action wherein combined physical stock was taken and to cover up the discrepancies, the assessee offered additional income of Rs.20 Lacs which has, in fact, credited to its financial statements for the year under consideration. It is the allegations of Ld. AO that the assessee tried to nullify the declaration so made by valuing the closing stock at lower rates and also by resorting to sell the frames at abysmally lower rates. Consequently, the books were rejected u/s 145 and the Gross profit rate of 42.36% has been applied to determine the income of the assessee. However, we find that the books were subjected to Tax Audit and the quantitative details were duly furnished by the assessee during the course of assessment proceedings. It could also be observed that discrepancies were found only in the physical stock of frames. To cover up the same, the assessee has already offered additional income of Rs.20 Lacs. No discrepancies were found in the stock of lenses. During original assessment proceedings, Ld. AO chose to make addition of Rs.12 Lacs since the closing stock of lenses was valued at Rs.5/- per pair as against cost of Rs.17/- per pair. However, the aforesaid action has already been turned down by the Tribunal in assessee's appeal ITA

No.6191/Mum/2005 order dated 26/06/2008 wherein the addition of Rs.12 Lacs was deleted. In other words, the matter of valuation of closing stock of Lenses has already attained finality.

5. Proceeding further, the assessee was maintaining proper books and furnished the requisite details, vouchers, bills, purchase and sales register as called for by Ld. AO during the course of assessment proceedings. However, no specific defects have been pointed out by Ld. AO in the documents furnished by the assessee before rejecting the books of accounts. Rather the assessee was successful in explaining that fall in Gross profit was mainly on account of old stock of lenses for which there was no fresh purchases during the year. There was only disposal of the old stock and the balance closing stock was valued at lower of cost or market price, which action the Tribunal has already accepted. Therefore, the lower authorities, in our considered opinion, were not justified in rejecting the books of accounts in the second round of assessment proceedings.

6. The revenue has pointed out that the Gross Profit as estimated by Ld. AO in the case of M/s Sunrise Optics has been accepted by Tribunal in ITA No.3524/Mum/2011 order dated 03/04/2013. However, we find that the loss in the case of the present assessee is arising only due to lower valuation of closing stock of lenses which has been accepted by the Tribunal in assessee's own case and we see no reason to deviate from the same.

7. Therefore, on the facts and circumstances, we are inclined to hold that the rejection of books u/s 145 was not justified and the estimation of Profit as done by lower authorities could not be sustained. The Ld. AO is directed to accept the income declared by the assessee as per its

computation of income. The appeal stand allowed in terms of our above order.

ITA No.3527/Mum/2011

8. Consequent to assessment order u/s 143(3) r.w.s. 263, the assessee was saddled with penalty u/s 271(1)(c) for Rs.11.36 Lacs vide penalty order dated 25/03/2009. The same, upon confirmation by Ld. CIT(A) is in further challenge before us.

Since we have already deleted the quantum additions as above, the impugned penalty would not survive. We order so. The appeal stands allowed.

Conclusion

9. Both the appeals stand allowed in terms of our above order.

Order pronounced on 09th February, 2021

Sd/-

(Saktijit Dey)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated :09/02/2021

Sr.PS:-Jaisy Varghese

आदेश की प्रतिलिपि □ प्रेषित/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– concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai.