

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "एकल सदस्यीय", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH
BENCH 'SMC' CHANDIGARH

श्रीमती दिवा सिंह, न्यायिक सदस्य
BEFORE: SMT. DIVA SINGH, JM

आयकर अपील सं./ITA No. 248/CHD/2019

निर्धारण वर्ष / Assessment Year : 2011-12

M/s Bhoday Steel Rolling Mills, G.T. Road, Khanna Side, Mandi Gobindgarh.	बनाम VS	The ITO, Ward 1, Mandi Gobindgarh.
स्थायी लेखा सं./PAN No: AABFB1257H		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Tej Mohan Singh

राजस्व की ओर से/ Revenue by : Smt. Meenakshi Vohra, Addl. CIT

सुनवाई की तारीख/Date of Hearing : 24.06.2021

उदघोषणा की तारीख/Date of Pronouncement : 05.07.2021

Hearing conducted via Webex

आदेश/ORDER

The present appeal has been filed by the assessee wherein the correctness of the order dated 17.12.2018 of CIT(A)-I Patiala pertaining to 2011-12 assessment year is assailed on the following grounds :

1. That the order of the Id. CIT(A) is against the facts of the case and is bad in law.
2. That on the facts & circumstances of the case, the Id. CIT(A) has erred in upholding the rejection of books of accounts solely on the basis of variation in electric consumption.
3. That on the facts & circumstances of the case, the Ld. CIT(A) has erred in drawing adverse inference from slightly higher variation in electric consumption in two cycles only, than the arbitrarily considered benchmark of 15% .

4. *That on the facts & circumstances of the case the Ld.CIT(A) has erred in confirming the addition of Rs.9,75,098/- on account of gross Profit on the alleged unaccounted sales and Rs.72,42,835/-on account of investment in alleged unaccounted production,though telescoped with last year investment.*
5. *That the appellant craves leave to add. amend or delete any of the grounds of appeal before the same is finally heard & disposed off.*

2. The present appeal has come up for hearing in the background where the issues were stated by the ld. AR to be fully covered in favour of the assessee. For this claim, reliance had been placed upon the order of the ITAT dated 11.11.2020 in ITA 818/CHD/2019 and ITA 879/CHD/2019 **M/s Kripalu Strips Vs ITO** wherein the cross appeals of the Assessee and the Revenue were decided by the Co-ordinate Bench where similar issue came up for consideration. For the said purpose, the ld. AR had drawn specific attention to the issues as considered and decided by the ITAT wherein the assessee's grievance on rejection of books of account addressed in page 2 para 2 was raised before the ITAT and was decided in its favour.

3. Accordingly, in the background of the said submissions when the appeal came up for hearing, ld. AR reiterating his earlier position drew attention to ground No. 2 addressed by the assessee in M/s Kripalu Strips Vs ITO ITA No. 818 & 879/CHD/2019 namely; *“That on law, facts and circumstances of the case, the Worthy CIT(A) was not justified in confirming the action of ld. AO wherein he had rejected the books of account of the appellant merely on suspicion of higher production on the basis of electricity*

consumption.” The issue, it was submitted, was decided in assessee's favour. Specific finding arrived at in page 14 para 7 was relied upon wherein reliance had been placed upon this Tribunal's Coordinate Bench decision in **ITO Vs M/s Baba Balak Nath Steels Pvt. Ltd.** in ITA No. 44/CHD/2019 dated 06.08.2019 and various other decisions referred to in page 18 para 18 namely **ITO Vs M/s Hansco Iron & Steel P Ltd.** in ITA No. 397/CHD/2017 and **ITO Vs M/s Kailash Steel Rolling Mills** in ITA No. 398/CHD/2017 dated 03.10.2017, considering which the appeal of the Revenue was dismissed and the assessee's appeal was allowed. Page 23 para 9 of the order of the ITAT was relied upon.

4. Apart from that, it had also been his submission that consistently the assessee has been asking for an opportunity to cross examine the persons on whom reliance has been placed by the department.

4.1 Specific reference was made to page 14-15 of the assessment order wherein the assessee's submissions to the said extent has been extracted by the AO himself.

4.2 Attention was also invited to a similar prayer made before the CIT(A) and the submissions have been extracted in para 4.6 at page 7 and 8.

4.3 Arguments have been advanced that the decision of the Apex Court in the case of *Melton India Vs CIT* (Civil Appeal No.

372 of 2007) is not applicable to facts has also been argued before the CIT(A) and the argument is extracted at page 11. Various other decisions of the ITAT addressing similar issue had been referred to.

4.4 Reliance had also been placed on a latest decision of the Apex Court in the case of **CIT Vs M/s R.A. Castings Pvt. Ltd. 2011(269) E.L.T. 337 (All.)** and in the decision cited at page 16 of the impugned order i.e. ITO V. Arora Alloys Ltd., Ludhiana in ITA No. 78/CHD/2012 of the CHD Bench) [17 ITR AT Section 133-424), reference has been made to similar legal position of relying on information sought at the back of the assessee without affording an opportunity to cross examine stands addressed. The action has been deprecated.

4.5 Accordingly, it was been his prayer that the issue is covered in his favour.

5. The ld. AR referring to these arguments made on the earlier date, drew attention to the fact that time was given to the ld. Sr.DR Ms. M. Vohra to go through the order of the ITAT dated 11.11.2020 in M/s Kripalu Strips Vs ITO ITA No. 818 & 879/CHD/2019 relied upon and considered the submissions.

6. Ms. Vohra on the next date on perusal of the record submitted that facts in the present case indeed remain identical as considered in M/s Kripalu Strips Vs ITO (supra). On the

issue of information sought by the assessee to cross examine the information/Report etc. relied upon, she agreed it was not addressed. In the absence of any discussion thereon, she placed reliance on the respective orders of the ITAT. The position of law as canvassed in M/s Kripalu Strips Vs ITO (supra) and reliance on R.A. Castings Pvt. Ltd. decision of the Apex Court latest in point of time and found considered as opposed to the case of Melton India (supra) was not disputed.

7. The ld. AR in reply summed up the position of law as argued and relying on the same it was his submission that ground No. 2 following the proposition of law as considered by the ITAT in identical cases deserves to be allowed and in the circumstances, following the precedent the additions made which are addressed in ground Nos. 3 and 4 are not maintainable as after upholding the said ground, additions cannot be sustained.

8. I have heard the submissions and perused the material on record. In the facts of the present, it is seen that to the returned income of the assessee of Rs. 4,98,332/-, addition of Rs. 9,75,098/- was made on account of undisclosed production and investment in stock arrived at on the basis of variation in electricity consumption and calculations as considered in various identical cases. It is seen that similar issues have been considered by the ITAT in its latest order dated 11.11.2020 in ITA

818 & 879/CHD/2019 in the case of **M/s Kripalu Strips Vs ITO (supra)**. It is seen that before the Co-ordinate Bench in similar set of facts and circumstances following ground No. 2 had been raised by the assessee :

“That on law, facts and circumstances of the case, the Worthy CIT(A) was not justified in confirming the action of ld. AO wherein he had rejected the books of account of the appellant merely on suspicion of higher production on the basis of electricity consumption.”

9. The issue has been considered by the Co-ordinate Bench in para 7 page 14 of its order. The detailed reasoning for the sake of completeness is extracted hereunder:

7. After giving thoughtful consideration to the above stated rival arguments, we find no merit in the Revenue's stand that the Assessing Officer's three folded action inter alia in rejecting the assessee's books of account followed by gross profit element on alleged unaccounted production of Rs. 13,04,677/- as well as unaccounted investment in stock of Rs. 1,62,54,188.78. Case records indicate that this issue of rejection of books of account based on difference in power consumption of the relevant previous year turning act to be excessive than the so called tolerable limit of 15% is no more res-intgra. This Tribunal's coordinate bench decision ITO Vs M/s Baba Balak Nath Steels Pvt. Ltd. in ITA No. 44/Chd/2019 dated 06/08/2019 has rejected Revenue's identical stand as follows:

"3. The brief facts relating to the issue under consideration are that the assessee company is engaged in manufacturing of Steel products. During the assessment proceedings, the Assessing officer asked the assessee to furnish details of daily production of finished goods as well as the details of the manufacturing process involved. On examination of the details, the Assessing officer observed that the amount of electricity consumed was directly related to the production of finished goods. In order to co-relate the consumption of electricity vis-a-vis production shown, the Assessing officer gathered information regarding the consumption of electricity from the Electricity Board. The Assessing officer analyzed the consumption data of electricity vis-a vis the production of finished goods and observed that there were • wide variation in ratio of electricity units consumed to per metric tons of finished goods produced during the year. He further observed

that on some days, electric units consumed were very low whereas finished goods produced were very high giving a very low value of electric units consumed to per ton of finished goods, whereas on some other days, electric units consumed were very high whereas the finished goods produced were very less giving a very high value of electric units consumed per metric unit of finished goods. He further observed that even on some days though there was electricity consumption yet no production was shown. He further noted that otherwise on other days, there was also a balance and consistency in consumption of electric units visa-vis production of finished goods. He, therefore, observed that it indicated that the daily production recorded by the assessee of the finished goods was not correct and, hence, not reliable. He observed that the data relating to the daily production had not been maintained as per actual production. When confronted in this respect, the assessee explained that the consumption of electricity was dependent on various factors as detailed in his reply which has been reproduced by the Assessing officer in the assessment order. The Assessing officer, however, was not satisfied with the above reply of the assessee. He ultimately held that the assessee company was involved in unaccounted production of finished goods which resulted in unaccounted sales and purchases. He, therefore, held that the sale and purchase figures in the books of account of the assessee were not correct and he accordingly rejected the books of accounts of the assessee by invoking the provisions of section 145(3) of the Income-tax Act, 1961 (in short 'the Act') and proceeded to frame the assessment in the manner as provided u/s 144 of the Act. He thereafter worked out the unaccounted income of the assessee on account of unaccounted production and added the same to the income of the assessee.

4. *Being aggrieved from the above order of the Assessing officer the assessee preferred appeal before the CIT(A).*

5. *Before id. CIT(A), the assessee filed detailed submissions. It was also brought into the knowledge of the CIT(A) that subsequent to the passing of the above stated impugned assessment order, a detailed study was carried out by a Committee headed by the Additional Commissioner of Income Tax, Range, Mandi Gobindgarh having all the Assessing officers of the Range as its members. The committee was assisted by the experts from the NISST (National Institute of the Secondary Steel Technology) and also the industry representatives. On the basis of the report of the committee, it was decided that if the variation in the consumption of the electricity is within the range of 15% of the yearly average consumption of power, the book results should be accepted. That pursuant to the report of the Committee, the Assessing Officers have followed this norm while making*

assessment in similar cases and has accepted the book results if the variation is within 15% window. It was, therefore, pleaded that the book results of the assessee for the assessment year 2012-13 should also be accepted and consequently, the addition should be deleted. The Ld. CIT(A) got verified from the Assessing officer the above contentions of the assessee which was reported to be correct by the Assessing officer. The Ld. CIT(A) thereafter held that once an issue has been decided on merits in a subsequent year, it would not be appropriate to take a different view for the year under consideration. He, therefore, relying upon the report of the Committee constituted by the Principal Commissioner of Income Tax, Patiala held that as decided by the Committee, the assessee was entitled to benefit of 15% variation in consumption of electricity per metric ton of finished goods produced from the average worked out on yearly basis and the variation up to 15% would not warrant any adverse cognizance. He accordingly held that since pursuant to the report of the committee, the Assessing officer has already followed this norm while making the assessment in similar cases and in same set of circumstances has accepted the books results shown in other cases, hence, following the principle of consistency, he held that the books results shown by the assessee company for the year under consideration need to be accepted, as well. He therefore, set aside the action of the Assessing officer in rejecting the books of account and directed the Assessing officer to accept the book results shown by the assessee and deleted the additions so made by the Assessing officer on estimation basis."

8. *Learned authorized representative next submits that yet another coordinate bench in ITO Vs M/s Hansco Iron & Steel P Ltd. in ITA No. 397/Chd/2017 and ITO Vs M/s Kailash Steel Rolling Mills in ITA No. 398/Chd/2017 dated 03/10/2017 has also declined the Revenue's identical arguments as follows:*

3. *Since the present appeals are filed by the Revenue, the Id. Sr.DR was required to address the issue. Reliance was placed on the assessment order, The Id. AR submitted that the issue is covered in his favour by a group of nine cases wherein a consolidated order dated 28.04.2017 in ITA 392/CHD/2017 in the case of ITO, Ward-1 Vs M/s Dhiman Steel Rolling Mills and eight other assesseees pertaining to 2011-12, 2012-13 assessment years was relied upon. In the facts of the present case also, referring to para 5.2 of the impugned order, attention was invited to the reference made to the Committee constituted by Pr. CIT, Patiala which, it was noted, had been directed to verify the normal variation in consumption of electricity for manufacturing each metric ton of finished goods. The orders, it was submitted have been passed adhering to the said directions in both the appeals.*

4. I have heard submissions and perused the material available on record. It is seen that the Co-ordinate Bench in the aforesaid order of the IT AT had an occasion to consider the facts as under:

'4. The brief facts relating to the issue under consideration are that the assessee company run a furnace Unit and is engaged in the production of Ingots. During the assessment proceedings, the Assessing officer asked the assessee to furnish details of daily production of finished goods as well as the details of the manufacturing process involved. The Assessing officer further observed that the amount of electricity consumed was directly related to the production of finished goods. In order to co-relate the consumption of electricity vis-a-vis production shown, the Assessing officer gathered information regarding the consumption of electricity from the Electricity Board. The Assessing officer analyzed the consumption data of electricity vis-a vis the production of finished goods and observed that there were wide variation in ratio of electricity units consumed to per metric tons of finished goods produced during the year. He observed that the lowest units consumed for production of one metric ton of finished goods were 1117.17 units and the highest electric units consumed for production of one metric ton of finished goods were 1188.12 units. He further observed that on some days, electric units consumed were very low whereas finished goods produced were very high giving a very low value of electric units consumed to per ton of finished goods, whereas on some other days, electric units consumed were very high whereas the finished goods produced were very less giving a very high value of electric units consumed per metric unit of finished goods. He further observed that even on some days though there was electricity consumption yet no production was shown. He further noted that otherwise on other days, there was also a balance and consistency in consumption of electric units vis-a-vis production of finished goods. He, therefore, observed that it indicated that the daily production recorded by the assessee of the finished goods was not correct and, hence, not reliable. He observed that the data relating to the daily production had been maintained as per actual production. When confronted in this respect, the assessee explained that the consumption of electricity was dependent on various facts as detailed in his reply dated 16.3.2015 which has been reproduced by the Assessing officer in the assessment order dated 26.3.2015. The Assessing officer, however, was not satisfied with the above reply of the assessee. He ultimately held that the assessee company was involved in unaccounted production of finished goods which resulted in unaccounted sales and purchases. He, therefore, held that the sale and purchase figures in the books of account of the assessee were

not correct and he accordingly rejected the books of account of the assessee by invoking the provisions of section 145(3) of the Income-tax Act, 1961 (in short 'the Act') and proceeded to frame the assessment in the manner as provided u/s 144 of the Act. He, thereafter estimated the income of the assessee on the basis of minimum valuation of average of electric unit consumed per metric ton of finished goods produced for over the period of 10 days. He took the lower average value of electric units consumed per metric ton of average finished goods over a period of 10 days and on this basis, and calculated the actual month wise production of the assessee. He compared the same with that shown in the books of account of the assessee and estimated the unaccounted production for each month. Thereafter, on the basis of average sales rate, the value of total unaccounted production was estimated. Then adopting the gross profit rate shown by the assessee, the unaccounted profit out of the unaccounted production was worked out. Secondly the peak unaccounted production for the relevant month was determined and by multiplying the average sale rate of finished goods, the unaccounted investment was worked out. The Assessing officer in this way worked out the total unaccounted income of the assessee out of the unaccounted production at Rs. 86,88,365/- and added back the same to the income of the assessee."

4.1 Perusal of the impugned order shows that facts have been considered in the following manner:

5.2 The report of the AO was called for on the written submissions of the appellant. In the report, sent vide letter No. ITO/W-I/MGG/2016-17/2227 dated 02.12.2016, the A.O. has tried to defend the rejection of books of account on the basis of reasoning given in the assessment order. However, regarding appellants contention w.r.t. the extent of variation in the consumption of electricity pmt of finished goods, the AO conveyed as under:

"a) The assesses in its written submission has contended that 15% variation on yearly average consumption of power for production of each metric tone of finished goods was accepted in the A.Y. 2013-14. The contention of the assesses is correct as a committee was constituted by the worthy Pr. Commissioner of Income Tax, Patiala to verify the normal variation in consumption of electricity for manufacturing each metric tonne of finished goods. On the basis of report of the committee which was headed by Addl. Commissioner of Income Tax, Range Mandi Gobingarh having all the AO's of Mandi Gobindgarh as member and technical person of NISST. It was decided by the committee that 15% variation from average consumption of power for producing of each metric tone of

finished goods should be accepted. As such the cases of for the A. Y. 2013-14 were decided by following these guidelines.

b) The contention of the assesses that his case for the A. Y. 2012-13 falls within 15% variation has been verified from record and found to be correct."

4.2 Considering the factual background, the CIT(A) deleted the addition holding as under:

"5.3 I have considered the facts of the case as also the submissions and the report of the Ld. AO. Undoubtedly, the only reason leading to the rejection of the books of accounts of the appellant company, which runs an furnace unit, was desperate consumption of electricity vis-avis the production of finished goods. Thereafter, as detailed earlier, the AO, on the basis of average purchase rate, went on to estimate unaccounted production in monetary terms and then adopting the gross profit rate shown by the appellant worked out unaccounted profit out of unaccounted production on the basis of average sale rate. Besides, the peak unaccounted production for the relevant month was determined and by multiplying with the average purchase rate of finished goods the unaccounted investment was worked out This finally resulted into additions on the basis unaccounted investment and unaccounted profit at Rs.57,93,183/-.

The appellant company has now contended that recently, a detailed study was carried out by a Committee headed by the Additional Commissioner of Income Tax, Range, Mandi Gobindgarh having all the AO's of the Range as its members. The committee was assisted by the experts from the NISST [National Institute of the Secondary Steel Technology] and also the industry representatives. On the basis of the report of the Committee, it was decided that if the variation in the consumption of electricity is within the range of 15% of the yearly average consumption of power, the book results should be accepted. Accordingly, its book results were accepted for the A.Y. 2013-14. Therefore, its book results for the A.Y. 2012-13 should also be accepted and consequently, the additions should be deleted.

The contention of the appellant company has been verified from the AO and as quoted above, he has reported it correct. There is a decision of the Hon'ble Punjab and Haryana High Court in the case of a CIT vs. Rieta Biscuits Co. (P) Ltd (2009) 309 ITR 154 wherein their Lordships have held that "keeping in view the principles of consistency once the issue on the merits has been decided against the revenue on the same issue during the subsequent assessment years, we do not deem it appropriate to take a different view on a technical reason. Accordingly, without specifically opining on the issue on the merits, the reference is decided against the revenue".

On a careful consideration of the totality of facts and circumstances on record, I'm of the view that the plea of the appellant company merits consideration. It is a matter of fact that a detailed study has been conducted

by a Committee, constituted by the Principal CIT Patiala, with a view to examine the variation in the consumption of electricity vis-a-vis the production of finished goods in the rolling mills and induction furnaces of the area. The committee, a broad-based multimember body, had the additional Commissioner of Income Tax, Range, Mandi Gobindgarh as its head and all the AO's of the range as its members. It was assisted by the experts from the National Institute of the Secondary Steel Technology (NISST) and the industry representatives. I have accessed its report from the JOT, Range, Mandi Gobindgarh. It's relevant excerpt reads as under:

"Thereafter, to ascertain the amount of variation in consumption of electricity per metric ton of finished goods produced of similar sizes and odd sizes, the AOs carried out on the spot verification by running some of the rolling mills on a fix period of time and noticed quite appreciable variation in the consumption of electricity per metric ton of finished goods in similar sizes as well as odd sizes. The technical experts from national Institute of secondary steel technology (NISST), Mandi Gobindgarh also opined that given the nature of technology, raw materials and finished goods, substantial variation in the number of electricity units for production of one metric ton of finished goods inter day basis, are bound to be there."

Based on its finding of facts, it has decided "to give benefit of 15% variation in consumption of electricity per metric ton of finished goods produced from the average worked out on yearly basis". Meaning, thereby that 15% variation in the number of electricity units consumed per metric ton of finished goods as compared to the average consumption of electricity units per metric ton of finished goods is the industrial norm warranting no adverse cognizance. Hence, because of that reason alone, books of account should not be rejected. Indeed, as stated above, pursuant to the report of the Committee, the AO's have followed this norm while making assessments in similar cases and in similar set of circumstances and accepted the book results shown by the assessee which includes the appellant as well. In view of this and also placing reliance on the decision of the Hon'ble jurisdictional Punjab and Haryana High Court in the case of a CIT vs. Rieta Biscuits Co. (P) Ltd (2009) 309 ITR 154,1 am of the view that the book results shown by the appellant company for the year under consideration need to be accepted as well. Consequently, the action of the AO in respect of rejection of books of account by resorting to Sec. 145(3) of the IT. Act is not upheld. The AO is directed to accept the book results shown by the appellant. The twin additions made by the AO on account of unaccounted profits and unaccounted investment are also deleted as a consequence.

4.3 In the facts, as they stand, it is evident that the point at issue is fully covered in favour of the assessee. Accordingly, in the absence of any change in facts, circumstances or position of law, the impugned order is upheld and the departmental appeal is dismissed."

9. Coupled with this, it is also noticed that the CIT(A)'s order itself hold the assessee to have already succeeded on the same issue in the preceding assessment year (*supra*) which has attained finality. We hold in these facts and circumstances that both of the assessee's substantive grounds challenging correctness of the lower authorities' action rejecting its books of account as well as adding gross profit element on alleged unaccounted production of Rs. 13,04,677/- deserve to be accepted. Same reasoning follows in Revenue's cross appeal ITA No 879/Chd/2019 as well raising the sole substantive issue of unaccounted investment in stock of Rs. 1,62,54,188.78 being the necessary consequence of our foregoing details. The assessee's appeal in ITA No. 818/Chd/2019 is accepted and Revenue's cross appeal in ITA No.879/Chd/2019 fails therefore.

10. It is seen that all the issues stand addressed by the above order of the ITAT. It is further seen that the issue of variation in electricity consumption stands addressed by M/s R.A. Castings Pvt. Ltd. (*supra*) wherein the Court was pleased to hold, *"Therefore, no universal and uniformly acceptable standard of electricity consumption can be adopted for determining the excise duty liability that too on the basis of imaginary production assumed by the Revenue with no other supporting record, evidence or document to justify its allegations."* Similarly it is seen that the deficiency of the Revenue Authorities in not confronting the incriminating statements relied upon and making those persons available for cross examination persists. In the facts of the present case, repeatedly request to this extent has been made by the assessee all along and for unstated reasons, it remains unaddressed, such an action again is unsustainable in law. Accordingly, the appeal of the assessee is allowed and the additions sustained are directed to be deleted. Said order was

pronounced at the time of virtual hearing itself in the presence of the parties via Webex.

11. In the result, appeal of the assessee is allowed.

Order pronounced on 5th July,2021.

Sd/-

(दिवा सिंह)
(DIVA SINGH)
न्यायिक सदस्य/Judicial Member

“पूनम”

आदेश की प्रतिलिपि अग्रेपित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar