IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Shri Manomohan Das, Judicial Member

ITA No. 141/Coch/2021
(Assessment Year: 2000-01)

Prakash R. Nair Prop. Dhanya Foods Kochuppilammoodu Kollam 691001 [PAN:ABFPN4424P]	vs.	Dy.CIT, Central Circle Kollam
(Appellant)		(Respondent)

Appellant by:	Shri R. Vijayaraghavan, Advocate
Respondent by:	Smt. J.M. Jamuna Devi, Sr. D.R.

Date of Hearing:	19.10.2023
Date of Pronouncement:	17.01.2024

O R D E R

Per: Sanjay Arora, AM

The instant Appeal by the Assessee agitates the dismissal of his appeal contesting the levy of penalty under section 271(1)(c) of Income Tax Act, 1961 ('the Act') dated 25.06.2008 for Assessment Year 2000-01 by the Commissioner of Income Tax (Appeals), Income Tax Department [CIT(A)], vide it's order dated 27.04.2021.

2. It would be relevant to recount the facts of the case. The assessee is in the business of manufacture and export of cashew kernels, with processing units setup at Mallappally, Nathavaram, Aduroad, Maruvada, Laxmipuram, Korukonds & Chathancode, maintaining separate books of account – on mercantile basis, for each. He filed his return of income for the relevant year on 16.03.2001 at Rs.18,25,973 (and agricultural income of Rs. 22,087), claiming deduction under Chapter VIA at an aggregate of Rs. 4.15 cores, being principally u/ss. 80IA and 80HHC of the Act, at

Rs.68.83 lakhs and 345.65 lakhs respectively. The same was processed u/s. 143(1), i.e., as such, granting refund for Rs.18.62 lakhs, on 15.03.2002. Subsequently, on 16.04.2002, notice u/s. 148(1) was issued, which was responded to by filing a return of income on 06.06.2003 at Rs.19,30,992, i.e., at an increase of Rs.1,02,199, retaining deduction u/c. VI-A at Rs.4.15 crores, even as that u/s. 80HHC stands enhanced to Rs.471.53 lakhs. This variation was explained in the assessment proceedings as on account of omission to include transactions of purchase and sale in the course of export, from/to sister concerns in Andhra Pradesh (AP), during the relevant year, which was stated as not deliberate. The said omission was further stated to have a chain effect for other locations, which had since been carried out, even as the overall production and out-turn remains the same. Inasmuch as the same was voluntary, it was requested to accept the same, without levy of penalty. It was observed by the Assessing Officer (AO) that while the original ret.urn reported a manufacturing and trading profit, i.e., *qua* goods manufactured and traded, at Rs.223.29 lakhs and Rs. 63.14 lakhs respectively, the same stood altered to a loss (ignored in computing deduction u/s. 80HHC) and Rs.416.69 lakhs respectively in the revised return. The manufacturing profit for the purpose of deduction u/s. 80-IA, however, remained unaltered at Rs.275.32 lakhs (including rs.13.54 lakhs by way of processing commission), claiming deduction u/s. 80IA @ 25% at Rs.68.83 lakhs, i.e., as per the original return. The restriction u/c. VIA at Rs.4,14,67,212 (i.e., inclusive of Rs.19,500 u/ss. 80L/80G) by the assessee, i.e., despite increase in the claim of deduction u/s. 80HHC by Rs. 125.88 (471.53 – 345.65) lakhs was explained to be in view of the reassessment proceedings, which are for the benefit of the Revenue (*CIT v. Sun Engineering Works Pvt. Ltd.* [1992] 198 ITR 297 (SC)). This was not accepted by the AO who, reckoning that on manufactured and traded goods separately, worked out deduction on the latter at Rs.327.40 lakhs. The assessment was completed on 09.03.2004, making the following adjustments to the returned income, also initiating penalty proceedings u/s. 271(1)(c) of the Act vide notice u/s. 274 of even date:

i. Claim for deduction u/s 80IA(Rs.68,82,867/-) was rejected.

ii. Bank interest of Rs. 3,13,508/- was assessed as 'Income from Other Sources'.

iii. The claim for deduction u/s 80HHC was restricted with reference to section 801A(9);

iv. Deduction under sec. 80HHC was re-worked;

v. Addition on account of under-pricing of sales of cashew kernels to sister concerns in the course of exports (Rs. 3,21,15,027/-)

The foregoing constitute the primary, undisputed facts of the case.

3.1 In the penalty proceedings, which were though considered only in respect of addition listed at Sr. No. 5, the assessee reiterated his stand in the assessment proceedings, toward which reproduce his reply dated 19.02.2004:

'In the original return, sales in the course of export was 30673 tins valued at Rs. 8,14,83,860/ This averages to Rs. 234.09 per kg. When the omission of 30593 tins in respect of sales in Andhra Pradesh was also taken into consideration, the total quantity sold for exports was 61,866 tins valued at Rs. 14, 84,30,582/- averaging to Rs. 205 per kg. If Andhra Pradesh transfers alone were taken into consideration, the value of 30593 tins was Rs. 6,10,06,722/-. This gives an average price of Rs. 176 per kg. The break up of the original transfers unit-wise is enclosed. On perusal, you will please appreciate that many of the transfers are at higher prices. *It is important to observe in this connection that the higher grade produced by the assessee have all gone for direct exports* as is evident from the fact that the average export realisation per kg. as per schedules accompanying return furnished to you works out to Rs. 276/-. The lower prices of Rs. 142/- to Rs. 199/- per kg. was attributed to sales of SPS, LWP, W.450 and such other similar far inferior grades included in transfers for exports. A similar situation has occurred in Andhra Pradesh comprising sales of lower grades

Overall cost of production cannot be a criteria for determining the transfer price for sales in the course of export for the simple reason that the stock consist of several grades with some of them as explained above are (of) far inferior in quality. *For valuation purpose, however, in the absence of grade-wise costing designed by the Cashew Industry*, over-all cost based on total overheads in this case, therefore, the closing stock if valued on grade-wise basis, would have been lower than the value adopted for closing stock by the assessee. You will therefore, appreciate that lower grades will have to be valued sometimes at prices which are lower than the overall cost of production. Stock valuation - lower of cost or market price.

This notwithstanding, the assessee offers himself voluntarily an addition to be made on the export business profits through sales in course of export in respect of the transfers in Andhra Pradesh accounting for 30593 tins *which is responsible for pricing distortions*. For this purpose, the working for the additional amount on export business profits is based on the following:

As you will kindly appreciate, the transfer price of Rs. 234.09 per kg. for the original transfers is taken as the base. The transfer price in Andhra Pradesh which was taken at an average price of Rs. 176 per kg. is given a step up as follows:

Cost of production in Andhra Pradesh – Average Rs. 213/- per kg. (Kindly refer to our Annexure to 80I claim where the average cost varies from Rs.201 to Rs 224/- per Kg on a factory to factory basis

Depreciation on assets in Andhra Pradesh - Rs 20,03,669/- (Vide Schedule to Fixed assets)

No. of bags processed in Andhra Pradesh - 18,563 nos.

Depreciation per kg.- Rs.5.33

Administrative Overheads (estimated) - Rs. 10/- per kg.

So, total cost - Rs.228/-

This is taken as the step up price after taking cognizance of lower grades comprised in these transfers as is evident from the break-up list enclosed. Accordingly, the value of 30,593 tins will be increased by a price differential of Rs.52/- per kg. *Since the transfer prices include the value of tins* and being packed quantities, a separate addition is not called for towards the value of tins.

Assessee offers this addition of Rs. 1,80,40,080/- voluntarily subject to 80HHC benefit.'

This was followed by the assessee's reply dated 04/3/2004, the relevant part of which, reproduced in the penalty order, reads as under:

'In the original return, sales in the course of export was 30673 tins value at Rs 8,14,23,860/-. This averages to Rs 234.09 per kg. When the omission of 30593 tins in respect of sales in Andhra Pradesh was also taken into consideration, the total quantity sold for exports was 61266 tins valued at Rs. 14,24,30,582/- averaging to Rs. 205 per kg. If Andhra Pradesh transfers alone were taken into consideration, the value of 30593 tins was Rs. 6,10,06,722/-. This gives an average price of Rs. 176 per kg. The break-up of the original transfers unit-wise is enclosed. On perusal, you will please appreciate that many of the transfers are at higher prices. It is important to observe in this connection that the higher grade produced by the assessee have all gone for direct exports as is evident from the fact that the average export realisation per kg. as per schedules accompanying return furnished to you works out to Rs. 276/-. The lower prices of Rs. 142 to Rs 199 per kg. was attributed to sales of SPS, LMP,W.450 and such other similar far inferior grades included in transfers for exports. *A similar situation has occurred in Andhra Pradesh comprising sales of lower grades*.

Overall cost of production cannot be a criterion for determining the transfer price for sales in course of export for the simple reason that the stock consists of several grades with some of them as explained above are of far inferior in quality. For valuation purpose, however, in the absence of grade-wise costing designed by the cashew industry,over-all cost based on total cost concept is given merit taking into account the

total overheads. In this case, therefore, the closing stock if valued on grade-wise basis, would have been lower than the value adopted for closing stock by the assessee. You will, therefore, appreciate that lower grades will have to be valued sometimes at prices which are lower than the overall cost of production. Stock valuation is lower of cost or market price.' (*emphasis, supplied*)

The same comprises and dilates the assessee's case.

3.2 We may at this stage state the basis of the Revenue's case *qua* the addition for rs. 321.15 lacs. Finding a spurt in the returned profit on export of traded goods, i.e., from Rs.63.14 lakhs to Rs.416.69 lakhs, the AO analysed the figures furnished by the assessee. As against the claim of sale (to sister concerns at Andhra Pradesh) for Rs.814.24 lakhs (347831.82 kgs. at Rs.234.09 per kg), the revised rate was at Rs. 205 per kg. The additional sale, omitted to be returned originally, at Rs.610.07 lakhs (346924.62 kgs) fetched an average rate of Rs. 175.86 per kg. This was explained as due to sale of low grade varieties, also exported through sister concerns at AP, omitted to be included earlier. This was doubted in the absence of any substantiation; the average cost of production being at Rs. 247 per kg, at which rate the closing stock as at the year-end was also valued. That apart, the assessee's claim was attended by the following:

(a) Section 80IA reported a profit of Rs.261.78 lakhs (other than processing commission of Rs.13.54 lakhs), while the manufacturing profit u/s. 80HHC was at a loss.

(b) The assessee's accounting system did not admit identification as to the extent to which a batch of cartons for export contained manufactured and traded goods.

(c) The entire export having been accounted for in the assessee's original claim for deduction u/s. 80-IA and 80-HHC, at Rs.68.83 lakhs and Rs. 345.65 lakhs respectively, how could the assessee claim the trading sales, omitted earlier, to be exported?

(d) The returned trading profit on export, at Rs.416.69 lakhs, i.e., after accounting for indirect expenditure at Rs.72.73 lakhs, worked out to 31.534%, unheard of in the said business;

(e) Section 80IA(9) specifically excludes deduction *qua* profits subject to section 80-IA from being claimed as deduction under any other provision of Chapter VIA, which is to be limited to the amount of profit or gain of the enterprise, also referring to section 80AB and decision in *Motilal Pesticides (I) Pvt. Ltd. v. CIT* [2000] 243 ITR 26 (SC).

