

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI**

**BEFORE SH. SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER**

ITA No.4408/Del/2017
(Assessment Year : 2006-07)

ACIT Circle - 27(2), New Delhi PAN No. AAACY 0201 G (APPELLANT)	Vs.	Y.K.K India Pvt. Ltd. R-13/14, LGF Ansal Chambers - II, 6, Bhikaji Cama Place, New Delhi-110066 (RESPONDENT)
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Assessee by	Shri Nageshwar Rao, Adv.
Revenue by	Shri H. K. Choudhary, CIT-D.R.

Date of hearing:	12.12.2023
Date of Pronouncement:	14.12.2023

PER SHAMIM YAHYA, AM :

This appeal filed by the Revenue is directed against the order of learned Commissioner of Income Tax (Appeals) - 13, New Delhi dated 30.01.2017 pertaining to Assessment Year 2006-07.

2. The ground of appeal filed by Revenue, which reads as under:

“1. On the facts and in the circumstances of the case, ld CIT(A) has erred in deleting the disallowance of Rs.16,78,91,652/- on account of out of books sales.”

3. Brief facts of the case are that the appellant company is a 100% subsidiary of YKK Corporation, Japan, with a manufacturing facility in Bawal, Haryana, producing zippers, sliders and fasteners. It filed return of income for the A.Y. 2006-07 on 28.11.2006 disclosing income of Rs. 26,10,24,372/-.

Assessment u/s 143(3) was completed on 24.12.2009 at a total income of Rs.67,49,22,330/- which included addition on account of excess production/suppressed sales of Rs.27,93,53,054/-. The appellant filed an appeal which was disposed of vide order dated 26.03.2012 by the CIT(A) upholding the above addition of Rs.27,93,53,054/-. The appellant then filed an appeal before the ITAT, New Delhi. The Hon'ble ITAT, New Delhi vide order dated 15.03.2013, remitted the case back to the assessing officer for re-adjudicating on all the issues. The assessing officer completed the assessment u/s 143(3)/254 on 30.03.2015 reducing the addition originally made at Rs.27,93,53,054/- to Rs.16,78,91,652/- on account of excess production/suppressed sales.

4. For making aforesaid additions, the AO rejected the assessee's submissions and gave following observations:

- “i) As per the Clause 'N' of Schedule 21 to Accounts, the installed capacity during the year has gone up from 12.50 Crores to 15 Crores Slide fasteners i.e. a rise of 20%. The present argument that the installed capacity stated is on double shift basis is of no great significance because, firstly this is not mentioned in clear-cut terms in the audited accounts and secondly, the previous year's installed capacity also must be on double shift basis because considering the assessee's own submission about being global & thorough audit, principle of consistency do not give any room of deviation and in case of deviation in reporting i.e. either the current year or the last year's installed capacity was on triple shift basis, the same would invariably find a place in the notes to the accounts.*
- ii) Auditor's note to the effect that with regard to the installed & utilized capacity, it has gone by the certificate of the management, goes to highlight the fact that there has been no thorough audit on this aspect.*
- iii) The claim about doubling the installed capacity in the current year as appearing in the assessee's own website as well as news item of UNI News Agency (an accredited & neutral source of news with undoubted authenticity) with reference to launching of new factory*

by the assessee in Haryana and expansion of installed capacity effected on 3 occasions, is based on the statement by assessee's CEO which is an admission to the public at large including the financial institutions which are funding the assessee and to those who are dealing with the assessee company either as supplier or customer. Hence, now the assessee cannot backtrack from the said claim. The assessee has not given one convincing reason for mentioning the increase in the installed capacity as 20% in its final accounts, while it itself was claiming that the same has been doubled during the year due to expansion activity, in other fronts like website & before news agency.

- iv) The claim that assessee's accounts are subject regular audit by excise authorities and sales tax/VAT authorities, is nothing but a deft after thought, because it is not assessee's case that their production activity is under 24 hour surveillance and by its own admission, it has admitted that as against double shift basis for all reporting including Schedules to the audited Accounts, the assessee company has in fact run the factory on triple shift, for meeting the increased demand. Further, it is a well known fact that assessee is a market leader in the range of products that it manufactures and therefore there is no dearth of market for its products in grey market.*
- v) The assessee's tirade against circumstantial evidence, is in fact an act to shift the attention of Revenue authority's focus/attention from its thought process that is bound to pin-point the assessee's act of suppressed production and its sale outside the Books of A/cs. Similarly, its contentions w.r.t being a subsidiary of a global company with impeccable record is also an attempt at creating a façade for hiding its act of concealment of income via unrecorded sales of the items produced but not recorded in the Books.*
- vi) The assessee's argument about its raw material being subjected to VAT and imported items is again a hollow one, because as there is no dearth of grey market for assessee's products, similarly there is grey market for the raw materials also. Here it is also pertinent to note that the entries regarding items of raw materials discarded during the year and earlier years which is shown to have been sold as scrap for petty amounts, are in fact available for such suppressed production.*
- vii) Thus on an proper analysis of the above facts, the only plausible conclusion is that Books of Accounts and details submitted do not reflect the correct state of affairs of the assessee's business and therefore there is no alternative but to reject the book results u/s. 145(3) of the Act, especially w.r.t production & sales. But, there are plethora of case-laws wherein it is stated that AO has to assess the suppressed sales/income on an objective basis and not subjectively or on any wild guess. Accordingly, the installed capacity, sale price*

and cost price is adopted as declared by the assessee, lest there is an allegation that AO has not been objective. Further sufficient allowance is also given to the fact that price in grey market will be at a lower level than that of open market.

- viii) Case-laws relied upon by assessee are distinguishable, based on the fact & circumstances of the instant case with that of the said case-laws*
- ix) In view of the above, it is established beyond doubt that assessee has in fact suppressed its production and which has been sold without its corresponding entry based on the circumstantial evidence of doubling of installed capacity but reporting the said increase as 20% in the notes to the final accounts and in the Return of Income and the based on the fact that actual production shown is more than the installed capacity declared by assessee.*
- x) The installed capacity in last year for slide fasteners was 12,50,00,000 pieces which has been doubled during the year i.e. 25,00,00,000 slide fasteners and actual production shown is 15,67,26,860. It is pertinent to note that only installed capacity which is on double shift basis as per assessee's own version is considered for calculating the difference or suppressed production i.e. 9,32,73,140 pieces and Gross Profit per piece calculated by AO @ Rs. 5.99 per piece is not disputed by assessee. But giving an allowance @ 25% for the depressed price in the grey market, the G.P. rate per piece would work out to Rs. 4.50 per piece and therefore the value of G.P. on the out of book sales from suppressed production would work out to Rs.41,97,29,130/-. Further, there would be expenses for transport & other overheads in respect of such out-of-book sales which also cannot be booked for in the Books of A/c for which 60% of such GP is allowed. Thus, concealed income from out-of-book sales from the suppressed production would work out to Rs. 16,78,91,652/- (ie. Rs.41,97,29,130/- 40%) which is brought to tax as undisclosed income from out-of-book sales from the suppressed production would work out to Rs.16,78,91,652/- (i.e. Rs.41,97,29,130/- * 40%) which is brought to tax as undisclosed income.*

5. Against the above order, assessee appealed before the learned CIT(A).
The learned CIT(A) summarized assessee's submissions as under:

"5. The above written submission has been carefully considered. I have also perused the case laws relied upon by the appellant to argue that ad-hoc additions could not be made without cogent and verifiable evidence. The appellant has filed a chart depicting comparative ratios of expenditure to turnover and profit for the A.Ys 2005-06 to 2008-09, to show that the turnover has increased from Rs. 121.59 crores in the AY

2005-06 to Rs.140.86 crores in the AY 2006-07, and up to Rs.204.74 crores in the AY 2008-09, due to increase in installed capacity and orders received. The appellant has vehemently argued that the capacity expansion in 2006 was only in the slider unit, while the production includes slide fasteners, chains and sliders. The AR produced the excise register, audited by the excise department, for the year under reference along with its sales tax assessment orders. The appellant has submitted that its case has been selected for scrutiny for every assessment year from its inception in 1997 and no ad-hoc addition has been made in any assessment apart from the year under consideration. The appellant has relied on a number of case laws to argue that section 145 cannot be invoked on surmises and conjectures of the AO. It is forcefully denied that the company has never manufactured or sold zippers in the grey market, as has been alleged by the AO without any basis whatsoever. The appellant has pointed out that the manufacture of slide fasteners, sliders and chains is order based since each item can vary in size, material and colour, and the appellant's production is entirely on specific orders. It is pointed out that the AO has relied on a news report that the appellant had doubled its installed capacity and hence concluded that the appellant had doubled its production. It is contended that the AO did not review the production process or the books of accounts or the excise records before arriving at this unjustified conclusion. The appellant has stated that YKK Corporation, Japan, is a global leader in fastening products and more than 90% of raw material consumed in the plant in India is imported to maintain global quality standards. The AO has ignored the fact that undocumented manufacture could not have taken place without increase in consumption of imported raw material. For all the above reasons, it has been argued that the addition made is frivolous and arbitrary.”

6. Considering the above, learned CIT(A) directed for the deletion of addition by observing as under:

“5.1. I have carefully gone through the details of production process and notes on the zipper structure and anti counterfeiting measures undertaken by YKK. I am in agreement with the appellant that the addition of Rs.16,78,91,652/- on account of suppressed production and out of book sales is based entirely on the increase in installed capacity of slider factory in 2006, as per UNI news report. The AO has disregarded the appellant's contention that increase in capacity has resulted in higher turnover over the next few years, and that the increase of about 10% in salaries and wages was commensurate with increase in turnover as well as increments and incentives. It was also submitted to the AO that the expansion was not completed in the year under reference, and even if the installed capacity was doubled, it cannot lead to the conclusion that the

additional production was doubled. The appellant has itself pointed out that depending on orders, the plant is run on double shift and even triple shift. And the installed capacity may also lie unutilized when orders have not been placed. Hence the installed capacity in itself cannot be an indicator of production, accounted or otherwise. The AO cannot be held to have brought any material evidence on record to prove that undisclosed production has been carried out and the zippers sold in the grey market. Even the calculation of the selling price per piece is arbitrary and a net profit of Rs. 4.50 per slider has been presumed without any reference to the normal variation in selling price of each piece. There is no evidence that the appellant was acquiring raw material and diesel for production outside its books or paying wages in cash, or selling the goods to unspecified buyers. As argued by the appellant, the addition is based on conjectures and surmises, and not on incontrovertible evidence. The addition made of Rs.16,78,91,652/- is accordingly deleted.”

7. Against the above order, the assessee is in appeal before us.

8. We have heard both the parties and perused the material on record and carefully considered the submissions and orders of authorities below. We agree that addition for excess production are only a conjecture and surmise of the AO and it has no cogent basis. The addition is only based upon increase in installed capacity without any evidence of suppressed production. Learned CIT(A) has made reference to excise register and its audit by excise authority. The learned CIT(A) has also referred to sales tax assessment record. No adverse finding is there for unaccounted production/sales. Thus Learned CIT(A) has elaborately discussed each and every aspect and given a factual finding that addition proposed by the Assessing Officer are not sustainable. Accordingly, we do not find any infirmity in the well reasoned order of learned CIT(A). Accordingly, we uphold the same.

9. In the result, appeal filed by Revenue stands dismissed.

Order pronounced in the open court on 14.12.2023

Sd/-

**(CHALLA NAGENDRA PRASAD)
JUDICIAL MEMBER**

Date:- 14.12.2023

Sd/-

**(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

*Priti Yadav, Sr. PS**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI