

THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD "A" BENCH

**Before: Shri Waseem Ahmed, Accountant Member  
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA Nos. 265 & 266/Ahd/2020  
Assessment Years 2008-09 & 2010-11**

Samir Kishor Parekh, Ahmedabad PAN: AFVPP7637L (Appellant)	Vs	The ACIT, Circle-5(3)(2), Ahmedabad (Respondent)
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**Assessee by: Shri Chintan Shah. A.R.  
Revenue by: Shri Sudhendu Das, Sr. D.R.**

Date of hearing : 18-05-2022  
Date of pronouncement : 22-06-2022

**आदेश/ORDER**

**PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-**

These two appeals have been filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals)-5, Ahmedabad in Appeal nos. CIT(A)-5/ACIT. Cir. 10/10003/2014-15 & CIT(A)-5/ACIT. Cir. 10/10058/2013-14 & vide order dated 30/01/2020 passed for the assessment years 2008-09 & 2010-11. Since, issues are involved in both cases, the same are being disposed of by a common order.

2. The assessee has taken the following grounds of appeals:-

**AY 2008-09**

*"Your appellant being aggrieved by the order passed by the learned Commissioner of Income Tax (Appeals)- V, Ahmedabad presents this appeal against the same on the following amongst other grounds.*

*1. The learned C.I.T. (Appeals) has erred in confirming the erroneous and illegal addition made by way of firstly on adhoc and estimated basis only. It is submitted that addition made by C.I.T. (Appeals) in the tune of Rs. 40, 00,000/- is made without any base, corroborative evidence on record, without proper efforts to find out the veracity and authentication of information relied and without rejecting books of accounts. CIT (Appeals) has mentioned the same fact in their order on pg. no. 40 that..*

*"This addition is purely on the estimate basis to take care of short comings notices in the accounts of appellant."*

*Such addition is bad and illegal in the eyes of law hence the same is unjustified and the same be deleted.*

*The appellant placed reliance on following case laws to in support of above:*

*• Hon'ble Delhi ITAT in case of Baldev Raj Chhabra v/s ITO ward-4 Karnal held that..*

*"Court has given thoughtful consideration to the facts and circumstances of the case and find that both the authorities below have acted upon, only on the presumption and without any substantive material for making and sustaining the addition under consideration. In our considered view the presumption cannot be real adjudication of an issue. The very purpose of income tax proceedings is to correctly assess the tax liability of an Assessee in accordance with law but not under presumption as held in this case. Article 265 of the Constitution of India prescribes that no tax shall be levied or collected except by the authority of law. The Hon"ble Allahabad high Court in the case of Pt. SheoNath Prasad*

*Sharma Vs. C.I.T., 66 ITR, p.647 (All.) reminded that the law empowers the Income-tax Officer to assess the income of an Assessee and determine the tax payable thereon in accordance with law."*

*2. The learned CIT (Appeals) has erred in confirming addition relying only on the basis of few elements of Financial Statement by stating that accounts are not much manipulated in A.Y.2010-11 without rejecting books of accounts for A.Y. 2008-09. It is submitted and explained that books of accounts are also subject to Audit by Independent Tax Auditor in view of Income tax Act, 1961, and no adverse comments has been found in the Tax Audit Report. Accordingly Appellant raised ground that learned CIT (Appeals) has erred in making addition without pointing out any specific defects and arbitrarily. The learned C.I.T.(A) cannot decide manipulation of books of accounts based on few factors on prime facie, without going in details scrutiny, where no cogent material is put forth to substantiate such findings. The approach of learned CIT (Appeals) is very casual. CIT (Appeals) grossly neglect the order of Hon'ble CESTAT which has already considered/redressed all the allegations viz. Consumption of fuel, Turnover, etc. raised by CIT (A) by giving Speaking Order and which is final fact findings. Accordingly, CIT(A) has also ignored the order of Hon'ble ITAT which clearly, in para 5 of its order, stats that CIT(A) to pass order in light of CESTAT order by providing reasonable opportunity of being heard.*

*2.1. Due to nature of the business of the Appellant, fuel expenses for Furnace must be incurred once furnace ignited irrespective of manufacturing operations continued or not, and consumption of gas depends on various factors. The gas consumption is one of the factors of production where there can be large variance and in the given facts and circumstances, the only base of gas consumption cannot be taken to be a factor for determining the income of the assessee.*

*However, in the absence of any corroborative evidence to support that, it cannot conclusively be taken to form the basis for assessing*

*the income as the consumption of gas necessarily may not be in respect of production process only.*

*2.2. The Learned CIT (Appeals] has erred while determining appeal by stating that abnormal closing stock is shown in A.Y. 2008-09, without any basis, without any corroborative evidences on record or any independent findings or on the assumptions and surmises and that cannot be base for making addition under the scheme of the Act, which is bad and illegal in the eyes of law. The learned CIT (Appeals] has not put forth any evidences establishing abnormal closing and hence, addition made by CIT (Appeals] is not sustainable.*

*2.3. The selling price is depends upon many factors like, Price of Raw Material, Quality of Frit Manufactured, etc. Increase in sales in A.Y. 2010-11 is due to increase in selling price for above reasons and / or increased in quality of frit Manufactured. Earlier the quality of the product was low and did not fetch good prices. The appellant increased quality gradually and thus price was increased. Your appellant also wants to draw your attention to the fact that cost of raw material Borax also got doubled. Further Appellant has also changed its manufacturing technology. Instead of Rotary Klin being used earlier, they installed continuous line Klin which not only increased in cost of the production but also quality of goods and therefore it was natural that the selling price of finished goods increased. Hence it cannot be said that due to investigations, the prices increases. Appellant also want to draw attention to prices of other raw material Zirconium Silicate had raised in four fold i.e. from 8.9/kg to 56/kg. Even prices of natural gas has also been increased from 2850/KM3 TO 7422.51/KM3. Turnover and fuel exp had nothing to do with each other and comparison for the same is not having any meaning for addition.*

*2.4. Further CIT (Appeals) has erred in order considering the statement of Shri Haribhai K. Patel without corroboration of even single evidence. Not even single document has been found which can support allegation of C.I.T.(A). Even Hon'ble CESTAT have also considered the same and quashed the entire allegation by doing sufficient enquiries and procedures. Here again CIT(A) fails*

*to appreciate the order of CESTAT and Accordingly CIT(A) has also ignore the order of Hon'ble ITAT which clearly, in Para 5 of its order, stats that CIT(A) to pass order in light of CESTAT order by providing reasonable opportunity of being heard.*

*3. C.I.T. (A) erred in deciding manipulation/non manipulation of books of accounts based on the assumptions and surmises and that cannot be base for making addition under the Scheme of the Act, which is bad and illegal in the eyes of law. The learned CIT (Appeals) cannot make additions on the basis of other A.Y. without rejection of books of accounts of such Assessment Year. The learned CIT (Appeals) has not put forth any evidences establishing manipulation of books of Accounts and hence, addition made by CIT (Appeals) is not sustainable.*

*4. Furthermore, as per the facts turnover and fuel exp has nothing to do with each other and comparison for the same is not having any meaning for addition. The learned CIT (Appeals) erred in making additions on the basis of other A.Y. without rejection of books of accounts of such Assessment Year. The learned CIT (Appeals) failed to appreciate fact that the appellant is maintaining his proper books of accounts, even at the time of finalizing the assessment proceedings no adverse finding has been given with regard to the maintenance of proper books of accounts by the appellant for the Assessment Year 2008-09.*

*5. The learned C.I.T.(A) has erred in law and on facts in not properly appreciating and considering Various submissions, evidences and supporting placed on the record during the course of the proceedings in and not properly appreciating various facts and law in its proper perspective.*

*6. That the learned CIT(A) has also erred in proceeding to uphold the levy of penalty on wholly irrelevant, extraneous, and immaterial considerations since whole addition made on estimate basis only.*

*7. That the learned CIT(A) has also erred in proceeding to uphold in levying interest u/ s. 234A/ B /C / D of the Act.*

8. *Your appellant craves leave to add, alter and/or to amend all or any of the grounds before the final hearing.*”

### **AY 2010-11**

*“Your appellant being aggrieved by the order passed by the learned Commissioner of Income Tax (Appeals)- V, Ahmedabad presents this appeal against the same on the following amongst other grounds.*

1. *The learned C.I.T. (Appeals) has erred in confirming the erroneous and illegal addition made by way of firstly on **adhoc** and **estimated basis** only. It is submitted that Addition made by C.I.T. (Appeals) of 20,00,000/- is made without any base, without proper efforts to find out the veracity & authenticity of information and evidence put on record and unjustified and the same be deleted.*

2. *CIT (Appeals) mentioned in order that Excise and Income Tax both are separate authorities and the order of one authority is not binding force on another, then on the same footing additions cannot be sustain mere based on inquiry carried out by Central Excise officer without any corroborative evidences and without carrying out any independent inquires. It is very settled law that in the scheme of the Act, no addition can be made without bringing on record any corroborative evidences to prove so and addition made merely on the basis of presumptions, assumptions and surmises is bad in law*

3. *Hon'ble ITAT set a side orders of lower Authority for AY 2008-09, in Para. 5 of its order dtd, 19/08/2014 vide ITA No. 1697/Ahd/2012. Further Facts for the AY under consideration is based on the same facts of AY 2008-09 only. The learned C.I.T.(A) has exceeded his jurisdiction by making additions considering facts other than considered by AO Hence additions of AY 2010-11 itself*

*has no validity in law. Hence additions made non sustainable in Law.*

*4. The learned C.I.T.(A) has erred in law and on facts in not properly appreciating and considering various submissions, evidences and supporting placed on the record during the course of the proceedings and not properly appreciating various facts and law in its proper perspective.*

*5. That the learned CIT(A) has also erred in proceeding to uphold the levy of penalty on wholly irrelevant, extraneous, and immaterial considerations since whole addition made on estimate basis only.*

*6. That the learned CIT(A) has also erred in proceeding to uphold in levying interest u/ s. 234A/ B /C / D of the Act.*

*7. The order passed by the Learned CIT(A) is bad in law and contrary to the provision of law and facts.*

*8. Your appellant craves leave to add, alter and/or to amend all or any of the grounds before the final hearing.”*

### **Assessment year 2008-09**

3. The brief facts leading to the present appeal are that investigation team of the Excise Department revealed that tile manufacturers were declaring only 50% of the actual ex-factory prices and MRP for the purpose of payment of Excise duty. Consequently, the DGCEI carried out search at the business premises of the assessee on 21-08-2008 and it was alleged that the assessee had resorted to certain measures like removal of ceramic frit, undervaluing of finished goods and issuing parallel invoices etc. to evade excise duty. On the basis of the investigation carried by the Excise Department, the income tax department initiated assessment proceedings and

ld. assessing officer made certain additions to the returned income of the assessee, which were confirmed by the Ld. CIT(Appeals) in appeal for the impugned year under consideration. In appeal before ITAT, the assessee submitted that the aforesaid additions have been made on the basis of investigation additions made by the Central Excise Department, against which the assessee has filed appeal before the Custom Excise and Services Tax Tribunal (CESTAT) in respect of which an order was expected shortly. In view of the above facts, the ITAT set aside the file to the Ld. CIT(Appeals) for adjudication afresh in the light of the order of the CESTAT. In the set aside proceedings before the Ld. CIT(Appeals), the assessee submitted that CESTAT had deleted all demands for AY 2008-09 under consideration so far as Central Excise proceedings are concerned vide order dated 28-06-2019. Accordingly, the assessee *inter alia* submitted that since the assessment was framed primarily relying on the enquiries carried out by the Central Excise officers, and now since the matter has been decided by CESTAT in favour of the assessee, the income tax demands are liable to be set aside. The Ld. CIT(Appeals) accordingly gave part relief to the assessee and restricted the disallowance to ₹ 40 lakhs. While passing order, Ld. CIT(Appeals) made the following observations:

*“In the circumstances and as per ratio laid down in the case laws relied upon by the appellant and the fact that GP ratio is quite reasonable for AY 2010-11, and addition of Rs.20,00,000/- is confirmed while deleting rest of the amount of all the four additions made by the Assessing Officer. This addition is purely on estimation basis to take care of short comings noticed in the accounts of the appellant. Similarly an addition and addition of Rs.40,00,000/- is confirmed while deleting rest of the amount of all the four additions made by the Assessing Officer as the expenses are inflated and*

*seriousness of the shortcomings is at much higher scale for assessment year 2008-09.*

*Rs. 69,98,589/- (14.13% of under valuation of sales of Rs. 4,95,30,000/-.)*

*Rs. 42,51,889/- (14.13% of sale outside the books of Rs. 3,00,91,218/-.)*

*Rs. 1,47,075/- (14.13% of excess shortage of Rs. 10,40,875/-.)*

*Rs. 14,130/- (14.13% of parallel invoices of Rs. 1,00,000/-.)*

*The ground no. 1 to 7 are **partly allowed.***

4. The assessee is in appeal before us against the aforesaid order of Ld. CIT(Appeals) confirming the additions to the tune of ₹ 40 lakhs. The counsel for the assessee's contentions are twofold: firstly, he submitted that the additions have been made by the Ld. Assessing Officer on the basis of investigation carried by the Excise Department and since the matter has been decided in favour of the assessee by CESTAT, the additions based on the order passed by the Excise Department are liable to be set aside. Secondly, he argued that the Ld. CIT(Appeals) have confirmed part of the additions made by the assessing officer purely on ad hoc and estimated basis only without any basis or corroborative evidence on record. The same is evident from the observations of the Ld. CIT(Appeals) while passing the order. The counsel for the assessee drew our attention to page 40 of the Ld. CIT(Appeals) order to point out that the CIT(Appeals) has himself admitted that the additions have been confirmed on an estimated basis in view of the following words: "*the addition is purely on estimation basis to take your of shortcomings noticed in the accounts of the appellant*". Accordingly, the same are liable to be deleted. The counsel for the assessee further took our attention to pages 56 to 66 of the paper book (CESTAT order) to point out

that CESTAT has given complete relief to the assessee and accordingly in light of the above, the additions are liable to be set aside. The counsel for the assessee then drew attention to page 57 of the paper book (page 2 of the CESTAT order) to point out that the CESTAT order relates to the period 2004-05 to 28-2-2010 and accordingly both the assessment years 2008-09 and 2010-11 are part of the CESTAT order. In response, Ld. D.R. relied upon observations made by the ld. CIT(A) in his order.

5. We have heard the rival contentions and perused the material on record. We note that vide order dated 19-08-2014, the ITAT in assessee's own case for assessment 2008-09 had observed that the additions made by the assessing officer and confirmed by the Ld. CIT(Appeals) are based on the basis of additions made by the Central Excise Department, against which the assessee has filed appeal before CESTAT. Accordingly, the matter was restored to the file of Ld. CIT(Appeals) for fresh adjudication in light of the order passed by CESTAT. However, we note that in the set aside proceedings even Ld. CIT(Appeals) gave only part relief even though CESTAT had deleted the additions proposed by the Excise Department. In view of the above order of CESTAT giving complete relief to the assessee and directions of ITAT in assessee's own appeal for assessment year 2008-09, we are of the considered view that additions to the tune of ₹ 40 lakhs sustained by the Ld. CIT(Appeals) are liable to be set aside. Further, we also note that the additions have been sustained by Ld. CIT(Appeals) on purely estimate basis, as is evident from the observations made by Ld. CIT(Appeals) while passing the appeal order. It is well-settled law that no addition could be made on estimated basis without rejecting books of

