

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH : NAGPUR

[THROUGH VIRTUAL HEARING AT PUNE]

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

I.T.A No.510/NAG./2016 & CO.No.6/NAG./2017
Assessment Year 2007-2008

The Dy. Commissioner of Income Tax, Central Circle-2(2), Room No.207, 2 nd Floor, Aayakar Bhawan, Civil Lines, Telangkhedi Road, Nagpur – 440001 State of Maharashtra.	vs	Smt. Anju A. Saraf Flat No.C-2, Yogeshwar Ganga Apartment, 97 &98, Farmland, Ramdaspath, Nagpur – 440 012. PAN AETPS5421E
Appellant		Respondent/Cross Objector

For Revenue :	Shri Kailash G. Kanojiya, CIT-DR
For Assessee :	CA Sudesh Bantia

Date of Hearing :	22.01.2024
Date of Pronouncement :	24.01.2024

ORDER

PER SATBEER SINGH GODARA, J.M. :

This Revenue's appeal I.T.A No.510/NAG./2016 and assessee's cross objection C.O.No.6/NAG./2017 for assessment year 2007-08, arises against the CIT(A)-4, Nagpur's Order No.CIT(A)-4/77/13-14, dated 28.06.2016, involving proceedings u/s.143(3) r.w.s.153A of the Income Tax Act, 1961 (in short "the Act").

Heard both the parties at length. Case files perused.

2. The Revenue's appeal I.T.A.No.510/NAG./2016 raises the following substantive grounds :

- “1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of claim of deduction u/s 80IB of Rs.5,50,67,840/-without appreciating the fact that the assessee had not fulfilled the prescribed condition of Explanation 2 of Sec.80IB(2)(11) of the Act as the plant & machinery previously used was transferred to the new business.*
2. *On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the disallowance of claim of deduction u/s 80IB of Rs.5,50,67,840/- without appreciating the fact that the assessee was not engaged in the manufacture or production of article or thing.*
3. *On the fact and in the circumstances of the case and in law, the CIT(A) has erred in deleting the disallowance of claim of deduction u/s 80IB of Rs.5,50,67,840/- relying on the decision of the Supreme Court in the case of Sesa Goa Ltd. (271 ITR 331) without appreciating the fact that the assessee was not engaged in the business of*

extraction and processing of iron and as such the fact of the case were different.

4. *On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs.47,00,000/- being cash paid for purchase of property without appreciating the fact that on being confronted with the seized document, Shri Ajay Saraf had accepted the fact that cash of Rs.94,00,000/- was paid and it was not accounted for in the books of accounts, during the course of the search proceedings and also confirmed the same during the course of the post search proceedings.*

5. *On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the disallowance of electric expenses of Rs.10,17,959/- and windmill expenses of Rs.13,36,833/- relying on the decision of the ITAT in the assessee's own case without appreciating the fact that the decision of the ITAT has not been accepted by the department and appeal u/s 260A has been filed and the same is pending.*

6. *On the facts and circumstances of the case, the Id. CIT(A) has erred in deleting the disallowance of expenses of Rs.92,26,805/- made by the Assessing Officer without appreciating the fact that the onus is on the assessee to prove the genuineness of the expenses which was not done during the assessment proceedings.*
 7. *Any other ground that may be urged at the time of hearing.”*
3. The assessee's cross objection C.O.No.6/NAG./2017 on the other hand pleads the following substantive grounds :
1. *“That the order passed by the assessing officer u/s 143(3) r.w.s.153A is bad in law and wrong on facts and the Ld. CIT (A) has erred in confirming the same.*
 2. *That on the facts and circumstances of the case, the Learned CIT (A) has erred both in law and on facts in confirming the validity of impugned assessment order u/s. 153A of the Income Tax Act, 1961 as framed by the AO in respect of completed assessment for which no incriminating material was found during the course of search action.*
 3. *That having regard to the facts and circumstances of the case, Ld CIT (A) has erred both in law and on facts in*

confirming the action of AO in making additions/disallowances, more so when there was no incriminating material found as a result of search and in any case additions/disallowances made by ld.AO were outside the scope of Section 153A.

- 4. That the AO erred in law and on facts in making addition of Rs.5,50,67,840/- by disallowing deduction claimed u/s 80IB and the LD. CIT (A) was justified in deleting the addition so made. On facts and circumstances of the case the AO made the addition merely because the same was disallowed in original order passed u/s.143(3) on 31/12/2009 and the Ld. CIT (A) was justified in setting aside the same.*
- 5. That the AO erred in law and on facts in making addition of Rs.47,00,000/- as undisclosed income on account of alleged cash payment made for purchase of property and the LD. CIT(A) was justified in deleting the addition by holding that payment of Rs.94 lacs in respect of the said property was in fact made by account payee cheque which is duly accounted in the audited books of accounts. On facts and circumstances of the case the AO made the addition on conjectures & surmises and the Ld. CIT (A) was justified in setting aside the same.*
- 6. That the AO erred in law and on facts in making addition by disallowing electricity expenses of Rs.10,17,959/- and*

- windmill expenses of Rs.13,36,833/ - merely because the same were disallowed in original order passed u s 143(3) on 31/12/2009 and the Ld.CIT (A) was justified in deleting the addition. On facts and circumstances of the case the addition made by the AO was bad in law and on facts and the Ld CIT (A) was justified in setting aside the same.*
7. *That the AO erred in law and on facts by making adhoc disallowance of expenses of Rs.92,26,805/- merely on the basis of surmises and conjectures and the Ld.CIT (A) was justified in deleting the addition by holding that the genuineness of expenditure has been proved by the assessee. On facts and circumstances of the case the addition made by the AO was not on any sound basis, wholly arbitrary, bad in law and highly unjustified and the Ld CIT (A) was justified in setting aside the same.*
8. *The appellant craves leave to add or amend any ground of cross objection with the permission of the Hon'ble members."*

4. It is in this factual backdrop that we deem it appropriate to deal with the assessee's second and third substantive grounds in her cross objection challenging validity of the impugned sec.153A r.w.s.143(3) assessment dated 07.03.2013 itself for want of incriminating material found and

seized during the course of search. Learned counsel has quoted PCIT vs. Abhisar Buildwell P. Ltd., [2023] 149 taxmann.com 399 (SC) and *inter alia* submits that assessee had filed her sec.139(1) return on 31.10.2007 followed by its sec.143(1) processing dated 22.01.2009, sec.143(3) assessment dated 31.12.2009 and the departmental search action dated 24.09.2010; respectively. He next took us to the Assessing Officer's computation that all these impugned additions/disallowances made in sec.143(3) assessment dated 31.12.2009 which stood repeated in sec.153A assessment as well.

5. We see no merit in assessee's instant legal ground. This is for the precise reason that the impugned search action has indeed come across various incriminating documents; including the alleged cash payments made by the assessee. This is indeed coupled with the fact that the Assessing Officer had made four additions over and above repetition of as many heads of disallowances/additions in the regular assessment. Ordered accordingly.

6. We next come to the Revenue's three substantive issues seeking to reverse the CIT(A)'s action accepting the assessee's sec.80IB deduction claim of Rs.5,50,67,840/-; deleting cash payment addition of Rs.47 lakhs at the rate of half share in Rs.94 lakhs; electric and wind-mill expenses of

Rs.1,07,959/- and Rs.13,36,833/- and sales-wise expenses of Rs.92,26,805/-; respectively. Suffice to say, the Revenue could hardly dispute that sec.80IB as well as electric and wind-mill expenses had formed subject matter of the assessee's 143(3) cross-appeal ITA.No.16/NAG./2012 preferred against the Revenue's case ITA.No.6/NAG./2012 which stood decided way back on 04.12.2015. We inter alia observe from a perusal of paras 5, 8, 12 and 16 thereof that the assessee's contentions on the very issues already stand accepted by the learned coordinate bench. We thus find that the Revenue's 1st to 3rd and 5th substantive grounds are mere repetitive of sec.143(3) additions without involving any distinction of facts or law. We accordingly see no reason to accept these substantive grounds once they have already attained finality in the regular round of assessment for the very assessment year 2007-2008. Rejected accordingly.

