IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, AccountantMemberand
Shri Manomohan Das, JudicialMember

ITA No. 176/Coch/2023
(Assessment Year: 2018-19)

Kerala Automobiles Ltd. Aralumoodu P.O., Neyattinkara Trivandurm 695123 [PAN:AABCK0142M]	vs.	Asst. CIT, Circle 1(1), Trivandrum
(Appellant)		(Respondent)

Appellant by: Shri Anand George Thomas, CA
Respondent by: Shri Sajit Kumar Das, CIT-DR

Date of Hearing: 13.07.2023
Date of Pronouncement: 10.08.2023

O R D E R

Per:Sanjay Arora, AM

This is an Appeal by the Assesseedirected against the Order dated 31.01.2023 by the National Faceless Appeal Centre, Delhi (NFAC), dismissing the assessee's appeal contesting it's assessment under section 144 of the Income Tax Act, 1961 (the Act) dated 27.08.2021 for Assessment Year (AY) 2018-19.

2. The assessee is a wholly owned public sector undertaking (PSU) of the Government of Kerala (GoK), operating in the automobile sector, manufacturing, marketing and servicing various models of three-wheelers. It filed it's return of income for the relevant year on 30.10.2018, declaring a loss of Rs.566.66 lakhs, which was processed as such u/s. 143(1) of the Act on 02.02.2020. Notice u/s.143(2) of the Act was in the interim issued on 22.9.2019 for a complete scrutiny of it's return in view of the infusion of capital in an entity consistently disclosing cash loss, i.e., before depreciation; the return for the preceding three years being also at a loss. The

assesseedid not respond to the several notices of hearing, detailed at para 4 of the assessment order. This was followed by notices u/ss. 142(1) and 144 of the Act, all of which were sent both at the primary and secondary e-mail addresses furnished by the assessee, and each of which stood delivered. The Assessing Officer (AO) even took pains to cause physical service at the assessee's registered address, proof of which finds reproduction in his order. All of them met the same fate of no response, leading to an assessment u/s.144 of the Act, by deeming non-current (Rs.37.61 cr.) and current (Rs.8.86 cr.) liabilities, i.e., at an aggregate of Rs.46.46 cr., as the assessee's income u/s. 68 of the Act, on which tax, in terms of sec.115 BBE of the Act, was levied. In appeal, filed at a delay of 121 days, the assessee questioned the appropriateness of considering the sums duly reflected in it's audited financial statements as loans from the GoK and Kerala Minerals and Metals Ltd. (KMML), another PSU, a substantial part of which was in fact a carry-over from an earlier year, as income u/s.68 of the Act. The non-response during the assessment proceedings was due to the uncertainty and situation prevailing on account Covid-19 pandemic. The same, however, did not find favour with the ld. CIT(A), who dismissed the appeal holding as under:

"Findings and Decision

7. From a perusal of the grounds of appeal reproduced herein above the appellant requests that the order of the Ld. AO passed u/s 144 r.w.s. 144B be set aside and the Assessing Officer be directed to give an opportunity to the appellant. As can be seen from the narration of the facts at para 2 supra, the Ld. AO had issued 13 notices, over a period of two years, which were duly delivered on the e-mail addresses as given by the appellant. In addition to the electronic notices the Ld. AO had also got the physical notices served on the appellant. The appellant had chosen not to respond to the said notices even through e-mail. In these circumstances the appellant cannot claim that the Ld. AO had not given an opportunity of being heard. Further, as per section 251, the Commissioner (Appeals) is not vested with the power to set aside the assessment order.

7.1 The appellant had also not filed an application under rule 46A for admission ofadditional evidence. In the absence of an application under rule 46A with due justification, thedocuments submitted by the appellant are not being considered.

> 7.2In view of the facts and circumstances of the case both on account of the unjustified delay in filing the appeal and on account of the inadmissibility of additional evidence the current appeal is not maintainable. Further, I also do not find any infirmity in the order of the Ld. AO. Accordingly, the appeal is dismissed."

Aggrieved, assessee is in second appeal.

3. We have heard the rival submissions, and perused the material on record. We are, to begin with, at a complete loss; nay, dismayed at the conduct of both the Revenue and the assessee-company. The latter maintains regular accounts, gets the same audited, both under the Companies Act, being it's governing Act, as well as the Act, and files it's return of income in time. However, it becomes incommunicado thereafter. There was no sign of Covid-19 in September, 2019 when the notice u/s. 143(2) was issued, much less assume the proportion of a pandemic. One can understand a delayed response in view of the difficult situation and operating with a skeleton staff, but not a complete non-response; the AO listing 13 instances of notices and reminders, from the period September, 2019 to July, 2021, as being unresponded. Even as much as an acknowledgement, seeking time, was not made. The claim of skeletal staff also appears incorrect in view of the expenditure on employees' benefit at Rs.519.58 lakhs, including Rs.416.10 lakhs on salary and wages bill, as per assessee's audited final accounts on record. This is most unfortunate to say the least, particularly considering that the assessee is a government undertaking. The Revenue, on it's part, ought to have, nevertheless, acted in accordance with law. *Does, one may ask, a recalcitrant assessee deserve to be treated any differently, except of course qua the non-compliant behavior; the law itself providing for penalisingnon-cooperation, as, for instance, s. 272A, stipulating a penalty of Rs.10,000 for each default*? It is within it's right to invoke sec.144 of theAct, and proceed to make the assessment on a best-judgement basis. The same, in fact, has been, and fairly, not disputed by the assessee. A best judgement assessment, however, means just that, i.e., to the best of the judgement of the assessing authority, on the basis of the material on, or brought

on, record, and which may require the assessee being put to notice. Nothing more and, nothing less. The law does not empower the Revenue to act unjudiciously.

The only material available with the AO, as we observe, is the assessee's audited final accounts, which reflect the balances of GoK and KMML as loans. *What, pray, one wonders, is the reason to doubt the same*? In case he had any reason to doubt – which ought to have been stated, he could seek direct confirmation bycalling information from the creditors u/s. 133(6) of the Act, or even summoning the concerned persons. That apart, the amount deemed as income is stated to include the opening balance/s, i.e., as outstanding as at the close of the immediately preceding year, as well, so that there is no credit in its respect in the assessee's accounts for the current year, which only could be, where unexplained in terms of its nature and source, regarded as an assessee's income for the current year. Yes, it may well be that the opening balance/s gets adjusted in full during the year, and the closing balance/s pertains to the transaction/s during the year. It is, however, only the ledger account of the parties that could provide the answer. He should have therefore called for the same, though did not, and where not forthcoming, from the creditors themselves. This is as loans are generally paid only as per the repayment schedule. Paying it in full, and again taking a fresh loan, in a higher sum, during the same year, makes little sense even otherwise; more so for an entity admittedly incurring losses and in deep debt, assuming Government borrowings only to meet it's financial obligations/losses. Like-wise, for the sundry creditors, purchases from whom have not been doubted. What, then, we wonder, lends support to the AO's inference of the same as not representing an actual liability of the assessee, even as the purchases (or supplies of goods and services) have not been doubted or disturbed, making his order dichotomous, unless, of course, he has reason to believe – which needs to be stated, that the creditors have been paid by the assessee, a *quasi* Govt. body, out of books! On the contrary, an increasing liability, both current and noncurrent, is a concomitant of loss; in fact,

only expected. It is only where not so, that should be regarded as not normal, and subject to further scrutiny. All the sources of capital, borrowed or otherwise, are from regular suppliers thereof.

The assessment order, *sans* any findings and bereft of any reason, is, in fact, a non-speaking order and, therefore, does not qualify as one. The travesty of the judicial process does not end here. The first appellate authority did not admit the appeal as it was delayed by about four months, even as the bulk of the period stands covered by the blanket saving by the Hon'ble Apex Court. The second objection by him is that the assessee did not apply for production of additional evidence, making out a case u/r.46A of the Income Tax Rules, 1962. Surely, r.46A is mandatory, but admitting evidence at the appellate stage would convert a best judgement assessment into a regular assessment, impermissible under the Act, unless of course the invocation of section 144 itself is not in order, in which case the same would require being cancelled first. As afore-noted, the said invocation is valid and, in fact, not in dispute. He, however, rather than dismissing the assesse's appeal at the threshold for non-admission of evidence, ought to have, in our view, either cancelled the assessment, directing fresh assessment, or exercised his power u/r. 46A(4), calling for material from the assessee to substantiate it's claims before him. Reference in this regard may be made to, *inter alia*, decisions in *Prabhavati S. Shah v. CIT* [1998] 231 ITR 1 (Bom); *CIT v. Text Hundred India Pvt. Ltd.* [2013] 351 ITR 57 (Del);*Velji Deoraj& Co. v. CIT* [1968] 68 ITR 708 (Bom), to cite some; the case law in the matter being legion. Even as the latter two decisions are in relation to the power of the Tribunal u/r. 29 of the Appellate Tribunal Rules, the same is in *paramateria* with r. 46A(4).His order, rather than rubbishing the assessment order for a gross abuse of the power to best-judge an assessment, endorses it on a false plea. It cannot but have our disapproval.

4. Under the circumstances, we only consider it proper to set aside the assessment, as indeed the impugned order, vacating the 'findings' thereby, and

remit the matter back to the file of the AO to redo the assessment from the stage of issue of notice u/s. 143(2) onwards. We would have, while doing so, given it's uncooperative conduct, imposed a cost on the assessee. We, however, restrain from doing so in view of it being a *quasi* public body, implying strain on public funds and, equally, the reckless manner in which the Revenue has proceeded. It is, thus, an open set aside. The AO may undertake any enquiry he deems proper for assessment of the assessee's total income for the current year in accordance with law, issuing clear and definite findings. Needless to add, he shall do so after affording a reasonable opportunity of being heard and presenting it's case before him to the assessee, who has through it's counsel undertaken before us to cooperate. He shall also state the loss, if any, assessed, and liable for being carry forward. Non-cooperation by the assessee, being afforded a final opportunity, shall, we may clarify, invite adverse inferences as permissible in law in the given facts and circumstances. We decide accordingly.

5. In the result, the appeal by the assessee is allowed for statistical purposes.

Order pronounced on August 10,2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: August 10, 2023
n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CITconcerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin