

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI S RIFUAR RAHMAN, AM

आयकर अपील सं /I.T.A. No 2383/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2000-01)

ITO, 1(2)(1), Mumbai Room No. 536, 5 th Floor, Aayakar Bhavan, M K Road, Mumbai-400020	बनाम / Vs.	M/s Koyna Glass Works Pvt. Ltd. 2C, Lawrence and Mayo House, Dr. D. N. Road, Fort, Mumbai-400001
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCK7983K		
(अपीलार्थी/ Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri D. D. Anjaria
Revenue by:	Shri P. D. Chougule (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 17/01/2024
घोषणा की तारीख /Date of Pronouncement: 29/01/2024

आदेश / ORDER

PER ABY T VARKEY, J.M:

This is an appeal preferred by the revenue against the order of the Ld. CIT(A)/NFAC dated 02.05.2023 for AY 2000-01.

2. The only grievance of the Revenue is against the action of the Ld. CIT(A) reducing the estimation of income from 10% of the annual export as computed by the AO to 0.5% of it.

3. At the outset, we are informed that this is the third (3rd) round of litigation before this Tribunal. Brief facts are that though assessee was incorporated in the year 1971, it had no business from F.Y. 1977-1978 to F.Y. 1998-1999. And that main promoter/director of assessee company Shri Govind N Nagar had expired on 01/01/2018; and survived by his wife/widow Smt. Shakuntala G Nagar aged 82 years who is looking after the litigation. From perusal of records, it is discerned that in the year under consideration as well as previous year [i.e. AY. 1999-2000 & AY. 2000-01], the assessee company had an opportunity to export garments to

Russia i.e. [*Fancy Ladies Dress Maxi, Fancy Ladies Maxi, Mens Shirts, Printed Cotton Ladies Blouse, Jeans Trousers, Ladies Denim Embrod Blouse, Knitted Round Neck T shirts, Fancy Trousers, Ladies Shirts, Mens Exclusive Trousers*]. And the proceeds of the exports according to assessee was received through official channel to the bank account of the assessee company i.e the proceeds are received with the State Bank of India NhavaSeva Branch through Letter of Credit (L/C) opened by the Russian buyer under the bilateral agreement between the Government of India and Russian Government. These amount of export was received by assessee in *Rupee* currency as per the notification/circular no.4 dated 19-5-1999 issued by the Government of India dated 23-9-1993, as well as by the Reserve Bank of India on 31-5-99 by way of circular to all the foreign exchange agencies. And that the assessee company had carried out total exports of garments to the tune of Rs 1,02,38,400/- & Rs.7,51,49,070/- for A.Y. 1999-2000 & A.Y.2000-2001 respectively which fact is supported by bank statement filed before the authorities.

4. The AO taking note of a show cause notice issued by the Directorate of Revenue Intelligence (DRI) on allegation of *over-invoicing of the purchases* pursuant to search action carried out by the Enforcement Directorate (ED) on 29.12.2000, asked the assessee about the allegation of over-invoicing of the purchases. But the assessee (late Shri Govind N Nagar) was not able to appear/produce any documents before the AO because he was in judicial custody (COFEPOSA). Therefore, AO had no other alternative but to pass the best judgement assessment u/s 144 of the Income Tax Act, 1961 (hereinafter "the Act") estimating the income at Rs. 6,29,84,437/- vide order dated 21.03.2006 u/s 144 of the Act [*hereinafter the first assessment order*]. This action of the AO was confirmed by the Ld. CIT(A) which was remanded/restored by Tribunal back to the file of AO by order dated 20.08.2010 for the reason that since all the relevant documents were seized by

the DRI/ED, and the director was in judicial custody, and therefore being assessee was prevented from producing the relevant documents before the AO during the first assessment proceedings. Thereafter, in the second round of assessment, the AO reiterated the addition vide order dated 14.12.2011 [*hereinafter the second assessment order*] which addition was reduced by the Ld. CIT(A) vide order dated 03.05.2013 to Rs. 4,12,19,200/-. However, when the appeal came up before the Tribunal, the Tribunal again remanded the matter back to the file of AO vide order dated 30.08.2017 taking note that DRI & ED had dropped their proceedings against the assessee as per the direction of the Special Director of ED. Thereafter, the AO in the third round of assessment vide assessment order dated 24.12.2018 was pleased to estimate/restrict the addition at 10% of the turnover of Rs. 10,65,60,682/- i.e. Rs. 1,06,56,6068 and duty draw back was also added and thus made total addition of Rs. 2,75,78,760/- [*Third assessment order*]. On appeal, the assessee challenged the estimate of income and the Ld. CIT(A) vide the impugned order was pleased to restrict the addition to 0.5% of the turn over as reasonable estimate and was of the opinion that this amount would be the probable profit arising from alleged bogus exports by holding as under:

“6.1 That this case pertaining to A. Y 1999-2000 and 2000-2001 should have been left pending is a matter of concern when the stated objective of the govt. is reduction of tax litigation. Even otherwise this is 3rd round of assessment in the case, which ought to have had closure long time back. As would be apparent from the detailed reply, the income has been estimated based on allegations of fraudulent exports by the company and based on show cause notices by the DRI, and consequent to a survey action by the sales tax department

6.2 It is not the stand of ITO that any independent inquiry has been done by the AO. The case of DRI was held in favour of

appellant hence the question would arise, as to whether there is any credence to the income estimated by the AO at 10% of turnover. There are instances where a person has given bogus entries, but where the profit estimated from such activities was held to be as low as 0.15% by Mumbai High Court in the case of PCIT Vs. Alag Securities (P.) Ltd. In this case AO has not doubted the purchases and circumstantial and contextual evidence would show that accounts were maintained with both purchases and sales being recorded. No glaring mistake has been pointed out in this. The tax authority have to be doubly sure for it has been said that power tax is power to destroy. (McCulloch Vs. Maryland) (1819) U. S. Supreme Court.

6.3 It is equally true that while the appellant case could not be compared to M/s Gokal das exports, there would be some profit from exports which would have been subjected to due taxation. The use of estimates is allowed and accepted in the tax proceedings as long as they are not fanciful and unreasonable. Keeping the above in mind, with a view to giving quietus to old issues, and with an idea that there may be reduction in litigation and due payment of tax, the income is sustained at 0.5% of the annual exports for the year. This would mean that AO would look at declared profit and add only 0.5% of turnover to it as an estimated and probable profit arising from the alleged bogus exports. Considering the fact, the director of company is no more and that the case is represented by his 82 year old widow, the AO should carryout appeal effect on priority as a gesture of enhanced tax payer service.”

5. Aggrieved by the aforesaid action of the Ld. CIT(A), the Revenue is before us.

6. We have heard both the parties and perused the record. We note that this is the third round of litigation before this Tribunal; and note that even though the assessee company was incorporated in the year 1971, it had no business from year 1977 to 1999; and only in the AY. 1999-2000 and AY 2000-2001 the company had exported the garments to Russia, and proceeds of the exports were received in Indian Currency in its the bank account of the company [*i.e. sale consideration was received the State Bank of India Nhava Sheva branch through Letter of Credit (L/c) opened by the Russian buyer as per the bilateral agreement between Government of Indian and Russian Government*]. However, DRI/ED based on allegation of over-invoicing of purchases had initiated proceedings against the assessee, which was the foundation on the basis of which AO drew adverse inference against the assessee and made additions. However, as found by Ld. CIT(A), the DRI/ED had dropped the proceedings against the assessee. So once the foundation goes the super-structure built by AO should have fallen. However, AO without conducting any independent enquiry on the allegation of over-invoicing of purchases/bogus purchases has in the 3rd round has *inter-alia* made estimation of profit from business at 10% of the turn-over and computed it Rs.1,06,56,068/-. The Ld. CIT(A) taking note that ED had dropped the proceedings against the assessee company and the AO had not carried out any independent enquiry into the allegation made by DRI/ED (*which has been dropped*) and after perusal of the relevant documents (*regarding purchases & sales of garments exported*), the Ld. CIT(A) found that the assessee had maintained its account in respect of both purchases & sales, and that the AO has not doubted the purchases & sales. This finding of fact could not be assailed before us and in that event, the Ld. CIT(A) has rightly estimated the reasonable profit embedded in the sales (*over and above the profit declared by the assessee in its regular return of income*) and restricted the same at 0.5% instead of 10%. While holding so, the Ld. CIT(A) has also found that the case of assessee is not comparable to that of M/s. Gokul Das Exports. No

material was placed before us to show that the assessee's case is comparable to that of M/s. Gokul Das Exports. In such a scenario, the impugned action of Ld. CIT(A) is confirmed and the appeal of revenue dismissed.

7. In the result, appeal of the revenue stands dismissed.

Order pronounced in the open court on 29/01/2024.

Sd/-
(S RIFAUR RAHMAN)
ACCOUNTANT MEMBER
Mumbai, दिनांक/Dated: 29/01/2024
Aniket Singh Rajput, (Steno)

Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai