



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND ARUN KHODPIA, ACCOUNTANT MEMBER**

ITA No.70/CTK/2008

Assessment Year : 1998-99

M/s. Exim India Oil Company Ltd., At:N.H-5, Tiberwal Nagar, Jagatpur, Cuttack	Vs.	DCIT, Circle-1(1), Cuttack
PAN/GIR No.AAACE 3929 K		
(Appellant)	..	(Respondent)

Assessee by : Shri B.K. Tiberwal, MD
Revenue by : Shri M.K.Gautam, CIT (DR)

Date of Hearing : 8/6/ 2022
Date of Pronouncement : 8 /6/2022

ORDER

Per Bench

This is an appeal filed by the assessee against the order of the CIT(A), Cuttack dated 16.11.2007 in Appeal No.0210/06-07 for the assessment year 1998-99.

2. The appeal is time barred by 1400 days. The assessee has filed condonation petition, stating therein that although the appeal was filed within the time on 4.3.2008, but with a short payment of appeal fees. The reason for such deficit payment was due to acute financial stringency of the

assessee company. It is stated that the company was completely paralysed due to financial losses. However, although the company is under liquidation, but managed to deposit the deficit fees on 5.1.2012, copy of the challan is placed on record. It is stated that the non-deposit of appeal is not intentional and prayed for condoning the delay.

3. At the time of hearing, the Managing Director of the assessee company reiterated the submissions made in the petition and prayed that for condonation of the delay of 1400 days. Ld CIT DR opposed the condonation petition.

4. After hearing the rival submissions and perusing the condonation petition, we are satisfied that there was sufficient cause for belated filing of appeal on account of financial crunch. Hence, we condone the delay of 1400 days and admit the appeal for hearing on merit.

5. The assessee has raised the following grounds:

"1.That the order passed by the Learned C.I.T.(A) is without proper appreciation of fact and application of mind, contrary to weight of evidence, contrary to settled law and without carrying out this Hon'ble Bench observation, therefore ought to be quashed on this ground only.

2. That under the facts and circumstances of the case, the addition of Rs.41,35,000/- by the Learned A.O. u/s. 68 of the I.T.Act. 1961 and confirmed by the learned C.I.T.(A) is illegal, arbitrary, without proper application of mind, contrary to weight of evidence and also lack of providing reasonable opportunity to the Appellant, therefore ought to be deleted.

3. That under the facts and circumstances of the case, the Learned C.I.T.(A) ought to have deleted Rs.4,68,705/- added u/s. 43B of the I.T.Act, 1961.

4. That under the facts and circumstances of the case, the Learned CI.T.(A) is not justified in confirming the addition of Rs.4,252/- as donation being inadmissible in nature.

5. That under the facts and circumstances of the case, the Learned C.I.T.(A) ought to have deleted the addition of Rs.2.83,371/- under bad debts written off.

6. That under the facts and circumstances of the case, the Id CIT(A) ought to have deleted the addition of Rs.3,80,625/- under the head NCD issue expenses.”

6. The assessee has filed written submission, which reads as follows:

“That the present appeal is arising out of the assessment order dated 28/03/2001 passed u/s 143(3) of Income Tax Act, 1961(Act) which was under challenge before the CIT(A), Cuttack in appeal bearing IT appeal no. 0210/0607. The said appeal was disposed of by the Ld. CIT (A) on 16/11/2007.

2. That in the present appeal the appellant has taken 7 grounds, but after going through the same it is felt that some of the grounds like, Ground No-3, Ground No- 4, have been partly allowed and conceded by the appellant therefore the appellant does not want to press the same, under such circumstances Ground No- 3 and Ground No-4 may be disposed of as not pressed.

3. That the appellant most humbly submits ground wise written submission as follows:

Ground No. 01 & 02

(i) That during the course of assessment proceeding the appellant on 20/11/1998 in response to the statutory notices produced the available books of account and other connected documents as regards to share capital as below:

- a. List of creditors and shareholders.
- b. Share application form of those creditors.
- c. Confirmation letters of those creditors as regards to investment in purchase of shares of appellant company with individual affidavit in /original.

However on the same date those books of accounts and documents were impounded by the **Id.** A.O. and till date the same is under the custody of the Income Tax Department, but upon repeated representation by the appellant and the direction of the Ld. CIT (A) the same have not yet been

released. For which the appellant has already filed a petition before this Hon'ble Bench on 28.10.2021 for production and release the impounded books of accounts with all assessment, and first appeal records which were under the custody of Ld. A.O since 20/11/1998.

(ii) That in the absence of such document the appellant in many difficulties begs to submit that, the Ld. Assessing Officer while framing the assessment has disallowed and added the investment in share capital of different persons in the hands of the appellant company on the ground that the transactions are not genuine and bogus. In this context it is submitted that during the course of 1st Appeal proceeding the appellant submitted photo copy of the Original Affidavit which were impounded by the Ld. A.O. But the Ld. C.I.T (A) without any further verification of veracity of the same by issuing commission/ summon to those share holders has merely opined that the addresses of the share holders are incomplete and are not sufficient to make any enquiry which is in fact not correct. As such the affidavits executed by those share holders clearly specify their complete address and also provided their PAN for verification.

(iii) That when the appellant discharges its primary onus before an authority, then it is the duty of the authority to disprove the same by making any further enquiry and issuing summons is one of them. But when a material/evidence which is capable of being verified if not verified cannot be rejected as law is well settled on this issue. All that matter is that the explanation is prima facie reasonable. If it is so, it cannot be rejected on mere surmises. It was so held in **CIT vs. Bedi & Co. Pvt. Ltd. (198) 230 ITR 580 (SC)**. The affidavits filed cannot be rejected outright without cross examination as was found by the Hon. Supreme Court in **Mehta Parikh & Co .vs.CIT(1956)30ITR181(SC)**.

[iv] The authorities below have impounded the documents and evidences under their custody in one hand and on other hand they have instructed the appellant to prove the same without any enquiry at their end, could be enough to vitiate the entire proceeding. 'It is just like tie somebody hands and legs ask him to swim', which is practically impossible. The law does not expect the impossible on the part of the tax payer as was pointed out *in* Life Insurance Corporation of India vs. CIT (1996) 219 ITR 410 (SC), Section 68 of the Income Tax Act clearly specifies that any sum found credited in the books of a taxpayer, for which he offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, may be charged to income-tax as the income of the taxpayer of that year. Therefore in the present case the appellant has already offered his explanation as regards to nature and sources thereof , but the authority bellow without following due procedure simply made an opinion merely by saying that the evidences are not sufficient where as duty cast upon them to make further enquiry.

(v) That this is the third journey in appeal by the Appellant before this Hon'ble Bench and the crux of the issues and contention of the Appellant in the present appeal are related to unexplained cash credit u/s.68 of the Income Tax Act, where the Id. Assessing Officer has treated the share holder of the appellant Company as bogus under surmises and conjecture. That at the time of assessment proceeding and Appeal Proceeding, the Appellant time and again submitted that all the share holders / creditors are identifiable, most of them are Income Tax assessee and having their respective Permanent Account Numbers. The share holders have duly confirmed that they have invested their money in purchasing shares by swearing Affidavits. But the authorities below without examining the veracity of the evidences and its genuineness, has given the aforesaid finding which is not proper for the reason that the CIT(A) has co-terminus power as the power like Assessing Officer. Before deciding an appeal he has to look into the evidences and test the same in their proper prospective which the Ld. C.I.T (A) failed to do. The Id. Assessing Officer while framing the assessment order has treated the entire share application money as bogus. Before deciding/taking any adverse inference, the onus is on the Assessing Officer to disprove the evidences put forth before him. The law is also well settled by the Hon'ble Apex Court that when the appellant Company established the identity of the share holders, there is no scope for further enquiry. The Hon'ble Court has also been pleased to give a finding that once the initial burden has been discharged in respect of identity of the share holders/investors about their existence and the confirmation from such investors has been obtained the burden shifted to the revenue to prove otherwise not only that the investment amount did not belong to the creditor, but further it has to prove that the said amount belong to the Appellant. Even if it be assumed that the subscribers to increase share capital were not genuine, never the less under no circumstances the alleged amount of share capital be treated as undisclosed income of the Appellant Company. It may be that there are bogus share holders in whose name shares have been issued and the money have been provided by some other person, if the assessment of the persons who are alleged to have really advanced the money is sought to be reopened that would have made some sense but the Hon'ble Court failed to understand as to how the amount of increased share capital can be assessed in the hands of the company. But unfortunately those submissions have been ignored by the Assessing Authority as well as the Appellate Authorities.

(vi) That earlier at the time of hearing of appeal before this Hon'ble Bench in ITA No.134/CTK/2005 those facts and submissions brought to the notice. But the Hon'ble ITAT vide their order dates 29.08.06 have directed the Ld. CIT (A) to dispose of the Appeal by taking those materials into consideration as well as the decisions of the Hon'ble Courts in the case of "C.I.T. vs. Stellar Investment reported in 192 ITR, 287 (Del.), CIT Vs. Orissa Corporation, Reported in 159 ITR, 78 (SC) and **CIT** Vs. Sofia Finance, Reported in 205 ITR, 98 (FB)(Del)". It is also very strange that when there is a decision of Hon'ble High Court and Hon'ble Apex Court in

favour of the Appellant, how without deciding the Appeal on merit the Ld. CIT (A) rejected this ground without any adjudication despite clear cut directions by this Hon'ble ITAT which are very much binding on the departmental authority.

[vii)That in the case of **CIT Vs Lovely Exports (P) Ltd. 216 CTR 195** which held as under: "Can the amount of share money be regarded as undisclosed income under section 68 of the Income Tax Act, 1961? We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgement."

Ground No. 5&6

So far as addition as regard to bad debt written off is concerned the Ld. AO as well as Ld. CIT (A) failed to examined whether the bad debt amounting to Rs. 2, 82,371/- has been properly written off through the account or not merely by saying that the debt must be proved to be bad looking at the debtor pecuniary condition his commitment and obligation. Whereas the appellant submitted before the authority that being the appellant was under parallel marketing and distribution of kerosene provided credit facilities to its dealers some of the dealers were not available for payment of such credit for which the appellant treated such credit facilities after adjustment of security deposits as bad debt. However in the next financial year the appellant has offered the same as income under such circumstances this addition of bad debt is not sustainable this Hon'ble Bench on an earlier occasion has given a clear cut finding that the bad debt amounting to Rs. 2, 83,371/- and Rs. 3, 80,525/- as regards to NCD expenses which is supported by voucher and invoices incurred through recognize by merchant bankers has to be verified by **the CIT(A) the copy of the ITAT order in ITA No. 134/CTK/2005 is enclosed here with marked as Enclosure - 1. Since the Ld. CIT (A) did not carry out the aforesaid direction, therefore both the additions are not sustainable.**

In consideration of these submissions the appeal maybe disposed off."

7. At the outset, Id A.R. of the assessee submitted that he does not wish to press Ground Nos.3 & 4 of appeal and has signed to that effect. Consequently, Ground Nos.3 & 4 are dismissed as not pressed.

8. In regard to Ground Nos.1 & 2 of appeal, it was submitted by Id AR that in the course of the original assessment proceedings, various documents and books of accounts have been produced before the Assessing Officer and these were also impounded by the Assessing Officer. It was the submission that the assessee company is non-functional for the past few years. It was the submission that the assessee has been repeatedly asking for the documents seized/impounded for the purpose of giving details as required in the course of assessment. It was the submission that the same has not been provided till date. It was the prayer that as these details have not been provided, he has no objection if all the issues in appeal other than that withdrawn, may be restored to the file of the Assessing Officer for readjudication after granting the copies, which have been impounded and with the custody of the department.

9. In reply, Id CIT DR opposed the prayer of the assessee. It was the submission that copies of the documents had already been given to the Dy.Company Secretary of the assessee company on 12.5.1999. It was the submission that copies have already been provided, fresh copies are not possible to be provided now. Ld CIT DR submitted that under no circumstances, should the issues be restored to the file of the AO. It was the submission that it is the duty of the assessee to substantiate his claim before the AO. He submitted that the addition made by the AO and confirmed by the Id CIT (A) is liable to be upheld. It was the submission

that the affidavits filed by the shareholders were for the assessment year 1997-98, which were never impounded. It was the submission that the entire share application money was received in cash and the affidavits are not prone to verification in the absence of detailed address of the share holders.

10. In rejoinder, Id AR submitted that the Dy.Company Secretary who is alleged to have received the documents left the company more than two decades ago. It was the submission that there were no details available with the assessee as the main documents required for answering the query by the AO was available with the AO and impounded by the AO himself.

11. We have considered the rival submissions. A perusal of the assessment order clearly shows that in page 2 para 3, the AO himself mentions that the cash book, share allotment register and share application forms(187 in number) relating to the financial year 1995-96 were impounded. It is also mentioned that the photocopy of the same were given to the Dy.Company Secretary, Shri Ranjan Rout on 12.5.1999. Admittedly, the share allotment registers and share application forms are not a yearly affair. It is single consolidated books/registers. Therefore, to say that those documents pertained to any earlier years or subsequent years will not make any credence. A perusal of the order sheet entry of the Tribunal also shows that this appeal has been pending for a quite long time. There is also an application from the assessee on 28.10.2021 for directing

the Revenue to release the impounded books of account. It is noticed that the revenue has not been able to produce any order for releasing of the impounded books of account nor able to show or produce the impounded material before the Tribunal. This being so, when the primary material required for proving the assessee's claim is with the revenue, the assessee cannot be expected to produce the evidences, which are allegedly with the department and not with the assessee. This being so, in the interest of natural justice, the issues in appeal are restored to the file of the AO for re-adjudication except in respect of Ground Nos.3 & 4. The Assessing Officer shall re-adjudicate the issues only after granting the assessee copies of the impounded in regard to the assessee.

12. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order dictated and pronounced in the open court on 8 /6/2022.

Sd/-
(Arun Khodpia)
ACCOUNTANT MEMBER

sd/-
(George Mathan)
JUDICIAL MEMBER

Cuttack; Dated 8 /06/2022
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : M/s. Exim India Oil Company Ltd.,
At:N.H-5, Tiberwal Nagar,
Jagatpur, Cuttack
2. The Respondent. DCIT, Circle-1(1),
Cuttack
3. The CIT(A)-, Cuttack
4. Pr.CIT-, Cuttack
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack