

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
(Conducted through E-Court, Rajkot)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
SHRI T.R SENTHIL KUMAR, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 19/Rjt/2021
निर्धारण वर्ष/Asstt. Year: 2010-11

A.C.I.T, Central Circle-2, Rajkot.	Vs.	M/s Shiv Shipping Services 101,102, Rajkamal Arcade, Plot No.353, Ward-12/B, 1 st Floor, Opp. B.M Petrol Pump, Gandhidham. PAN: AAQFS5371J
--	-----	---

(Applicant)	(Respondent)
Revenue by :	Shri K.L Solanki, Sr. D.R
Assessee by :	Shri Mehul Ranpura, A.R

सुनवाई की तारीख/**Date of Hearing** : **06/07/2023**
घोषणा की तारीख /**Date of Pronouncement**: **12/07/2023**

आदेश/ORDER

PER WASEEM AHMED ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)-11, Ahmedabad, (in short "Ld. CIT(A)") arising in the matter of assessment order passed under s. 143(3) r.w.s. 147 of the Income Tax Act 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2010-11.

2. The Revenue has raised following grounds of appeal:

1. *On the facts and in the circumstances of the case and in law, learned Commissioner (Appeals) erred in ignoring the facts that additions were made on the basis of inquiry report of a committee appointed by the Government of India.*

2. *On the facts and in the circumstances of the case and in law, learned Commissioner (Appeals) erred in ignoring the facts that in export of iron ore there is large scale under invoicing by some of the companies.*

3. *On the facts and in the circumstances of the case and in law, learned Commissioner (Appeals) erred in the facts that the AO has made addition on the basis of analyses of export data of the custom department/various government agencies, and ignore the fact that the under invoicing of iron ore was noticed by the different investigation agencies.*

4. *On the facts and in circumstances of the case and in law, learned Commissioner (Appeals) erred in ignoring the facts that average price of Iron Ore was compared with the average price of corresponding grade and found that under invoicing was done.*

5. *The appellant prays that the order of the learned Commissioner (Appeals) on the above ground be set aside and the addition made in the Assessment order may kindly be restored.*

3. The only effective issue raised by the revenue is that the Ld. CIT(A), erred in deleting the addition made by the AO for Rs. 2,45,30,899/- on account of under invoicing of the export sales.

4. Briefly stated facts are that the assessee in the present case, a partnership firm, is engaged in the business of Cargo Handling Work shipping/stevedoring of iron & trading of scrap. The AO during the assessment proceedings based on the report of the Hon'ble Justice Shri MB Shah, Enquiry Commission, found that the assessee has exported iron ore which were under invoiced by sum of Rs. 2,45,30,899/- only. Accordingly, the AO treated the same as income and added to the total income of the assessee.

5. Aggrieved assessee preferred an appeal to the learned CIT(A) who deleted the addition made by the AO by observing as under:

7.5 The above finding is very clear that the impugned addition (was also made on the basis of the same M B Shah Commission's report) is merely on the basis of the recommendation of the shah commission report, without applying mind by the AO Rather, the Shah Commission report itself suggests that the matter is subject to further verification and investigation from the Income tax department. Enforcement Directorate and other government agencies Even a survey carried out at the premises of the appellant yielded nothing about such practice of under invoicing.

7.6 It is also pertinent to observe that the assessee is trader and not miner. It has purchased goods from the open market and exported. The goods were sold at arm's length. It has purchased royalty paid iron ore and evidence to this effect are already on record. This export was made at a price of US\$ 62.50 per DMT and it was not doubted. It has been accepted by all the authorities including income-tax Department Further it is also a fact that the declared value of export in bill of entry was accepted by the custom houses. It has already paid export duty, which has been accepted by the custom department. According to section 28 of Customs Act, the limitation to recover duty by rejection of declared value has expired Hence, the assessee's duty has become final, and no action of under-invoicing under Custom Act can be raised now. Consequently, there cannot be any inquiry under Income Tax Act.

No Seller or buyer would under-insure their cargo and no bank would agree to contract the amount or the export value lower the insurance amount Solicitor General of India as well as Advocate General of Goa and Other States made it clear to the Hon'ble Supreme Court that no action will be taken against mining lessees only on the basis of the report Reference is invited to para 10 of the judgment. Thus, on the basis of the report, no action ought to be taken against the Assessee.

No evidence was being possesses by the AO to demonstrate that the assessee has under invoiced its export The AO put onus upon the assessee to justify its rates, whereas it should be other-way round. The AO has to justify that the rates of the assessee could not be accepted He has to demonstrate that the assessee has received money through some other channel, and these are unaccounted sales. The Assessing Officer in that case is required to point out the defects in the accounts of the assessee and required to seek explanation of the assessee qua those defects. If the assessee failed to explain the defects than on the basis of the book result, income cannot be determined, and Assessing Officer would compute the income according to his estimation keeping in view the guiding factor for estimating such income. However, the AO has not rejected the book result for determining the suppressed sales:

During the course of assessment and reassessment proceedings, the AO was unable to lay hand in any evidence exhibiting under-invoicing by the assessee. The AO solely harboured upon Commission's report. It is pertinent to observe that a charge of suppressed sales carried out by the assessee has been raised by the AO against it. It is the duty of the AO to prove the prime facie that such a charge can be leveled against the assessee, only thereafter it can be called for disproving that. The AO assumed charge and thereafter put a negative burden upon the assessee to prove that it has not exported iron ores by under- invoicing

The methodology adopted by the commission itself is improper and its comparison is misplaced. Government of India and other law enforcement agencies took the stand that on the basis of this report they are not going to take any action. rather they will investigate the issue further

The AO has miserably failed to collect any evidence against the assessee demonstrating the fact that is has under-invoiced its export, and therefore, received unaccounted sale proceeds. The undisclosed sales cannot be worked out on the basis of this report, and no addition required to be made in the absence of any evidence

7.7 Therefore, even on merits, there is no substance in the finding of the AO, and thus, the addition is required to be deleted. Thus the ground of appeal is allowed

6. Being aggrieved by the order of the Ld. CIT(A), the revenue is in appeal before us.

7. Both the Ld. DR and the Ld. AR before us relied on the order of the authorities below as favourable to them.

8. We have heard the rival contentions of both the parties and perused the materials available on record. At the threshold, we note that the Hon'ble Gujarat High Court in the case of DCIT vs. Raw Mining and Industries Pvt. Ltd. reported in 119 taxmann.com 454 has decided the issue in favour of the assessee by observing as under:

Therefore, we are of the view that report which has been termed by the Commission itself as tentative report could be setting the investigation machinery in motion. But it cannot be treated equivalent to a decree which is required to be executed as it is, more so, in the light of finding recorded by the Hon'ble Supreme Court and the stand taken by the respective States. The AO has miserably failed to collect any evidence against the assessee demonstrating the fact that it has under-invoiced its export and therefore, received unaccounted sale proceeds. The undisclosed sales cannot be worked out on the basis of this report, and no addition required to be made in the absence of any evidence. We allow this fold of contention raised by the assessee and delete the addition. "

9. *Thus, the Tribunal has taken into consideration the applicability of the report of the Justice M.B. Shah Commission so as to make addition of the alleged amount under-invoicing by the Assessing Officer.*

10. *We are in agreement with the findings recorded by the Tribunal, referred to above, and, therefore, no question of law, much less the substantial question of law arises. Accordingly, the appeal is dismissed with no order as to costs.*

8.1 Admittedly, the assessee is the trader of Mineral Ores and not engaged in mining activities. The ratio laid down by the Hon'ble Gujarat High Court as discussed above is squarely applicable in the given facts and circumstances on hand. Hence, respectively following the judgement of Hon'ble Gujarat High Court as discussed above, we do not find infirmity in the order of the Ld. CIT(A). Hence, we declined to interfere in the findings of the Ld. CIT(A). Thus, the grounds of appeal of the revenue are hereby dismissed.

9. In the result, the appeal of the revenue is dismissed.

Order pronounced in the Court on 12/07/2023 at Ahmedabad.

**Sd/-
(T.R SENTHIL KUMAR)
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated

12/07/2023

Manish