

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES : A : NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT  
AND  
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.2593/Del/2015  
Assessment Year: 2010-11

Madura Biotech (P) Ltd.,  
Plot No.146-149, Sector I.I.D.C.,  
Sidcul Ranipur,  
Haridwar.

Vs DCIT,  
Circle-6(1),  
New Delhi.

PAN: AAFCM8070L

(Appellant)

(Respondent)

Assessee by : Shri Tanpreet Kohli, CA  
Revenue by : Shri Kanav Bali &  
Shri Vivek Vardhan, Sr. DRs  
  
Date of Hearing : 07.06.2024  
Date of Pronouncement : 23.07.2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the assessee against the order dated 27.02.2015 of the Commissioner of Income Tax (Appeals)-6, Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in Appeal No.188/14-15 arising out of the appeal before it against the order dated 28.03.2013 passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act'), by the DCIT, Circle-6(1), New Delhi (hereinafter referred to as the Ld. AO).

2. The relevant facts are that the assessee company was incorporated on 28.04.2008. The main Business of the company is to manufacture Milk and Milk based products at the industrial area of Haridwar. The assessment year under consideration is the second year of the assessee. Appellant company filed its Income Tax Return declaring Business income of Rs.8533519.0 which was claimed to be 100% exempt U/s 80IC(2)(a)(ii) of the Act .The other head of income is Short Term Capital Gain of Rs.15669577.00 which was taxable @ 15% which includes Short Term Capital Gain of Rs 16753970.00 and Short Term Capital Loss Rs 1084393.00.

2.1 The Assessing Officer treated this short term capital gain as Business Income. The Assessing officer denied the deduction U/s 80IC. Further, a 20% disallowance, of Rs 6084325,00 out of total purchases Rs 30421625.00 was made. The appeal of assessee was dismissed by CIT(A), for which assessee is in appeal raising following grounds:-

- “1. The authorities below have not given proper opportunity to explain the facts and circumstances of the case.*
- 2. The authorities below have erred in law and on facts in treating the Short Term Capital Gain Rs.15669577.00 as business income.*
- 3. The authorities below have erred in law and on facts in denying the deduction u/s 80IC of the IT Act 1961 for business income.*
- 4. The authorities below are not justified in disallowing Rs.6084325.00 as 20% out of the total purchase of milk Rs.30421625.00 during the year.”*

3. Heard and perused the record. As with regard to ground no. 1 nothing specific was argued, so same being general in nature is covered in other grounds on merits as decided below.

4. **Ground No. 2** is directed against of treating short term capital gain of Rs 1,56,69,577/- as business income. The assessee company has traded in shares and has shown short term capital gain from these transactions at Rs 1,56,69,577/-. The assessee has shown income from business & profession at Rs.85,33,519/- which has been claimed exempt u/s 80-IC of the I.T.Act. AO observed that total short term capital gain from sale/purchase of shares which amounted to Rs 1,56,69,577/- is about 65% of the total income of Rs.2,42,03,092/-. Further, out of the total assets of Rs 18,94,74,456/-, the assessee has made investment in shares at Rs.14,41,58,341/- which is 76% of the total assets. Therefore, AO observed that the assessee is dealing in shares which is clear from the facts that its income from transactions in share constitutes 65% of the total income and its investments in shares is 76% of the total assets. AO further observed that the assessee has made transactions in shares in quick succession. The assessee has made more than 110 transactions in shares from 01.09.2009 to the close of the Financial Year. Therefore, AO was of the view that assessee is manifestly involved in business activities only, and is showing capital gains to cut down its tax liabilities. AO held that the quick succession in which the assessee has conducted transactions in shares show that the assessee does not intend to earn dividend, rather making quick

bucks by dealing in shares which shows that the assessee in fact is involved in business of shares. AO held that the magnitude of purchases & sales and the frequency of transactions and ratio of sales to purchases as shown on account of investment shows that the assessee has deliberately tried to show huge income as earned from short term capital gain instead of showing the same as business income to avoid a higher rate of taxation and to take advantage of lower rate of taxation. Therefore, the income of Rs 1,56,69,577/- was taxed by the AO as business income for the year under consideration. The CIT(A) sustained the same with following findings;