7. Now comes Revenue's fourth substantive ground that the Assessing Officer had rightly added cash payments of Rs.47 lakhs in assessee's hands based on the seized material. Learned counsel has reiterated the assessee's stand in light of her paper book pages 18 to 19 containing the corresponding ledger account of M/s. Sigma Buildcon Pvt. Ltd. Her case in light thereof is that she had duly paid the very sum on 15.05.2008 vide cheque no.097489 in the recipient's account.

We note that the Assessing Officer has nowhere examined this clinching fact in the course of assessment whereas the CIT(A) has proceeded to deal with other technical aspects. We thus deem it appropriate to restore the Revenue's instant 4th substantive ground back to the Assessing Officer to verify the clinching nexus between the alleged cash payment of Rs.94 lakhs [assessee's share coming to 50% thereof at Rs.47 lakhs] vis-à-vis the foregoing cheque payment of Rs.94,20,800/- made on 15.05.2008 in consequential proceedings. Needful may be done within three effective opportunities of hearing. This Revenue's 4th substantive ground is accepted for statistical purposes in very terms.

8. This leaves us with the Revenue's sixth substantive ground that the CIT(A) has erred in law and on facts in deleting expenditure disallowance of Rs.92,26,805/- made by the Assessing Officer vide following detailed discussion :

5.4 I have perused the assessment order, grounds of appeal, appellant's submission and facts available on record. The AO has discussed the issue in Para 6 of the Assessment order. On careful perusal of the observations of the AO, I find that the AO has discussed about the observations of the investigation wing at the time of search. It is quite clear from the finding recorded by the AO in his order that the AO has made proportionate disallowance of expenditure in the case of assessee merely on the basis of declaration made by M/s RBSSN, sister concern of the appellant in AY 2010-11 on account of inflated / overbooked expenditure under four heads. The verification of expenses relates to AY 2010-11 and not to the year under consideration. Further, the surrender of Rs. 15 Cr. in the statement

recorded u/s.132(4) on 28-9-2010 was by Shri Ajay Saraf and the income so surrendered has been included in the return of income of M/s. RBSSN filed for AY 2010-11 and tax paid thereon. There is no statement of the assessee confronting any seized material, as regards any surrender or any acceptance regarding inflation in the expenditure. The AO stated that the nature of the business and the nature of expenditure of the assessee being the same as that of M/s RBSSN in every assessment year, therefore on the basis of presumption that the expenditure claimed by assessee also are non genuine, the addition is made. I am of the considered opinion that the addition cannot be made in such a manner. The onus to prove the genuineness of the expenditure and its reasonability is on the assessee and whether the assessee has discharged such onus in the present case before me needs to be examined. I find that the books of accounts of the assessee are duly audited and no defect has been pointed out by the AO in any such books of accounts which are maintained by the assessee. The assessee has filed the details of expenditure and also produced vouchers and bills with reference to the claim of expenditure. All the expenses relating to transportation, freight and hire charges etc have been substantiated by bills and vouchers which have not been denied by the AO. The assessee has made payments after deducting TDS, where applicable. It is a fact verifiable from records that the appellant has deducted tax at source on payment of Rs.7,52,12,493/- out of total expenditure of Rs. 7,52,12,493/- claimed. TDS has been deducted on cash payments also. The AO has failed to bring on record any infirmity or discrepancy in the vouchers/bills or any record in relation to the claim of such expenditure. The trading result has also been accepted by the AO. The AO has alleged that there exist irregularities and discrepancies as regards claim of expenditure made by the assessee under different heads and incriminating material was also found during the course of search. The AO has however not pointed out or referred to in his order even a single instance of any such discrepancy in the expenditure claimed by assessee. The AO has also failed to bring on record any specific incriminating material / evidence found during the course of search in support of his allegations that the expenditure claimed is bogus or overbooked/inflated. In absence of any such finding, I hold that the addition is made merely on conjectures and surmises. The addition on the basis of presumption that the expenses are inflated to reduce the profit cannot be sustained unless the AO brings on record any evidence in support of such presumptions. Suspicion backed by no evidence cannot be a cogent reason.

5.5 The AO has also alleged that there is variation in valuation of closing stocks; there are unaccounted receipts and unrecorded payments and host of other discrepancies found on examination of seized material. The AR in response to this has contended that the AO has not brought on record any such incriminating evidence from the seized material and not shown even a single instance of unrecorded receipt or payment for the relevant financial year. The variation in closing stock as mentioned by him also not gets clarified

from the assessment order. On perusal of the assessment order the contention of the AR of the appellant is found correct. There is nothing in the assessment order which shows that the assessee has indulged in suppression of receipts or inflation or deflation of any expenditure & variation in valuation of closing stock. The statement of Mr. Ajay Saraf was also perused by me and I find that the surrender was with reference to Asstt. Year 2010-11 and there was no discussion about the assessee's case in his statement. The surrender of Rs.15 Cr. was made by Mr. Ajay Saraf under peculiar circumstances as submitted by the assessee before the AO as well as before me. Just because a surrender is made by third party in a particular asstt. year cannot be the reason to saddle the assessee with the addition to the total income. It is clear that in making the assessment under sub section 3 of Section 143 of the Act, the AO is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than mere suspicion in support of any disallowance of expenditure. In this peculiar fact the AO was not justified in estimating the disallowance to be made as apart from general suspicion there is no material or fact on record to hold that the assessee has claimed bogus expenditure or has inflated/overbooked the expenditure to reduce the profit.

5.6 Similar type of addition was made in appellant's own group case M/s R. B. Seth Shriram Narsingdas (A.Y.-2005-06 to AY 2009-10 & AY 2011-12) which was contested before CIT (A) III Nagpur. The counsel for appellant furnished the copy of the appellate order and claimed that the facts of the case of the assessee are similar to the case already decided. I have perused the order of the CIT(A)III Nagpur which is of the group concern which is on same facts and find that the addition of similar nature made in the case of RBSSN has been deleted. Accordingly based on facts of the case, appellants submission, documents available on record, discussion as above and the judicial pronouncement relied upon by the appellant, I am of the considered opinion that the addition made by A.O. to the tune of Rs. 92,26,805/- is not in accordance with law and hence deleted. This ground of appeal is accordingly **Allowed**.

9. We have considered vehement rival submissions and find no merit in the Revenue's stand. We make it clear that there is no incriminating material found or seized during the course of search which could pin-point the assessee's impugned expenditure claim to be bogus or an inflated one. All these makes us to conclude that such a disallowance/addition would hardly be sustainable in an instance involving an "unabated" assessment in sec.153A proceedings as per hon'ble apex court's recent landmark decision in PCIT vs. Abhisar Buildwell P. Ltd., [2023] 149 taxmann.com 399 (SC). We

accordingly uphold the CIT(A)'s action deleting the impugned disallowance made by the Assessing Officer on mere conjectures and surmises in very terms. The Revenue fails in its instant sixth substantive ground.

No other ground or arguments has been pressed at the Revenue's behest during the course of hearing. This Revenue's appeal I.T.A No.510/NAG./2016 is partly accepted for statistical purposes in above terms.

10. This leaves us with the assessee's remaining grounds 4th to 7th substantive grounds in her cross objection C.O.No.6/NAG./2017. Suffice to say, we have already decided her 2nd to 3rd legal grounds in preceding paragraphs. Her all remaining grounds are merely supportive of the CIT(A)'s action deleting various disallowances/additions forming subject matter of challenge in Revenue's appeal I.T.A No.510/NAG./2016 and do not need any separate adjudication. Her 4th, 6th and 7th grounds stand rendered infructuous and 5th substantive ground is accepted for statistical purposes. ordered accordingly.

11. This assessee's cross objection C.O.No.6/NAG./2017 is partly allowed for statistical purposes.

12. To sum-up, this Revenue's appeal I.T.A No.510/NAG./2016 and assessee's cross objection C.O.No.6/NAG./2017 are partly allowed for statistical purposes in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open Court on 24.01.2024.

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

Sd/-
(SATBEER SINGH GODARA)
JUDICIAL MEMBER

Pune, Dated 24th January, 2024

VBP/-

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-4, Nagpur.
4. The Pr. CIT-3, Nagpur.
5. The DR, ITAT, "Nagpur" Bench, Nagpur.
6. Guard File.

BY ORDER,

// TRUE COPY //

Senior Private Secretary
ITAT, Pune.