



IN THE INCOME TAX APPELLATE TRIBUNAL

"G" BENCH, MUMBAI

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI S. RIFAUH RAHMAN, ACCOUNTANT MEMBER

ITA no.3818/Mum./2019
(Assessment Year : 2012-13)

ITA no.3819/Mum./2019
(Assessment Year : 2012-13)

Shri Shailesh Jayant Shah
210, Shop no.5, Iron Market
Masjid, Mumbai 400 009
PAN : AAEPS1841D

..... Appellant

v/s

Income Tax Officer
Ward-29(3)(3), Mumbai

..... Respondent

Assessee by : Shri Vimal Punmiya
Revenue by : Shri Ajay Singh

Date of Hearing – 31.08.2021

Date of Order – 30/09/2021

ORDER

PER S. RIFAUH RAHMAN, A.M.

The present appeal has been filed by the assessee challenging the impugned order dated 8th March 2019, passed by the learned Commissioner of Income Tax (Appeals)-40, Mumbai, pertaining to the assessment year 2012-13.

2. The assessee has filed the present appeal on the following grounds:-

"1. On the facts and circumstances of the case the Ld. CIT(A) erred in confirming the addition of 8% i.e. Rs.2,21,54,561/- of

the total turnover of Rs.27,69,32,010/- as the business income of the appellant

2. Without prejudice to the ground No. 1 the LID. CIT(A) erred in confirming in law and facts in taking 8% of the total turnover as the business income of the assessee even after mentioning of the AO of the nature of appellants business activities

3. The Ld. CIT(A) has erred in law in facts in disallowing the entire deduction claimed by the appellant under chapter VI A of the Income Tax Act amounting to Rs.81,984/-.

4. The Ld. CIT(A) erred in confirming the charging of interest under section 234A, 234B 234C and 234D of the Income Tax Act 1961.

5. The Ld. CIT(A) erred in confirming the initiation of the penalty proceeding under section 271(1)(c) of the Income Tax Act 1961.

6. The Assessee craves leave to add further grounds or to amend or alter the existing grounds of appeal on or before the date of hearing."

3. Facts in brief:- The assessee filed its return of income on 30th September 2012, declaring total income of ₹ 6,09,630. The return of income was processed under section 143(1) of the Income Tax Act, 1961 (for short "*the Act*"). Subsequently, the case was selected for scrutiny under CASS and notice under sections 143(2) and 142(1) of the Act were issued and served on the assessee. Since there was no compliance to none of the notices issued and the assessment was completed based on the best judgment under section 144 of the Act and the Assessing Officer observed that the assessee is carrying on two business in the name and style of Vaibhav Enterprises and Harsh Corporation. During the year, the assessee has shown a turnover of ₹

27,69,32,010 and declared a net profit of ₹ 2,29,142, only which is barely 0.083%. The Assessing Officer observed that it is not known what is the nature of the assessee's business activity and in the absence of any details, he estimated the net profit @ 8% of the gross turnover which works out to ₹ 2,21,54,561. Aggrieved with the above order, the assessee preferred appeal before the first appellate authority.

4. The learned CIT(A) after considering the submissions of the assessee and rejected the submissions of the assessee, sustained the estimation of net profit @ 8% with the following observations:-

"However, keeping in view of the submissions made by the assessee who was carrying on the business of trading in iron and steel under whom proprietorship of M/s., Vaibhav Enterprises and in 2004 his brother Mr. Hasmukh Shah introduced the assessee to Mr. Amarchand Sharma. As per the version of the assessee, Mr. Amarchand Sharma offered him to float a proprietary concern M/s. Harsh Corporation under his name for a monthly remuneration of Rs.20,000/-. As per the assessee's own submissions, the entire FIS of the said concern was managed by Mr. Amarchand Sharma including issuing of bills, invoices, placing orders, making payments, maintaining books of accounts, etc. As per assessee's submissions, Mr. Amarchand Sharma was the beneficiary of M/s. Harsh Corporation. The assessee used to give blank signed cheques to Amarchand Sharma of the current bank account. The assessee used to sign documents on the directions given by Mr. Amarchand Sharma. The assessee signed the copy of the balance sheet and profit and loss account by Mr. Amarchand Sharma with a huge turnover of Rs. 27,69,32,010/- on 31.3.2012. According to the assessee, the entire sales were made to one party M/s. Amar Tubes Pvt Ltd. which is a group concern of Amarchand Sharma and purchases are made from Alpha Steel Tube Pvt Ltd which is also a group concern of Amarchand Sharma and the entire transaction of M/s. Harsh corporation was a kind of circular trading.

As for as M/s. Vaibhav Enterprise is concerned, the assessee has shown net profit of Rs.1,69,186/- on a turnover of Rs.31,95,382/- . The total net profit from both concerns were Rs.2,29,141/- and income under the business head from both concerns were shown at Rs.6,91,611/-, the bifurcation of which was not given by the assessee. The ratio of net profit from both concerns i.e. business income from M/s.Vaibhav Enterprises comes to Rs.5,10,680/- which is more than 8% of total turnover of the assessee. Further, in ITRs for A.Y. 2013-14 and A.Y. 14-15, the assessee has itself offered business income at 8% of the total turnover. The business income at 8% was accepted by the AO in the assessment order u/s. 143(3) of the I.T. Act for the A.Y. 14-15. Accordingly, the AO is justified in estimating the total income of the assessee at 8% in respect of M/s. Vaibhav Enterprises. Therefore, the appellant's claim regarding low OP in respect of M/s. Vaibhav Enterprises is rejected and hence dismissed.

As for as M/s. Harsh Corporation, where the assessee has shown a turnover of Rs. 27,37,36,628/- and shown a net profit of just at Rs.59,944/-. The AO has estimated business income in respect of this concern at 8% of the turnover. The AO has given ample opportunities to the assessee to substantiate why he has shown a very negligible amount of gross profit/net profit of Rs.59,944/-. To verify the assessee's contention, the AR of the appellant was asked to furnish the audited financial accounts of Amax Tubes Pvt Ltd and Alpha Steels tubes Pvt Ltd for F.Y. 2011-12. He was also asked to furnish the ITR and audited financial statements of the assessee from A.Y. 2008-09 to 2010-11. He was also asked to produce Mr. Amarchand Sharma with financial statements of Amar Tubes Pvt Ltd and Alpha Steels Tubes Pvt Ltd for F.Y. 2011-12. The assessee could furnish copy of annual return filed for Alpha Steel Tubes Pvt Ltd for F.Y. 2009-10 and for Amar Tubes Pvt Ltd for F.Y. 2011-12, from which it could not be ascertainable that the assessee had transactions with both these entities. Neither assessee could produce Mr. Amarchand Sharma before the AG to prove the assessee's stand. The AG issued summons u/s. 131 of the I.T. Act at the request of the appellant to prove the stand taken by the assessee. However, at this juncture nothing more can be done as the assessee himself admitted that he had signed the documents relating to M/s. Harsh Corporation, the cheques, but whereas he could not produce his witness Mr. Amarchand Sharma. The appellant could not produce the signed audited financial statements as well. Neither he could furnish his copy of ITR and financial statements for A.Y. 2008-09 onwards. The return application filed by the assessee through e-filing portal were downloaded and it is noticed that the assessee has shown turnover of Rs.11,71,94,614/- in the ITR for F.Y. 2010-11 and

Rs.16,20,33,452/- for F.Y. 11-12 which clearly contradicts the assessee's stand that he came to know for the first time about the high turnover when the audited books were signed by him for F.Y. 2011-12. It clearly establishes that M/s. Harsh Corporation was operating under the proprietorship of the assessee in those years also. Thus, the assessee having failed for not furnishing the above documents despite specifically asking the assessee who tried to hide the above said facts. Under the circumstances, even during the remand proceedings, the assessee was not able to furnish detailed financial audited documents and other facts regarding M/s.Harsh Corporation. The gross profit/net profit estimated by the AG based on the information available on record, is justified and hence, the estimated income of 8% on gross turnover of Rs.27,69,32,010/-,which works out to Rs.2,21,54,561/- is hereby confirmed, dismissing all his grounds of appeal."

5. Aggrieved with the above order, the assessee is in appeal before the Tribunal.

6. Before us, the learned Authorised Representative submitted as under:-

"Further in continuation of submission dated 12.08.2021 for ground No.1 & 2 we would like to state as under:-

CONTENTION OF LD. AO AND LD. CIT(A)

The Ld. AO has mentioned in the assessment order on pg. no. 2 reading as under:-

"The assessee has shown a net profit of Rs. 2,29,1421- only which is barely 0.083%. It is not known what is the nature of the assessee's business activities on the basis of the facts available on record. In the absence of any details, I hold the net profit to be 8% of the Gross turnover which works out to Rs. 2,21,54,5611-." The Ld. CIT(A) has mentioned in the appellate order on pg. no. 3 and 4 reading as under:-

Pg. No. 3

"Further, in ITRs for AY 2013-14 and AY 14-15, the assessee has itself offered business income at 8% of the total turnover. The

business income at 8% was accepted by the AO in the Assessment Order u/s 143(3) of the LT Act for the AY 14-15. Accordingly, the AO is justified in estimating the total income of the assessee at 8% in respect of M/s. Vaibhav Enterprises.

Pg. No. 4

"the assessee was not able to furnish detailed financial audited documents and other facts regarding M/s Harsh Corporation. The gross profit/net profit estimated by the AO based on the information available on record, is justified and hence, the estimated income of 8% on gross turnover of Rs.27,69,32,010/- which works out to Rs.2,21,54,561/- is hereby confirmed, dismissing all his grounds of appeal."

OUR SUBMISSION

The Ld. AO added and CIT(A) confirmed Rs.2,21,54,561/- on ad-hoc basis i.e. 8% net profit of Gross turnover of Rs. 27,69,32,010/- without considering all the material facts available on record. A comparative chart showing net profit of existing and previous assessment years is produced below for your perusal:-

<i>Sr. no.</i>	<i>A.Y.</i>	<i>Turnover (₹)</i>	<i>N.P. (₹)</i>	<i>N.P. (%)</i>
<i>1.</i>	<i>2010-11</i>	<i>11,74,91,614</i>	<i>7,25,326</i>	<i>0.62</i>
<i>2.</i>	<i>2011-12</i>	<i>16,20,33,452</i>	<i>6,78,487</i>	<i>0.42</i>
<i>3.</i>	<i>2012-13</i>	<i>27,69,32,010</i>	<i>2,29,142</i>	<i>0.08</i>

From the above comparative profit chart of previous years, it can be noted that the average profit rate for previous assessment years 2010-11 and 2011-12 comes at 0.52% (0.62 + 0.42/ 2). Normally, to estimate the profit of any assessee, the previous years profit ratios are used and not the subsequent years profit ratio. Also it would be pertinent to mention here that the previous years Net Profit was accepted by the Ld. assessing officer.

However, we note that Ld. assessing officer has made addition on basis of subsequent years profit as mentioned in the order. Also the Ld. AO and Ld. CIT(A) have not specifically identified any specific defects in the purported evidences and also the fact that the assessing officer has not held that the expenses so claimed by the assessee in his books of accounts were not incurred by the assessee for the purpose of its business. The assessee has produced all books of accounts, vouchers, bills and other documents but the Assessing Officer without pointing out any

mistake and error in the bills/vouchers and in the books of accounts made addition @ 8% which was confirmed by the Ld CIT(A). It is also admitted fact that assessee's books of accounts were not rejected by the assessing officer although these were audited under section 44AB of the Act by a Chartered Accountant. The Ld. AO could have ventured into estimation only after rejecting the books of accounts of the assessee u/s 145(3) and thereafter by best judgment assessment u/s 144 of the Act. Here in this case, the Ld. AO has not rejected the books of account and passed the order u/s 144 of the Act. Thus, the Ld. AO and Ld. CIT(A) without rejecting the books of account of the assessee has gone for estimation on suspicion and conjectures that the assessee may be showing net profit ratio at a very low rate and also made estimation on basis of subsequent years profit.

RELIANCE IS PLACED ON:-

DCIT Vs. JSR Constructions (P.) Ltd 71 taxmann.com 184 (Bangalore - Trib.)

Where in preceding two years, assessee had shown net profit at 1.7 per cent and 2.21 per cent and same had been accepted by Assessing Authority, estimation of netprofit at 8 per cent by Assessing Officer was not justified

We have perused the record and heard the rival contentions. It has been not disputed by the Revenue that assessee's own assessments for the AYs 2006-07 and 2007-08 were completed u/s. 143(3) of the Act after scrutiny. As per assessee, the netprofit rate for AY 2006-07 and worked out to 2.2% and for AY 200708 it came to 1.7%. In the case of MIs. Deluxe Roadlines Pvt. Ltd. (supra) relied on by the id. AR, where assessee was engaged in transportation business, Their Lordships of the jurisdictional High Court had held as under:-

"6. The Apex Court in the case of RAGHUBAR MANDAL HARIHAR MANDAL vs THE STATE OF BIHAR (1957 Vo.VIII STC 770) has held when the returns and the books of account are rejected, the assessing officer must make an estimate, and to that extent he must make a guess; but the estimate must be related to some evidence of material and it must be something more than mere suspicion. The assessing officer must make what he honestly believes to be a fair estimate of the proper figure of assessment and for this purpose he must take into consideration such materials as the assessing officer has before him, including the assessee's circumstances, knowledge of previous returns and all other matters which the assessing officer thinks will assist him in arriving at a fair and proper estimate.
[Emphasis Supplied]

7. Therefore, in the instant case, when the assessee did not produce the books of accounts, the assessing officer was not helpless. The assessee has been filing returns every year. In fact, he has produced five years returns. It is from that they took the turnover because the turnover offered by the assessee for the year 200910 was comparable with the past five years turnover as reflected in the returns filed. They acted on that. However, he refused to act on the profits shown in the said returns. No reasons are given for not relying on the said profits at the same time, he has also not taken into consideration the comparable cases in similar business to come to the conclusion. Without any basis, the assessing authority determined the profit at 8%, the first appellate authority reduced it to 3% and the tribunal has reduced it to 2.5%. In coming to the said finding, all the three authorities have declined to take note off the evidence by way of earlier returns. In that view of the matter, what the authorities have done is a mere guess work and without any basis. That is not permissible in law as held by the Apex Court in the aforesaid judgment.

8. In that view of the matter, the impugned orders ore unsustainable. Hence, the order passed by the tribunal is hereby set-aside. Matter is remitted back to the tribunal for fresh consideration in the light of the observations made above. In that view of the matter, the substantial question of law is answered in favour of the assessee and against the revenue and appeal is portly allowed.'

28. What we find from the above judgment is that in the said case, assessment was completed u/s. 144 of the Act estimating the income of assessee at 8% as done here. The concerned assessee had failed to produce books of account. The CIT(A), on assessee's appeal, had reduced the netprofit to 3% of the total turnover. This was reduced by the Tribunal to 2.5%. Their Lordships had held that such adhoc estimate was not warranted, when evidence in the nature of earlier returns filed by the assessee was available. Here in the case before us also, scrutiny assessments were done for AYs 2006-07 & 2007-08 and the netprofit rate accepted were much lower than 8%. Submission is that such rates came to 1.796 forAY 2007-08 and 2.21% for A Y 2006-07. We, therefore, set aside the orders of authorities below in so far as it relates to the estimation of profit and direct the AO to take the average of netprofit of the above two years and apply it to the gross receipts of the assessee and determine its income from business for the impugned assessment year."

In view of our submissions made earlier and substantial increase in turnover and accounts audited by Chartered Accountant in Income Tax and VAT Act, and all payments received by cheque

and paid by cheque, all seller and purchaser are identifiable and even today they are available, also stock has been maintained properly, we request your honours to kindly accept the book result shown by assessee.

HUMBLE PRAYER

In view of the above facts, circumstances and the referred judicial pronouncements, the appellant humbly requests your goodself to consider the above submission and extend a sympathetic consideration."

7. The learned Departmental Representative relied upon the order passed by the authorities below.

8. Considered the rival submissions and perused the material on record. We notice that the assessee has two line of business. The Assessing Officer estimated the income due to non-availability of the information at the time of assessment. We notice that even the learned CIT(A) has sustained the addition. What is relevant is the actual income earned by the assessee and authorities are expected to determine the actual income earned by the assessee and tax the same. In case, it is not determinable, they have to bring on record the proper reasons and justify the determination of actual profit. They cannot resort to estimate without properly justifying the same. In the given case, the assessee has dealt with the trading only through banking channel. It is not proved anything against the assessee that it has involved any bogus transaction or any other activities involving suppression of profit. Merely because the profit declared is less, the

authorities cannot resort to estimation. In the past, the profit declared by the assessee is accepted by the authorities. As held by the Hon'ble Supreme Court in Raghubar Mandal Harihar Mandal (supra), it was held that- *"when the returns and the books of account are rejected, the Assessing Officer must make an estimate, and to that extent he must make a guess; but the estimate must be related to some evidence of material and it must be something more than mere suspicion. The Assessing Officer must make what he honestly believes to be a fair estimate of the proper figure of assessment and for this purpose he must take into consideration such materials as the assessing officer has before him, including the assessee's circumstances, knowledge of previous returns and all other matters which the assessing officer thinks will assist him in arriving at a fair and proper estimate"*. Considering the above ratio, we are inclined to direct the Assessing Officer to estimate the profit based on the previous assessment year's actual profit, which was accepted by the Revenue. The assessee has declared 0.62% in assessment year 2010-11 and 0.42% in assessment year 2011-12. The average profit declared by the assessee in the above assessment year is 0.52%. The Assessing Officer can estimate 0.52% as the profit for this assessment year since the assessee has already declared 0.08%, the balance 0.44% can be added to the profit for this assessment year. We direct

the Assessing Officer to estimate the income as per above direction considering the fact that the profit has to be assessed based on the actual and in case, it is forced to estimate, it has to be based on past declared profit, which the Revenue has accepted. Therefore, the grounds no.1 and 2 raised by the assessee are partly allowed.

9. With regard to ground no.3, the learned Authorised Representative has not submitted any arguments, we are directing the Assessing Officer to verify the claim of the assessee and if it is allowable as per law, same may be allowed.

10. With regard to ground no.4, it is consequential, hence dismissed.

11. With regard to ground no.5, it is premature, hence dismissed.

12. With regard to ground no.6, the same being general in nature need not be adjudicated separately.

13. We noticed that the assessee is in appeal on the penalty levied by the AO on income which is based on estimation. The Courts have held that the penalty cannot be levied on the income which is estimated. In the given case, we noticed that the AO himself estimated the income @ 8% and the same was sustained by the Ld. CIT(A). The assessee filed quantum appeal and in that we have directed the AO to restrict the profit earned by the assessee which was declared and

accepted by the Revenue based on earlier assessment years referred at para 8 above. Therefore, the penalty levied by the AO estimating the income is not sustainable. Accordingly, we direct the AO to delete the penalty levied by the AO. Accordingly, the grounds raised by the assessee are allowed.

14. In the result, appeal filed by the assessee in ITA No. 3818/M/2019 is partly allowed and ITA No. 3819/M/2019 is allowed.

Order pronounced in the open court on 30/09/2021.

Sd/-
MAHAVIR SINGH
VICE PRESIDENT

Sd/-
S. RIFAUR RAHMAN
ACCOUNTANT MEMBER

MUMBAI, DATED: 30/09/2021.

Rahul Sharma, Sr. P.S.

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

By Order

Assistant Registrar
ITAT, Mumbai