

IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI
BEFORE SHRI M BALAGANESH, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 750/Mum/2019

(A.Y: 2013-14)

ACIT – 13(3)(2) Room No. 229/2019, 2 nd Floor, Aayakar Bhavan, MK Road, Mumbai-400020.	Vs.	M/s Vega Chemicals Pvt Ltd C-404, Gokuldham, Dindoshi Goregaon (W), Mumbai-400063
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAECV1029M		
Appellant	..	Respondent

Assessee by :	Mr.Aditya Ramchandra.AR
Revenue by :	Mr.S.N.Kabra.DR

Date of Hearing	23.05.2022
Date of Pronouncement	22.06.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The revenue has filed the appeal against the order of the Commissioner of Income Tax (Appeals)-21 Mumbai passed u/s 143(3) and 250 of the Act. The revenue has raised the following grounds of appeal:

1. *On the facts and circumstances of the case and in law the Ld.CIT(A) has erred in deleting the Oil & Fuel expenses of RS.1,16,14,702/- and Transportation Charges of Rs.66,35,185/- , more so when analyzed vis-à-vis to claim of the proprietary concern carrying on similar business.*

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2. *On the facts and circumstances of the case and in Rs.75,000/- law the L.CIT(A) has erred in deleting the disallowance of company formation expenses of Rs.2,50,000/-, as these expenses are in the nature of capital expenditure.*
3. *On the facts and circumstances of the case and in Rs.5,246/- law the Ld.CIT(A) has erred in deleting disallowance of interest paid on late payment of Excise Duty Rs.9,567/-, Service Tax Rs.282/- and VAT/CST amounting to Rs.8,238/-.*
4. *The appellant prays that the order of CIT(A) on the above ground be set aside and that of Assessing officer be restored.*
5. *The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.*

2. The brief facts of the case are that the assessee company is engaged in the business of chemicals. The assessee has filed the return of income for the A.Y 2013-14 on 23.09.2013 disclosing a total income of Rs.Nil after set off of current year loss of Rs. 60,70,088/-.The assessee has filed the Tax Audit report u/s 44AB in form No. 3CA and 3CD along with Audited financial statements supporting the return of income and it was processed u/s 143(1) of the Act. Subsequently, the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act along with questionnaire are issued. In compliance to the notice, the Ld. AR of the assessee appeared from time to time and filed the details. During the year under

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consideration, the assessee has disclosed the income from business and profession and supporting evidences were filed. (i) The Assessing Officer (A.O.) observed that the assessee has debited abnormal expenditure pertaining to oil, fuel & transportation expenses in the profit and loss account. The assessee has taken over the proprietary business concern i.e Vega Chemicals and has claimed the higher expenses in comparison to turnover and the information was called for. The assessee company has taken over the proprietary concern in the month of November as a going concern and there is a possibility that the expenses before October 2012 could not have been provided. The A.O is of the opinion that the percentage of expenses of turnover in proprietary concern is very less as compared to percentage of expenses to turnover in the assessee company. Since, the nature of business is almost similar and is carried on the going concern, such a huge increase in percentage of expenses is considered excessive and made addition of Rs. 1,82,49,887/-. (ii)The AO made addition of Rs. 2,50,000/- towards the company

formation expenses which is in the nature of capital expenditure and no proper explanations were filed.

3.(iii) the assessee has claimed legal expenditure of Rs.1,48,300/- debited to profit and loss account and no TDS was deducted and the explanations were not filed, the A.O. applied the provisions of sec40(a)(ia) of the Act and disallowed the claim. (iv) The assessee has claimed Rs. 18,263/- towards interest on Govt. dues and the AO is of the opinion that these expenses are penal in nature and is not a allowable claim. Finally the Assessing Officer assessed the total income of Rs. 1,25,96,362/- and passed the order u/s 143(3) of the Act dated 09.03.2016.

4. Aggrieved by the order, the assessee has filed an appeal before the CIT(A). Whereas in the appellate proceedings the CIT(A) considered the grounds of appeal, submissions of the assessee and the additional evidences filed by the assessee in the course of hearing and the CIT(A) has called for the remand report. The CIT(A) has granted relief in respect of addition of excess expenditure and disallowance of ROC expenditure and interest paid on

the Government dues and partly allowed the assessee appeal. Aggrieved by the order of the CIT(A), the revenue has filed an appeal before the Hon'ble Tribunal.

5. At the time of hearing, the DR submitted that the CIT(A) erred in not considering the various facts that the assessee has not submitted in details and the additional evidences filed by the assessee could not support the transactions and relied on the A.O. order. Contra, the Ld.AR submitted that the assessee has filed additional evidences before the CIT(A) and referred to the paper book and the remand report. The Ld. AR substantiated the submissions with the paper book and relied on the order of the CIT(A).

6. We heard the rival submissions and perused the material on record. The Ld. DR submitted that the CIT(A) has erred in granting the relief to the assessee allowing the higher claim of expenses. At this juncture, we consider it appropriate to refer to the observations and additional evidences filed by the assessee in the course of appellate proceedings

referred at page 2 Para 4 to 4.2 of the order read as under:

4. Additional evidences

It is seen from the facts available on record that the appellant filed additional evidences containing 15 pages explaining the difference in expenditure of the proprietary concern and the Appellant company during the course of appellate proceedings on 08.06.2017. The said evidences were remanded to the A.O. for necessary examination and comments. The gist of the remand report forwarded by by the A. O. is reproduced as under:

"A. Expenses claimed higher in comparison to turnover During the course of assessment proceedings, it was observed that the assessee had debited heavy expenses in its P&L account. The assessee company had taken over business of proprietary concern viz. Vega Chemicals (Proprietor Balchandra P Patil, HUF). The assessee company had claimed expenses higher in comparison to turnover and also in comparison of turnover and expenses ratio with proprietary concern. Since, the assessee company had taken over the proprietary concern in the Month of November as a going concern. Further, it was observed that the % of expenses to turnover was very less as compared to % of similar. Therefore, the huge increase in % of expenses was considered to be excess claimed by the assessee company. The excess expenses claimed was not allowed as expenditure and hence the amount of Rs. 1,82, 49,887/- was disallowed. During the remand proceedings, the assessee has explained the difference in representation of expenses in the proprietary concern. The assessee has stated that the baggage is not available throughout the year. It is available mainly in the months of December to February. Thus, it need to be purchased in

bulk in these months. These months coincide with the months in which the appellant company has come into existence. Thus, transportation expenses of the company are higher vis-à-vis the proprietary concern. Further, the assessee has submitted the month wise details of Oil & Fuel Expenses and transportation expenses, the comparison of expense to revenue ratio in F.Y.2011-12 in Proprietary concern and F.Y.2012-13 in Proprietary concern and assessee company which comes to 16.13% and 14.26% respectively. Thus, the explanation of the assessee company may be considered and the disallowance of Rs. 1,82, 49,887/- on account of expenses claimed at higher side may be decided on merit."

4.2 I have perused the information available on record. It is considered that immediate non-availability of comparison of complex information with the Appellant is a sufficient cause of not producing the documents before the A.O. during the course of assessment proceedings. Thus, as discussed in the above paragraphs and in the Light of provision of Rule 46A of Income-tax Rules, 1962, the additional evidences produced by the Appellant are admitted

7. The CIT(A) find that the AO has admitted certain facts in the remand report on the additional evidences filed. The CIT(A) dealt on the submissions and remand report and granted the relief and observed at Page 7 Para 8 of the order as under:

8. *Decision:*

I have considered the facts of the case and submissions made by the appellant. This ground of appeal relates to disallowance of Rs 1,16,14,702/- in respect of excess oil and fuel expenses and Rs 66,35,185/- in respect of excess transportation expenses as compared to the total turnover of the Appellant company and the proprietary concern the Appellant took over in Nov 2012. The AO has disallowed the excess oil and fuel expenses on the ground that the ratio of oil and fuel expenses to total turnover of the assessee company is higher as compared to that of the proprietary concern it took over. The AO recorded that the ratio of oil and fuel charges is 32.68% for the Appellant company as compared to 3.87% in the proprietary concern it took over. During the course of appellate proceedings, the Appellant company explained the difference by giving detailed account of the expenses month wise in tabular form. The Appellant company submits that on account of different procedures adopted in preparation of financials, there is a suspicion of the excess expenses. The documents reveal clearly that the accounting method of oil and fuel expenses of the Appellant company differs from that of the proprietary concern. The opening and closing stock of oil and fuel are considered for calculating oil and fuel expenses in both the concerns. The opening and closing stock of oil and fuel are adjusted with normal raw material consumption of the Appellant company whereas the opening and closing stock of oil and fuel is included in the opening stock and closing stock in trade respectively. The oils and fuel and transportation expenses are debited under the head other expenses as shown in Schedule 23 to profit and loss account and opening and closing stocks are reflected in cost of raw material consumed as shown in schedule 22 of profit and loss account. For the said reason the cost of materials consumed is 67% in the

proprietary concern and it is 17% for the Appellant company. It is evident from the figures submitted that the consumption of oil and fuel is debited under other expenses of the proprietary concern to the extent of Rs 1,45,87,997/- and net closing stock of Rs 2,00,73,966/- is included in raw material and reduced from other expenses of the Appellant company. Therefore, the cost of raw material is 46.6% in the Appellant company and it is 52.43% for the proprietary concern. If we compare the figures of both the concerns, total expenses to revenue of the proprietary concern for Assessment Year 271 a 01 2012-13 is 16.13% and total expenses to revenue of the Appellant for AY 2013-14 14.26% (aggregate expense of the proprietary concern from Apr 12 to Oct 12 and the Appellant company from Nov 12 to March 13). The comparison of figures show that the difference is not substantial which warrants an addition to the total income of the assessee. Similarly, the additions do not seem plausible without comparing the figures with previous years or without comparing the same with peer concerns.

8.2 The Appellant contested against disallowance of transportation expense of Rs 66,35,185/- made by the AO on the ground that the ratio of transport charges to total turnover of the assessee company is higher as compared to that of the proprietary concern it took over. The fact of this case is that the Appellant company started its operation from Nov 2012 after taking over the proprietary concern of HUF. The Appellant submitted that the bagasse required as a fire supplement in boiler was purchased in bulk quantity from Sugar industries in the month of Dec-Feb as it is not available during the whole year and the said bagasse is stored away from the place of consumption due to its inflammatory nature resulting in increasing expenses for transportation from godown to

the factory. It is observed that the Appellant company came into existence in Nov 2012 which coincided with the period of availability of the bagasse leading to the excess expense. Further, the proprietary concern's transportation expenses to revenue for the entire AY. 2012-13 was 7.54% whereas the Appellant company's transportation expenses to revenue AY.2013-14, it is 7.67%. Transportation expenses for these three months took the largest share of 66% for AY 2012-13 and 72% for AY 2013-14 for both the concerns. In the light of peculiarity of availability of its raw materials, the expenses seem natural during the month of Nov-Feb every year. The comparison of figures show that the difference is not substantial which warrants an addition to the total income of the assessee. Similarly, the additions do not seem plausible without comparing the figures with previous years or without comparing the same with peer concerns.

8.3 It is also seen from the remand report that the AO has accepted the explanations narrated during remand proceedings. The AO has not controverted the fact that the expenses were incurred for the purpose of business. The version of the Appellant appears to be valid from the material available on record. As the Appellant company started its business from the month of November, its expenses increase owing to its nature of its business. It is seen that the assessment order does not reflect any reason of rejecting the said version put by the Appellant. A transaction which is supported by documentary evidences could not be rejected merely on the basis of doubts raised regarding the same. The indirect inferences drawn from a merger, amalgamation or taking over of a company in similar business cannot be applied ipso facto and in a sweeping manner in all cases without making any enquiry or investigation to examine the genuineness of

the particular transaction which is under suspicion and without comparison of its issues with previous years or with other companies in similar business. In view of the facts and circumstances mentioned above, in my opinion, the appellant has submitted sufficient evidences to prove the substantial increase in oil and fuel expenses and transportation expenses of the Appellant as compared to those of the proprietary concern and from the comparisons of the financials it can clearly be concluded that the difference of expenses of both the concerns are not abnormal. The AO is therefore directed to delete the addition of Rs 1,82,49,887/- made to the total income of the assessee in respect of excess expenses as compared to total turnover. This ground of appeal is therefore allowed.

8. On the second ground of appeal in respect of the company formation expenses of Rs. 2,50,000/-, the assessee has made a submissions before the CIT(A) that the expenditure was incurred for formation of the company and the revenue expenses in nature We find that the CIT(A) has dealt on this disputed issue at Page 11 Para 12 as under:

