

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA-PATNA 'e-COURT', KOLKATA
[Virtual Court Hearing]**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Rajesh Kumar, Accountant Member**

**I.T.A. No. 106/PAT/2020
Assessment Year: 2008-2009
&
I.T.A. No. 114/PAT/2020
Assessment Year: 2009-2010**

***Deputy Commissioner of Income Tax,.....Appellant
Circle-1, Patna,
Loknayak Bhawan, 3rd Floor,
Dak Bunglow Road,
Patna-800001, Bihar***

-Vs.-

***Dina Mahabir Re-Rollers Pvt. Limited,.....Respondent
Agam Kuan,
Patna-800007, Bihar
[PAN:AAACD9668E]***

Appearances by:

*Smt. Rinku Singh, CIT (D.R.), appeared on behalf of the
Revenue*

*Shri A.K. Rastogi, Sr. Advocate, appeared on behalf of the
assessee*

Date of concluding the hearing : January 05, 2023

Date of pronouncing the order : March 15, 2023

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The present two appeals are directed at the instance of Revenue against the separate orders of Id. Commissioner of

Income Tax (Appeals), Patna-1 dated 13.08.2020 passed for A.Ys. 2008-09 and 2009-10.

2. The Revenue has taken three grounds of appeal in both the assessment years. However, its grievances revolve around a single issue, namely ld. CIT(Appeals) has erred in deleting the Gross Profit addition of Rs.3,79,19,183/- and Rs.39,42,318/- respectively in A.Ys. 2008-09 and 2009-10.

3. The facts on all vital points are identical therefore, for the facility of reference we are taking up facts mainly from A.Y. 2008-09. Brief facts of the case are that the assessee-company at the relevant time was engaged in manufacturing of Re-rolled M.S. Bars. It has filed its return of income on 20.11.2008 and 29.09.2009 declaring total income of Rs.48,80,770/- and Rs.99,63,890/- in A.Y. 2008-09 and 2009-10 respectively. The returns were processed under section 143(1) of the Income Tax Act. Thereafter the ld. Assessing Officer had received an information from Additional Director General of Central Excise & Intelligence, demonstrating the fact the assessee has suppressed its sales and thereby avoided the payment of excise duty. Thus in A.Y. 2008-09, assessment was reopened by issuance of a notice under section 148 on 23.08.2010. In A.Y. 2009-10, case of the assessee was selected for scrutiny assessment and a notice under section 143(2) was issued on 22.09.2010. The ld. Assessing Officer has passed the assessments under section 143(3) read

with section 147 on 30.12.2011 in A.Y. 2008-09 and under section 143(3) on 30.12.2011 in A.Y. 2009-10. The ld. Assessing Officer has worked out undisclosed sales in both the years and thereafter applied gross profit rate and worked out the additions. The discussions made by the ld. Assessing Officer in A.Y. 2008-09 read as under:-

The assessee was required to show cause as to why additions of G.P. on unaccounted sale should not be made ? (It is pertinent to mention here that figure of G.P. has been changed from 3,72,99,264/- to 3,79.1.9,183/- on account of clerical error.)

6. *The A.R. then made following submission on 29.12.2011:*

An addition of Rs.3,72,99,264/- has been proposed on account of GP on alleged unaccounted sale of Rs. 46.10 Cr. on the basis of photocopy of material purportedly seized by the Excise Authorities in course of search conducted on 25/03/2009. As requested in petition dated 28.12.2011, the petitioner may be allowed inspection of the original of the seized material. However, without prejudice to our claim for inspection of the original and subject to inspection, our reply to the show cause raised on 27.12.2011 is as under:-

(1) It is already on record that the Excise Authorities even after a lapse of more than 32 months have not issued any show cause notice alleging unaccounted production/ sale.

(2) Photocopies are not admissible as evidence under Indian Evidence Act unless the originals are produced for verification / inspection. This legal proposition has recently been propounded by the Apex Court in the case reported in (2011) 4 SCC 240- H. Siddiqui Vs A. Ramalingam

(3) Page nos. 9 to 51 of the bundles (photocopies given on 23.12.2011) - Year (as presumed by the department - F.Y.20007-08) has not been suffixed after the dates in any pages and, therefore, the whole allegation of unaccounted sale and GP thereon for A.Y.2008-09 is wholly misconceived and contrary to the facts on record. Kindly provide us the material / evidence on the

basis of which the presumption has been raised of it belonging to F.Y.2007-08 corresponding to A.Y.2008-09. As stated above, year (2007/2008) has not suffixed after the dates, it would be wholly illegal to read something which does not exist and / or found written on the seized material i.e. year and to charge the petitioner with the liability of tax without there being any evidence or material.

(4) There has been an allegation of sale of 29652.800 MT as against the installed capacity of 7000 MT per annum and in support photocopy of certificate, issued by District Industries Centre dated 12/04/2010 has already been submitted along with petition dated 28/12/2011. In the circumstances, the presumption of sale of 29652.800 MT which is four times of the installed capacity is wholly misconceived. The rule of law is that presumption is always in favour of legality and not illegality. It would be wholly absurd to presume illegality of higher production in absence of any concrete and definite evidence/ material.

(5) The whole basis for alleging unaccounted sale is being made on the basis of entries in photocopy of seized materials (page Nos. 9 to 51), the nature of which has been explained extensively in petitioner's reply dated 16/12/2011 and 27/12/2011. No other corroborative evidence/material has been relied upon and/or referred to and/or confronted with indicating such unaccounted sale. The Supreme Court in the case of CBI Vs V.C.Shukla & Others reported in (1998) 3 SCC 410 has examined the evidentiary value of entries in loose sheet, note pad, books of accounts, etc. and had come to the conclusion and 'a conspectus of the above decisions makes it evident that even correct and authentic entries in the books of accounts cannot without independent evidence of their trustworthiness, fix a liability upon a person.' If the facts of the petitioner's case is tested on the anvil of the decision, of the Apex Court, no liability can be fasten on the basis of photocopy of the seized material to support the case of unaccounted sale. The petitioner has already produced books of accounted maintained in the regular course of business along with bills, vouchers and other supporting material and the same has been found to be amenable to proper verification and no defect whatsoever has been detected and/or pointed out. The books o accounts includes cash book, ledger, journal,

stock registers of various items including stock registers maintained in compliance to Excise Laws, Bank Statements, bills, vouchers, etc. Unaccounted sale pre-supposes unaccounted purchases of raw material/inputs besides other unaccounted expenditure. No such evidence/material has been found in course, of search by Excise Authorities and/or . brought on record till date. Thus, there is no circumstantial evidence/material in possession of the department and/or the Excise Authorities to allege production/sale beyond those recorded in books. As stated in earlier replies, on perusal of punchnama of Excise Authorities it is evident that there is no charge of evasion of Central Excise Duty.

(6) It is respectfully submitted that the seized material do not indicate any evasion of Excise Duty by the petitioner rather the seized material supports the case of the petitioner that no discrepancy/evasion whatsoever was found or detected in course of search or thereafter. The Excise Authorities do not possess any material even to allege any discrepancy an/or evasion of Excise Duty by the petitioner and, therefore, the Excise Authrories even after a lapse of 32 months from the date of search have not been able to point out any discrepancy/evasion on the basis of the seized material or otherwise and have not issued any show cause notice alleging any evasion of Duty.

In the circumstances, it is requested that your honour would be kind enough to accsept the returned income as the authority who has searched the premises on 25/03/2009 has not drawn any adverse inference so far on the basis of the material seized lying in-their possession for the last more than 32 months.

7. The above reply of the A.R. is considered. It is already on record that although copy of seized material was given to the assessee on 7.12.2011 and 23.12.2011, the same copy has been obtained by the assessee much earlier from the excise authorities after Order of Hon'ble Patna High Court dated 25/08/2009. Further, it has already been mentioned that when quantity of page no. 81 of this seized diary was compared with page no. 1 of earlier diary displaying date as 01.01.2009, year of dates/month mentioned in only DD/MM format deciphered. This diary is having running dates from 02.04.2007 to 1.0.03.2009. This diary contains data of production and sale of

M/s Dina Mahabir Re-rollers Pvt. Ltd. as stated by Sri Shobhagmal Jain, accountant of the concern.

Claim of the assessee regarding lower installed capacity of the manufacturing concern w.r.to unaccounted sale is also not acceptable as assessee is also receiving materials from its sister concern M/s Dina Metals Ltd. as evident from seized papers and statement of Sanjay Kumar Sinha, Supervisor. The seized documents include four loose sheets relating to 21.03.09, 23.03.09 & 24.03.09 , which contains details of M.S. Ingots received in the factory of M/S Dina Mahabir Rerollers Pvt. Ltd., from M/s Dina Metals Ltd as well as details of dispatch/sale of TMT bars from the factory of the said M/S Dina Mahabir Rerollers Pvt. Ltd., on the aforesaid dates. It has been admitted by Shri Sanjay Kumar Sinha, Supervisor of M/s Dina Mahabir Rerollers Pvt. Ltd., that the said loose sheets are loading charts relating to M/S Dina Mahabir Rerollers Pvt. Ltd., and the same contains details of receipt of Ingot as well as dispatch of rods pertaining to M/S Dina Mahabir Re-rollers Pvt. Ltd.

It is not acceptable that Excise authorities had not found any discrepancy in the seized material. As per report of the Addl. Director, DGCEI, Jamshedpur, preliminary investigation has indicated evasion of Central Excise duty to the extent of more than Rupees Five Crore. Further, The Member (CX) has passed an order dated 06/06/2011 whereby the benefit of CENVAT credit against monthly payment of Excise Duty was withdrawn from 15/06/2011 to 15/10/2011 from the assessee.

Therefore contention of the assessee is not acceptable.

- 8. It is clear from above discussion that the assessee is indulged in unaccounted sale of MS Bars on large scale. Hence, books of account of the assessee is rejected as per the provisions of section 145 of the I.T. Act 1961. An addition of Rs.3,79,19,183 is made on account of profit on unaccounted sale in the F.Y. 2007-08. The same is to be added in the total income of the assessee concern.*

4. On same analogy, he made the addition of Rs.39,42,318/- in A.Y. 2009-10. The ld. Assessing Officer has applied Gross Profit on unaccounted sales at 3.36%.

5. Dissatisfied with the assessment orders, assessee has filed appeals in both the years. In A.Y. 2008-09, it has challenged reopening of assessment along with challenging the additions on merit. The ld. CIT(Appeals) upheld the reopening and rejected this ground of appeal, however, concurred with the submissions of the assessee on merit and deleted the additions in both the years.

6. As far as reopening part is concerned, no Cross Objection has been filed by the assessee before the Tribunal, hence that aspect attains finality. On merit, the ld. CIT(Appeals) recorded a well reasoned finding and it is worth to note:-

"I have gone through the assessment order, written submission and remand report as well as rejoinder of the remand report submitted by the A.R. of the appellant that a search & seizure operation was conducted by DGCEI, Jamshedpur on 25.03.2009. Based on information shared by Central Excise Department notice u/s 148 was issued on 23.08.2010 on the ground that the assessee has resorted to unaccounted production and sale of TMT bars on large scale from 02.04.2007. The A.O. has rejected the books of account u/s 145 of the Income Tax Act and has worked out the sales at Rs.3,00,15,124/- and GP thereon at Rs. 3,79,19,183/- on the basis of the statement on oath of the employees on the material seized by Central Excise authorities.

It has been contended by the assessee that

(1) the seized material Spiral Note Book No. 23 starting from page 9 does not mention the year and it only mentions the date i.e. 02.04 and therefore the presumption of the year 2007 in respect of this spiral note book on the basis of Spiral Note Book No. 18 reflecting the date and year as of 01.01.2009 is misconceived,

(2) the resemblance of data as of 01/01 at page no. 81 of note book 23 with page no. 1 of (2) note book 18 can lead to the inference that page 81 of note book no. 23 is on and from 01.01.2009 and not that it is on and from 02.04 2007 as inferred by the A.O.

(3) *The AO has worked out the sales at 30015.124 MT as against the installed capacity of the plant 7000 MT per annum which was enhanced to 48000 MT per annum on and from 06.09.2008 with corresponding increase of electricity load from 670 KVA to 1500 KVA and from 11000 Volt line/to 33000 Volt line from the said date.*

(4) *The electricity required for conversion of ingot into bar / rod is 200 unit per MT as per reports of Public Accounts Committee bearing no. PA 24 of 2009-10 issued by Union Government and for production of 30015.124 MT, the assesee was required to consume electricity of 6003024.8 units whereas it has consumed actual electricity of 1669332 Units with electricity charges of Rs.87,89,071/-*

(5) *the average unit consumed by the assessee per MT comes to 247.51 whereas if the production of 30015.124 MT is assumed, on the actual units consumed i.e. 1669332, the average unit consumed will be 55.61 per MT which is not feasible as per industry standard on the basis of which the report no. PA 24 of 2009-10 has been issued by Union Government prescribing minimum consumption of 200 unit per MT for conversion of ingots into rod and bar.*

(6) *During search on 2.5.03.2009, no discrepancy in stock, cash in hand was found.*

(7) *The books of accounts such as cash book, ledger, stock register, purchase and sale registers were found written upto 24.03.2009.*

(8) *The statement of the two employees have been recorded by the A.O. on 24.05.2017 wherein they have categorically stated that the statement given by them as to the nature of entries in the seized material were as per dictates of the authorities who have threatened for putting them behind bar in case they failed to follow their dictates.*

(9) *The employees in their statement before the A.O. have category explained the nature and purpose of entries in the very seized materials to be the record of loading & unloading, internal movement of goods, etc.*

(10) *The Central Excise Authorities have not proved the charge of unaccounted production and clandestine removal by any independent document such as proof of slae of goods, mode of*

transportation, payment to transporter, confirmation from the buyers of the goods, receipt of consideration and its utilization, except on relying on the statement of the employees on the seized materials which as per settled proposition of law is only the starting point of investigation.

(11) The excise authorities have, also conducted spot audit of F.Y. 2007-08 & 2.008-09 on 08.06.2.009 after their search action conducted on 25.03.2009. No discrepancy was pointed out.

The A.O. has rejected the contention of the assessee mainly by placing reliance on the statement of the two employees namely Sobhagmal Jain and Sanjay Kumar Sinha and by placing reliance on the preliminary investigation report of Additional Director, DGCEI, Jamshedpur indicating unaccounted production and its clandestine clearance.

The A.O. has submitted a remand report dated 16.07.2015 and thereafter on 08.07.2020. The A.O. in its remand report has reiterated the stand taken in the assessment order. The A.O. has also forwarded the statement of the two employees recorded on 24.05.2017.

During the remand proceedings, the A.O. has examined the two employees and has recorded their statement on 24.05.2017. The A.O. has not doubted the averments made by the two employees explaining the circumstances in which their tements were obtained. Further, no doubt has been expressed by the A.O. in the nand report as to the explanation offered by the two employees in respect of 'nture and purpose of entries in the seized material.

The admitted fact on record is that the installed capacity of the assessee during the period was 7000 MT per annum which was enhanced to 48000 MT w.e.f. 06.09.2008. It is highly improbable to assume production of 30015.124 MT as against installed capacity of 7000 MT per annum. Further, the consumption of units of electricity also does not support the manufacturing of 30015.124 MT. There is no allegation of excess consumption of electricity than the units actually consumed. Further, the two generators of 50 KVA and 80 KVA are not capable of taking the load of the furnace so as to manufacture the bar/ rod without the aid of electricity. It is also an admitted fact on record that no incriminating material supporting the production I sale beyond those:: recorded in books of accounts have been found or detected in course of search on 25.03.2009. The books of accounts have been found written upto 24.03.2009 and no discrepancy in stock or cash has been found.

Thus, the determination of production / sale of 30015.124 MT and GP thereon @8.09% amounting to Rs.3,79,19,183/- is merely on the basis of

the report of Additional Director, DGCEI, Jamshedpur dated 31.08.2009, wherein he has relied on the confessional statement of the two employees on the seized material, without there being any supporting evidence of production of higher quantity than the installed capacity and higher consumption of electricity for producing such higher quantity.

It is a case where the A.O. has made addition of GP by relying on oral statement recorded by Central Excise Authorities on the seized materials. Undoubtedly, confessional statement is extremely important piece of evidence but it cannot be said to be conclusive and the same is required to be corroborated from other material/ evidence and in absence of any circumstantial evidence, the same cannot be made sole basis for drawing adverse inference. In the instant case, there is no other corroborative or circumstantial evidence to support the determination of sales and addition of GP by the A.O. The undisputed fact on record of production capacity, consumption of electricity which is commensurate to disclose/ production, absence of any discrepancy in stock and cash in hand as on the day of search i.e. 25.03.2009 and the fact that books of accounts were found written upto the date i.e. upto 24.03.2009 belied the oral evidence of the employee recorded on the day of search. The employees in their statement recorded by the A.O. 24.05.2.017 have explained the circumstances in which the statement was recorded and have explained the nature and purpose of entries therein. The bare perusal of seized material wherein only quantity of various items have been noted supports the explanation given by the two employees as to nature and purpose of the entries therein in their statement dated 2.4.05.2017 and further disproves the inference drawn by the A.O. of unaccounted production and its sale. Further, the A.O. has rejected the books of accounts merely by placing reliance on the statements of the employees recorded by Central Excise authorities and without pointing out any concrete and/or specific instance of unaccounted production/ sale and/or inflation of expenditure.

In view of the above, the A.O. is not justified in rejecting the books of the appellant and in estimating the sales and adding the GP thereon amounting to Rs.3,79,19,183/-. Accordingly/the addition of Rs.3,79,19,183/- is hereby deleted”.

7. The reasoning in A.Y. 2009-10 are identical. The ld. D.R. relied upon the order of the ld. Assessing Officer, whereas on the other hand, ld. Ld. Counsel for the assessee relied upon the orders of ld. CIT(Appeals) in both the years.

8. We have duly considered the rival contentions and gone through the record carefully. A perusal of the finding recorded by the Id. Assessing Officer would reveal that there is no coherence between the materials referred by him, vis-à-vis the inference drawn by him. The Id. Assessing Officer has been relying upon the alleged diary whose pages have been seized by Excise Department and copies were transmitted to him. On the strength of those pages, he harboured a belief that the assessee has made undisclosed sales on which profit is required to be added. We have taken note of his finding available in paragraph no. 7 extracted supra. In this finding, first five lines relates to an issue that seized material was supplied to the assessee. Thereafter he observed that there were two diaries, one contained 81 pages, other one contained 1 page. On the material containing one page, date is 01.01.2009 and from that date, he inferred that the dates written on days and month are to be construed of 2007 to 2009. This is an inference drawn by him. The second reasoning given by him is that the assessee has been receiving materials from its sister concern. If that be so, how it will become unaccounted production of the assessee whose sale has been made. The receipt of material if to be treated as a gospel truth can be for number of reasons. On page no. 37 of the paper book, Id. 1st Appellate Authority has made reference of two statements namely Mr. Sobhagmal Jain and Mr. Sanjay Kumar Sinha. He also made reference to the statements of these persons in other parts also. The statements of these employees have been recorded during

the remand proceedings also and in these statements, it was demonstrated the background how their statements were taken and it was also explained how loading and unloading details are there, which some of them relates to taken the goods towards kilns.

9. It is pertinent to note that the actual sale declared by the assessee in A.Y. 2008-09 was 6901.13 M.T. This sale has been assumed by the ld. Assessing Officer at 30015.124 M.T. The assessee has declared production of 6744.420 M.T. The production capacity of the assessee-company in the relevant year was 7000 M.T. per annum and it was enhanced to 48000 MT per annum from 06.09.2008. The ld. Assessing Officer was considering the accounts ended prior to this date, i.e. 31.03.2008. The assessee has further apprised the Revenue Authorities about sanctioned electricity load and how on the basis of such electricity load, a production could be achieved. All these discrepancies have been noticed by the ld. 1st Appellate Authority while taking note of submissions of the assessee under Points No. 1 to 11 of the finding of the ld. CIT(Appeals) extracted supra. The Excise Authority had not concluded their proceeding pointing out the alleged unaccounted sales. It was just an investigation process, and out of which material was supplied to the Income Tax Authorities. What is the final outcome to such a material was not traced out by the ld. Assessing Officer. Even during the course of hearing before us, it was submitted by the ld. Counsel for the assessee that Excise Authorities have not

made any addition. The assessee before the ld. 1st Appellate Authority put reliance upon the judgment of the Hon'ble Gujarat High Court in the case of Principal CIT –vs. – Ganga Glazed Tiles Pvt. Limited dated 25.06.2019. In this case, Hon'ble Gujarat High Court has upheld the order of the ITAT, wherein additions have been deleted under identical circumstances. Thus a perusal of finding of the ld. 1st Appellate Authority extracted supra, we are satisfied that the ld. 1st Appellate Authority had made analysis in right perspective and there was no material possessed by the Revenue, which can demonstrate unaccounted sales made by the assessee in both the years. The additions have been rightly deleted by the ld. 1st Appellate Authority and we do not find any merit in these appeals, these are dismissed.

10. In the result, both the appeals of the Revenue are dismissed.

Order pronounced in the open Court on 15.03.2023.

Sd/- (Rajesh Kumar) Accountant Member Kolkata, the 15th day of March, 2023	Sd/- (Rajpal Yadav) Vice-President
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*Copies to :(1) Deputy Commissioner of Income Tax,
Circle-1, Patna,
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Dak Bunglow Road,
Patna-800001, Bihar*

*(2) Dina Mahabir Re-Rollers Pvt. Limited,
Agam Kuan,
Patna-800007, Bihar*

(3) *Commissioner of Income Tax (Appeals),
Patna-1;*

(4) *Commissioner of Income Tax- ,*

(5) *The Departmental Representative*

(6) *Guard File*

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By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.