*“4.1.2 AO treated the short term capital gain at Rs 1.56 crores as business income of the assessee following the principles enunciated in CBDT's Circular No.4/2007 dated 15.06.2007. The above Circular No.4/2007 encapsulates the law on the subject as to whether the sale and purchase of transactions of shares are for business purposes and investment. From the P&La/c and Balance Sheet of the assessee company it is evident that profit from sale/purchase of shares constitutes about 65% of total income. Out of the total assets of Rs 18.94 crores investment in shares constitute Rs 14.41 crores which is about 76% of total assets. The above figures show voluminous magnitude of share transactions carried out during the year. During the year, the assessee earned dividend income of Rs 7,389/- only as against gain of profit from sale of shares at Rs 1.56 crores. Therefore, it is evident that the share are not purchased as investment to earn dividend income but with the intention to earn profit from resale of shares. The assessee has made 120 transactions from 01.09.2009 to 31.03.2010 within a period of seven months, selling the shares very frequently and average period of holding of scrips stands at around 45 days. In many cases shares were sold within a day or two of purchases. From the volume and magnitude of transactions, frequency in purchase and sale transactions coupled with duration of holding, it is evident that the sale and purchase transactions of shares were not made for investment purposes but for business purposes.*

*4.1.3 The assessee has been habitually trading in quoted shares. The frequency of such purchases and disposal as also the fact that with the investment of Rs. 14.41 crores in shares, the assessee had gain from sale of shares which is more than 65% of total income indicates nothing but intention of trade. The assessee earned only a meager amount of dividend of*

*Rs.7,389/- in the year under consideration. A trader in a commodity is basically motivated by profit in selling the commodity on each and every rise in value, which is apparent in the instant case. High frequency, high volume and regularity of transactions are therefore the basic features of a trading transaction. An investor on the other hand makes purchases with a view to earning income from the investments. He is not tempted to sell the commodity to earn quick profit on each and every rise in the value and holds the commodity for a longer period so as to have income as well as appreciation in value. The true nature of transaction can be understood from the intention of the assessee at the time of purchase. Crucial factor is the period of holding which is very short in case of a trader as is in the instant case, because a trader buys the commodity not for holding it in contrast to an investor who buys the commodity for holding it so as to earn some income from investment and have decent appreciation. In case of shares, income is in the form of annual dividend and therefore, an investor in shares will normally be holding shares for more than a year and any sale before one year has to be explained from the circumstances of the case. The profit motive is also relevant but this is also not conclusive because even an investor may earn profit by way of appreciation. In the instant case, purchases as well as turnover are continually increasing and the assessee has regularly dealt in purchase and sales of shares. Profit motive is also, clearly evident in making the transaction. As is apparent from the aforesaid facts, the transactions of purchase of shares, and thereafter selling it within a few days and most of the time within a month, with a view to earn profit, reflects motive of the assessee as a trader and not an investor.*

*4.1.4 In the case of CIT v. H Holck Larsen [1986] 160 ITR 67, the Hon'ble Supreme Court has held as under:*

*"The character of a transaction cannot be determined solely on the application of any abstract test or rule and the cumulative factors affecting the transactions have to be seen. Habitual dealing in a particular item is indicative of the assessee's intention of trading. Merely for taking benefit of provisions of sec. 111A of the Act applicable from the AY 2005-06, the assessee cannot be categorised as an investor especially when the aforesaid facts speak otherwise and lead us to the conclusion that the assessee is indulging in activities of a trader in shares. As observed in Sutlej Cotton Mills Supply Agency Ltd. (supra), it is a manner of first impression with the Court whether a particular transaction is in the nature of trade or not.; it is not even the assessee's case that they had held all the shares for a long duration. The facts and circumstances of the case before us, when viewed in the light of principles laid down in the various decisions referred to above, lead us to the conclusion that the voluminous share transactions were in the nature of the business; purchase of shares by them was not for the purpose of earning dividend, but with the dominant intention of resale in order to earn profits; the profit made by the assessee is not of mere enhancement of value*

*of the shares, but is a profit made in the carrying on of a business scheme of profit making; huge volume of share transactions, the repetition, and continuity of the transactions, give them a flavour of "trade": the magnitude, frequency and the ratio of sales to purchases on the total holdings is evidence that the assessee had not purchased the shares as an investment, but with the intention to trade in such scrips. In the light of view taken in the aforesaid decisions, we are of the opinion that the Id. CIT(A) was not justified in accepting the claim of the assessee as investor in shares. Accordingly, we vacate the findings of the Ld. CIT(A) and restore the order of the AO."*

*From the above factual and legal position it is clearly established that the intention behind these transactions was to derive business income or profit and not to invest the amounts. On identical circumstances, Hon'ble Delhi High Court in the case of Manoj Kumar Samdaria v/s CIT (2004) 45 taxmann.com 394(Del) upheld the view of the AO that income from sale of shares is taxable as the business income. In view of the above factual and legal position the AO is fully justified in his view that income from sale of shares is taxable as the business income. Therefore, the addition made by the AO is sustained. The appeal fails in this ground."*

5. As with regard to this **ground no. 2**, the Ld. AR has submitted that the purpose of the shares is for investment and not trading and for making the investment, the assessee deputed owned funds without any borrowings. It was submitted that the investments were made in limited shares, with almost 98.92% made in just one company. Ld. AR has stressed on the fact that the frequency and volume of shares were not very high, viz a viz, the turnover of the assessee, being maximum of 13.66% of the turnover. It was also contended that the transactions were not frequent and were occasional, with average holding time of 45 days. The weighted period of shares being held is 63 days, which is not typical for a trader.

5.1 Ld. AR submitted that the AO was not able to identify whether any specific expense has been incurred towards shares and has upheld all the expenses to be towards business, meaning thereby, he confirms that the entire activities and the

resources were actively deputed for main business activity and not for investment in shares, which is passive in nature and thus investment.

5.2 Ld. AR pointed out that the assessee has shown the shares as investment in the books, which has been accepted by the AO while completing assessment under Sec 143(3) of the Act.

5.3 Distinguishing the judgement relied by CIT(A), Ld. AR submitted that the CIT(A) has relied on the judgement of **Manoj Kumar Samdaria vs CIT, 45 Taxmann.com 394** and same is differentiable on the facts of the assessee, since assessee in that case, Manoj Kumar Samdaria, had transacted in shares almost daily, while, in the case of the assessee, average transaction period is 63 days, with there being practically occasional and specified number of occasional transactions. Then in that case assessee had transacted professionally through a broker, thereby deputing its resources and incurring specific resources and expenses, indicating this segment of its business. While in the present case of the assessee, the AO has not made any specific observation, thereby proving that the earnings from the investment of die assessee is purely passive, involving no active efforts from the assessee.

5.4 Ld. DR has relied the order of tax authorities below.

6. As we appreciate the material on record and submissions on this issue we find that at page No.47 to 59, a copy of Memorandum of Association of the

assessee company is provided and in Part-C, the 'other objects of the company' are mentioned wherein at Sl. No.42, it is mentioned that the assessee has one of the objects as 'to carry on the business as shares and stock brokers and to buy, sell and deal in all kind of shares, stocks, securities, bonds, debentures, units and such other instruments of all types.' Thus, transacting in business of shares is one of the objectives of the assessee company. Then, we find that at pages 38 to 41, the assessee has provided the list of transactions giving rise to short-term capital gains and short-term capital loss on sale of shares. It is observed that the assessee has primarily transacted by way of sale and purchase of shares of only four companies, i.e., Kwaliti Dairy India Ltd., Uflex Ltd., Tata Motors and elspun-Gujarat Stahl Rohren Ltd.. We find that the first purchase of the shares was of Kwaliti Dairy. On 06.08.2009 which was sold after 32 days of 07.02.2009 and, thereafter, there were 95 such transactions upto 31.03.2010 on which short-term gain was earned and, there were 25 transactions in which short-term capital loss occurred. We find that there were instances where the holding was of 1 to 8 days and the lot was also as small as of 36 shares.

7. Thus, whatever has been asserted on behalf of the assessee by the ld. AR does not hold good. There is no substance in the contention that merely because the shareholding is in seven companies at the end of the year which is shown as investments, therefore, the transactions resulted in capital gains. It is quite apparent that during the year the assessee has entered into the trading not to earn

capital gains, but, the profit motive was out of the habitual dealing in the quoted shares. The crucial factor as allegedly observed by the Id. tax authorities is the period of holding which is very short in case of a trader as in the instant case. There is no substance in the assertion that period of holding was average to 63 days. It is not the average of the days of holding, but, the frequency which matters coupled with the lots in which the shares are purchased and sold. Furthermore, since the transactions are broadly in just four scrips that all the more shows that the intention was not at all to buy the shares and hold them for a period to earn a capital gain, but, the intention was to leverage in the prices fluctuating in the stock exchange.

7.1 The judgement which the Id. AR has relied are not applicable as the judgement of the Hon'ble Gujarat High Court in the case of *PCIT vs. Gujarat Fluorochemicals Ltd. (2020) 120 taxmann.com 433 (Guj.)* was where the CIT(A) had allowed the claim of the assessee observing that the Memorandum of Association of the Assessee company showed that business of purchase and sale of securities was not the main object and the assessee had maintained distinction between trading assets and non-trading assets in the books of account and only net surplus or loss arising out of shares and securities was reflected in the Profit & Loss Account. Here, in the case in hand, the assessee is claiming to be into a business leading to earning exempt income u/s 80 of the Act. Thus, the main

object may not be purchase and sale of securities. However, as we have observed from Memorandum of Association, it is one of the other objects of the company.

7.2 Then, in the case of **Gujarat Fluorochemicals (supra)**, there was no allegation of frequent transactions. The assessee was found to be investing heavily in the mutual funds also for which in para 24, it was observed as follows:-

*“24. As against the observation made by the Assessing Officer with regard to the volume of trade frequency etc. of the transaction in shares and securities, it is found by the CIT(A) as well as the Tribunal that the majority investment was made in the mutual funds and bonds and in shares of group companies of strategic investment and only 23.01 Crore were invested in the shares of other companies out of total investment in shares and securities amounting to Rs.224.70 Crore. In such circumstances, the purchase and sale of units in mutual funds cannot be said to be constituted as trading in shares as the same cannot be sold in open market. Moreover, the memorandum of association of the assessee company clearly shows that the business of purchase and shares and securities is not the main object of the company. The assessee has also maintained distinction between trading assets and non trading assets in the books of accounts and only net surplus or loss arising out of the shares and securities is reflected in the profit and loss account. The assessee has also complied with legal requirement applicable under the Companies Act read with Accounting Standard 13 with regard to investment in shares and securities by showing depreciation in value of shares and securities in the books of accounts.”*

8. Then, the judgement in the case of **CIT vs. Smt. Sonia Uppal (2014) 52 taxmann.com 62 (P&H)** was in regard to investments in the land deals. The judgement in the case of **DCIT vs. SMK Shares & Stock Broking (P) Ltd. (2010) 8 taxmann.com 120 (Mum)** was in regard to an assessment year 2005-06 while the AO while passing the assessment orders for earlier years had not disputed assessee's claim regarding profit on sale of investment. In that case, it was also established that the assessee had maintained separate investment portfolio. In the

case of the present assessee, it is second year of the business and half way through the financial year, the trading was initiated in shares. Thus, by merely mentioning the shares to be the investments, benefit of Circular No.4 of 2007 dated 15.06.2007 cannot be granted. Then, in the judgement in the case of *Indi Stock (P) Ltd. Vs. CIT (2023) 148 taxmann.com 449 (Cal)* again the assessee was found to be maintaining separate account for trading in shares and stock-in-trade and the assessee was found to have purchased shares by way of investments only and debited cost to the investment account. Then in the order in *ACIT vs. Jignesh Madhukant Mehta (2017) 83 taxmann.com 349 (Mumbai Trib.)*, it was found that the assessee had undertaken delivery based transactions. In the order in the case of *Second Leasing (P) Ltd. vs. ACIT (2018) 95 taxmann.com 133 (Delhi – Trib)* again in the preceding years income arising on sale of investments was accepted by the AO as capital gains and all the transactions was delivery based. Therefore, we are of the considered view that the claim of the ld. AR that the assessee was investing its own funds which were lying idle is not in itself sufficient to establish that the trading in shares was done as investments to earn capital gain. Accordingly, findings of CIT(A) sustained and this ground is decided against the assessee.

**9. Ground no. 3** of appeal is directed against denying deduction u/s 80-IC of the Act, for business income. Assessee has shown income from business at Rs.85,33,519/- and has claimed deduction u/s 80-IC of the entire amount. AO

observed that as per the notification issued by the CBDT, certain khasras of village Rawali Mahdood in Distt. Haridwar have been included in the schedule under the heading of "State of Uttaranchal" which are eligible for deduction u/s 80-IC of the Act. The assessee has furnished a copy of lease deed dated 11.07.2005 entered into by State Industrial Development Corpn. of Uttaranchal Ltd.(SIDCUL) and Madura Agro Food Industries that the land measuring 4000 sq.mtr. which has been conveyed through this lease deed is situated at villages Rawali Mehdoon and Salempur Mehdoon of Distt. Haridwar. AO observed that, as per the notification only the Rawali Mehdoon village has been, included. The other villages namely Salempur Mehdoon is not appearing in the Board's Notification dated 03.10.2006. The assessee has not furnished any evidence to prove that the area in which the undertaking is situated is covered by the CBDT Notification. Therefore, the deduction u/s 80-IC is not allowable.

10. Further, AO observed that the said lease deed was entered into by SIDCUL with the Madura Agro Food Industries which was a partnership concern. No evidence has been furnished as to how the deduction u/s 80-IC would be available to the assessee which is a company. Copy of letter dated 26.11.2008 from the SIDCUL was been furnished by the assessee in which permission to change in constitution from partnership firm to Pvt. Ltd. company has been allowed with change of name from Madura Agro Food Industries to Madura Biotech (P) Ltd. As per the letter of SIDCUL, addition of product such as bakery products,

confectionary products, all kind of food juices, instant foods, all kinds of edible and non edible herbal products and other food products was allowed with the certain conditions. Therefore, AO held that the above change is clearly reconstruction of a business already in existence within the meaning of Sec.80-IC(4)(i) of the I.T. Act and hence, deduction u/s 80-IC is not allowable to the assessee. AO was of the view that mere copy of letter from SIDCUL permitting to change in constitution from partnership firm to Pvt. Ltd. Company with permission to change of name from Madura Agro Food Indus, to Madura Biotech (P)Ltd. is not sufficient. AO observed that the assessee has not furnished requisite evidence as to how the firm namely M/s Madura Agro Food Industries was first eligible for deduction u/s 80-IC and how the assessee company subsequently was eligible to continue to get such deduction. AO concluded the assessee has failed to adduce evidence that the undertaking is not formed by the transfer to a new business of machinery or plant previously used for any purpose, as per the provisions of Sec. 80-IC(4)(ii). In view of the above, AO held that the assessee company is not eligible for deduction u/s 80-IC claimed in the return of income at Rs 85,33,519/-.

