

IN THE INCOME TAX APPELLATE TRIBUNAL
PANAJI BENCH :: PANAJI

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER &
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER
(Through virtual hearing)

ITA No.72/PAN/2018
(A.Y. 2014-15)

M/s. Salitho Ores Pvt. Ltd., Salgaocar Bhavan, Altinho, Panaji, Goa. PAN: AABCS 8859 F	vs	ACIT, Circle-1, Margao
Appellant		Respondent

ITA Nos.99 & 100/PAN/2018
(A.Y. 2012-13 & 2013-14)

ACIT, Central Circle-1, Panaji, Goa.	vs	M/s. Salitho Ores Pvt. Ltd., Salgaocar Bhavan, Altinho, Panaji, Goa. PAN: AABCS 8859 F
Appellant		Respondent

Assessee by	:	Shri P.J. Pardiwalla, CA
Revenue by	:	Shri Prabhakar Anand DJ, DR
Date of hearing	:	05/09/2023
Date of pronouncement	:	21/09/2023

O R D E R

Per PARTHA SARATHI CHAUDHURY, JM:

The appeal in ITA No. 72/PAN/2018 preferred by the assessee and the appeals in ITA Nos.99 & 100/PAN/2018 preferred by the Revenue emanates from the separate orders of Commissioner of Income Tax (Appeals)-2, Panaji, (for short, 'CIT(A)') dated

28/12/2017, 26/12/2017 & 26/12/2017 for A.Ys.2014-15, 2012-13 & 2013-14 respectively as per the grounds of appeal on record.

ITA No.99/PAN/2018

2. First we shall adjudicate the appeal of the Revenue in ITA No.99/PAN/2018. In ground No.1, the Department is aggrieved with the action of the Id. CIT(A) deleting the addition made by the AO by way of disallowance of royalty u/sec. 43B of the Income Tax Act, 1961 (for short, 'the Act') for Rs. 5,58,17,298/-. The AO has discussed this issue at para 3.2 in his order, the relevant part of which is as follows:-

"The assessee debited to its P&L account royalty payable relating to the year under consideration to the tune of Rs.6,07,50,740/-. However, on examination it has been found that royalty amounting to Rs.5,85,17,298/-, which has been debited to the P&L account has not been actually paid by the assessee before the due date for filing return of income and is shown as liability in the balance sheet as "Royalty suspense account". On being confronted the assessee vide its reply dated 26.03.2015 states that "..... This royalty relates to the ore sold to Sister Companies like M/s. Salgaocar Mining Industries Pvt Ltd, Shantilal Khushaldas & Bros Pvt Ltd etc. and hence as assessee company has raised the debit notes to these companies for this Royalty amount in proportion to the Ore sold to them. This Royalty Suspense account has been credited by this amount and correspondingly these respective companies have been debited. There was no entry for this amount through p & L Account and hence the Profit and Loss account is not affected by this account ". The assessee did not file any evidence in support of its claim and it appears that the assessee has no substantive evidence to produce in support of the claim made in its reply. The assessee has thus failed to explain the claim of royalty debited to the P & L account amounting to Rs.5,85,17,298/-. The royalty is a government due and section 43B speaks of the government dues payable. Therefore, unpaid royalty cannot be allowed as an expenditure and accordingly royalty of Rs.5,85,17,298/- is disallowed and added to the total income of the assessee."

3. The Id. CIT(A) while giving relief to the assessee, has observed and held as follows:-

"4.3. From the above table, it is quite clear that the appellant has already paid the share of royalty amount which is to be borne by the appellant i.e. 5,85,17,297/- and which has been debited to the P and L account. The royalty which is outstanding and payable by the associate concerns has not been routed through the P & L Account by the appellant and hence, there is no question of disallowance of the said amount u/s. 43B of the Act. In view of the fact the royalty debited to P and L account has been paid before the filing of the return of income, no disallowance can be made u/s.43B of the Act. Hence, I am not adjudicating on the submissions of the appellant that the royalty in question does not come within the ambit of section 43B of the Act. As the appellant has paid the royalty claimed in the P and L account, the disallowance made by the AO u/s. 43B of the Act amounting to Rs.5,85,17,297/- cannot be sustained and hence, is deleted. Ground No.2 is allowed."

4. The Department in this ground substantially had contended that there has been a violation of Rule 46A(3) of the Income Tax Rules, 1962 by the Id. CIT(A) in admission of additional evidences produced by the assessee. That, on merits of the addition u/sec. 43B, we find placed on record the decision in assessee's own case by the Tribunal in ITA Nos. 132 & 165/PAN/2016 for A.Ys. 2008-09 & 2011-12 order dated 09/04/2018 wherein the Tribunal has observed and held as follows:-

"16. We heard the rival contentions on this issue and perused the record. Since Hon'ble Supreme Court has held in the case of Kesoram Industries Ltd. & Ors. (supra) that royalty is not tax and since Hon'ble Gujarat High Court has held in the case of Kutch Minerals (supra) that royalty would not be covered u/sec. 43B of the Act, we do not find any reason to interfere with the decision rendered by learned CIT(A) on this issue."

Therefore, on the merits of the addition u/sec. 43B, the law laid down specifically by the decision of the Hon'ble Supreme Court in the case of *State of West Bengal v. Kesoram Industries Ltd.* [2004] 266 ITR 721 (SC) is that royalty is not tax. Further, the Hon'ble Gujarat High Court in the case of *CIT v. Kutch Minerals* [2008] 03 DTR 11

(Guj.) has held that royalty is not tax and hence the provisions of sec.43B would not be attracted. When the merits of addition under the said provision is not sustainable, then in such scenario, the issue whether there has been any violation of Rule 46A by the Id. CIT(A) while providing relief to the assessee on this very section itself becomes redundant and infructuous. Ld.DR also could not refute the said proposition of law as laid down by the Hon'ble Supreme Court (supra) by citing any decision favouring the Revenue. Accordingly, there is no infirmity in the order of the Id. CIT(A) on this issue and it is upheld. Hence, ground No.1 of the Revenue's appeal is dismissed.

5. Ground Nos. 2 & 3 pertains to the issue of suppression of sale. The AO has discussed this issue from para 3.3.4 of his order and held as follows:-

"3.3.4 From the above reply it can be easily noticed and understood that the assessee has resorted to manipulation of sales price of iron ore sold to its sister concerns to evade payment of Royalty. This fact has been admitted by the assessee in its above reply itself. Not only there is evasion of royalty but also heavy under-invoicing of the sales made to its sister concerns resulting in huge tax evasion. By resorting to such unfair means the assessee has suppressed its sales value to evade payment of royalty and payment of income tax. The practice being followed by the assessee is not only unfair and immoral but also illegal. This is loot of natural resources of the country without payment of royalty, income tax and other statutory payments. It appears that the assessee has least regard for the laws of the country and hence requires no consideration in light of the malpractices the assessee has resorted to reduce its mandatory and statutory liabilities. The assessee's contention that it is transaction between associate concerns is therefore, unacceptable and hence deserves to be rejected. Therefore, rate per MT in respect of sale of iron ore made to associate concerns M/s Salgaocar Mining Industries Pvt. Ltd. and M/s Shantilal Khushaldas & Brothers Pvt. Ltd. is adopted at Rs. 922/- being the actual selling price or the prevailing market price at that particular point of time. The supersession in sales value in respect of sales made by the assessee at lower price to associate concern M/s Shantilal Khushaldas & Brothers Pvt. Ltd. and M/s Salgaocar Mining

Industries Pvt. Ltd. is computed in the following table -

S1. No.	Name of the Seller	Name of the buyer	Fe Content	WMT	Total receipts (in Rs.)	Rate per MT (in Rs.)	Difference in rate per MT (in Rs.)	Total Suppression in sale value (in Rs.)
2	M/s Salitho Ores Pvt. Ltd.	M/s Salgaocar Mining Industries Pvt. Ltd.	45/54	1,93,024	61574656	319	603	116393472
	- do-	- do-	51/52	1,70,200	5,61,66,000	330	592	100758400
	- do-	- do-	46/46	1,49,094	4,92,01,020	330	592	88263648
	- do-	- do-	46/46	1,32,600	4,37,58,000	330	592	78499200
	- do-	- do-	51/51	1,10,900	3,65,97,000	330	592	65652800
	- do-	- do-	46/46	79,715	2,63,05,950	330	592	47~91280
	- do-	- do-	44/45	31,000	1,02,30,000	330	592	18352000
	- do-	- do-	45/55	67,000	2,13,73,000	319	603	40401000
3	M/s Salitho Ores Pvt Ltd	M/s Shantilal Khushaldas & Bro. Pvt. Ltd.	46/45	1,75,143	5,77,97,190	330	592	103684656
	- do-	- do-	46/45	1,73,500	5,72,55,000	330	592	102712000
	- do-	- do-	50/50	1,69,700	5,60,01,000	330	592	100462400
	- do-	- do -.	46/45	1,66,290	5,48,75,700	330	592	98443680
	- do-	- do-	51152	1,04,350	3,44,35,500	330	592	61775200
	- do-	- do-	ROM Fe	6,710	21,40,490	319	603	4046130
Total								105,77,75,066

3.3.5 From the above table it is clear that the total suppression in sale value works out to Rs. 105,77,75,066/-. Therefore, the under-invoicing resorted to by the assessee amounts to unaccounted sales and hence the estimation of the under-invoiced amount is justified and correct and legally valid. This view is also supported by the ratio of the decision in the case of Commissioner of Sales Tax vs. H.M. Esufali H. M. Abduali (SC) 90 ITR 271. In light of the facts as discussed above an amount of Rs.105,77,75,066/-, as computed in the table in para 3.3.4 above is added to the total income of the assessee on account of suppression of sales value/under-invoicing. Penalty u/s 217 (1)(c) of the I. T. Act, 1961 for suppression of income and for furnishing inaccurate particulars of income is initiated separately.

6. The Id. CIT(A), as evident from his order, has given specific

findings discussing each and every issue raised, and has finally given relief to the assessee at para 5.12 of his order by holding as follows:-

"5.12. Thus, on basis of the facts brought on record in the earlier paras that the price of sales made by the appellant to associate concerns is for the sale of are at mine head and the ore sold by the associate concerns to the third party purchasers is the price for are loaded on the barges. I have also examined the expenses that the associate concerns have incurred for picking up the are from mine head upto the point they are loaded on the barges and the approximate costs incurred by the associate concerns for loading the are on barges. I have also given a finding as to how the associate concerns have earned normal profit which is at arms length in the transactions with the appellant. Considering all these facts, I hold that the comparison made by the AO of the sale price on page 10 of the assessment order for making an addition was of incomparable prices and hence, the AO came to the wrong conclusion of making addition on this issue. On similar facts of the case, the CIT(A) in A.Y. 2008-09 had deleted the addition made by the AO on the identical issue. In view of the facts brought on record and following the decision of CIT(A) in appellant's case for A.Y. 2008-09 on identical issue, the addition made by the AO amounting to Rs.1 07,77,75,066/- is hereby deleted. Ground no.3 is allowed."

We further find that the Hon'ble Supreme Court in the case of *CIT v. Calcutta Discount Company Ltd.* [1973] 91 ITR 8 (SC) held that when one trader transfers his goods to another trader at a price less than the market price, the taxing authority cannot take into account the market price of those goods ignoring the real price fetched. In this case of the assessee, the AO has not alleged that the assessee has not offered its income for purposes of taxation in the return of income. The AO also has not doubted the transaction as such. It is also not the case of the AO that the assessee has earned more than it has offered to tax merely because the sale to sister concern is at a price lower than the sale price charged by the sister concern. In fact, the Hon'ble Supreme Court in the case of *Calcutta Discount Company Ltd.* (supra)

has observed as follows:-

"15. Several decades back the Madras High Court in the case of Sri Ramalinga Choodambikai Mills v. CIT [1955] 28 ITR 952 held that in the absence of any evidence to show either that the sales were sham transactions or that the market prices were in fact paid by the purchasers, the mere fact that goods were sold at a concessional rate would not entitle the income tax department to assess the difference between the market price and the price paid by the purchaser as profit of the assessee. In CIT v. A. Raman & Co. [1968] 67 ITR 11 the Supreme Court held that the law does not oblige a trader to make the maximum profit that he can out of his trading transactions. Income which actually accrues is taxable, but income which the assessee could have, but has not in fact earned, is not made taxable."

Therefore, from the aforestated judicial pronouncements, it is clear that what has to be considered for taxation, is not the market price of the goods which were transferred but the actual price that was received or fetched. Income which actually accrues is taxable. But income which the assessee could have but has not in fact earned cannot be taxed. We do not find any infirmity with the findings of the Id. CIT(A) which is upheld. Ground Nos. 2 & 3 of the Revenue's appeals are dismissed. Ground No.4 is general in nature.

7. In the result, appeal of the Revenue in ITA No.99/PAN/2018 is dismissed.

ITA No.100/PAN/2018

8 In this appeal, the only issue for adjudication is suppression of sale. This issue has already been decided by us while adjudicating the departmental appeal in ITA No.99/PAN/2018. Therefore, on the same parity of reasoning and facts and circumstances, the decision on this

issue already taken in ITA No.99/PAN/2018 shall apply *mutatis mutandis* to this appeal also. Resultantly, grounds raised by the Revenue are dismissed.

9 In the result, appeal of the revenue in ITA No.100/PAN/2018 is dismissed.

ITA No.72/PAN/2018

10. This appeal is preferred by the assessee.

11. Ld. senior counsel appearing for the assessee submitted that the issue for adjudication in this appeal is with regard to the conversion charges.

12. The relevant facts of the case in brief are that assessee in the course of its business used agricultural land owned by it, in the vicinity of the mining leases for non-agricultural purposes such as dumping of waste ores. Vide Gazette Notification, Govt. of Goa framed a Policy for regulating the mining dumps on Govt. and private land. During the F.Y. 2013-14, the assessee had paid conversion charges pursuant to above Policy of the Govt. of Goa to regularize such use of agricultural land into non-agricultural purposes. The breakup of the said charges is as follows:-

Conversion fees	4,07,36,000	Part C-7(i) of Policy
+ Interest	<u>12,22,080</u>	
	4,19,58,080	
+ Fine/penalty	<u>81,47,200</u>	Part C-7(iv) of Policy
	<u>5,01,05,280</u>	

The aforesaid conversion charges were paid based on the "Policy" issued. The AO in the course of assessment, referring to the Policy document, required the assessee to explain why charges imposed as a result of unauthorised use of land in violation of the existing provisions of Land Revenue Code, 1968 with regards to conversion of land and use of land for non-agricultural purposes without permission of the prescribed authorities should not be disallowed. The AO held that since the Land Revenue Code stated provisions for procedure for conversion of use of land from one purpose to another and prescribed penalty for the same, and since the "Policy" was akin to the Land Revenue Code, the assessee did not follow the laid down provisions and as such payment of conversion charges were held to be paid for violation of law and were disallowed by AO u/sec. 37(1) of the Act.

13. Ld.senior counsel demonstrating through the gazette notification of Government of Goa, filed in the paper book, submitted that the conversion procedure has been undertaken as per the gazette and with this payment, there is change of user. No asset is earned. This is as authorized by the Govt. In support of his proposition, relied on the decision of the Hon'ble Supreme Court in the case of *Bikaner Gypsums Ltd. v. CIT* [1991] 187 ITR 39 (SC). In this decision, the Hon'ble Apex Court has observed and held that where the assessee has an existing right to carry on a business, any expenditure made by it during the course of business for the purpose of removal of any restriction or

obstruction or disability would be on revenue account, provided the expenditure does not acquire any capital asset. Payments made for removal of restriction, obstruction or disability may result in acquiring benefits to the business, but that by itself would not acquire any capital asset. The relevant part of which is extracted as under:-

"The appellant company took over a lease of 4.27 square miles for mining gypsum for a period of 20 years (with provision for renewal for a further period of 20 years), and carried on the business of mining gypsum in accordance with the terms and conditions of the lease. One of the clauses in the lease deed provided that no mining operation shall be carried on in or under the lands within a distance of 100 yards from any railway, reservoir, canal or other public works or any buildings, etc., except with previous permission. The railway authorities extended the railway area on the leased land by laying down fresh track, providing railway siding and also constructing quarters. The suit of the appellant for ejecting the railway was dismissed. Thereafter, under an agreement with the Government, the Railway Board and the Sindri Fertilisers to whom the appellant company supplied gypsum, the railway station, track, etc. were removed to another area offered by the appellant company. Out of the total expenses of Rs.12 lakhs incurred by the railway for the shifting, the appellant company paid Rs.3 lakhs as its share under the agreement. The appellant claimed deduction of the sum of Rs.3 lakhs in computing its profits. The Appellate Tribunal held that the sum was allowable as a deduction as it was a revenue expenditure. But the High Court, on a reference, held that the amount was capital expenditure. On appeal to the Supreme Court:

Held, reversing the decision of the High Court, that the amount was spent on the removal of a restriction which obstructed the carrying on of the business of mining within a particular area in respect of which the appellant had already acquired mining rights. The payment of Rs.3 lakhs was not made for initiating the business of mining operations or for acquiring any right; the payment was made for shifting the railway station, track, etc., i.e., to remove an obstruction to facilitate the business of mining, and it did not bring into existence any advantage of an enduring nature. The expenditure was on revenue account."

14. Facts are absolutely identical to the present case of the assessee. The entire work has been done in accordance with the gazette notification, Govt. of Goa. The assessee had already an existing right

to carry on business and whatever expenses the assessee had incurred was to remove restriction/obstruction or disability and such removal of restriction /obstruction was on revenue account and though it has provided benefit to the business of the assessee, but at the end of the day, the assessee has not acquired any capital asset. Following the aforesaid judicial pronouncement and applying it to the facts of the assessee's case, we set aside the order of the Id. CIT(A) and allow the appeal of the assessee.

15. In the result, appeal of the assessee is allowed.

16. In the combined result, appeals of the Revenue are dismissed and that of assessee is allowed.

Order pronounced in open Court on 21st September, 2023.

Sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

Sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Dated : 21st September, 2023

vr/-

Copy to :

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
4. The DR, ITAT, Panaji Bench, Panaji.
5. Guard File.

By Order

// TRUE COPY //

Senior Private Secretary
ITAT, Pune.