

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA**

Before **Shri A.T.Varkey, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.2373/Kol/2013 Assessment Year:2007-08
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M/s New Harilal Saha & Sons, 16, Pageya Patty Street, Kolkata-700 007 [PAN No.AACFN 2135 P]	V/s.	Income Tax Officer, Ward-45(2), 3, Govt. Place, Kolkata-700 001
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Ankit Jalan, AR
प्रत्यर्थी की ओर से/By Respondent	None
सुनवाई की तारीख/Date of Hearing	27-12-2016
घोषणा की तारीख/Date of Pronouncement	08-02-2017

आदेश /ORDER

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-XXX, Kolkata dated 12.04.2013. Assessment was framed by ITO Ward-45(2), Kolkata u/s 144/143(3)(II) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 02.12.2009 for assessment year 2007-08.

2. It is also noticed that the Revenue has moved adjournment petition in almost 15 cases and this *en block* adjournment is not possible and hence, the possible case, we have taken up for hearing and decided the issue by rejecting the adjournment petition. In this case also we have rejected the

adjournment petition and heard the appeal in presence of Shri Ankit Jalan, Ld. Authorized Representative appeared on behalf of assessee.

3. At the time of hearing Ld. AR for the assessee has stated that he has been instructed by assessee not to press grounds No. 1 and 3. Hence, these are dismissed as not pressed.

4. Only issue raised by assessee in this appeal is that Ld. CIT(A) erred in confirming the order of Assessing Officer by sustaining the disallowance @ 10% as margin on sale on *ad hoc* basis.

5. Facts in brief are that assessee in the present case is a partnership firm and engaged in business of cloth. The assessee in the year under consideration filed its return of income declaring total income of ₹1,47,123/-. Subsequently the case was selected under scrutiny and accordingly notices u/s 143(2)/142(1) of the Act were issued upon assessee. The assessment was framed u/s. 144/143(3) of the Act at a total income of ₹16,88,910/- after making certain additions and disallowances.

6. The assessee for the year under consideration has shown total turnover of ₹1,68,89,059/- and net profit on such turnover at ₹1,47,123/-. During the course of assessment proceedings, AO issued several notices to the assessee in connection with assessment proceedings but assessee failed to appear before him. In the absence of any compliance from the side of assessee, AO framed assessment to the best of his knowledge u/s/ 144 of the Act. Accordingly, he worked out the net profit @ 10% of the turnover i.e. ₹16,88,905/- and assessed total income of ₹15,41,782.00 (16,88,905 – 1,47,123) as undisclosed income.

7. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who confirmed the order of AO by observing as under:-

“2. It is seen that since the Appellant has not made any submissions in response to the notice for hearings in Assessment proceedings and the AO has clearly mentioned in the Assessment Order regarding the issue of notices u/s/. 142(1) and 143(2) dated 1.01.2009 and 2.08.2008 which had been served on the Appellant on 2001.2009 and 29.08.2008 as well as the subsequent notices and letters issued by the AO (referred to in Para 11 above). Therefore sufficient opportunity had been given to the

Appellant before completion of Assessment us. 144 by the A.O. Further, no submissions or evidences have been filed or evidences to establish that the action of the AO was not justified. Therefore, the action of the AO in completing the Assessment us. 144 is held to be justified. it is therefore seen that the sufficient opportunity was given by the AO before passing the above mentioned order u/s. 144 of the IT Act. Further, in view of absence of any accounts or details, the Assessment made by the AO estimating the Net Profit at 10% of the turnover i.e. Rs.16,88,905/- is upheld and the same is confirmed.”

Aggrieved by this, assessee has come up in appeal before us.

8. Before us Ld. AR filed written statement and stated that all the expenses claimed in the profit & loss account are permissible expense as per IT Act. Such fact is not disputed by the Assessing Officer but he failed to pin point any specific item or defect in the books of account. It is to be noted that all the expenses are wholly and exclusively of the purpose of the business of the assessee. Our attention was drawn towards the profit & loss account. He further stated that assessee had claimed expenses such as purchases, salary, rent, bank charges, interest on loan, telephone charges, electricity charges etc. Thus from the perusal of the nature of expenses it can be clearly concluded that all are allowable expenses as per the provisions of the Income Tax Act, 1961. It is also to be noted that such fact is not disputed by the AO. Merely the AO was not able to verify the expenses could not be the basis for framing the assessment on assumptions and surmises. There being no dispute in fact that expenditure was incurred wholly and exclusively for the purpose of business and no part of expenditure can be disallowed to cover possible loss of revenue.

9. Having heard Ld. AR for the assessee and on perusal of materials available on record. At the outset, we find that both the Authorities Below has passed *ex parte* order in spite of the fact that several opportunities were provided to assessee while framing assessment proceedings. In the absence of any compliance on the part of assessee AO had no option but to frame assessment on the basis of available information. Accordingly, AO has estimated the net profit @ 10% of the turnover. Now, issue before us arises

the estimation made by AO @ 10% is justifiable in the aforesaid facts and circumstances of the case. It is undisputed fact that assessee failed to present the proceedings both Authorities Below and therefore assessee was framed to the best of Assessing Officer's judgment u/s. 144 of the Act. However, the best judgment assessment also requires to determine the income of assessee in a scientific manner. In case the AO wishes to disallowance the expense / deduction then he has to record the reasons for doing so. The AO cannot make any disallowance without any basis as done in the instant case before us. We find that AO has estimated the net profit on *ad hoc* basis without rejecting the books of account and AO has not brought any defect in the financial statement available before him while framing assessment proceedings. The AO has also not made any comparison with the historical data of the assessee. As such, we find that the net profit has been estimated purely based on his surmise and conjecture also. Therefore, in our considered view, the addition made by AO is not sustainable in the eyes of law. In holding so, we find that guidance and support from the judgment of Hon'ble Gujarat High Court in the case of *CIT vs. Shakti Industries* reported in 36 taxmann.com 16 (2013) (Guj) and the relevant extract is reproduced below:-

"5. The Tribunal concurred with CIT(A) on both tie issues, by holding thus-

'Having heard the Ld. DR, we have carefully gone through the orders of the authorities below. It is pertinent to note that the AO in the assessment order added all the things like opening stock, total purchases, total trading and P &L Account, expenses, secured and unsecured loans without giving any estimation of giving any reason. The books of account of the assessee are audited. With the return of income, the assessee had filed audited P&L Account, balance sheet and audit report. The Id. CIT(A) called the remand report from the Assessing Officer, this remand report was forwarded to the assessee for is comments and after considering the comments of the assessee, in our opinion, the Id. CIT(A) is legally and factually correct in deleting the additions to the tune of Rs.57,04,983/-and Rs.23,30,814/- out of total addition of Rs.62,20,098/- and DRs.26,64,814/- made by the Assessing Officer in the assessment order. We are, therefore, inclined to uphold the order of the learned CIT(A).'

Both the authorities, since have concurrently held in favour of the assessee-respondent on the issues, which is predominantly factual in nature, no perversity is pointed out as the reasonings are sound based on evidence adduced before these authorities, no question of law much less substantial question of law arises. Tax Appeal is therefore, dismissed.”

Accordingly respectfully following the precedent in the case of *Shakti Industries* (supra) we reverse the order of Ld. CIT(A) and this ground of assessee's appeal is allowed.

10. In the result, assessee's appeal stands allowed.

Order pronounced in the open court 08/02/2017

Sd/-
(न्यायिक सदस्य)
(A.T.Varkey)
(Judicial Member)
Kolkata,

Sd/-
(लेखा सदस्य)
(Waseem Ahmed)
(Accountant Member)

*Dkp, Sr.P.S

दिनांक:- 08/02/2017 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-M/s New Hirlal Saha & Sons, 16, Pageya Patty St. Kolkata-007
2. प्रत्यर्थी/Respondent-ITO Ward-45(2), 3, Govt. Place, Kolkata-001
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,
उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।