The same was sustained by the CIT(A) with following relevant findings;

*“4.2.2 During the appellate proceedings I have examined the statutory audit report, tax audit report and audit report in Form No. 10 CCB filed by the assessee. It is seen that in the tax audit report in Form No. 3 CD the auditor has shown purchase of finished products at Col.No.28 B at Rs.1,39,94,513/- and sales of finished products at Rs.1,92,90,745/- whereas in the statutory audit report the auditor has shown the purchases at Rs.9,80,34,902/- and sales at Rs.11,46,90,509/-. In the tax audit report the figures of opening stock and closing stock of raw material, raw material purchases and consumption during the year were shown as 'Nil'. In the statutory report the auditor has shown Trading and P&L a/c only. No manufacturing a/c has been shown in*

*the statutory audit report. From the above, it is evident that no manufacturing activity has been carried out as per the tax audit report and statutory audit report. Since the deduction u/s 80-IC is claimed by the assessee as a manufacturing undertaking, therefore, in the absence of manufacturing, the claim is not allowable. It appears that AO rejected the claim of deduction on the basis of CBDT notification on area and on the basis of provisions of sec 80IC(4)(ii) without examining the audit reports. In the 10CCB report the initial assessment year of the undertaking is shown as AY 2009-10 whereas in the 10CCB report of Madura Agro Food Industries, the initial assessment year of the undertaking is shown as AY 2007-08. Since claim of the assessee is that Madura Agro Industries was reconstituted into the company in the name of the assessee company, therefore, the initial assessment year of the undertaking should have been the same. From the above anomalies/discrepancies observed from the lax audit report and statutory tax audit report, difference in initial AY shown and the fact that no manufacturing activity has been carried out, therefore, it is clearly established that the entire claim of the assessee is farcical and bogus. The entire claim of the assessee is simply to avail 100% deduction u/s 80-IC without any genuine manufacturing activity. In view of the above, the AO is fully justified in disallowing the claim of deduction u/s 80-IC. Therefore the appeal of the assessee is dismissed in this ground.”*

11. As with regard to this **ground no 3** Ld. AR submitted that the AO and CIT(A) have disallowed the claim under Sec 80IC on different pretext. It was submitted that AO had based his reasoning on allegation that the designated zone of the assessee is not notified in the circular of zones for Sec 80IC and the conversion of assessee to company from partnership is reconstruction of business. It was submitted that as against the above, before the CIT(A), the assessee submitted the notification [PB Pg No 104-222] stating that it's zone is covered as a designated zone under Sec 80IC. Further it submitted that the conversion of partnership to a company is not reconstruction and thus, Sec 80IC to the assessee deserved to be allowed by CIT(A). Ld. AR submitted that while accepting the

above contentions, the CIT(A) changed the basis of disallowance, by pointing the following points:

- i. That the turnover and stock in Tax Audit Report versus the Financial Statements is different
- ii. The Form 10CCB mentions the initial assessment year as AY 2009-10 and not AY 2007-08, being the date of inception of partnership

11.1 As regards the assertion of the AO on change in constitution of partnership firm to private limited company disentitles the assessee to the benefit, we find no substance as the deduction is available to undertaking and not to individual assessee. We are of the considered view that there is a mere change in the status of the company in terms of its composition and that does not brings into action provisions of section 80IC(4)(ii) of the Act. Thus, this ground is decided in favour of the assessee.

12. Against this, the Ld. AR submitted that clerical inadvertent errors don't entail any disallowance under Sec 80IC. The differences in balances of tax audit does not entail a disallowance of claim of Sec 80IC, if all the conditions are fulfilled. It was pointed out that Section 80IC claims were accepted in subsequent years. The Ld. AR relied on the assessment order of AY 2012-13 [PB Pg No 247-251] where the claim of Sec 80IC has been accepted by the department. Accordingly, on the pleas of consistency, the Ld. AR submitted that the claim should be allowed in present year also.

