

आयकर अपीलीय अधिकरण, रायपुर न्यायपीठ, रायपुर
IN THE INCOME TAX APPELLATE TRIBUNAL RAIPUR BENCH, RAIPUR
श्री रविश सूद, न्यायिक सदस्य एवं श्री अरुण खोड़पिया, लेखा सदस्य के समक्ष ।
BEFORE SHRI RAVISH SOOD, JM & SHRI ARUN KHODPIA, AM
आयकर अपील सं./ITA No.261/RPR/2017

(निर्धारण वर्ष / Assessment Year :2010-2011)

ACIT-4(1), Raipur	Vs	M/s Super Iron and Steel Pvt. Ltd., Pritpal Farm House, VIP Road, Raipur(C.G.)
PAN No. : AAICS 2579 R		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

AND

Cross Objection No.13/RPR/2017
(Arising out of ITA No.261/RPR/2017)

(निर्धारण वर्ष / Assessment Year :2010-2011)

M/s Super Iron and Steel Pvt. Ltd., Pritpal Farm House, VIP Road, Raipur(C.G.)	Vs	ACIT-4(1), Raipur
PAN No. : AAICS 2579 R		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by	:	Shri Nikhilesh Begani, CA
राजस्व की ओर से /Revenue by	:	Shri G.N.Singh, Sr. DR
सुनवाई की तारीख / Date of Hearing	:	25/07/2022
घोषणा की तारीख/ Date of Pronouncement	:	31/10/2022

आदेश / O R D E R

Per Arun Khodpia, AM :

The revenue has filed appeal against the order passed by the CIT(A)-I, Raipur, dated 18.08.2017 for the assessment year 2010-2011.

The assessee has also filed cross objection to the appeal filed by the revenue.

2. The revenue in its appeal has taken the following grounds:-

1. "Whether on points of law and on facts and circumstances of the case, the Ld. CIT(A) is justified in deleting the addition of Rs. 36,00,000/- made by the AO u/s 40A(2)(b) of the Income Tax Act, 1961 on account of excessive remuneration paid to the Directors."

2. *“Whether on points of law and on facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the addition of Rs. 65,67,679/- made by the AO on account of undervaluation of closing stock.”*
3. *“Whether on points of law and on facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the addition of Rs. 66,42,939/- made by the AO on account of stores and spares consumption and handling and finishing expenses.”*
4. *“Whether on points of law and on facts & circumstances of the case, the Ld. CIT(A) was justified in deleting the addition of 5,49,649/- made by the AO u/s 68 of the Act?”*
5. *“The Order of the Ld. CIT(A) is erroneous both in law and on facts.”*
6. *“Any other ground that may be adduced at the time of hearing.”*

3. Brief facts of the case are that the assessee filed its return of income electronically on 22.09.2010 declaring total income of Rs.7,69,370/-. The case of the assessee was selected for scrutiny through CASS and on issuance of statutory notices by the AO, the assessee neither appeared before the AO nor produced any relevant documents to substantiate its claims. Therefore, the AO proceeded to complete the assessment u/s.144 of the Act after making additions amount to Rs. 1,97,73,462 under the following heads:-

<i>Out of Director's remuneration</i>	<i>:</i>	<i>36,00,000/-</i>
<i>Undervaluation of Closing stock</i>	<i>:</i>	<i>65,67,750/-</i>
<i>Unexplained cash credit</i>	<i>:</i>	<i>20,00,000/-</i>
<i>Disallowance u/s.40(a)(ia)</i>	<i>:</i>	<i>2,92,028/-</i>
<i>Unrecorded contract receipts</i>	<i>:</i>	<i>72,435/-</i>
<i>Unexplained sundry creditors</i>	<i>:</i>	<i>5,49,649/-</i>
<i>Interest on late payment of TDS</i>	<i>:</i>	<i>48,661/-</i>
<i>Disallowance out of Mfg. Exp</i>	<i>:</i>	<i>66,42,939/-</i>

4. Against the said order of AO, the assessee preferred appeal before the CIT(A) and the CIT(A) partly allowed the appeal of the assessee. Now, the revenue is in further appeal before the Tribunal against the additions deleted by the CIT(A).

5. **On Ground 1 of revenue regarding deleting the addition of Rs. 36,00,000/- made u/s 40A(2)(b) of the Income Tax Act, 1961 on account of excessive remuneration paid**, Ld Sr DR submitted that the Ld AO has passed a reasoned order on this issue and thus the same needs to be restored and the findings of Ld CIT(A) deserves to be set aside.

6. Ld AR of the assessee on the other hand has defended the order of Ld CIT(A) on this issue, wherein the Ld CIT(A) has observed as under:

3.2 On the above facts coming out from assessment order and submission of the assessee, it is found that the remuneration of directors was not increased in last several years. It is a fact that loan of the company has increased from Rs. 4.75 crores in the last year to Rs. 5.7 crores and it is also not denied that personal guarantee of directors was provided to avail the increased loan. On going through the profit and loss account it is seen that turnover of the business has reduced from 116 crores to 79 crores in this year. It is well known that steel industry has entered into recession in FY 2009 -10. AO has mentioned that there is no recession. The impact of reduced turnover was somewhat compensated by other income of Rs. 4.63 crores which is basically conversion charges received from Bhilai Steel Plant (BSP). In the last year the conversion charges were only Rs. 69 lakhs. This shows that a lot of efforts of the directors were required for obtaining the job work from BSP and completing it on time, while complying to various formalities required by the governed department and achieving the target on time. In the sister concern M/s G.P. Ispat Pvt Ltd also the net profit has reduced from 3.45 crores to 2.01 crores under similar circumstances. Remuneration in that case has increased from Rs. 68 lakhs to Rs. 1.44 crores. The AO has accepted increased remuneration in that case. Lastly, there cannot be a motive of tax evasions in paying higher remuneration to the directors because the company and the directors both are paying taxes @ 30 percent. On going through the return of income of one of the directors Shri Jagdish Saini, it is seen that he has received total remuneration of Rs. lakhs from three concerns including from the assessee company and some

income under the head other sources. He has paid tax of Rs. 2388644/-.

It has been held by the Hon'ble Allahabad High [Abbas Wazir (P) Ltd. Vs. CIT reported in (2004) 265 ITR 77] that whenever a claim is made before the Income-tax Officer for allowing an expenditure as a legitimate business expenditure, the approach of the Income-tax Officer (or other 'Income-tax authority) has to be that he has to look at the matter from the view point of a prudent businessman, and not from his own view point, and then ascertain whether the said expenditure has been incurred for the purpose of commercial expediency.. When a company pays a higher salary to the directors or the managers or other officers or employees as a matter of commercial expediency, it is not for the Income-tax Officer to say that in his opinion the said salary should not have been paid. A company may decide to pay a higher remuneration to its directors, officers or employees so as to encourage them to work hard, expand the business, or for a host of other commercial considerations and the matter has to be looked at from the view point of the company. A businessman may make an expenditure, which he is under no legal obligation to make, but if he does so as a measure of commercial expediency, it must be allowed under section 37 of the Income Tax Act as a legitimate business expenditure. Assessee company has justified the increase of salaries of its directors . on account of higher sales. There was no good ground for making such disallowance. It is not for the ITO to decide what would be the correct salary of the directors or other officers of the company, unless on the face of it the salary fixed is so exorbitant or absurd, that it can clearly be said to be fictitious and aimed at tax evasion, "

From the above facts, no conclusion can be drawn that there is any motive of tax evasion. Also there is no finding that the increase remuneration is excessive which was made after several years and for which there was justification for the increase, there is no reason for disallowance. The disallowance is therefore deleted and assessee's ground is allowed.

7. With regard to evasion of tax by excessive or unreasonable payments the Ld AR has relied on following judgments:-

i) CIT Vs. Indo Saudi Services (Travel) (P.) Ltd., [2018] 219

CTR 562 (Bombay), wherein it is held as under :-

Section 40A(2) of the Income-tax Act, 1961 - Excessive or Unreasonable Payments - Where revenue was not in a position to point out how assessee evaded payment of tax by alleged payment of higher commission to its sister concern, since sister concern was

also paying tax at higher rate, disallowance of alleged excess commission paid to sister concern was not justified

ii) CIT Vs. V.S.Dempo & Co. (P.) Ltd., [2011] 196 TAXMAN 193

(Bom), wherein it is held as under :-

Section 40A(2) of the Income-tax Act, 1961 - Business disallowance - Excessive or unreasonable payments - Assessment year 1985-86 - Whether a subsidiary company is a 'related person' within meaning of clause (b) of section 40A(2) - Held, no - Assessee-company, engaged in business of extraction and export of iron ore, purchased iron ore from its subsidiary company at rate higher than market rate in view of assurance of supply of huge quantity of ore of uniform quality - Assessing Officer made disallowance by invoking provisions of section 40A(2) - Whether since assessee as well as its subsidiary were in same tax bracket and paid same rate of tax, there was no question of diversion of funds by paying higher rate to subsidiary company and, therefore, no disallowance could be made under section 40A(2) - Held, yes - Whether even otherwise, subsidiary company was not a related person of assessee within meaning of section 40A(2)(b) and, therefore, section 40A(2) was not attracted in instant case - Held, yes

8. We have considered the rival submissions and perused the material available on record.

9. The admitted facts of the issue are that the remuneration of 2 directors of the company was increased from Rs. 12.00 Lac each to Rs. 36.00 Lac each, thereby a substantial increase in the remuneration as against fall in production of company from 46688MT to 46537MT was noticed by the Ld AO. Turnover of the assessee company was also declined by Rs. 34.00 Crore. Relief was granted by the Ld CIT(A) with the findings that in the sister concern of the assessee company namely M/s G.P. Ispat Pvt Ltd, under the similar circumstances where profit was reduced from Rs. 3.45 Crores to Rs. 2.01 Crores, however the remuneration to has been increased from Rs. 68 Lakh to Rs. 1.44 Crores

and the AO has accepted such increased remuneration. It is also mentioned by the Ld CIT(A) that by increasing remuneration of the director, no motive for tax evasion by the assessee company could be envisaged since the assessee company and the directors both are under the 30% tax bracket, this fact has been duly verified by the Ld CIT(A) from the ITRs of the said directors. It was also observed by the CIT(A) that higher salaries to directors can be paid by the company for the purpose of commercial expediency and are allowable u/s 37 of the act., Ld AO has no prerogative to offer an opinion on the same, the matter has to be looked at from the view of the company. Reliance was place on the judgment in the case of Abbas Wazir (P) Ltd. Vs CIT (supra).

10. Going through the above facts and observations and submissions of the assessee, it is perceive that the opinion formulated by the Ld AO that the hike in remuneration was excessive and unreasonable was based on certain factual findings. However, the same was not tested on the conditions mentioned U/s 40A(2)(a) that (1) fair market value of the service for which payment is made – No comparative remunerations of the employees of similar statures was brought on records or (2) Legitimate needs of the business – no comment was offered by the Ld AO on this thus the decision taken by the assessee company looking to its legitimate need under business exigency as interpreted in the case of Abbas Wazir (P) Ltd. Vs CIT (supra) will prevail, or (3) the benefit derived by or accruing – on this point the assessee has put an emphasis on the efforts, experience/qualifications, increased burden of

responsibilities/work load of the said Directors etc. but the same could not find a favour from The Ld AO in absence of any figures to support the same. Since one of these 3 conditions needs to be fulfilled to come out of the ambit of provisions of section 40A(2)(a) and (b), thus the contentions of the Ld AO are devoid and bereft of merit. It is also observed that 50% of the remuneration to two directors i.e Rs. 36 Lakh out of Rs. 72 Lakh was disallowed on adhoc basis and added back to the total income of the assessee company was a pure guess work without any arithmetic or cogent substance / material.

11. It is also submitted and verified that the tax paid by the directors was in the same range in which the company would have to pay its taxes, thus no tax evasion can be purported or achieved, thus the reliance of the assessee on judgments in the case of Indo Saudi Services (Travel) (P.) Ltd (supra) and V.S. Dempo & Co. (P.) Ltd. (supra) is acceptable.

12. In view of the above observations, we are of the considered opinion that the increase in salary of the directors could not be substantiated by the revenue to brought the same within the compass of the provisions of section 40A(2)(a) and thus addition made u/s 40A(2)(b) by the Ld AO has rightly been deleted by the Ld CIT(A). This finding of the Id. CIT(A) is worth sustaining, so we do. Thus, ground no 1 of the appeal of the revenue is dismissed.

Ground no 2. Deleting of the addition by Ld CIT(A) of Rs. 65,67,679/- made by the AO on account of undervaluation of closing stock

13. On Ground no. 2, Ld Sr DR vehemently supported the order of the Ld AR.

14. Ld AR placed its reliance on the order of Ld CIT(A) and drew our attention to Para 4.3 of the Ld CIT(A), which is extracted as under:-

4.3 As seen above the AO has made his own estimation of closing stock whereas the assessee has provided detailed working of stock in the cost sheet. AO has not pinpointed whether there is any discrepancy in the working of the assessee. AO's estimation is based on rate of sale for few dates at the end of the year. He has worked out valuation @ Rs. 24442/- per metric ton. On going through the cost sheet it is found that average monthly sale rate was lowest at Rs. 19213/- in July, 2009 and highest at Rs. 23267.69 in January 2010. In between during the other months the average sale rate was Rs. 20375/- per metric ton. Thus the approximate computation of stock by the value adopted by the AO on the basis of few stray sale instances is very high and does not represent the actual state of affairs of the assessee's business during the FY 2009-10

It has been held by Hon'ble Supreme Court of India in the case of CIT s. D navision Ltd. reported in 348 ITR Part the assessee has been following consistently the method of valuation of closing stock which is "cost or market price whichever is lower"..... In the case of Chainrup Sampatram v CIT 24 ITR 481, it has been held that "valuation of unsold stock at the close of the accounting period was a necessary part of the process of determining the trading results of that period. It cannot be regarded as source of profits. That, the true purpose of crediting the value of unsold stock is to balance the cost of the goods entered on the other side of the account at the time of the purchase, so that on cancelling out of the entries relating to the same stock from both sides of the account would leave only the transactions in which actual sales in the course of the year has taken place and thereby showing the profit or, loss actually realized on the year's trading. The entry for stock which appears in the trading account is intended to cancel the charge for the goods bought which have remained unsold which should represent the cost of the goods." For the above reasons, it was held that, the addition of Rs.16,39,000 to the income of the assessee on the ground of undervaluation of the closing stock was wrong and that the order of CIT(A) was accordingly upheld. Consequently this civil appeal filed by the department is dismissed. Before replacing his own approximate method to value the stock, the AO has not found any fault with the method of valuation adopted by the assessee. It, has been held by Hon 'ble Madras High Court in the case of CIT Vs. Chari & Ram reported in 17 ITR the accepted basis of valuation of stock is cost or market value, whichever is lower, at the date to

which the accounts for a period are made up The assessee is entitled to compute the income, profits and gains 'in accordance with the method of accounting regularly employed by him, and ordinarily this method must be accepted by the Department. It is only if in the opinion of the ITO the method employed is such that the income, profits and' gains cannot properly be deduced therefrom that he Call. disregard it altogether. But if it is found as in this case that the method adopted by the assessee in the period of assessment is in accordance with the method of accounting regularly followed by the assessee in the past then that method must be accepted in the absence of anything to suggest that it is improper or patently false. It makes such a method of accounting a compulsory basis of computation, unless, in the opinion of the ITO, the income, profits and gains cannot properly be deduced there from. It has not been established in this case that there was anything in law or principle which empowered the ITO to reject the method of accounting adopted by the assessee.-CIT vs. Chengalvaraya Chetti (1925) ILR 48 Mad 836 and CIT vs: Sarangpur Cotton Manufacturing Co. Ltd. of Ahmedabad (1938) 6 ITR 36 (PC): TC1R.109 applied.

Assessee has made detailed working. If assessee has been regularly valuing its stock at lower of cost or market price and unless the AO finds discrepancy in the valuation of the assessee he cannot reject the same and replace it with his own approximate estimation based on the sale price of few transactions. Therefore, the assessee's ground 18 allowed and the addition made by the AO is deleted.

15. We have considered the rival submissions. At the outset it is observed that the addition made by the Ld AO was based on estimation of the cost of closing stock of finished goods, worked out on average sale price of the finished goods, calculated on the basis of sale price on certain dates at the end of March 2010, reduced by Excise duty, Cess on Excise Duty, VAT and GP included in sale price. Value of closing stock based in this exercise by the AO was arrived at Rs. 3,94,04,200/- (Rs. 24442X1614.921 MT) as against the Rs. 3,29,04,200/- (Rs. 20375 X 1614.921 MT). Accordingly an addition of Rs. 65,65,679/- was made on account of undervaluation of stock.

16. While deciding this issue Ld CIT(A) has observed that the valuation was done based on Average Sales Price at end of the financial year, but the variation during the year were not taken into account, the lowest cost of sale was in July 2019 for Rs.19213/- per MT and Highest cost of sale was Rs. 23267.69 per MT in January 2010, thus, the approximation in computation of value of stock based on few stray sale instances does not represent the actual state of affairs. It is mentioned that there should be consistency in the valuation of closing stock, if the method adopted by the assessee in the period of assessment is in accordance with the method of accounting regularly followed by the assessee in the past then that method must be accepted in the absence of anything to suggest that it is improper or patently false. With respect to valuation of opening and closing stock, the principle of law laid down by the Hon'ble Supreme Court in the case of CIT Vs. Dynavision Ltd reported in 348 ITR 380 is relevant and a binding to be followed, wherein it has been held that:-

Section 145 of the Income-tax Act, 1961, read with section 3 of Central Excise Act, 1944 - Method of accounting - Valuation of stock - Assessment year 1987-88 - Assessee was carrying on business of manufacture and sale of television sets - Assessing Officer found that assessee had not included in closing stock, element of excise duty - Accordingly, he made addition to income of assessee on ground of under valuation of closing stock - However, assessee had been following consistently method of valuation of closing stock - Moreover, Assessing Officer conceded that he revalued closing stock without making any adjustment to opening stock - Lastly, though under section 3 of Central Excise Act, 1944, levy of excise duty is on manufacture of finished product, same is quantified and collected on selling price - Whether, therefore, addition to closing stock was unjustified - Held, yes [Para 2] [In favour of assessee]

17. In backdrop of the aforesaid discussion, we are of considered view that the Ld AO was in error while deciding the issue regarding valuation of the stock as much as the method of valuation was erroneous as explained herein above, valuation of the opening stock was not taken into consideration, thus two different methods were applied on opening and closing stock in the same financial year, consistency in method of valuation of stock adopted by the assessee has been disturbed, without any patent mistake being pointed out is not permissible. The finding of the Ld CIT(A) on the issue of undervaluation of the stock does not carry any infirmity, therefore, we do not see any reason to interference. Resultantly, ground no 2 of the revenue is dismissed.

Ground no 3 : Deletion of addition of Rs. 66,42,939/- made by the AO on account of stores and spares consumption and handling and finishing expenses.

18. Ld Sr DR relied on the order of the Ld AO. Submitted that the deletion of addition by Ld CIT(A) was unjustified without proper appreciation of the facts and thus liable to be set aside.

19. Ld AR in rebuttal has relied on the order of the Ld CIT(A). It was the submission of the Ld AR that the addition made by the AO was a pure guess work, hypothetical, farfetched, erroneous, hold no water, the findings of AO are contrary and illogical to the actual facts of the issue. It was observed by the Ld CIT(A) that the AO has compared expenses incurred with the turnover, stores and spares expenses for the relevant AY 2010-11 was 2.25% as against 1.65% in the immediately preceding year and Handling and finishing expenses for the relevant AY 2010-11

was 0.65% as against 0.42% in the immediately preceding year, thus the addition was made without verifying the same with the quantities actually consumed viz a viz actual quantities produced. The analysis should have been done comparing the expenses with production of the steel. A chart showing actual consumption of stores and spares extracted from the order of Ld CIT(A) is as under:-

Particulars/Description	A.Y.2010-11	A.Y.2009-10	A.Y.2008-09
Expenditure Claimed under the head "Stores & Spares Consumed" (A)	1,78,68,063	1,96,27,960	2,00,98,953
Production (In MT) (Including Conversion) (B)	46,537.332	46,688.018	45,179.892
Stores & Spares Consumed per M.T. of Production (A / B)	Rs.383.95 per M.T.	Rs.420.41 per M.T.	Rs.444.87 per M.T.

20. On perusal of the above figures, ostensibly, it is explained that on per MT production of the finished goods, consumption of the Stores and spares was actually reduced for AY 2010-11, which was Rs. 383.95/- per MT as against Rs. 420.41/- in AY 2009-10 and 444.87/- in the AY 2008-09.

21. Ld CIT(A) while decided the issue has observed as under:-

9.3 The AO has compared the expenses with TO. If seen in the units of exp/MT production, the expenses has gone down. Because the price of finished products was low during the year due to slump in the steel sector, therefore for the same quantity of production, the TO will be worked out less and then percentage of Stores & spaces consumed will be computed more. For each MT of production of steel consumed during the year was Rs.383.95 vis a vis.Rs.420.41 in AY 2009-10 and 444.87 in the AY 2008-09. No defect has been found by the AO in the consumption figure. No further inquiry has been made to prove that the amount of consumption claimed is

Inflated and actual consumption was less. Just by comparing the figures, the addition cannot be made. If AO considered the figure 'of appellant unbelievable he cannot proceed to make an arbitrary addition on estimate but he must relate his estimate to some evidence. In the case of Lalchand Bhagat Ambica Ram Vs. CIT (1959) 37 ITR 288 (SC) hon'ble Supreme Court held that if the Assessing Officer while arriving at a conclusion indulged in suspicions, conjectures and surmises and acted without any evidence or upon a view of the facts which could not reasonably be entertained or the facts found were such that no person acting judicially and properly instructed as to the relevant law could have found, or the finding was, in other words, perverse, the same is not allowable. In the case of International Forest Co. Vs. CIT (1975) 101 ITR 721 (J&K HC) hon'ble High Court has held that even, if the ITO considered the material placed by the assessee to be unreliable keeping in view the comparative statement of accounts of the previous years, he could not proceed to make an arbitrary addition and base his conclusion purely on guess work. He ought to have related his estimate to some evidence or material on record as it is now well- settled that if the profits shown by the assessee in his return are not accepted, it is for the taxing authorities to prove that the assessee has made more profits.

Respectfully following the higher wisdom as above, I hereby delete the addition.

22. We have considered the rival contentions, perused the material available on record and considered the case laws relied upon.

23. On perusal of the submissions of the assessee before the Ld CIT(A) and findings of the CIT(A), we concur with conclusion of LD CIT(A) that consumption of Store and Spare is directly attributable to that of production in terms of quantity and comparison based on quantum of the TO would be deficient in an business environment where rates of the product sold was volatile much less low during the year. An analysis of the expenditure of Store and Spare based on its quantitative usage viz-a-viz the production of finished product in the relevant AY and preceding two AY's was also submitted as referred to (supra). Thus the finding of the Ld CIT(A) based on a logical analysis of incurrence of the sores and

spares consumed expenses, in our considered view holds substance and therefore sustained.

24. With regard to expenses incurred on "Handling & Finishing Expense" of Rs. 52,029,927/- out of which an amount Rs. 18,69,699/- was disallowed by the Ld AO. Apparently, such expenses are also incurred based on quantity produced, but quantitative analysis was missing in the order of Ld CIT(A). However, the Handling & Finishing Expense were allowed to the assessee based on conclusion drawn for Stores and Spares Consumed, such inference is not permissible so far as the different expense incurred have a different factum and shall have a different ratio to be compared than the one relied upon. To achieve a logical conclusion of the impugned expenditure it would be prudent to have the expense pertaining to Handling & Finishing also tested on such parameters. Therefore, we are of the opinion that this issue for the limited purpose of analysis of such expenses on touchstone of the quantitative analysis, as was done in the case of "Store and Spare", is restored back to the files of AO to decide the issue afresh. Reasonable opportunity of being heard and liberty to submit necessary information shall be granted to the assessee. Consequently, ground no 4 of the appeal of revenue is partly allowed.

Ground no 4 : Deletion of addition of 5,49,649/- made by the AO u/s 68 of the Act.

25. At the outset, Ld Sr DR relied on the order of the Ld AO. Submitted that the deletion of addition by Ld CIT(A) was erroneous and thus liable to be quashed.

26. Ld AR drew our attention to the findings of Ld AO in Assessment Order and Ld CIT(A) in the appellate order. Placed his reliance on the order of Ld CIT(A). It was submitted that the addition made was made on the basis of credit balances shown as payable at the end of each month for Jan, Feb and Mar 2010 comparing the same with cash balance available in those three months. It was the submission that the assessee company procures various items as transported by various suppliers. The transportation charges were paid part in cash and part credits allowed were paid later, therefore such credit balances are recorded, which are paid in future date. Conclusion of the AO that all such payments are made in cash immediately and the credit balances were adjustment in books of accounts, represents shortage of cash balance, thus disallowable u/s 68 of the IT Act 1961, was a conclusion drawn based on presumption and surmises, uncorroborated, hypothetical, farfetched and is liable to be rejected. It is also submitted by the Ld AR that all such credit balances were paid in the subsequent year for which copies of ledger account for AY 11-12 were produced at paper book page no 95-99.

27. Ld CIT(A) has deleted the addition u/s 68 by observing as under:-

7.3 Just because the credit balance in transport payable account is more than assessee's cash balance in January, February and March 2010, the AO has presumed that payment was not made

because assessee did not have sufficient cash or assessee must have paid these expenses out of unknown sources. Such presumption made by the AO is not supported by any evidences. There may be several reason for not making payment immediately and one has been advanced by the appellant that the appellant processes various items through same regular transport agency and part payment in cash is paid immediately and balance payment is made later on. It is not AOs case that the outstanding balance has not been squared off. On the contrary the appellant has paid to these parties and therefore the same cannot be disallowed. The addition is hereby deleted.

28. We have considered the rival submissions.

29. On perusal of the Assessment Order and appellate order, we are live with the fact that the addition made u/s 68 by the Ld AO was on the basis of his presumption that the credit entries shown are representing shortage of cash. Apparently, no enquiry was conducted to prove this contention, thus the same was not supported with any material evidence. On the contrary the assessee had submitted relevant documents. In view of aforesaid observations, we do not find any infirmity in the findings of the Ld CIT(A), so we not see any reason to interfere with the same. Consequently, this ground of the revenue is dismissed.

30. In the result appeal no ITA 261/RPR/2017 of the revenue is partly allowed.

31. Coming to the Cross Objection No. 13/ RPR/2017 of the assessee towards ITA 261/RPR/2017, wherein the assessee has taken the following grounds:-

1. On the facts and in the circumstances of the case as well as in law, the Learned Commissioner of Income Tax (Appeals) - I, Raipur ["the Ld.CIT(A)"] has grossly erred in not annulling the assessment order passed by the Learned Assessing Officer ["the Ld.AO"] under section 144 r.w.s. 143(3) of the Income Tax Act, 1961 ["the Act"], The Ld.CIT(A) has failed to appreciate that the assessment order

had been passed without observing the principles of natural justice as no effective opportunity was afforded to the appellant before passing the ex-parte assessment order and the assessment has been framed without rejecting the books of accounts as per the provisions of section 145(3) of the Act.

The Ld.CIT(A) ought to have held that the order passed by the Ld.AO under section 144 of the Act is bad in law, highly illegal, highly unjustified and untenable and hence, it is requested that the assessment order may please be quashed and set aside.

2. On the facts and in the circumstances of the case as well as in law, the Ld.CIT(A) has grossly erred in confirming the addition of Rs.20,00,000/-- made by the Ld.AO under section 68 of the Act for the reason that the confirmations from unsecured loan creditors has not been filed which is highly unjustified, unwarranted and not in accordance with the provisions of law and it is requested that the addition of Rs.20,00,000/- may please be deleted.

3. On the facts and in the circumstances of the case as well as in law, the Ld.CIT(A) has grossly erred in sustaining the disallowance of Rs.2,92,028j- made by the Ld.AO under the provisions of section 40(a)(ia) of the Act for the reason that tax has not been deducted at source on payment of interest to NBFCs which is highly unjustified, unwarranted and not in accordance with the provisions of law and it is requested that the disallowance of Rs.2,92,028/- may please be deleted.

4. That the cross objector craves leave to add, amend, alter or delete all or any of the grounds of cross objection at the time of hearing of the appeal.

32. At the outset, Id. AR did not press ground No.1 & 3 raised in the cross objection, therefore, grounds No.1 & 3 are dismissed as not pressed. Ground No.4 is general in nature, therefore, the same does not require any adjudication.

33. Ground no 2 of the CO was pressed by the Ld AR and It is submitted that the loan was repaid during the year itself therefore the same should not be a subject matter of provision of section 68 of the IT Act. It is submitted that the transactions were made through proper banking channel, supporting evidences for such banking transactions

were also submitted to AO, thus, the onus cast upon the assessee u/s 68 was duly discharged. The assessee was unable to submit the confirmations from the parties due to compelling circumstances; it was beyond the assessee's control, despite reasonable efforts made, to adduce the confirmation & requisite documents. It was the submission of the assessee that as per settled position "*Law does not require a man to do what he cannot possibly perform*". Reliance was placed on the judgment of Hon'ble Madras High Court in the case of S. Hastimal Vs. CIT reported in 49 ITR 273, where in it was held that:-

It must be noted that the proceedings under s. 34 were started in the year 1957 calling upon the assessee to explain a capital credit in his favour in the books of account for Hastimal Jayantilal and Co. made in the year 1947. The difficulty on the part of any assessee to explain a transaction which is a decade old has to be borne in mind by the department and should under no circumstances be underestimated or taken advantage of by them.....As stated already, with regard to the sum of Rs. 15,000, the assessee produced indisputable documentary evidence to show that the amount came out of his borrowing at Jodhpur whether it was from V or from G. The assessee had been able to point out a source for this sum of Rs. 15,000 and this cannot be refuted by a mere , steady disability on the part of the department or the Tribunal. After the lapse of ten years the assessee should not be placed upon the rack and called upon to explain not merely the origin and source of his capital contribution but the origin of origin and the source of source as well. The Tribunal and the department had no material to hold that the sum of Rs. 15,000 credited to the capital account of the assessee with the Coonoor firm represented income from undisclosed sources.

34. Ld AR further submitted that in view of the above facts, inability of the assessee in furnishing of the information due to compelling circumstances beyond control could not form a basis for addition u/s 68, thus the addition u/s 68 of the IT Act by the Ld AO needs to be deleted and the order of Ld CIT(A) is liable to be set aside.

35. Regarding, borrowed sum cannot be added as unexplained Cash Credit when such borrowings were repaid subsequently, reliance was placed on following Judgments :-

- i) *CIT Vs. Ayachi Chandrashekhar Narsangji (2014) 42 taxmann.com 251 (Guj.HC);*
- ii) *PCIT Vs. M/s Skylark Build (2018) in ITA No.616 of 2016 (Bom.HC) (Date of Judgment : 24.10.2018); and*
- iii) *M/s Dhariwal Brothers Vs. ITO in ITA No.186/RPR/2018 (ITAT Raipur) (Date of Order : 05.10.2021)*

36. Ld Sr DR on the other hand has vehemently supported the orders of the revenue authorities.

37. We have considered the rival contentions, perused the material available and considered the judgments quoted in support by the Ld AR.

38. On perusal of the finding of Ld CIT(A) on this issue, which reads as under :-

5.3 Assessee has furnished copy of confirmation in respect of the two creditors. The forms are not signed by the second party, therefore these are not the confirmations but just account statements. The documents do not contain address and PAN of the party. Appellant has relied on the judgment of Aravali Trading company Vs ITO 187 Taxman 338(Raj)(2010) and contented that AO has not found any incriminating, material. However, first the appellant has to discharge its onus by producing PAN, address etc of the second party to the transaction. Only after that the onus will shift to the AO. Appellant having failed to do so the AO's action cannot be faulted. Therefore, the addition made by the AO is sustained.

39. In view of the findings of the Ld CIT(A), wherein it is observed by the Ld CIT(A) that the documents to prove the Identity, Creditworthiness and Genuineness of the transaction could not be submitted by the assessee. In all the cases quoted by the Ld AR in support of the contention that 'if the borrowed amount is repaid subsequently it cannot be defined as

unexplained cash credit within the meaning of section 68", it was commonly noted that the documents to satisfy the genuineness of transaction and credit worthiness of the lender were made available and to that extent the CIT(A) was satisfied. Thus the repayment of the borrowed funds cannot be a sole criteria to treat a transaction of loan as explained. In present case no document pertaining to Loan creditor could be provided by the assessee, thus the onus cast upon the assessee remained un discharged and thus the findings of the Ld CIT(A) on this ground are hereby upheld. Accordingly, ground no 2 of the CO of the assessee is dismissed.

40. In the result, appeal of the revenue is partly allowed and Cross objection of the assessee is dismissed.

Order pronounced in pursuance with Rule 34(4) of ITAT Rules, 1963 on 31/10/ 2022.

Sd/-
(RAVISH SOOD)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(ARUN KHODPIA)

लेखा सदस्य / ACCOUNTANT MEMBER

रायपुर/Raipur; दिनांक Dated 31/10/2022

Prakash Kumar Mishra, Sr.P.S.

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

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

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Assistant Registrar)

आयकर अपीलीय अधिकरण, रायपुर/ITAT, Raipur