12. Decision:

I have considered the facts of the case and submissions made by the appellant. The Appellant contended against disallowance of Rs 2,50,000/- in respect of expenses of capital nature. The AO has brought on record in assessment order that that the expenditure was related to registration of share capital with ROC-at the time of

formation and other miscellaneous items. The Appellant has submitted that total preliminary expenses incurred during formation of the company is Rs 2,68,406/- which it did not claim at all and the AO has disallowed Rs 2,50,000/- out of the Rs 2,68,406/- wrongly. The Appellant argued for disallowance of Rs 53,681/- only as per the provisions of Sec. 35D(c)(ili) of the Act, if its arguments do not find favour. The preliminary expenses include fees paid to ROC towards application of DIN, filing of forms for registration of MOA and AOA, stamp duty, registration charges and professional fees. After analysing the financials of the Appellant, it emerges that the dispute relates to the expense of Rs 2,68,406/- which the Appellant claimed in its profit and loss account under the head other operating and general expenses(Note 27). The said amount was also added to the Net profit before tax in the statement of income under the head other additions (Schedule 1). Therefore, at the first instance, it is accepted that the Appellant did not claim the entire preliminary expense of Rs 2,68,406/- as the AO viewed. Second dispute relates to the disallowance of Rs 53,681/- as per the contention of the Appellant. Sec 35D(c)(iii) of the Act clearly stipulates that fees for registering the company under the provisions of Companies Act, 2013 are subjected to amortisation over a period of five successive years at 1/5th of every year from the year the company commences production or operation. In the instant case, the Appellant company was formed and started its operation in Nov 2012 and incurred substantial expenses on its formation. As per the provisions of the said section of the Act, the said expenses are allowable and the Appellant has rightly claimed Rs 53,681/- in its statement of income. The AO is therefore directed to delete the addition of Rs 2,50,000/-

to the total income of the Appellant. This ground of appeal is therefore allowed.

9. The last disputed issue being the disallowance of interest expenditure of Rs. 18,263/-, the CIT(A) has considered the submissions of the assessee and the findings of the AO and allowed the partial relief dealt at Page 15 Para 20 to 20.3 of the order as under:

20. Decision:

I have considered the facts of the case and submissions made by the appellant. The Appellant contested against disallowance of Rs 18,263/- in respect of interest on Government dues being penal in nature citing various judicial pronouncements. The said expenses attribute to the interest paid for late payment of Statutory taxes to Central and State Government. The ground is decided in the light of provisions of the Act and various case laws on the issue. Income tax is not a permissible deduction u/s 37(1) of the Act and hence, any interest payable for default committed by the taxpayer, in discharging its statutory obligation under the Act which is calculated with reference to the tax or income, cannot be allowed as a deduction Interest paid u/s 201(1A) of the Act cannot assume the character of business expenditure and is not allowable as deduction as the liability to pay interest is directly related to the failure to deduct or remit the TDS. Interest on late payment of TDS has been categorically held as not allowable in the following case laws:

1 Ferro Alloys Corporation Ltd Vs CIT [1992] 196 ITR 406(Bombay High Court)

2. *CIT Vs Chennai Properties and Investment Ltd [1999] 239 IT 435 (Madras High Court)*

20.2 However, interest paid on late payment of Service tax, Sales tax, Excise duty is considered as compensatory in nature and therefore is an admissible deduction u/s 37(1) of the Act. Following case laws are relied upon on the issue:

1. *Lachmandas Mathuradas Vs CIT[2002] 254 IT 799(SC)*

2. *CIT Vs Western India State motors [1987] 167 IT 395 (Raj)*

3. *CIT Vs Hoshiari L K Krishan (2007] 160 Taxman 96 (P&H)*

20.3 The Hon'ble Courts have categorically held that interest payments on any statutory taxes paid by an assessee by way of damages or penalty or interest is claimed as an allowable expenditure u/s 37(1) of the Act, the AO is required to examine the scheme of the provisions of the relevant statute providing for payment of such impost notwithstanding the nomenclature of the impost as given by the statute, to find whether it is compensatory or penal in nature and the authority has to allow such interest, whenever such examination reveals the concerned expense to be purely compensatory in nature. In view of the judicial opinions available on the issues, disallowance on late payment of TDS is sustained and the A.O. is directed to delete the addition made in respect of interest paid on late payment of other statutory taxes. This ground of appeal is therefore partly allowed.
21. In the result, appeal is partly allowed.

10. We find that the CIT(A) has relied on the judicial decisions, remand report, additional evidences filed in

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respect of disputed issues and passed a reasoned order. Further the Ld. DR could not controvert the observations of the CIT(A) with any cogent material or information to take a different view. Accordingly we do not find any infirmity in the order of the CIT(A) and has passed a speaking order on merits and we uphold the same and dismiss the grounds of appeal of the revenue.

11. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 22.06.2022.

Sd/-
(M BALAGANESH)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 22.06.2022

KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, Mumbai / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

ITA No. 750/Mum/2019
M/s Vego Chemicals, Mumbai

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आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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(Asst. Registrar)
ITAT, Mumbai