

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "B": NEW DELHI**

**BEFORE  
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER  
AND  
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 583/ASR/2017  
Asstt. Year: 2013-14

M/s. Chemester Food Industry, 201-202, Pankaj House, Sarita Vihar, New Delhi. PAN AADFC9539P (Appellant)	Vs.	DCIT, Circle-III, Amritsar  (Respondent)
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Assessee by:	Shri Ranjan Chopra, CA
Department by :	Ms. Indu Bala Saini, Sr.DR
Date of Hearing :	15.03.2023
Date of pronouncement :	22.03.2023

**ORDER**

**PER ASTHA CHANDRA, JM**

The appeal filed by the assessee is directed against the order of the Ld. Commissioner of Income Tax (Appeals)-1, Amritsar ("**CIT(A)**") dated 23.06.2017 relating to the Assessment Year ("**AY**") 2013-14.

2. The assessee has raised the following grounds of appeal:-

*"1. That the Id. CIT (A) is not justified in upholding the assessment order having failed in discharging the onerous duty as an appellate authority for passing a order which is bad in law and as per facts of the case going to prejudice the appellant.*

2. *That the Id. CIT (A) is not justified in upholding the additions of on account of low Gross Profit. The Id. AO has worked out the Gross profit at the rate 9% of total sales of Rs 169,47,18,511/- against the Gross profit at the rate 5.22% declared by assessee, Hence total addition of Rs.6,41,27,336/- has been made by DCIT which is totally wrong and illegal and against the facts.*
3. *That However at the time of making assessment, Id. AO has not considered the explanations given on different dates in respect of lower G.P. rate, which has been ignored by the Id. AO and has made additions on account of lower G.P.Rate and taking imaginary figure of 9% as G.P. Rate which is baseless, illegal and bad at law.*
4. *That worthy CIT (Appeal) -1, Asr, has not properly considered the submissions filed by the assessee firm. The Worthy CIT (Appeal) has completely ignored the Judgements of higher authorities on the same grounds favoring the assessee.*
5. *That the Worthy CIT (Appeal), Amritsar has decided the case in just one hearing and without making proper enquiries and having failed in discharging the onerous duty as an appellate authority for passing a order which is bad at law.*
6. *That the CIT (Appeal) has wrongly alleged that assessee firm has consumed 128572 Qtls of Soyabean against the 67645 Qtls in immediately preceeding year. However as per submission of assessee the fact is that assessee has consumed 128571 Qtls of Soyabean against the 143644 Qtls of Soyabean in the immediately preceeding year. This clearly shows that the worthy CIT(Appeal), Amritsar has not gone through the facts of submissions of assessee. Hence the submissions made of assessee are completely ignored.*
7. *That the worthy CIT(Appeal), Amritsar has alleged that assessee has changed the ratio of mixing of Soyabean and Maize during the relevant period which is absolutely wrong, illegal and against the facts. The assessee firm has followed same ratio of mixing in both years as per agreement i.e 5% Maize and 22% Soyabean. Again the said facts have not been verified by worthy CIT(Appeal), Amritsar.”*

3. The brief facts of the case are that the assessee firm is engaged in manufacturing and supply of supplementary nutrition based energy foods, namely Amylase Rich Energy Food (AREF) under various Integrated Child Development Scheme (ICDS) projects in the state of Uttar Pradesh. It filed its return for AY 2013-14 on 27.09.2013 declaring income of Rs. 1,85,17,600/-.

The return was processed under section 143(1) of the Income Tax Act, 1961 **(the "Act")**. The case was selected for scrutiny under CASS. During assessment proceedings, the assessee furnished requisite details and produced books of account which were examined by the Ld. Assessing Officer **("AO")** by test-check. The Ld. AO found that during the year the assessee declared gross profit of 5.22% on turnover of Rs. 169,47,18,511/- as against gross profit of 13.21% on turnover of Rs. 185,37,83,000/- of the last year. The Ld. AO sought explanation for sharp decline in the rate of gross profit in the year as compared to the preceding year(s). The assessee furnished justification for the steep fall in GP rate in the year. On consideration thereof the Ld. AO drew the following inferences in para 3 of the assessment order:

*"3. Inference :- From the totality of the facts and in the circumstances of the case as disused above in detail following inferences are drawn:*

*(i) There has been steep fall in G.P.Ratio from 13.21% to 5.21% in the relevant period for which the assessee's prime justification was that there has been steep increase in cost of certain raw material like Soyabin.*

*(ii) As discussed in para 2.1(b) above, From the data given in Annexure E to form 3CED it is clear that during the relevant period of R.Y.,2013-14 the assessee has shown abnormally high soyabin consumption i.e. 128572.62 Qntls(66975.62 +61597). As against 67645.93 Qntls in the immediately proceeding year, obviously the assessee has shown consumption of much costlier item of Soyabin and Soya Maize Flour in this year. Such a vast difference is certainly not commensurate with the standard formula of the constituents. In fact the assessee has over stated its purchases of soyabin and Soya Maize Flour, when compared with the figures of the last year. No explanation whatsoever was given for this abnormal consumption of soyabin shown the assessee in this year.*

*(ii)(a) The average cost of soyabin and soya flour was around Rs.3500 to Rs.3700 per quintals whereas Maize was costing around Rs.1540/- per quintal. The assessee has changed the ratio of maize and soyabin consumption without any plausible reason given in the Audit Report or in the assessment proceedings. Even there was no such explanation coming on record to justify the variations in the constituents against the standards set by the Govt. Department for supply of the products manufactured by the assessee*

*(iii) There is regular day to day production record but assessee has simply produced a computerized extracts of various items purchased. There is no such evidence produced where from the exact quantification of stock manufactured could be ascertained.*

*(iv) The assessee has not substantiated the abnormal increase in wages inspite of lesser production and lesser sale in this year.*

*(v) The assessee has failed to justify the claim of wastage of wheat to the tune of 29683.28 quintals which is valued at Rs.!,30,90,326/- (@4.41 per Kg). This wastage has not been claimed in the earlier years.*

*(vi) The assessee has not substantiated with evidence, its claim for over all wastage in production at 6.49% out of the total raw material consumed. The assessee only argument was that this wastage is lesser than last year.*

*(vii) The assessee has not maintained any record for goods received inward and outward which is a primary record for entry and dispatch of goods at the factory gate. On the other side there have been detected large number of sale invoices without any truck numbers. The assessee had simply ignored this discrepancy.”*

3.1 The above set of inferences drawn by the Ld. AO made him to reach the conclusion that the books of account and the result declared therein are neither complete nor correct within the meaning of section 145(3) of the Act and the same are liable to be rejected. He did so and held that the assessee has overstated its purchase of soyabean and soyaflower; overstated its expenses on wages and manipulated its records to reduce its taxable profits. He, therefore, applied GP @9% on the declared sales which resulted in addition of Rs. 6,41,27,336/- to the income of the assessee. Accordingly the Ld. AO completed the assessment on total income of Rs. 8,26,44,936/- on 29.03.2016 under section 143(3) of the Act.

4. Aggrieved, the assessee appealed before the Ld. CIT(A) who dismissed the appeal of the assessee by recording the following findings in para 6 of his appellate order which is reproduced hereunder:-

“6. I have gone through the grounds of appeal, submission and the assessment order.

*In the given case the AO has rejected the books of A/c u/s 145(3) on the ground that there was steep fall in GP from 13.21% to 5.21%. The defects were pointed out by the AO and they are very much relevant for deciding the case on merits as following:*

1. *There was abnormally high consumption of Soyabean, during the year under consideration as against that in last year.*

*The total Soya bean consumed is 1,28,572 quintals as against 67,645 quintal in the immediately preceding year. Such a vast difference is certainly not commensurate with the standard formula of the constituents of the food item made. In fact the assessee has overstated the purchase of Soya bean and Soya maze flour and the explanation for excess consumption was not in order. In these circumstances the AO has rightly rejected the books of A/cs.*

2 *The Average cost of Soya bean and Soya flour varies from Rs.3500/- to Rs.3700/- per quintal. Whereas maze was costing Rs. 1540/- per quintal. The assessee has changed the ratio of maze and Soya bean, without any plausible reason and which was even against the standard set by Govt. Department.*

*Hence the defect pointed out by the AO is correct and the basis of rejection of books of A/c is reasonable.*

3 *During the year under consideration the assessee has claimed wastage of wheat to the tune of 29,683 quintal, valued at Rs.1,30,90,326/- This wastage was not claimed in earlier years. The Assessee has not substantiated the claim of wastage of Wheat. Besides this the assessee has also claimed overall wastage in production as 6.49% which is no corroborated with any evidence asked by AO during assessment.*

*Considering all the above facts and circumstances the AO has rightly rejected the books of A/cs by applying provision of section 145(3) and the GP rate was increased from 5.22% to 9 %, which is very reasonable, because during last year for the same business was 13.21%. The appeal is dismissed.”*

5. Dissatisfied, the assessee is in appeal before the Tribunal and all the grounds relate thereto.

6. At the very outset the Ld. AR pointed out that the assessee has filed the additional evidence alongwith prayer for admittance thereof on 25.03.2022. Some more additional evidence alongwith prayer for admission thereof was filed on 14.06.2022. These form part of the Paper Book filed before the Tribunal on 27.02.2023 and appear at pages 59 to 129 and at pages 1 to 58 respectively of the Paper Book. The Ld. AR cited the judgment of the Hon’ble Supreme Court in Tek Ram (Dead) through LRs vs. CIT

Faridabad in Civil Appeal No. 6262 of 2013 delivered on 5<sup>th</sup> August, 2013 wherein the assessee placed before the Hon'ble Supreme Court a number of documents which were not placed before the Hon'ble High court of Punjab & Haryana in ITA No. 109 of 2005. The Hon'ble Supreme Court accepted the documents filed by the assessee observing that they are of some relevance and should be looked into by the High Court before it comes to a conclusion whether the appeal requires to be allowed or to be rejected.

6.1 The assessee has also filed an application for admission of additional legal ground on 25.03.2022 which appear at pages 161 to 276 of Paper Book. It reads as under:-

*“The order u/s 143(3) dated 29/03/2016 of the Ld. AO and order u/s 250(6) dated 23/06/2017 being passed in the name of the non-existent of the assessee is void ab initio and ought to be quashed.”*

In support, the assessee has placed reliance on various precedents which find place at pages 277 to 330 of the Paper Book. This includes the decision of the Hon'ble Supreme Court in Pr. CIT vs. Maruti Suzuki India Ltd. (2019) 107 taxmann.com 375(SC) wherein the Hon'ble Supreme Court held that issuance of jurisdictional notice and assessment order thereafter passed in the name of non-existing company i.e. amalgamating company having ceased to exist as a result of approved scheme of amalgamation, is a substantive illegality and not a procedural violation of nature adverted to in section 292B and hence, being without jurisdiction was to be set aside. It is submitted by the Ld. AR that the additional ground has been taken for the first time before the Tribunal. It has not been taken before the lower authorities.

7. The Ld. DR had no objection to the admittance of additional evidence and additional ground. No arguments were advanced by either side on merits of the case.

8. We have heard the Ld. Representative of the parties and carefully considered their respective submissions. We are conscious that the judicial consensus is that the Tribunal has to exercise its power vested in it under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 by applying its judicial mind as the said power is given with a view to doing substantial justice between the parties. In CIT vs. Kum Satya Setia (1983) 143 ITR 486 (MP) and Orissa States Civil Supplies Corporation Ltd. vs. DCIT (2003) 259 ITR (AT) 20 (Ctk) it has been held that where Tribunal thinks that evidence sought to be admitted is material for deciding the issue, it can be admitted though not produced before the lower authorities and the discretion of the Tribunal will not be interfered with unless exercised on non-existent or imaginary grounds. Hon'ble Bombay High Court in its Full Bench decision in Ashok Vardhan Birla vs. CWT 208 ITR 958 (Bom) (FB) has held that the powers of the Tribunal are similar to those of the assessee. The Tribunal can permit additional grounds to be raised. In National Thermal Power Co. Ltd. vs. CIT 229 ITR 383 (SC) the Hon'ble Supreme Court observed that a question of law arising out of facts found by the authorities and which goes at the root of the jurisdiction can be raised for the first time before the Tribunal. Following the principle of law enunciated in the decisions (supra) and the recent decisions of the Hon'ble Supreme Court in Tek Ram (supra) and Maruti Suzuki India Ltd. (supra) relied upon by the assessee, we have admitted the additional evidence placed before us as also the additional legal ground taken by the assessee before us for the first time.

9. Since the additional evidence produced by the assessee before the Tribunal and the additional ground taken for the first time before us need verification and consideration, the Ld. Representative of the parties agreed that the order of the Ld. CIT(A)/AO be set aside for fresh adjudication by the Ld. AO in the light of the additional ground and additional evidence produced by the assessee before the Tribunal.

10. Accordingly, we set aside the order of the authorities below and restore the matter back to the file of the Ld. AO for decision afresh after due

verification and enquiry into the additional evidence and consideration of the additional legal ground taken now before the Tribunal, in accordance with law and of course, after allowing reasonable / adequate opportunity of hearing to the assessee. We order accordingly.

11. In the result, the appeal of the assessee is treated as allowed for statistical purposes.

**Order pronounced in the open court on 22<sup>nd</sup> March, 2023.**

**sd/-**

**sd/-**

**(SHAMIM YAHYA)  
ACCOUNTANT MEMBER**

**(ASTHA CHANDRA)  
JUDICIAL MEMBER**

Dated: 22/03/2023

***Veena***

Copy forwarded to -

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	