account of assessee as held by various Courts in the case of **Asian Grantio India Ltd.[2020] 113 taxmann.com 445 (Ahmedabad - Trib.)**, **Shree Asutosh Transport Co.[1997] 90 Taxman 331 (Ahmedabad - ITAT)**, **Royal Marwar Tobacco Product (P.) Ltd.[2009] 29 SOT 53 (Ahmedabad) (URO)**, **Anil Kumar &Company [2016] 67 taxmann.com 278 (Karnataka)**, **Ercon Composites[2014] 49 taxmann.com 489 (Jodhpur - Trib.)**, etc. to name a few. Accordingly, we are of the considered view that Ld. CIT(Appeals) has erred in facts and in law in confirming the addition to the tune of ₹ 40 lakhs in the instant set of facts.

6. In the result, the appeal for the assessee is allowed for assessment year 2008-09.

#### **Assessment year 2010-11**

7. The facts of the instant year are similar to that of assessment 2008-09 which we have decided in the preceding paragraphs. The assessee filed return of income for the impugned year declaring total income of ₹ 26, 32, 490/-. The case of the assessee was taken up for scrutiny and the Ld. Assessing Officer made additions to tune of ₹ 2,21,68,030/- to the returning of the assessee. At page 2 of the assessment order (para 3), the assessment was initiated for similar reasons as for assessment year 2008-09 i.e. on the basis of finding given by the Excise Department in respect of the assessee and also on the basis of contents of the assessment order for assessment year 2008-09. In appeal, the Ld. CIT(Appeals) has mentioned that the assessment for assessment 2008-09 has travelled to ITAT, and same were set aside to

the file of CIT (A) in view of order of CESTAT. The Ld. CIT(Appeals) noted that the assessment order for assessment of 2010-11 was based on the facts and findings of assessment year 2008-09 and therefore he is required to take similar stand for both the assessment years. Accordingly, the Ld. CIT(Appeals) restricted the addition to ₹ 20 lakhs with the following observations:

*“In the circumstances and as per ratio laid down in the case laws relied upon by the appellant and the fact that GP ratio is quite reasonable for AY 2010-11, and addition of Rs.20,00,000/- is confirmed while deleting rest of the amount of all the three additions made by the Assessing Officer. This addition is purely on estimation basis to take care of short comings noticed in the accounts of the appellant. Similarly an addition and addition of Rs.40,00,000/- is confirmed while deleting rest of the amount of all the three additions made by the Assessing Officer as the expenses are inflated and seriousness of the shortcomings is at much higher scale for assessment year 2008-09.*

*Therefore, following additions are replaced by Rs.20,00,000/- :-Rs. 93,34,184/- (20.36% of under valuation of sales of Rs. 4,58,45,701/-.)*

*Rs. 1,18,73,044/- (20.36% of sale out side the books of Rs. 5,83,91,218/-*

*Rs. 9,60,802/- (20.36% of excess shortage of Rs. 47,19,068/-)*

*The ground nos. 1 to 5 are **partly allowed.**”*

8. We note that the facts and the basis of additions for both the years are similar. Accordingly, our observations for assessment year 2008-09 would apply to assessment 2010-11 as well. As pointed out by the counsel for the assessee, the CESTAT order relates to the period 2004-05 to 28-2-2010 as is evident from the CESTAT order (page 2). Accordingly, since all the additions made by the Excise Department have been deleted by the CESTAT

in appeal proceedings for assessment year 2010-11 as well, we allow the assessee's appeal for the assessee for Assessment Year 2010-11 as well, since facts and basis of addition for both the assessment years 2008-09 and 2010-11 are similar.

9. In the result, the appeal of the assessee is allowed for assessment year 2010-11.

10. In the combined result, assessee's appeals are allowed for assessment years 2008-09 & 2010-11.

Order pronounced in the open court on 22-06-2022

**Sd/-**  
**(WASEEM AHMED)**  
**ACCOUNTANT MEMBER**  
**Ahmedabad : Dated 22/06/2022**

**Sd/-**  
**(SIDDHARTHA NAUTIYAL)**  
**JUDICIAL 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