The unexplained difference between the trading sale of Rs.1424.31 lakhs (694756.44 kgs. or 61,266 tins) and the average cost of purchase, i.e., Rs.1716.05 lakhs (@Rs.247 per kg.), was added as income, also factoring in the cost of tins (containers) inasmuch as the sale value was admittedly inclusive of tin cost, as under:

Cost of kernels as per closing stock valuation.	Rs.247/- per kilo
Cost of tin purchased.	Rs.48 per tin
Value of kernels sold in the course of export (61266*11.34*247)	Rs. 17,16,04,84
Value of 61,266 (61266*48) tins	Rs. 29,40,768
	Rs. 17,45,45,609
Less: Value disclosed in the accounts.	Rs.14,24,30,582
Short credit in A/cs. due to Under valuation made.	Rs. 3,21,15,027

3.3 Though the assessee furnished several replies in the penalty proceedings; his case, as afore-noted, was a reiteration of that in the assessment proceedings. We may, nevertheless, reproduce his reply dated 10/10/2007 in the penalty proceedings:

'In the original return of income the sales in the course of export to sister concerns covered only the transactions in Kerala and Tamil Nadu. *The similar transactions* pertaining to such activity in Andhra Pradesh were omitted by oversight in all the units of the group. This necessitated filling a revised return of income which was also in response to notice under 148. The revised return of income filed in June 2003 was accompanied by a detailed explanatory letter dated 2nd June 2003 by the assessee establishing the genuineness of the omission. Whereas the original sales in the course of export was to the tune of Rs. 8.14 crores comprising sales of 30673 tins, the revised return incorporated the omitted sales transaction figure of Rs. 6.10 crores comprising sale of 30593 tins of kernels thus totalling a total figure of Rs. 14.24 crores on the total sale of 61266 tins of kernel. Whereas the weighted average sale price originally was Rs. 234 per kg. The revised total value after considering the omissions, went down to Rs. 205/- per kg. Our detailed reply dated 4th March 2004 has (in)adequate explanations for the reason of fall in weighted

average sale price. To reiterate, you will kindly note that there was no grade-wise costing system in the cashew industry. *Hence the valuation of closing stock could be done only on overall basis*. However, the exports and domestic sales were priced taking into account the grades sold and the prevailing market price. Therefore, the closing stock, if valued, on grade-wise basis, would have been lower than the value adopted for closing stock by the assessee since it will take into account the different grades including lower grades and following the standard accounting policy that closing stock has to be valued at lower cost or market price.

This notwithstanding, the assessee voluntarily offered an addition of Rs. 1.80 crores noticing the overall fall in transfer price for transactions in Andhra Pradesh which was omitted to be considered in the original return of income. The voluntary act done in good faith even after incorporating the additional sales income of Rs. 6.10 crores would prove the *bonafides* of the assessee and the fact that there was no wanton concealment. In fact, the revised return of income reported an increase in profits subject to tax. *In any case, the huge addition of Rs. 1.8 crores to business profits offered by the assessee in the beginning of the assessment proceedings itself should remove any apprehension in the mind of the Officer regarding any concealment at all*. Of course, the additional income offered under business profits was only subject to 80HHC benefit which also derives support from decisions of higher authorities.

Thus, you will be convinced beyond doubt that the assessee has not concealed any income by voluntarily filing a revised return of income to be followed by a voluntary offer of addition of a substantial magnitude. *In the transfers to sister concerns, the value of tins was already embedded in the sale price, an issue decided by the first Appellate authority in favour of the assessee*. (emphasis, ours)

4. The assessee thus failing to improve his case in any manner, penalty was levied for the same reasons, finding the assessee's offer of an additional sum of Rs.180.40 lakhs in assessment (subject to the deduction u/s. 80HHC), as inadequate. Reliance was placed on the decision in *Patel Chemical Works v. CIT* [2004] 265 ITR 273 (Guj), wherein it stands held that Revenue is under no obligation to find the overall effect of receipt of tax by the Revenue, i.e., taking into account that, if any, paid by the assessee's sister concern/s. Once tax is found to have been avoided by the assessee, penalty u/s. 271(1)(c) is exigible. The penalty order was passed without noticing the order by the Tribunal (to which matter was carried in appeal by the assessee) – in the quantum proceedings, since passed on 29.11.2007. The penalty

stands since confirmed in appeal, meeting the assessee's reliance on case law, and itself citing several. Aggrieved, assessee is in second appeal.

5. Before us, the emphasis of Shri Vijayarghavan, the learned counsel for the assessee, was as to the addition being based solely on estimation, i.e., of the assessee having under-priced sale of traded goods to sister concerns, which is not proved at all. The assessee, as explained, is not maintaining inventory of cashew kernels grade-wise and, accordingly, valued the same, i.e., as at the year-end, consistent with the past, on a weighted average for the year. No fault has been pointed out by the Revenue on that score. The actual purchase and sale of goods, however, would be as per the quality of the goods. Further, the profit being entitled to deduction u/s. 80HHC, no benefit in terms of tax saving, as inferred, would arise on underselling goods to his sister concern/s. Also, penalty had not been levied on the profit omitted to be returned per the original return, i.e., Rs.1.02 lakhs. The Tribunal, in the quantum proceedings, had again confirmed the addition on the premise that the assessee had failed to disprove under-valuation, while it was the AO who, making the said charge, had to prove it, as explained by the Tribunal in the assessee's own case for the subsequent years (ITA Nos. 213 – 216/Coch/2021, dated 07.11.2022). *He could not, however, furnish the rate at which the claimed inferior grade goods had been purchased by the assessee which, as it appears, are again from it's sister concerns and, further, the rate fetched by the sister concerns on export thereof*. We say so as this information would definitely either substantiate or discredit the assessee's case. Shri Vijayaraghavan would, in reply, submit that this may not be relevant. The assessee has subsequently, on 30/10/2023, i.e., vide letter dated 27/10/2023, placed the same on record. Smt. Devi, the ld. Sr. DR, would, on the other hand, rely on the orders by the Revenue authorities. Shri Vijayaraghavan would, at this stage, raise a legal ground, i.e., *qua* the non-maintainability of the proceedings in view of the notice u/s. 274 dated 09.03.2004 not specifying the limb of section 271(1)(c), i.e.,

concealment of particulars of income or *furnishing inaccurate particulars of income*, under which the impugned penalty stands levied u/s. 271(1)(c) r/w *Explanation 1* thereto, adverting to the copy of the said notice (PB pg. 3). Reliance for the purpose was placed by him principally on *Mohd. Farhan A. Shaikh v. Dy. CIT* [2021] 434 ITR 1 (Bom)(FB), also reading out there-from. Smt. Devi would, in reply, submit that the matter ought to be decided on merits, as indeed had been done in quantum and penalty proceedings inasmuch as there is, on facts, even no claim that the assessee had not understood the reason/s for which the addition had been made and, accordingly, penalty initiated and levied; the legal ground now raised being motivated to eschew an adverse decision.

6. We have heard the parties, and perused the material on record.

6.1 Our first observation in the matter is that, as opposed to the Tribunal's order dated 29.11.2007 for the current year, the Tribunal's order for the subsequent years, i.e., AYs. 2005-06 to 2007-08, and 2016-17, dated 07/11/2022, deletes the addition on the same ground. This is extremely relevant as if the Tribunal does not find it to be a fit case for addition on quantum, the question of penalty thereon does not arise. In fact, the Tribunal, for the said years, does not issue any finding on merits, but follows it's order for assessment years 2008-09 to 2011-12 (in ITA No. 40-43/Coch/2016, dated 03.02.2020), reproducing there-from. It is indeed surprising that this issue should arise year after year, i.e., the assessee selling goods to it's sister concerns at rates far lower than that obtaining, on average, for the year, and which he, albeit without evidence, explains as on account of inferior grade goods, and, further that the assessee's case continues to be unsubstantiated. Two, we find no reference to it's order dated 29.11.2007 in the Tribunal's orders for the later years. It is clear, therefore, that the same was not brought to it's notice by the parties, which is extremely disconcerting and depreciative. *More so, of the assessee pleading his case sans reference to the Tribunal's order in his own case*! Reliance thereon, in terms of

the clear law *qua* judicial precedence, is, thus, misplaced (refer: *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Others* [1999] 3 SCC 722 [(2) SCR 728] and *Sir Chunilal V. Mehta & Sons Ltd. v. Century Spng. & Mfg.Co. Ltd.* [1962] AIR 1962 (SC) 1314 [(1962) SCR 549]. That is, not only the same cannot be regarded as a judicial precedent for the current year, it cannot be so for the later years as well; the only manner in which the Tribunal could take a different view on the same issue is by referring it to a larger Bench, or by explaining, with reference to binding judicial precedents, why it's order for the current year could not be followed.

6.2 We shall, nevertheless, consider this aspect on merits. While the Tribunal for the current year holds against the assessee in view of his case being unsubstantiated, the Tribunal for the later years holds that the Revenue had not made out any case of under-pricing in view of the goods sold being, as stated, of lower grades. *But, then, this is precisely what the assessee is required to prove*. The primary burden to prove his return, and the claims preferred thereby, is on the assessee, who is even otherwise, i.e., on facts, in the intimate know of his affairs (*CIT v. Calcutta Agency Ltd*. [1951] 19 ITR 191 (SC); *Lakshmiratan Cotton Mills Co. v. CIT* [1969] 73 ITR 634 (SC);and which can further only be on the basis of proper materials (*CIT v. R. Venkataswamy Naidu* [1956] 29 ITR 529 (SC)). And which remains un-discharged in the instant case. It is only thereafter that the onus shall, where the sale rates are still doubted by the Revenue, shift thereto. There is nothing on record to show that the purchase and sale of cashew kernels from/to sister concerns was of lower grades and, therefore, billed lower. The purchase and sale bills would have at once proved the difference in quality and, concomitantly, price. That apart, the assessee's explanation itself shows that while the purchases and sales of cashew kernels are of different grades, varying vastly in prices, no separate inventory is maintained, so that the year-end inventory is valued at weighted average cost of purchase or, as the case may be, production. *How can, then, one may ask, the said method of valuation, admittedly followed throughout*

– *on the plea that there was no practice of keeping grade-wise inventory in the industry, be regarded as valid*, i.e., which would yield the true operating profit or loss of the business for the relevant accounting year; each year being a separate and independent unit of assessment. *The plea is in fact false; if kernels could be purchased and sold grade-wise, why could'nt they be inventorized on that basis*? The said method may pass muster where the assessee was dealing in the same variety of goods, price of which may vary from time to time, with a view to even out the impact thereof, while different grades are bound to be purchased and sold at different prices, perhaps to separate constituencies, in different markets. The valuation method adopted presupposes that the closing inventory is comprised of different grades in the same ratio in which they are purchased during the year, which is clearly presumptuous. The same, highly irregular, could be sustained only in case the different grades fall within a small price range or the sale of inferior goods is marginal, not impacting the operating result for the relevant year in any significant manner. Reference for the purpose may be made to *CIT v. British Paints (I) Ltd.* [1991] 188 ITR 44 (SC). As clarified therein, section 145 confers power as well as imposes duty on the AO to determine the correct profit and gain of the business. As such, where the accounts are prepared without disclosing the real cost of the goods in trade, he is duty bound to determine the taxable income by making computation in the manner he deems fit. *Given the clear law in the matter, the issue becomes principally factual, wholly unproved*. In our clear view, therefore, the Tribunal's order dated 29.11.2007 for the current year rightly holds the burden of proof as on the assessee, and of it being un-discharged.

6.3 We, next, consider if the adjustment made by the AO in imputing the sale at the average cost of purchase for the year is proper, or in excess, as alleged by the assessee, offering instead an amount of Rs.180.40 lakhs in assessment. We observe three major variations in the figure computed by the assessee:

(a) in quantity;

(b) in rate; and

(c) in the cost of tins (container).

The AO has rightly considered the entire quantity (61266 tins x 11.34 kg. per tin) purchased/sold from/to sister concerns, as against the quantity omitted to be originally returned (30593 tins). The said omission only served to bring to focus the assessee's trading results, and the manner in which the same were arrived at, and hold no other significance so as to exclude the quantity (30673 tins) sold through sister concerns, returned originally. The rates to be compared are the average rate for the year, at which the closing stock stands in fact valued (Rs.247 per kg.), and that in respect of the sale under reference, i.e., Rs.205/kg. As regards the cost of tins, the same would definitely form part of the goods sold inasmuch as the goods are sold upon being packed therein. If they were purchased in packed condition, there was no necessity for purchasing tins. There is, in fact, no statement of the condition in which the same were purchased. The same stands deleted by the ld. CIT(A), whose order is not placed on record, and which therefore does not help the assessee's case. Be that as it may, the said amount being no longer a part of the assessed income, would stand to be excluded in terms of *Explanation 4* to section 271(1)(c). *In fact, it needs to be appreciated that the Revenue by imputing sales at the cost of purchase, is only assessing the trading profit at Nil*. How, then, one may ask, could the same be impugned as unreasonable or excessive?

6.4 We may at this stage advert to the clarification provided by the assessee vide his letter dated 27.10.2023, annexed whereto is the following working:

	Original Return	**Revised Return**
No of bags fully processed	124307	124307
Cost of production	Rs.247 per kg.	Rs. 247 per kg.
Quantity (Kg)	102381.400	102381.400
Value (Rs. in Crores)	2.53	2.53

Working to include omission & sales of cashew kernels (finished goods) in AP per revised return

	Qty (Kgs)	**-**	**Value (Rs. in Crores)**
Opening stock	147340.120	-	2.96
Production	2660357.420	-	61.15
Purchase			
Original	250364.520	-	6.36
'Omission'	346924.620	-	6.09
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Total	597289.140	-	12.45
Cost of sales	3404986.680	-	76.56
Less sales	2955680.660	-	75.96
Original			
'Omission'	346924.620	-	6.10
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Total	3302605.280	-	82.06
Closing stock	102381.400	-	102381.400
Value (Rs in Crores)	2.53		2.53

[The same was stated to be in agreement with the Balance Sheet (as on 31.3.2000), filing along-with original and revised Balance Sheet and P&L (for fy 1999-2000)].

The same, to our mind, radically alters the assessee's case, stating, in effect, that the sale, omitted to be returned earlier, i.e., Rs.6.10 crores, was accompanied by the omission to record the corresponding purchase as well, which is at Rs.6.09 crore, and which accounts for the additional income of Rs.1.02 lakhs, offered in the reassessment. The same would:

(a) prove that the omission has no bearing on the valuation of closing stock; and

(b) that the goods sold at low rates were also, similarly, purchased at a lower price,

proving the assessee's case of the said sale being, as stated, of low grade varieties. Though, surely, it would still be at a loss, i.e., taking into account, as ought to be, the container (tin) cost of Rs.4.33/kg (Rs.48/11.34 kgs.) and the proportionate

administrative cost, it yet provides a definite basis, bereft hitherto of any, supporting the assessee's case. What, we wonder, prevented the assessee from stating so in the first instance; it merely harping on having sold inferior grade cashew kernels without in any manner demonstrating the same. There is, accordingly, no reference thereto in the orders by the Revenue authorities, either at the assessment or at the appellate stage, or even in that by the Tribunal in the quantum proceedings, both for the current and the subsequent years. This led to the matter being decided by it, instead of on merits, on the basis of burden of proof.

6.5 The matter, therefore, ought to travel to the file of the AO for necessary verification and examination of assessee's claim/s. The same, where true, shall, as afore-stated, loss notwithstanding, operate to remove the basis of the Revenue's charge of the assessee having not shown to have sold inferior grade varieties in any manner and, thus, inferring under-selling thereof, presumably to save on tax by transferring profit to the sister concern/s, which charge is though, both unproved and incidental, on which nothing therefore turns, even as explained in *Patel Chemical Works* (supra). We may though add that the assessee's reply should also meet the other incident observations by the AO in the assessment order, noted by us at para 2 (pg. 3) of this order. *Why, for example, should there be a loss, particularly considering it to be regular phenomena, so that it cannot be a result of a bad bargain/s, particularly considering the same is with sister concern/s*. Further, assuming a like profit of Rs. 1 lac on 30593 tins, reported earlier, the gross loss, i.e., considering the cost of tin (container), to the tune of Rs. 27.40 lakhs would arise. *Why?* The AO has, in computing the export profit on traded goods considered export sale at 52,671 tins, implying that all the 61,266 tins had not been sold in the course of export, i.e., even assuming that the former contains no opening stock of traded goods. Also, while the average sale rate of 61,266 tins is at rs. 205/kg., the export sale is taken at rs. 276/kg. There is a mismatch inasmuch as *the omitted sale is also stated to*

