

IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT
(Conducted Through Virtual Court)
**Before: Ms. Annapurna Gupta, Accountant Member
And Shri Mahavir Prasad, Judicial Member**

**ITA No. 290/Rjt/2016
Assessment Year 2013-14**

The A.C.I.T. Circle-3, Jamnagar (Appellant)	Vs	Shri Milankumar M Pobaru, Prop. Gokul associates, Near Meidi Mata Temple, Rajkot Highway, Hapa, Jamnagar PAN: ACMPP9141K (Respondent)
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**Appellant by : Shri Chetan Agarwal, A.R.
Respondent by : Shri Ajai Pratap Singh, CIT/DR**

Date of hearing : 16-02-2022
Date of pronouncement : 06-05-2022

आदेश/ORDER

PER : ANNAPURNA GUPTA, ACCOUNTANT MEMBER:-

The present appeal has been filed by the Revenue against the order passed by the Commissioner of Income Tax (Appeals), Jamnagar, (in short referred to as CIT(A)), dated 24-05-2016, u/s. 250(6) of the Income Tax Act, 1961(hereinafter referred to as the "Act") pertaining to Assessment Year (A.Y) 2013-14.

2. Ground No. 1 raised by the Revenue reads as under:

1.The Ld.CIT(A) erred on facts and in law in deleting Rs.4,03,38,986/- made by AO on account of discrepancy in closing & opening stock.

3. Brief facts relating to the issue are that the AO noted discrepancy in the value of closing stock of the preceding year and the opening stock of the impugned year as reflected in the return filed by the assessee, noting the same to be shown as Nil in the preceding year and Rs.4,03,38,986/- in the impugned year. During the course of assessment proceedings, the assessee was requested to reconcile the same. In reply, the assessee submitted that due to technical error in generation of xml file in assessment year 2012-13, the same was not reflected in return of income but contended that the resultant figure of net profit in the return of income matched with the net profit as per audit report which was derived after giving effect of closing stock. The AO rejected the explanation of the assessee finding it not satisfactory and not supported by any documentary evidence, and thereafter added the said discrepancy of closing stock of assessment year 2012-13 & opening stock of assessment year 2013-14 to the tune of Rs.4,03,38,986/- to the total income of the assessee.

4. The Ld.CIT(A) deleted the addition finding merit in the assessee's contention that it was only a typographical error in the return and the audited financial statements of both the years reflected no such discrepancy. The findings of the Ld.CIT(A) at para 6.1 of his order is as under:

“6.1 So far as ground of appeal against addition of Rs.4,03,38,986/~ on account of difference between closing stock as on 31-03-2012 and opening stock as on 01-04-2012 is concerned, I am of the view that when all material facts viz. audit report, audited P&L account, and balance-sheet of

A.Ys. 2012-13 & 2013-14 were available with the AO, he must have looked into those details before making such a huge addition. I have gone through the audit reports of both the years and I find that there is no difference in stock at all. This is a simple case of clerical mistake. Hence the addition is deleted.”

5. Before us Ld.DR relied on the order of the AO, though was unable to controvert the factual findings of the Ld.CIT(A) that the audited financial statements of the assessee reflected no such difference.

6. The Ld.Counsel for the assessee filed submissions in writing before us reiterating the contentions made before the lower authorities. The relevant extract of his submissions are as under:

“1) There was a typographical mistake which was clerical in nature in filing proper schedules in ITR-4 for A.Y. 2012/13.

2) There was also some technical error in generation of Xml file of income tax return for A.Y. 2012/13.

3) In fact, there is no discrepancy whatsoever in the figures of opening and closing stock shown in the income tax return Form ITR-4 for the A.Y. 2013/14.

4) The A.O. has not considered opening stock of Rs. 4,03,38,986 shown as on 01/04/2012 only for the reason that the corresponding closing stock as on 31/03/2012 is shown at Rs. Nil in the ITR-4 for A.Y. 2012-13.

5) *The fact that case of the appellant for A.Y.2012/13 was scrutinized u/s 143(3) and there was no dispute in respect of closing stock for the A.Y. 2012/13. In other words, the closing stock of Rs. 4,03,38,986 as on 31/03/2012 was duly reflected in the audited annual accounts for A.Y. 2012-13 and the same was accepted by the Department in the assessment made u/s. 143(3) for A.Y. 2012-13.*

6) *In any case, the A.O. also did not consider the corrected version of ITR-4 for the A.Y. 2012/13 submitted during the Assessment proceedings which indicate even the return was filed correctly there was no change in profit and loss or in Return of income for the A.Y 2013/14.*

7) *Actual figures were very well apparent and verifiable from the Audited annual accounts for the year which is primary set of documents and part of the records of the department.”*

7. We have heard the rival contentions and have gone through the orders of the authorities below. We do not find any infirmity in the order of the Ld.CIT(A) who has given a categorical finding of fact after due verification that there was no such discrepancy in the figures of stock of the preceding and impugned year in the audited financial statements of the assessee., that the discrepancy in the return filed therefore was a mere typographical error. The Revenue being unable to controvert the finding of the Ld.CIT(A) before us, we see no reason to interfere in the order of the Ld.CIT(A) deleting the addition of Rs.4,03,38,986/- made on account of alleged difference in stock.

8. Ground of appeal No.1 of the Revenue is therefore dismissed.

9. Ground no. 2 raised by the Revenue reads as under:

The Ld.CIT(A) erred on facts and in law in deleting Rs.9,028/- made by AO on account of late payment of employees contribution u/s 36(1)(va)/43B.

10. Briefly stated the disallowance made by the AO u/s 36(1)(va)/43B of the Act pertained to employees contribution towards ESI of Rs.4,701/- for the month of August 2012 paid on 15.10.2012 which was due on 21.09.2012 and Rs.4,327/- for the month- of May 2012, challan of which was not furnished by the assessee.

11. The Ld.CIT(A) deleted the same on the ground that the payments were made before the due date of filing return of income. His findings at para 6.3 of the order is as under:

“6.3 So far as ground of appeal against addition of, Rs.9,028/- on account of late payment of ESI is concerned, I am inclined to agree with the appellant that since the payment has been made on or before due date of filing the return of income, the disallowance is not warranted. Hence, deleted.”

12. Before us Ld.DR contended that the issue stands decided against the assessee by the decision of the jurisdictional High Court in the case of CIT vs Gujarat State Road Transport Corporation (2014) 366 ITR 170(Guj) .

13. Ld.Counsel for the assessee was unable to distinguish the decision of the jurisdictional High Court, but at the same time relied on the order of the Ld.CIT(A) and reiterated the contentions made before him in writing before us also as under:

“ (ii) Addition of Rs.9028/- on account of late payment of employees contribution u/s. 36(1)(va)/43B.

The assessing officer has made addition of Rs.4,701/- on account of delayed payment of employees contribution to ESI for the month of August – 2012 paid on 05/10/2012 without appreciating the fact that though the payment was late but the same was deposited on or before the due date of filing of return of income and therefore the same is allowable as deduction.”

14. Having heard the rival contentions, we have no hesitation in upholding the order of the AO disallowing employees contribution to ESI deposited delayed, u/s 36(1)(va) of the Act, in view of the decision of the jurisdictional High Court in Gujarat State Transport (supra) categorically holding that the deposit of the same before the due date of filing of return of income will not suffice to escape from the provisions of section 36(1)(va) of the Act. Since it is a fact on record that the employees contribution of Rs.9028/- was deposited delayed as per the applicable provisions of law, the issue stands covered against the assessee. The disallowance of Rs.9028/- on account of delayed deposit of employee's contribution to ESI is accordingly upheld.

15. Ground of appeal No.2 of the Revenue is allowed.

16. **Ground no. 3 raised by the Revenue reads as under:**

3.The Ld.CIT(A) erred on facts and in law in deleting Rs.9,28,106 /- made by AO on account of disallowance u/s 14A .

17. The issue relates to disallowance of expenses incurred for the purposes of earning incomes exempt from tax u/s 14A of the Act Brief facts relating to the same are that during the course of assessment proceedings, it was seen that the assessee had made investment in Mutual Fund, income from which was exempt and had earned tax free dividend income of Rs.1,50,803/-& interest on PPF of Rs.92,710/-. Further, it was seen that the assessee had borrowed funds from banks & incurred interest expenses of Rs.74,20,523/-. Since the assessee did not furnish any details of separate interest expenses incurred on borrowed funds which had been utilized for the purpose of investment in Mutual Fund to earn the said tax free income, therefore the AO worked out disallowance u/s 14A rwr 8D at Rs. 9,28,106/-.

18. The Ld.CIT(A) deleted the addition finding sufficient interest free funds available with the assessee to make the investments. The relevant findings of the Ld.CIT(A) at para 6.4 of the order is as under:

6.4 So far as ground of appeal against disallowance of Rs.9,28,106/- U/S.14A r.w.r, 8D is concerned, I am of the considered view that the question of disallowance u/s.14A does not arise because the capital of the appellant is much more than the amount invested in the funds having tax free income. Further the AO has wrongly taken Rs.7,07,52,996/- as

investment in Mutual Fund. In fact, total investment is merely Rs.1,26,99,613/- (being peak) on 09-04-2012. Only peak has to be taken as the appellant go on purchasing & selling the funds on regular basis. Because the interest free fund available is more than fund invested, the disallowance of expenses U/S.14A does not arise. Hence, deleted.

19. Before us Ld.DR though was unable to controvert the factual findings of the LD.CIT(A),he however relied on the order of the AO

20. Ld.Counsel for the assessee on the other hand relied on the order of the Ld.CIT(A) and reiterated his contentions made before the Ld.CIT(A) ,which briefly summarized are as under:

“Investment in mutual fund is one time process and once investment is made, it automatically yields dividend income and the assessee need not to incur any expenses or devote any time to earn such dividend income. Hence, there is no direct or indirect expenses which can be said to have been incurred to earn dividend income and in absence of having incurred any expenditure in relation to such dividend income, the question does not arise to apply provisions of Section 14A in so far as exempted income in the form of dividend is concerned.

Also, the assessee is having interest free funds in the form of his own capital to the tune of Rs.5,43,34,613/- which is more than the amount of investments under question and it is a settled position on the law that disallowance u/s. 14A cannot be made out of interest expenses considering its indirect nexus where the assessee is having his own interest free funds

to the extent of investment amount. Under the circumstances, interest expenses cannot be allocated in the computation of disallowance u/s. 14A.

In any case, the interest expenses of Rs. 74,20,523/- incurred by the assessee on working capital facilities availed from bank for the purpose of his trading business and therefore the same has not any direct or indirect nexus with amount invested in the mutual funds so as to apply provisions of Section 14A to such interest income.

It is submitted that all the mutual fund investments as tabulated in the show cause notice are not equity investments from which income earned is fully exempt. We enclose herewith chart (Annexure A) showing details of such investments from which income earned is considered as exempt. Hence, the investments from which income is considered as taxable should not be considered in the computation of disallowance u/s. 14A.

Further, the average of total assets appearing in the balance sheet of the assessee, on first day and last day of previous year will be worked out as per Annexure B enclosed herewith."

21. We have heard the rival contentions. We see no reason to interfere in the order of the Ld.CIT(A) who deleted the disallowance finding sufficient interest free funds available with the assessee for the purpose of making the investments. This fact has remained uncontroverted before us. It is a settled position of law that where sufficient own funds are available, the presumption is that the investments have been made out of the same calling for no disallowance of interest u/s 14A of the Act. The Hon'ble apex court laid down this proposition in

the case of Commissioner of Income Tax(LTU) vs Reliance Industries Ltd.in Civil Appeal No. 37 of 2019 & Others dated 23-03-2019 . In view of the same we uphold the order of the Ld.CIT(A) deleting the disallowance made u/s 14A of the Act amounting to Rs.9,28,106/-

22. Ground of appeal No.3 is dismissed.

23. **Ground no. 4 raised by the Revenue reads as under :**

4.The Ld.CIT(A) erred on facts and in law in deleting Rs.12,92,550/- made by AO on account of disallowance u/s 40(a)(ia) interest on late payment.

24. The issue relates to disallowance made of interest expenses amounting to Rs.12,92,550/- on account of non deduction of tax at source, as per the provisions of section 40(a)(ia) of the Act. The said interest expenses pertained to that paid to the creditor of the assessee M/s Hero Moto Corp. Ltd for delay in payments against various purchases.

25. The Ld.CIT(A) deleted the disallowance finding that interest paid to creditors is not in the nature of interest as envisaged in the definition of interest u/s 2(28A) of the Act and hence the said interest was not covered u/s 40(a)(ia) of the Act. The relevant findings of the Ld.CIT(A) at para 6.5 of his order is as under:

“6.5 So far as ground of appeal against disallowance of Rs.12,92,550/- u/s.40(a)(ia) is concerned, I am inclined to agree with the appellant's submission that the TDS on interest is not envisaged in the-provisions on

the interest paid to sundry creditors. This interest is in normal course of trading activity and is not at par with interest on loan/borrowing. Hence question of disallowance u/s.40(a)(ia) does not arise. Accordingly the disallowance/ addition is deleted.”

26. Before us Ld.DR was unable to controvert the finding of the LD.CIT(A) that interest paid to creditors on account of delayed payment did not qualify as interest as defined u/s 2(28A) of the Act.

27. In view of the above ,we see no reason to interfere in the order of the Ld.CIT(A) deleting the disallowance of interest amounting to Rs.12,92,550/-.

28. Ground of appeal No.4 is dismissed.

29 . **Ground no. 5 raised by the Revenue reads as under:**

The Ld.CIT(A) erred on facts and in law in deleting Rs.36,61,656/- made by AO on account of disallowance u/s 40(a)(ia) freight expenses.

30. Briefly stated the disallowance pertained to transportation/freight charges of Rs.36,61,656/- paid/credited by the assessee without deduction of tax at source.

31. The Ld.CIT(A) deleted the disallowance on finding that the transportation charges were included in the Bills of the Creditors/Suppliers and was therefore part of purchase cost paid to them and not in the nature of transportation expenses. Relevant findings of the Ld.CIT(A) at para 6.6 of the order as under:

“6.6 So far as ground of appeal against disallowance of Rs.36,61,656/- u/s.40(a)(ia) is concerned, I am inclined to agree with the appellant that as the appellant does not make any payment to any transporter and the expenditure is part of purchase invoice raised by Hero Moto Corp. Ltd., question of disallowance u/s.40(a)(ia) does not arise. Hence, disallowance/addition is hereby deleted.”

32. Before us Ld.Counsel for the assessee drew our attention to the decision of the Hon’ble Punjab and Haryana High Court in the case of CIT Vs. M/s. Bhagwati Steels (2010) ITA No. 693 Punjab & Haryana High Court holding that where freight expenses are part of bills of suppliers ,it cannot be said that assessee has paid any amount for transportation of goods and therefore no deduction of tax at source is called for on such payments u/s 194C of the Act .That as a consequence such amounts cannot be disallowed by invoking section 40(a)(ia) of the Act. Relevant findings of the Hon’ble High court to which our attention was drawn is as under:

“Putting the aforesaid logic to the instant case, it is evident that the expenses of freight incurred by M/s Tata Steel, which have been shown separately in the invoices raised on the assessee, cannot be construed to infer that the assessee has paid any amount for transportation of goods separately than the cost of the goods purchased by it. Ostensibly, in such circumstances, there would not arise any necessity of deduction of tax at source on the freight amount separately shown in the Invoices, in terms of section 194C of the Act. Therefore, following the parity of reasoning laid down by the Hon’ble Jurisdictional in the case of Food Corporation of India (supra) the amount raised by M/s Tata Steel in the invoices shown as

freight did not create an obligation on the assessee to deduct tax on such amounts as per section 194C of the Act. In our view, if the freight expenses incurred by M/s Tata Steel are added to the cost of goods in the invoice raised, it cannot be inferred that the assessee has paid any amount of freight separately because the same is part of the cost of product purchased. The assessee could not be said to be an assessee in default for non deduction of tax at source in terms of section 194C of the Act on the amount of freight billed separately by M/s Tata Steel. As a consequence, it follows that the provisions of section 40(a)(ia) of the Act cannot be applied to disallow the amount of such freight amounting to Rs.2,01,81,428/-. Following the aforesaid discussion, we set-aside the order of the Commissioner of Income-tax (A) and direct the Assessing Officer to delete the impugned addition. The assessee accordingly, succeeds on this Ground."

33. It was further pointed out that the facts were clearly demonstrated as the freight charges being included in the bills of the suppliers, Hero Moto Corp, to which the entire amount pertained as under:

- 1) Invoice of Purchase received from Hero Moto Corp Limited separately shows freight amount charged in particular invoice.
- 2) Freight Charges was paid to Hero Moto Corp Limited which is not a transporter / contractor but a supplier of goods.

34. Ld.DR was unable to controvert the factual contentions of the assessee and the factual findings of the Ld.CIT(A) that the freight payments were part of the bill of suppliers nor was he able to bring to our notice any decision of the jurisdictional High Court or the Hon'ble apex court holding to the contrary to

what was held by the Hon'ble Punjab and Haryana High Court in the case of Bhagwati Steels (supra).

35. In view of the same we see no reason to interfere in the order of the Ld.CIT(A) deleting the disallowance of freight expenses amounting to Rs.36,61,656/-.

36. Ground of appeal No.5 is dismissed.

37. Ground no. 6 reads as under:

The Ld.CIT(A) erred on facts and in law in deleting Rs.2,91,440/- out of Rs.4,11,483/- made by AO on account of travelling expenses.

38. Briefly stated the AO had disallowed entire travelling expenses of Rs.4,11,483/- incurred by the assessee during the year on account of his failure to substantiate the same as having been incurred for business purposes.

39. Before the Ld.CIT(A) the assessee pointed out that the travelling expenses comprised of foreign travelling and domestic travelling and considering its business transactions with Hero Moto Corp Group travelling cannot be completely ruled out.

40. Ld.CIT(A) found merit in the same but held that the foreign traveling was not justified by the explanation and accordingly while he upheld the disallowance of foreign travelling expenses amounting to Rs. 1,20,043/, the domestic travelling expenses of Rs.2,91,440/- were allowed. The relevant findings of the Ld.CIT(A) at para of his order is as under:

“6.7 So, far as ground of appeal against disallowance of traveling expenses Rs.4,11,483/- is concerned, this consists of foreign travel as well as inland travel within India. Before me the appellant has not been able to justify the foreign travel. However, the claim of travel within India for business purpose cannot be brushed aside altogether, but personal element too cannot be denied. Hence, foreign travel expenses of Rs.70,043/- & Rs.50,000/- from travel expenses within India is confirmed and balance is deleted.”

41. The Ld.DR though relied on the order of the AO was unable to controvert the fact that the assessee had business transactions with the Hero Moto Corp Group ,nor was he able to point any infirmity in the findings of the Ld.CIT(A) that domestic travelling could not be ruled out completely in the aforestated backdrop of facts.

42. In view of the same we see no reason to interfere in the order of the Ld.CIT(A) deleting the disallowance of travelling expenses of Rs.2,91,440/-.

43. Ground of appeal No.6 is dismissed.

44. Ground no. 7 reads as under:

The Ld.CIT(A) erred on facts and in law in deleting Rs.10,46,251/- out of Rs.12,30,193/- made by AO on account of personal nature expenses out of car loan, interest , car depreciation, car insurance and car fuel expenses.

45. The AO disallowed 1/3rd of the total expenses incurred by the assessee on cars on various accounts attributing personal use to them noting that all of them were luxurious, expensive and the least fuel efficient cars, the assessee has used more than one car for business purpose during the year under consideration and the assessee did not furnish any log book relating the usage of above cars to distinguish business & personal uses.

46. Ld.CIT(A) finding the disallowance to be on the higher side restricted it to 20% of the fuel expenses of Rs.9,19,710/-, holding at para 6.8 of the order as under:

“6.8 So far as ground of appeal against disallowance of Rs.12,30,193/- out of car loan interest, car depreciation, car insurance & car fuel expenses is concerned, I am of the considered view that the disallowance appears to be on higher side. Further, only fuel expenses should be considered for disallowance. In my view, 20% of Rs.9,19,710/- (Fuel Exp.) would be justified in the interest of justice. Balance is deleted.”

47. We have gone through the order of the authorities below. Both the AO and the Ld.CIT(A) have resorted to estimation for the purposes of disallowing car expenses on account of non-business user. We see no reason to interfere in the order of the Ld.CIT(A) whose disallowance of 20% of the fuel expenses we find is justified considering that there is no basis with the Revenue also for justifying disallowance of 1/3rd of entire car expenses which definitely is in our considered view on the higher side.

48. Accordingly we uphold the order of the Ld.CIT(A) deleting disallowance of car expenses to the tune of Rs.10,46,251/-

49. Ground of appeal No.7 is dismissed.

50. In effect appeal of the Revenue is partly allowed.

Order pronounced in the open court on 06-05-2022

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER True Copy
Ahmedabad : Dated 06/05/2022

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद