

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'B' BENCH : BANGALORE**

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

<b>ITA No. 46/Bang/2023</b>
<b>Assessment Year : 2010-11</b>

Shri Kenche Kumar, Door No. 847, 21 <sup>st</sup> Ward, Bellary Road, Opp. Lucky Tyres, Hospet, Bellary – 583 201. <b>PAN: AVSPK7166L</b>	<b>Vs.</b>	The Assistant Commissioner of Income Tax, Central Circle – 2(1), Bangalore.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Shri V. Srinivasan, Advocate
Revenue by	:	Smt. Supriya Rao .O.N, Addl. CIT (DR)

Date of Hearing	:	22-06-2023
Date of Pronouncement	:	27-06-2023

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeal is filed by assessee against the order dated 29.11.2022 passed by Ld.CIT(A)-11, Bangalore for A.Y. 2010-11 on following grounds of appeal:

*“1. The impugned order passed by the learned Assessing Officer as upheld by the learned Commissioner of Income-Tax (Appeals)-11 is opposed to law, weight of evidence, probabilities, facts and circumstances of the case.*

*2. The Appellant denies itself liable to be taxed in excess of returned income of Rs.37,74,530/- under the facts and circumstances of the case.*

3. *The learned Commissioner of Income-Tax (Appeals) is not justified in dismissing the appeal without independent application of mind and without proper appreciation of the facts and circumstances of the case.*

4. *The learned CIT(A) erred in law in not holding that, reasons recorded by the learned Assessing Officer for invoking the provisions of section 147 of the Act are mere "Reasons to suspect" and much less of "Reasons to believe" and is in violation of the pre mandated requirements in terms of provisions of section 147 of the Act under the facts and circumstances of the case.*

5. *The learned CIT(A) erred in law in upholding the view of the learned Assessing Officer that, the purchase and processing expenses incurred by the Appellant i.e., Rs.55,09,148/- and Rs.54,24,300/- respectively aggregating to Rs.1,09,33,448/- was hit by the Explanation 1 to the provisions of section 37(1) of the Act under the facts and circumstances of the case.*

6. *The learned CIT(A) erred in law in not holding that the purchase and processing charged incurred by the Appellant were essential elements towards the sale reported by the Appellant under the facts and circumstances of the case. The learned CIT(A) further erred in law in disallowing the purchase and processing charges and taxing the sale proceeds in entirety which is against the canons of taxation under the facts and circumstances of the case.*

7. *The learned CIT(A) erred in law in not holding that in view of absence of action from competent authorities the act of independent invoking Explanation 1 to the provisions of section 37(1) of the Act by the learned Assessing Officer was not warranted under the facts and circumstances of the case.*

8. *The learned CIT(A) erred in law in upholding the disallowance of Rs.18,05,780/- incurred by the Appellant towards the transportation charges under the facts and circumstances of the case.*

9. *The Appellant crave leave to add, alter, amend, substitute, change and delete any of the grounds of appeal.*

*10. For the above and other grounds that may be urged at the time of hearing of the appeal, the Appellant prays that the appeal may be allowed and justice rendered.”*

2. For the year under consideration the assessee had filed his return of income on 13.10.2010 declaring an income of Rs.37,74,530/-. A notice u/s. 148 of the act was issued by the Ld.AO on 04.07.2016 and the assessee had filed his return of income on 31.10.2016. Subsequently, the Ld.AO passed order u/s. 143(3) r.w.s. 147 of the Act on 30.11.2016, determining the income at Rs.1,61,13,758/-.

Aggrieved by the order of the Ld.AO, the assessee filed an appeal before the Ld.CIT(A).

3. During appellate proceedings, the assessee filed additional grounds of appeal. The additional grounds of appeal 1 to 3 were legal issue challenging the validity of issuance of notice u/s. 148 of the Act. Since these can't be decided on the basis of material available on record, the same are admitted.

3.1. After considering various submissions of the assessee, the legal issues raised by the assessee in the additional grounds of appeal 2-3 were dismissed as per the observations in paras 4-4.3 of the impugned order by observing as under:

4.0 The additional grounds of appeal 1 to 3 relate to the common issue of the action of the AO in passing order under Section 147 r.w.s. 143(3) of the Act after issue of notice under Section 148 of the Act. A copy of the additional grounds of appeal was sent by the then CIT(A) for the comments of AO. The comments of the AO on the same, as sent vide letter dt. 07.09.2022, are as follows:

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The assessee has raised the following additional grounds of appeal

1. **The assessing officer is not justified in invoking provisions of section 147** -In the present case the assessment was reopened by duly recording reasons and notice U/s 148 was issued to the assessee on 04.07.2016, after obtaining necessary approval of the PCIT ( Central ) vide communication dated 27.06.2016 (copy of approval enclosed)

2. **The reasons recorded if any in the instant case by the AO are mere reasons to suspect and not reasons to believe** – The reasons have been duly recorded and the assessment has been reopened following the due procedure of law. The assessee participated in the assessment proceedings duly submitted the details and also submitted that the return of income filed on 13.10.2010 may be considered as return

in response to notice issued U/s 147. The assessee during the course of entire assessment proceedings did not question the assumption of jurisdiction by the assessing officer U/s 147 of the Income Tax Act and hence the assessee cannot raise this issue in the appellate proceedings. The assessee in the additional grounds of appeal has not pointed out any reason why the assumption of jurisdiction is not proper. Hence this ground raised by assessee is not correct

3. **The notice is issued without proper sanction** – As mentioned above, the notice U/s 147 is issued after obtaining necessary approval from the PCIT, Central, Bangalore. Hence this ground raised by assessee is also not correct

4.1 A copy of the above report was sent to the appellant for filing rejoinder. The appellant has filed his submissions vide letter dt.08.11.2022. The relevant part of the same is reproduced as follows:

3. The Appellant further submits that the act of the learned Assessing Officer in invoking the provisions of section 147 of the Act to effect the aforesaid disallowances on pure guess work do not constitute the reasons to believe as contemplated under the said provisions and will merely amounts to reasons to suspect. Thereby in the absence of the said mandated conditions precedent the resultant proceedings are will have no legs to stand and is liable to be quashed in toto under the facts and circumstances of the case.

4.2 Thus only additional ground of appeal 2 needs to be adjudicated and the other additional grounds of appeal 1 and 3 are dismissed, as the appellant has accepted the report of the AO.

4.3 As regards the additional ground of appeal 2, the argument of the appellant is that the reasons as recorded by the AO are reasons to suspect and not reasons to believe. However this contention of the appellant is a mere bland statement which does not show us to how the reasons recorded were not reasons to believe. Considering above the additional ground of appeal 2 is dismissed.

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3.2. On merits, the Ld.CIT(A) decided the issue by observing as under:

5.0 The ground of appeal 1 relates to the action of the AO in making a disallowance of Rs 1,09,33,448/-. In brief, this was observed by the AO that the appellant had made purchases of iron ore from unregistered dealers. The appellant could not furnish anything other than a copy of purchase account in his books, to support his claim of such purchases. Since the appellant had failed to prove genuineness of the purchase and also that as per law the purchase of iron ore could not have been from any unregistered dealer, the AO made the disallowance. The AO also invoked the provisions of the Explanation 1 to Section 37(1) of the Act while doing so.

5.1 During appellate proceedings the arguments of the appellant are as follows:

- The expenditure was wholly and exclusively for the purpose of business and not covered by Explanation 1 to Section 37(1) of the Act.
- The expenditure included an amount of Rs 55,09,148/- for purchase of iron ore and lumps and balance Rs 54,24,300/- related to processing charges.

5.2 A copy of this written submission was sent by the then CIT(A) for the comments of AO. The comments of the AO on the same, as sent vide letter dt. 07.09.2022, are as follows:

3. In the original grounds of appeal, the assessee has raised following grounds

- i. Without purchase a sale cannot be made and it exclusively met for the business and it is an allowable expenditure U/s 37(1) – In this respect it is submitted that the assessee has made purchases Unregistered dealers as purchases made is Iron ore which is a mineral permits are issued by the government agencies for extraction and transportation of mineral, for any person to sell minerals proper license from Department of Mines and Geology is required for extraction of mineral. In the present case the purchases are made from the unregistered dealers who do not have any license or permission, hence the sale of such ore by unregistered dealers who do not have licence either for mining or for transportation of mineral is illegal, hence the assessing officer has made reference to explanation 1 to section 37(1) which is as under

*Explanation 1.—For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.*

Hence the purchases made by the assessee from unregistered dealers is prohibited by law, hence the expenditure incurred towards the same is not allowable expenditure. Hence the assessee's contention that without purchase there cannot be any sales is correct. In the assessment proceedings the assessing officer did not question the purchases for quantity, but disallowed the expenditure as not allowable under section 37 as the same is prohibited by law. Hence the disallowance under section 37 requires to be upheld

5.3 A copy of the above report was sent to the appellant for filing rejoinder. The appellant has filed his submissions vide letter dt.08.11.2022. The relevant part of the same is reproduced as follows:

**1. Without purchase sale cannot be made and it exclusively met for the business and it is an allowable expenditure u/s 37(1).**

The learned Assessing Officer in the remand report has stated that the purchase of iron ore from unregistered dealers in the instant case is illegal and is hit by explanation 1 to 37(1) of the Act.

The Appellant in this regard humbly wishes to submit that the transaction in the instant case has to be looked in its entirety and in a holistic approach.

The general accepted principle under the income tax act is that the real income theory has to be looked into and taxing the sale proceeds without allowing thereon the genuine expenditure i.e., purchase cost of iron ore will amount to taxing the gross sum in absurdity and is against the principles of canons of taxation which is not tenable in law.

The Appellant further submits that the competent authorities have not initiated any proceedings against the Appellant and under the given circumstances the act of involving the explanation 1 to section 37(1) of the Act against the said genuine purchases, by the learned Assessing Officer lacks the inherent jurisdiction.

The Appellant in view of the above submits that the sum of Rs.1,09,33,448/- incurred by the Appellant is not hit by the explanation 1 to section 37(1) of the Act under the facts and circumstances of the case.

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5.4 During hearing on 16.11.2022, the AR of the appellant sought short adjournment to verify whether any purchase bills were available and as to what was the mode of payment i.e. account payee cheques or cash. The case was adjourned to 25.11.2022. On the due date of hearing the appellant has filed following submissions:

It has been brought to the notice of the Appellant that during the last course of hearing, the Appellant's AR was directed to furnish the details w.r.t purchases made in the instant case for the impugned Assessment Year 2010-2011.

In this regards the Appellant wishes to draw kind attention of this Hon'ble office to the fact that, the Appellant despite of his sincere and best efforts, is not in a position to lay hands on the aforesaid documents owing to the following factors:

1. The Appellant records were seized by the IT department as well as the lokayukta department owing to the search operations conducted in the case of the Appellant.
2. The Appellant is not able to locate most of the records as these are more than a decade old i.e., pertaining to the Financial Year 2009-2010.
3. The Appellant's accountant who was looking after the accounting entries of the Appellant is also not reachable as he had left the job long ago.
4. Further the Appellant's then Chartered Accountant, also has informed the Appellant that - they don't have the copies of the documents of the Appellant in their office.

The Appellant under the given set of conditions is not in a position to place on record the details as called for by this Hon'ble Office. However, the Appellant dehors the conditions which are enumerated above, which are beyond the control of the Appellant humbly wishes to submit that the business transactions undertaken by the Appellant in the instant case has to be looked in its entirety and in a holistic approach.

5.5 In addition to above the appellant has reiterated his earlier submissions, which have already been reproduced supra.

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5.6 The submissions of the appellant and report of the AO have duly been considered. The undisputed facts are as follows:

- The appellant has not been able to place anything on record to support his claim of having made purchases from any registered dealer. In fact, this was admitted by him during the assessment proceedings that the purchases were made from unregistered dealers.
- Permit from Government is required for extraction, transportation and selling of iron ore. The Department of Mines and Geology issues licence for these purposes. This is not denied by the appellant.
- As per law, purchase could not have been made from unregistered dealer. This is not denied by the appellant.

5.7 The main contention of the appellant is that only his real income could have been brought to tax. The appellant has submitted that he had recorded sales in his books and since sales could not have been possible without purchase so the purchases needed to be allowed and Explanation 1 to section 37(1) of the Act could not have been invoked to disallow the same. However this contention of the appellant is devoid of any merit. The Explanation 1 to section 37(1) of the Act specifically provides that the expenditure for a purpose, which is an offence or which is prohibited by law, shall not be deemed to have been incurred for the purpose of business and no deduction or allowance shall be made in respect of such expenditure. Thus this provision specifically disallows certain types of expenditure and it is provided that the same would be deemed to not have been incurred for the purpose of business. So action of the AO cannot be faulted with and the disallowance made by the AO is upheld.

5.8 Without prejudice to above, the appellant has not brought anything on record to prove genuineness of the expenditure also. The appellant has not been able to produce any purchase bills. The purchases, if any, are in cash and the same also attract the provisions of Section 40A(3) of the Act. The argument of the appellant that part expenditure relates to purchases and remaining to processing of iron ore, is also a mere assertion without any supporting evidence. So this argument also needs to be rejected.

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3.3. In respect of the disallowance of processing fees amounting to Rs.18,05,780/-, the Ld.CIT(A) upheld the view of Ld.AO by observing as under:

6.5 A perusal of the above clearly shows that the appellant was not able to produce the relevant bills/invoices or other evidence to support the claim of transportation charges amounting to Rs 18,05,780/-. Under these circumstances the AR of the appellant had agreed to the disallowance during assessment proceedings. This is not a case where something was agreed by AR during assessment proceedings on the basis of some erroneous presumption although the facts on record showed otherwise. Instead, it is a case where the requisite evidence is still lacking. In fact, till date the appellant has not brought anything on record to substantiate his claim and no such bills/ invoices etc have been produced even during appellate proceedings. The AO is also correct in observing that by accepting the disallowance during assessment proceedings the appellant had prevented the AO from carrying out further investigation. So the action of the AO in making the disallowance cannot be faulted with. The case laws relied upon by the appellant are not relevant as the disallowance is not based on a mere agreement by the appellant but on the fact that the appellant had failed to substantiate his claim by bringing any evidence on record.

Aggrieved by the order of the Ld.CIT(A), the assessee is in appeal before this *Tribunal*.

4. **Ground nos. 1,2,4 and 5** are general in nature and therefore do not require adjudication.

5. **Ground no. 3** is challenging the validity of assessment u/s. 148 of the act which the Ld.AR has not argued at the time of hearing.

6. **Ground no. 6** is on the additions made u/s. 37(1) invoking Explanation 1.

6.1. The revenue authorities disallowed the purchase and processing fees incurred by the assessee amounting to Rs.55,09,148/- and Rs.54,24,300/- respectively aggregating to

Rs.1,09,33,448/-, disallowance of transportation charges claimed by assessee amounting to Rs.18,05,780/-.

6.2. The Ld.AR submitted that, the assessee is involved in purchase and processing of iron ore. During the year under consideration, assessee had made purchases from unregistered dealers who do not have any licence or permission. It is submitted that the revenue authorities disallowed the purchases as they were hit by Explanation 1 to section 37(1) of the Act. The primary argument of the Ld.AR is that the sales are not been disturbed by the Ld.AO. He further submitted that once the sale is accepted purchases cannot be doubted.

6.3. It is submitted by the Ld.AR that assessee incurred transportation charges to the extent of Rs.18,05,780/-. The revenue disallowed the expenditure as assessee could not produce evidences in respect of the same. It is submitted by the Ld.AR that the total transportation charges claimed by assessee was Rs.3,48,47,678/- however evidences were not available in respect of Rs.18,05,780/- that was subjected to disallowance.

6.4. The Ld.AR submitted that assessee's records were seized by the department as well as the lokayukta department owing to the search operations conducted. Therefore assessee was not able to locate most of the records as these are more than a decade old i.e., pertaining to the Financial Year 2009-10.

6.5. On the contrary, the Ld.DR placed reliance on orders passed by authorities below.

7. We have perused the submissions advanced by both sides in the light of records placed before us.

7.1. The disallowance of Rs.1,09,33,448/- comprises of following two items:

- a) Purchase of iron ore and lumps amounting to Rs.55,09,148/-.
- b) Processing charges of Rs.54,24,300/-.

7.2. The above expenditure was disallowed by the Ld.AO by invoking explanation 1 to section 37 of the act. The Ld.AO was of the opinion that as the assessee has purchased lumps and iron ore fines from undisclosed sources from the grey market through cash payments. It was the opinion of the Ld.AO that the persons from whom the purchases were made did not have valid license from the Government and that assessee had therefore failed to prove the genuineness of such purchases from such unregistered dealers.

7.3. In our opinion, though the purchases were not made from registered dealers and that assessee could not provide with the details of such persons from whom purchases were made, it would be only the profit element embodied in such purchases that could be added to the income of the assessee. Both sides submitted that some estimation may be made in respect of the profits that would have arose in the hands of the assessee out of such undisclosed purchases.

As assessee does not have any details as submitted by the Ld.AR, in the interest of justice, we estimate the profit from such purchase to be at 12%. The Ld.AO is directed to restrict the disallowance at 12% of Rs.1,09,33,448/-.

**Accordingly, ground nos. 5, 6 & 7 raised by assessee stands partly allowed.**

8. The next disallowance made by the Ld.AO is of Rs.18,05,780/- incurred by the assessee towards transportation charges.

8.1. It is the observation of the Ld.CIT(A) that assessee had not produced complete details and supportive evidences for the transportation bills to the extent of the amount disallowed. We note that the total transportation charges claimed by assessee was Rs.3,48,47,678/- out of which the disallowance was made to the extent of Rs.18,05,780/-.

8.2. In the remand report placed at pages 34-36 of the paper book, the assessing officer has noted as under:

*“That the transportation charges are supported by proper documentary evidences and it is exclusively met for the business and the same should be allowed — During the course of assessment the assessee produced evidences for incurring transportation charges, the AO after verifying the same came to a conclusion that expenditure to the extent of Rs.18,05,780 was either not properly vouched or incomplete, hence the AO proposed for disallowance transportation expenditure to the extent of Rs.18,05,780 and the authorized representative agreed for this disallowance, the acceptance of the AR for this disallowance is duly noted in the order sheet and the same is acknowledged by the AR (copy of the order sheet is enclosed), hence the assessing officer disallowed the transportation expenditure to the extent of Rs.18,05,780 out of total transportation charges claimed of Rs.3,48,47,678 the same is mentioned in the order sheet noting made on 30.11.2016. Once the addition is accepted by the assessee, the assessee cannot challenge the same in appellate proceedings, by accepting the addition, the assessee prevented the assessing officer from carrying any further investigation, but now has raised the same in the appellate proceedings.”*

8.3. Assessee has filed a rejoinder in respect of the same has denied any such admission during the assessment proceedings and has submitted vide rejoinder dated 08.11.2022 filed with the Ld.CIT(A) on 16.11.2022 as under:

*“2. The disallowance of transportation charges:*

*The learned Assessing Officer in the remand report has stated that a sum of Rs.18,05,780/- has been accepted by the authorized representative for the disallowance towards the transportation charges during the course of assessment proceedings. The learned Assessing Officer in the remand report has reiterated that the ground for the said disallowance is that the said sum is not property vouched or incomplete.*

*The Appellant submits that the entire notion of the learned Assessing Officer is based on mere surmise conjunctures and suspicion without placing reliance on any cogent material on record.*

*The Appellant during the course of assessment proceedings had submitted the bank statements, transportation charges details. The learned Assessing Officer without appreciating the nature of the business of the Appellant in its real sense had resorted for the disallowance of the said sum on mere guess work.*

*The Appellant in this regards at the foremost submits that consent does not confirm jurisdiction unless the law holds otherwise. The Appellant wishes to place reliance on the following judicial precedents where it has been held that mere consent cannot confer jurisdiction.*

- a. CIT Vs MRP Firm 56 ITR 67 (SC)*
- b. Pullongode Rubber Vs State of Kerala 91 ITR 18*
- c. S.R Kosti Vs CIT 276 ITR 165*
- d. Nirmala L Mehta Vs CIT 269 ITR 1*
- e. Bhandari Metal & alloys Vs State of Karnataka 136 STC 292*

*The Appellant further submits that the learned Assessing Officer without appreciating the details as furnished during the course of assessment proceeding and further without appreciating the nature of the business of the Appellant has completely erred in law in disallowing the said sum of Rs.18,05,780/-."*

8.4. We note that admittedly assessee do not have any documents to support in respect of the expenditure incurred towards transportation. However we note that the authorities have not objected to the nature of the expenditure being arising out of business. Both sides submitted that an estimation may be made to disallow the transportation expenditure for want of sufficient documentation.

In the interest of justice, we direct the Ld.AO to estimate the disallowance at 25% of Rs.18,05,780/-.

**Accordingly, ground no. 8 raised by assessee stands partly allowed.**

**In the result, the appeal filed by assessee stands partly allowed for statistical purposes.**

Order pronounced in the open court on 27<sup>th</sup> June, 2023.

Sd/-  
(CHANDRA POOJARI)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 27<sup>th</sup> June, 2023.  
/MS /

**Copy to:**

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|---------------|------------------------|
| 1. Appellant  | 4. CIT(A)              |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT        | 6. Guard file          |

By order

Assistant Registrar,  
ITAT, Bangalore