be in the course of export. Also, the sale rate of rs. 30593 tins being rs. 234 per kg., and that of the omitted sale (30673 tins), rs. 176 per kg., the sale rate of the exported 52,671 tins should fall in between even as the sequence of either sale – both of which though are at a profit, is not known. To put it in perspective, while the assessee thus states of the same being sold at a profit of about Rs. 2 lac and odd (ignoring tin cost), the AO computes the profit at Rs.327.40 lakhs, and the assessee himself at an even higher at Rs.416.69 lakhs, increasing it from Rs.63.14 lakhs returned earlier! *The same needs to be explained*. And the apparently contradictory claims reconciled with reference to the books of account, presenting a cogent picture, which appears incoherent. The burden for the same, besides w.r.t. *Explanation 1* to section 271(1)(c) (refer *Mak Data (P.) Ltd. vs. CIT* [2013] 358 ITR 593 (SC); *CIT v. Atul Mohan Bindal* [2009] 317 ITR 1 (SC); *UoI v. Dharmendra Textile Processors* [2008] 306 ITR 277 (SC); *Guljag Industries v. CTO* [2007] 293 ITR 584 (SC); *K.P. Madhusudhanan vs. CIT* [2001] 251 ITR 99 (SC); *B.A. Balasubramaniam & Bros v. CIT* [1999] 236 ITR 977 (SC), to cite some), is on the assessee who makes the claim.

6.6 Next, we consider the assessee’s legal ground, i.e., of the notice u/s. 274 not striking off one of the two limbs attracting penalty u/s. 271(1)(c), charging it therefore of being vague. The Revenues’ sole case is of the assessee’s inability to prove his accounts, inferring, on the basis of the available material, the cost of the goods sold for the year (Rs.247/kg) to have been recovered in-so-far as it relates to cashew kernels sold to sister concerns, at an average of Rs.205/kg, inclusive of the cost of containers. The assessee renders no substantiated explanation, making a false plea as to absence of quality-wise grading. During hearing before us, however, he provides one with reference to the purchase cost, which appears plausible, and for consideration of which the matter stands restored to the file of the AO, also noting, at the same time, of it being inconsistent with the assessee’s both original and revised claims, which would therefore need to be reconciled, only which would render the

explanation acceptable to that extent. There is thus a clear understanding of the said case by the assessee, also apparent from the detailed replies in the assessment and the penalty proceedings; in fact; offering a sum of Rs.1.8 crores in assessment proceedings, reiterated in penalty proceedings. Why, his case remains the same year after year, which it pleads for acceptance, as by the Tribunal in the quantum proceedings for the later years. No prejudice, whatsoever, stands caused, or in fact even suggested, as was questioned by the Bench during hearing. To say, therefore, that the charge is vague, is ludicrous. Reference in this context may be made to the decision in *T.A. Abdul Khadar v. CWT* [2008] 296 ITR 20 (Ker); and *Sundaram Finance Ltd. v. Asst. CIT* [2018] 403 ITR 407 (Mad) – the facts of which be noted. Much less being raised in good faith and for *bona fide* reasons, we find the said legal ground as, rather, an abuse of the process of law. We therefore decline admission, relying thereon, as indeed on *Jute Corp. of India v. CIT* [1991] 187 ITR 688 (SC).

6.7 We may, nevertheless, without prejudice, also discuss the validity of the notice u/s 274. The jurisdiction to levy penalty u/s.271(1)(c), it is well-settled, is on the basis of a satisfaction, in the course of proceedings under the Act, that the assessee has either concealed or, as the case may be, furnished inaccurate, particulars of income. This satisfaction is to be immanent in the assessment order, and may not necessarily be separately recorded. It is not under challenge in the instant case. The notice u/s. 274 is not a statutory notice, but only an administrative device to seek the assessee's explanation *qua* the adjustment/s to it's returned income in assessment *qua* which penalty proceedings stand initiated. The requirement of law is accordingly met on the provision of opportunity, through a notice u/s. 274, to the assessee to meet the Revenue's case as made out in the assessment order, observing, thus, the mandate of law as well as the principle of natural justice. This is purport of notice u/s. 274 – nothing more and nothing less. How, as questioned by the Bench during hearing, to no answer, does the AO convey the specific limb of s. 271(1)(c) where, in his view,

separate limbs thereof are attracted *qua* separate adjustments in assessment in respect of which penalty proceedings u/s.271(1)(c) are being initiated? *Does the law therefore contemplate issue of separate notices for each such adjustment*? The notice is valid. No wonder, the Hon'ble Courts have considered the matter in perspective, and validated the issue of notice where the 'relevant' part thereof was not struck-off, as in *T.A. Abdul Khadar* (supra); *CIT v. Maharaj Krishan* [2000] 246 ITR 327 (Del), to cite two. Instances w.r.t. s.271(1)(c) are again several, viz., *Maharaj Garage & Co. v. CIT* [2018] 400 ITR 292 (Bom)(rendered independent of *CIT v. Smt. Kaushalya* [1995] 216 ITR 660 (Bom)), not considered by it in *Mohd. Farhan A. Shaikh* (supra)); *CIT v. Chandulal* [1985] 152 ITR 238 (AP); *CIT v. Mithila Motors Pvt. Ltd*. [1984] 149 ITR 751 (Pat); *Hajarilal Kishorilal v. CIT* [1967] 64 ITR 563 (MP). None of these decisions, based on fundamental principles of law, stand considered in the decisions in *CIT v. Manjunatha Cotton & Ginning Factory* [2013] 359 ITR 565 (Kar) and *Mohd. Farhan A. Shaikh* (supra). Most of the decisions in the matter are prior to insertion of s. 292B. Though not a case one, a defective notice, it is well-settled, does not annul proceedings. Reference is made to *Kantamani Vankata Narayan & Sons v. ITO* [1967] 63 ITR 638 (SC) where the Hon'ble Court upheld a reassessment notice which did not, similarly, set out the clause under which it was issued. At worst, where a prejudice is shown, the matter would stand to be remitted to the stage where the irregularity had thus intervened. There are accordingly decisions galore to the effect that due opportunity to explain his case would imply waiver of irregularity, as in *C.G.G.Panicker v. CIT* [1999] 237 ITR 443 (Ker.) and *CIT v. N.Krishnan* [1999] 235 ITR 386 (Ker), rendered, drawing on the law explained in *Guduthur Bros. v. ITO* [1960] 40 ITR 298 (SC). Principles of natural justice, after all, cannot be imprisoned in any strait jacket or rigid formula, as is well-settled, for which we may advert to *K. L. Tripathi v. SBI*, AIR 1984 SC 273, itself rendered w.r.t. judicial precedents.

Continuing further, the argument is predicated on a false premise, i.e., that the two limbs of s. 271(1)(c) constitute two different charges. Even as clarified in *Dilip*

N. Shroff v. Jt. CIT [2007] 291 ITR 519 (SC), *Explanation 1* is applicable to both. Why, then, can the notice be not read as for concealing, or furnishing inaccurate, particulars of income? It is only the assessee who knows the facts or, otherwise, fails to exhibit his explanation w.r.t. the Revenue's case as already set out/communicated. This non-substantiation of it's case attracts *Explanation 1*, which <u>deems</u> it as concealment of particulars of income, i.e., irrespective of the limb on which initiation was based or specified in s.274 notice, i.e., concealment of particulars of income or furnishing inaccurate particulars of income. Nothing, as such, turns on whether it is a case of one or the other. *How, one may ask, is the AO supposed to firm-up his mind in the matter without considering the assessee's explanation*? The difference between the two may in the facts of a case may even otherwise be very thin, as observed in *Sivagaminatha Moopnar & Sons v. CIT* [1964] 52 ITR 591 (Mad), or may overlap, as noted in *A.M. Shah & Co. v.CIT*[1999] 238 ITR 415 (Guj). The dismissal of the SLP by the Hon'ble Apex Court in *S.S. Emrald's* case is not per a speaking order.

In Sum

7.1 We may capsule our findings. There have to be, it may be appreciated, strong reasons for selling goods at rate/s below par, much less recovering indirect cost as well, as also including an element of profit, more so where it is on a regular basis and, further, from sister concerns. *This is precisely what the assessee seeks to justify* – without material though, stating of having sold inferior grade cashew kernels. That apart, valuation of goods varying in quality and price, *de hors* the same, i.e., at the average cost for the year across all varieties, obfuscates and distorts the correct operating result, and toward which the assessee's explanation, i.e., absence of such a practice in the industry, is equally misplaced. Couple these debilitative facts with the omission to record purchase and sale worth several crores, it seriously undermines the credibility of the assessee's accounts, ostensibly audited; more so when the omission admittedly had a chain reaction, resulting in revising initial claims u/ss. 80-IA/HHC, and not merely an addition of Rs. 1.02 lac in trading profit. The accounts, much less

of sister concerns – even whose identity is not disclosed, equally under cloud, are not produced at any stage. Penalty stands accordingly imposed and confirmed in appeal, as was the relevant adjustment to the returned income in quantum proceedings up to the second appeal, not stated to have been contested further. He, before us in second appeal in penalty proceedings, while not improving his case in any manner, seeks to capitalize on the alleged defect in the notice u/s. 274, claiming it as vague, not conveying the basis for the initiation of penalty proceedings. The same is wholly misplaced on facts; rather, a false statement and, accordingly, only needs to be stated to be rejected, which is done at the threshold, denying admission to the charge. The same, even otherwise not legally maintainable, thus, fails on facts.

The burden to prove his return, and the claims preferred thereby, it is well-settled, is on the assessee. He failing to do so even in the penalty proceedings, the Revenue's intervention in making an adjustment to the returned income; it thereby only imputing recovery of (direct) cost, incurred on an average, is thus apposite. Estimation is integral to assessment and, therefore, cannot be impugned on that basis. Case law in the matter is legion, and toward which we may, for authority, advert to *Kachwala Gems v. Jt. CIT* [2007] 288 ITR 10 (SC) and *CIT v. Hotel Samrat* [2010] 323 ITR 353 (Ker). Real income, subject to the provisions of the Act, is liable to be taxed (*Southern Technologies Ltd. v. Jt.CIT* [2010] 320 ITR 577 (SC)). The only aspect to be therefore examined is if the adjustment is reasonable, consistent with the facts and circumstances of the case. *How could an assessment made inferring recovery of direct cost, implying nil gross profit, be said to be excessive*? No case of it being excessive or not reasonable stands made in either quantum or penalty proceedings. The assessee, however, explaining before us, per submissions made in response to a query in its respect, post hearing, that the goods sold below par were in fact at a profit, albeit nominal, being also purchased at low prices, alters the assessee's case, proving the goods sold, at least in part, to be of an inferior grade. It removes the basis of the Revenue inferring a loss thereon, as where the identity of the

goods purchased and sold, at rs. 6.09 cr. and rs. 6.10 cr. respectively, is, as stated, the same. So, however, there are yet serious gaps; rather, anomalies, in the assessee's case, with even the Revenue's action being internally inconsistent. Our directions in the matter are being stated separately (see para 7.2). Though we have approved the adjustment made in principle, we refrain from issuing any direction in its respect. The same is, in the set aside proceedings, to be made by the AO, as deemed proper after hearing the assessee, taking into account the explanation/s furnished. The trading profit to the extent explained would stand to be accepted, so that the adjustment made (Rs. 321.15 lacs) shall, for the purpose of penalty, survive only to the extent unexplained inasmuch it, then, clearly falls within the purview and ambit of *Explanation 1* to sec.271(1)(c), invoked by the AO. Two things, however, need to be made clear. Firstly, that penalty, imposable in principle, would be w.r.t. the assessee's revised return, to the extent the adjustment *qua* the trading profit on sale of 61,266 tins (Rs. 14,24,30,582), including revised claims u/ss. 80IA and 80HHC, incident thereon, remain unexplained. Though generally levied with reference to the original return, as rightly argued by Sri.Vijayaraghavan, no penalty in the instant case has been proposed on the additional income of Rs.1.02 lakh offered in reassessment. Two, even as the assessee shall be allowed incidental deductions u/ss. 80IA and 80HHC, i.e., to the extent consistent with the assessee's explanation, penalty shall have to be necessarily computed in accordance with law. This is as the quantification of penalty is subject to *Explanation 4* to section 271(1)(c). Finally, we have explained, even if broadly, as to why the assessee's legal challenge to the notice u/s.274 is *de hors* the facts and, thus, invalid and, even otherwise, without merit.

7.2 Accepting the assessee's explanation of having purchased the omitted goods sold for rs. 6.10 cr., at rs. 6.09 cr., i.e., of the same being also bought at like prices, subject to being verified, does raise the inference of they being of the same, inferior grades. Why, we wonder, this was not stated earlier, resulting in no finding in its respect. The assessee, nevertheless, has some explaining to do; his revised claims

u/ss. 80IA & 80-HHC being inconsistent therewith, as indeed per the original return, i.e., of having sold inferior grades goods through sister concerns at marginal gross profit. Having claimed deduction u/s. 80HHC *qua* his total export sale (52671 tins) for the year per his original return, no modification in his claims for deduction u/s. 80HHC, as indeed u/s. 80IA, ought to have followed per the revised return, particularly considering that the only omission in the original return, as stated, was to account for purchase and sale of the same (quantity of) goods, at Rs. 6.09 cr. and Rs.6.10 cr. respectively. Like-wise, the explanation *qua* manufacturing profit, where and to the extent explained and accepted, may also require revisiting the claim for deduction u/s. 80-IA. Again, even if a part (22,078 tins, i.e., 52671 – 30593) of the export sale comes out of the omitted sale of 30673 tins, the same would be at marginal profit and, considering the proportionate indirect cost, at a loss, while the revised claim is at an increase over the reported profit of rs. 63.14 lacs! The assessee's case rests critically on the truth and validity of his explanation, made presumably w.r.t. his accounts. Each of the observations made herein, as indeed by the AO, have to be addressed, and toward which reference is also made to para 6.5 of this order. The AO also contradicts himself. While charging the assessee to have diverted profit to sister concerns, i.e., under-reporting it, seeking to neutralize the inferred deficit of rs. 321.15 lacs, even without proportionate administrative cost, and which the assessee works at Rs. 180.40 lacs, he determines the trading net profit on export at rs. 327.40 lacs! That is, goes by the reported figures, which, he, in the same breath, claims as inflated. This is in view of a clear lack of transparency in the assessee's claims and working, which is to be necessarily w.r.t. his accounts, duly substantiated. That apart, he allows deduction u/c. VI-A in a sum higher than that originally claimed, which cannot be in view of it being reassessment proceedings, i.e., other than where it is in respect of and w.r.t. a higher profit. Deduction u/s. 80-HHC, being consequential to the acceptance, to whatever extent, of the assessee's claim of export trading profit, would need to be revisited, toward which we may refer

to decisions, *inter alia*, in *Topman Exports* v. CIT [2012] 342 ITR 49 (SC) and *IPCA Laboratory* Ltd. *v. Dy. CIT* [2004] 266 ITR 521 (SC). Where and to extent accepted, the higher of the two sets of income, i.e., net of deductions, u/ss. 80-IA & 80-HHC, shall prevail inasmuch as the reassessment proceedings are for the benefit of the Revenue (*Sun Engg. Works Pvt. Ltd.* (supra)). Further, again, penalty would stand to be finally restricted to the sum, i.e., *qua* the adjustment, net of incidental deductions, as finally assessed, for which reference, apart from the decisions afore-cited, be made to s. 80-AB. Needless to add, the assessee's objections to the proposed re computation, i.e., consistent with the manufacturing & trading export profit as finally accepted by the AO, on the basis of evidence furnished, be sought, to eliminate both, the scope for error, as well as comply with the principles of natural justice. His order shall be a speaking order, meeting the assessee's objections, which we expect would conform to the clear provisions of law, as explained by the higher courts of law.

7.3 We decide accordingly. We are conscious that some of our observations may not be in agreement with the case of either party before us. That, however, would be to no moment inasmuch as it is the correct legal position that is relevant, and not the view that the parties may take of their rights in the matter: *CIT v. C. Parakh & Co. (India) Ltd*. [1956] 29 ITR 661 (SC))(Also see, *Kedarnath Jute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363 (SC)).

8. In the result, the assessee's appeal is partly allowed for statistical purposes.

Order pronounced on January 17, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-
(Manomohan Das)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Cochin, Dated: January 17, 2024

n.p.

Copy to:

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

By Order

Assistant Registrar
ITAT, Cochin