13. Ld. DR has relied the order of tax authorities below.

14 After appreciating the facts and circumstances, it comes up that the CIT(A) has not disputed the fact that the assessee company was located in a geographical area which was covered by the CBDT Notification for the purpose of benefit u/s 80IC of the Act. Before us, the ld. AR has demonstrated on the basis of copies of Notification available at page 104-218 with special reference to page 138 that areas of Salempur Mehdood and Rawli Mehdood fall in the notified industrial areas. As we go through the assessment order for AY 2012-13, copy of which is available at pages 247 to 251 of the paper book, it appears that the manufacturing activity and income of the assessee from the business of manufacture of milk and milk based products is not disputed at all and, during AY 2012-13, on the basis of particulars of sales and net profit of the assessee company for AY 2010-11 and 2009-10, the AO had re-determined the NP ratio to make an addition. Thus, there is no justification in findings of CIT(A) that the manufacturing activity of the assessee itself is doubtful.

15. **Ground no. 4** of appeal is directed against disallowing Rs 60,84,325/- as 20% out of the total purchases of milk Rs 3,04,21,625/- during this year. AO observed that the assessee had shown 13 sundry creditors of Rs 2,61,81,3255/- in respect of the supply of milk to assessee company. The above creditors had made sales of milk to the assessee company but barring few creditors, no payment has been made to any of the creditors by the assessee company throughout the year.

The assessee furnished confirmations from these creditors as also the affidavits. In order to verify the genuineness of the transactions letters were issued by the AO to the above creditors at the addresses as furnished by the assessee. The letters issued to the above creditors were received back with the postal remarks that "addresses were incomplete". On being informed by the AO the assessee furnished fresh addresses which were stated to be complete. Letters calling for information u/s 133(6) were again issued by the AO at the given fresh addresses. This time also the letters were received back unserved. The assessee was intimated about this and was asked as to why adverse inference be not drawn in view of this. The assessee was also afforded fresh opportunity by the AO vide note sheet entry dated 18.03.2013 to produce the creditors on 21.03.2013 since letters issued to them had been received back twice. In response assessee furnished letter dtd. 21.03.2013 expressing its inability to produce any of the above creditors for the reasons that they are petty, illiterate villagers/milk vendors who will lose their day earning if they attend the office of the AO and it is not practical and feasible to produce these milk vendors. AO observed that the assessee company has shown sales amounting to Rs 11,46,90,509/- and net profit of Rs 84,71,623/- @ 07.38% (excluding profits on sale of share amounting to Rs. 1,56,69,577/-). Since the assessee eventually failed to produce any of the milk vendors, therefore, 20% of the expenditure incurred for purchase of milk of Rs 3,04,21,625/- from the above named milk vendors which works out to Rs 60,84,325/- is disallowed and added back by the

AO to the income of the assessee. CIT(A) has sustained the same with following findings;

*“4.3.2 Requisition issued by the AO to the sundry creditors u/s 133(6) at the addresses provided by the assessee was received back un-served with the postal remarks "incomplete address". The assessee was duly informed about this fact and was asked to furnish latest complete address of sundry creditors. Accordingly, the assessee has furnished the latest complete addresses of the sundry creditors. Letters for calling confirmation were again issued by the AO u/s 133(6) at the given fresh addresses. Again letters were received back unserved. Since the letters returned back unserved twice therefore the AO asked the assessee to produce the sundry creditors on 21.03.2013. In response the assessee expressed his inability to produce the creditors before the AO on the ground that the creditors being petty, illiterate villagers/milk vendors will lose their day earning if they attend before the AO and it is nor practical and feasible to produce them. While the claim of the assessee is that the creditors are petty, illiterate villagers/milk vendors and loss of a day earning would be a great loss to them, on the other hand no payment has been made by the assessee to most of the creditors and the same has been outstanding throughout the entire period for months since the purchases were made. Out of the 13 creditors, not a single payment has been made by the assessee to 12 of them where the outstanding is ranging from Rs 9 lacs to Rs 16 lacs. Payments were made only partly to Shri Sattar on few occasions as against large number of purchases where the outstanding is Rs.96.41 lacs. It is beyond any logic as to how petty illiterate villagers/vendors who cannot afford to lose a days earning to appear before the AO, can afford to supply milk to the assessee of such huge magnitude without getting a single payment throughout entire year, It is beyond any comprehension that such small and petty milk vendors can afford to provide such, large credit to the assessee without getting payments throughout the entire period. The submission of the appellant that affidavits from the sundry creditors were filed before the AO is without any merit. It is held in plethora of decisions that affidavit cannot be accepted unless corroborated by intrinsic or extrinsic evidence. As the existence of the sundry creditors are not prove, therefore, the genuineness of the affidavits are also not proved. The above view finds support from the decisions in the case of Technical Glass Industries v/s CIT(All) 281 ITR 61, Chowkchand Balabux v/s CIT(Assam)41 ITR 465, Munilal Ramdayal v/s ITO & ors. (Ori) 76 ITR 151. From the above it is evident that the assessee failed to prove the genuineness of the milk purchases from the above vendors. In view of the above, AO is fully justified in disallowing 20% of the purchase of milk i.e. of Rs 60,84,325/-. Therefore the disallowance made by the AO is sustained. The appeal fails in this ground.”*

16. As with regard to this ground no. 4, Ld. AR primarily stressed on the proposition that there cannot be rejection of purchases if sales not doubted and the books of accounts are accepted. It was submitted that the AO and the CIT(A) have accepted the books of accounts and have not pointed any infirmity in it. As a matter of fact, the AO has barely chose to disallow a selective portion of such purchases, without prescribing any adequate reasoning to the disallowable portion. Ld. AR has submitted that if the AO wanted to make a specific disallowance, he must have rejected the books of accounts and made assessment under Sec 144 of the Act, being not the present case of the assessee. Thus, according to him the disallowance is vague and *void-ab-inito*.

17. At the same time, Ld. AR submitted that even otherwise the disallowance is to be restricted to the amount of Gross Profit. He submitted that while the AO has accepted the books of accounts, he has also accepted the sales made thereby by the assessee. Essentially, if the AO was to consider the purchases non-genuine, the AO ought to make an addition of the GP being 7.38%, as a disallowance otherwise would lead to double jeopardy, being not allowable by law.

18. Ld. DR has relied the order of tax authorities below.

19. In regard to this ground, we are of the considered view that ld. tax authorities have fallen in error in making ad hoc disallowance without pointing out any error in the books of account of the assessee. As we go through the books of account of the assessee in the form of tax audit report available at pages 18-27 of

the paper book and audit report in Form 10CCB available at pages 28 to 37 and audited financial statements available at pages 7-17 of the paper book, we find that the assessee has maintained a composite trading and profit & loss account for the year ending 31<sup>st</sup> March, 2010 and all expenses of the nature like advertisement expenses, director's remuneration, interest expenses, machine running & maintenance, salary, staff welfare expenses, vehicle running and maintenance expenses, have been debited and which have not been doubted. We are of the considered view that the nature of business of the assessee primarily requires electricity consumption and fuel expenses which along with substantial purchases stands allowed. Thus, there is no justification to doubt the purchases by accepting the sales and the income. Further, as we have observed on the basis of assessment order for AY 2012-13, the assessee's net profit ratio for AY 2010-11 have been considered for making an assessment of the net profit for AY 2012-13. Thus, there is no justification to discredit the purchases on ad hoc basis. Accordingly, we allow this ground.

20. In the result, the appeal filed by the assessee is allowed partly with consequences to follow as per determination of grounds above.

Order pronounced in the open court on 23.07.2024.

Sd/-

(G.S. PANNU)  
VICE PRESIDENT

Sd/-

(ANUBHAV SHARMA)  
JUDICIAL MEMBER

Dated: 23<sup>rd</sup> July, 2024.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi

		Date
1.	Draft dictated on	.06.2024
2.	Draft placed before the author	.06.2024
3.	Draft placed before the other Member	
4.	Approved Draft comes to the Sr.PS/PS	
5.	Order uploaded on	
6.	File sent to the Bench Clerk	
7.	Date on which file goes to the Head Clerk.	
8.	Date on which file goes to the AR	
9.	Date of dispatch of Order.	