

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
SHRI K.M. ROY, ACCOUNTANT, MEMBER

ITA no.14/Nag./2024
(Assessment Year : 2019-20)

Asstt. Commissioner of Income Tax
Central Circle-1(3), Nagpur Appellant

v/s

Mor Alloys Pvt. Ltd.
D. No.172, Duwam Village
Shreeramnagar, Garvidi Respondent
Vizianagaram 535 101
PAN - AAGCM3029C

Assessee by : Shri Mukesh Agrawal
Revenue by : Shri Sandipkumar Salunke

Date of Hearing - 04/12/2024

Date of Order - 27/01/2025

ORDER

PER V. DURGA RAO, J.M.

The captioned appeal by the Revenue is directed against the impugned order dated 22/11/2023, passed by the learned Commissioner of Income Tax (Appeals)-3, Nagpur, [*learned CIT(A)*], for the assessment year 2019-20.

2. In its appeal, the Revenue has raised following grounds:-

"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.1,04,50,153/- made by the A.O. on account of suppression of sales made U/s 69A of the IT Act, 1961 based on evidences of under invoicing, whatsapp chats and statements of Mr. Ashfaque Ahmed & Shri Suresh Kankani.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made by the A.O., without taking into consideration

the statements of Mr. Ashfaque Ahmed & Sri Suresh Kankani which are supported by whatsapp chats related to cash dealing and deleting the addition of Rs. 1,04,50,153/- made by the A.O. on account of suppression of sales made U/s 69A of the IT Act, 1961.

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.1,04,50,153/- made by the AO without taking into consideration the statements of Mr. Ashfaque Ahmed, Additional Director of the company had stated that the sale price of off grade Silico Manganese was not decided on the basis of market price, as is happening as is happening in the rate of prime grade Silico Manganese, but as per the choice of the Directors.

4. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.1,04,50.153/- made by the AO without appreciating the facts that the transaction in question, was out of books and hence was not the part of books to note any defect."

3. Facts in Brief:- The assessee is a company carrying on business of manufacturing of Siloco Manganese by using different grades of Manganese ore. In the process of manufacturing of finished product i.e., Silico Manganese, a by-product (waste) is generated which is called off grade metal. There was a survey action under section 133A of the Income Tax Act, 1961 ("*the Act*") was conducted on the Radhika Group of cases on 25/08/2021. Subsequently, notice under section 148 of the Act was issued in response to which the assessee declared income of ₹4,59,57,916. The case was selected for scrutiny and ultimate the assessment order was passed under section 143(3) r/w section 147 of the Act, determining total income of ₹5,64,08,073, after making addition of ₹ 1,04,50,153, under section 69A r/w section 115BBE of the Act on account of estimation of suppression of sales which is in dispute.

4. The case of the assessee is that the addition made by the Assessing Officer of ₹ 1,04,50,153, is on account of estimation of suppression of sales. During the course of survey proceedings, no evidence of under invoicing for

sale of off grade metal was found. However, in the assessment order made under section 143(3), the Assessing Officer has estimated sale price of off grade metal at the rate of 49% of prime metal rate and worked out difference of ₹ 1,04,50,153, as compared to sales recorded in books of accounts and made addition of it under section 69A r/w section 115BBE of the Act.

5. On appeal, the learned CIT(A), considering the entire submissions made by the assessee, deleted the addition made by the Assessing Officer. The relevant portion of the order of the learned CIT(A) is extracted below:–

"4. Discussion and Decision:

The appellant has raised six grounds of appeals. Out of which ground no. 1, ground no. 2, ground no.3 and ground no.6 are general in nature and not adjudicated. Hence these grounds of appeals are hereby dismissed.

Ground no. 4 and 5 are regarding the addition of Rs. 1,04,50,153/- made u/s 69A of the Act on account of suppression of sales of "Off Grade Metal". Appellant is engaged in the business of manufacturing Ferro Silico by using different grades of Manganese ore. A Survey u/s 133A of IT act was conducted at premises of the appellant on 25.08.2021. During survey, statement of Mr. Ashfaqe Ahemad an employee of the appellant was recorded wherein he stated that in the process of manufacturing of finished product i.e. Silico Manganese, a by-product is generated which is called off grade metal. He stated that price of off grade metal will be around 60-70% of prime metal and further reduced by another 20-30% depending upon quality, size and grade. He further stated that the price of off grade metal is fixed by Director, Shri Manoj Agrawal and Shri Manvendra Mor. The Id. AO, based on statement of Mr Ashfaqe Ahemad, estimated sale price of off grade metal at the rate of 49% of prime metal rate, compared it with sales recorded in books of accounts, and worked out difference of Rs. 1,04,50,153/- and made addition of it u/s 69A r.w.s. 115BBE of IT Act.

During appellate proceeding appellant submitted that the addition is solely based on estimation of sale price as per the statement of Mr. Ashfaqe Ahemad. The addition is on assumption and presumption that the sale price of off grade metal would have been @ 49% of Prime Metal rate. There is no corroborative evidence on record to prove theory of the Id. AO that there is suppression of sale price. Appellant submitted that Mr. Ashfaqe Ahmed in his statement has only narrated about how sale price of off grade metal is fixed by management but he has never admitted about any suppression in sale price. Appellant submitted that there is no evidentiary value of statement of Mr Ashfaqe Ammed recorded during survey for which appellant relied on certain judicial pronouncements.

It is seen from the assessment order that the sole basis of addition of Rs. 1,04,50,153/- is the statement of Mr Ashfaque Ahmed. I have also perused the statement of Mr Ashfaque Ahmed recorded at the time of survey.

It is seen from the statement of Mr Ashfaque Ahmed has only narrated about approximate price of off grade metal considering various factors like quality of material, its size and demand in the market. He also stated that the final price is fixed by Directors considering various market factors. Now here in the statement he has ever admitted about suppression of sale price. The AO has not referred to any evidence found during survey which suggests that the sale price of off grade metal is 49% of prime metal. Director of the appellant Shri Manvendra Mor has also, in his statement confirmed that the sale price as per books of accounts is actual negotiated price and there is no suppression of sale value. I agree with the argument of the appellant that the addition solely based on statement recorded during action u/s 133A of the Act is not sustainable.

Hon'ble Madras High Court in Paul Mathews and Sons V. Commissioner of Income Tax (300 ITR 157), has held as under-

"Section 133A(3) (iii) enables the authority to record the statement of any person which may be useful for, or relevant to, any proceeding under the Act. Section 133A, however, enables the income-tax authority only to record any statement of any person which may be useful, but does not authorize taking any sworn statement. On the other hand, we find that such a power to examine a person on oath is specifically conferred on the authorised officer only under Section 132(4) of the Income-tax Act in the course of any search or seizure. Thus, the Income-tax Act, whenever it thought fit and necessary to confer such power to examine a person on oath, the same has been expressly provided whereas section 133A does not empower any Income-tax Officer to examine any person on oath. Thus, in contradistinction to the power under Section 133A, Section 132(4) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income tax Act. On the other hand, whatever statement is recorded under Section 133A of the Income-tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law. Therefore, there is much force in the argument of learned counsel for the appellant that the statement elicited during the survey operation has hol evidentiary value and the Income-tax Officer was well aware of this."

This judgment in Paul Mathews (supra) was relied on by the Madras High Court in S. Khader Khan Son and was confirmed by the Apex Court by dismissing the appeal filed by the Revenue (352 ITR 480).

It is also seen that AO has not found any defect in the books of accounts of the appellant. The AO has accepted all the figures such as purchases, sales etc, as appearing in the books of accounts. No evidence of any sale/purchase outside books has been notice by the AO. The AO never felt the need to reject the appellant's Books of accounts. The results as per the books of accounts have been accepted by the AB Hon'ble Orissa High Court in CIT Vs. Utkal Alloys Ltd. (2009) 319 ITR 339 (Ori.) pertaining to a search and seizure case has held as under:

"11. The procedure of assessment is quasi judicial in nature and in making the assessment the assessing officer must observe the future principles. Accounts regularly maintained in course of business have to be relied upon unless there are strong and sufficient reasons to disbelieve them. Needless to say that discrepancy worked out on the basis of estimation of quantity and value of stock is not accurate, connect with scientific. Therefore, in absence of any defect found out in the books of account, maintained in regular course of business, no addition can be made to the income disclosed by the appellant in its return of income on the basis of discrepancy worked out on estimation of sale."

Considering the fact that no defect has been found in audited books of accounts, no evidence of any sale/purchase out of books has been noticed, the addition cannot be made merely on assumption and presumption of estimation of sale price. Mere suspicion cannot take place of proof. Therefore, the addition of Rs. 1,04,50,153/- is directed to be deleted. Hence the ground no. 4 and 5 are allowed."

Against this order of the learned CIT(A), the Revenue is in appeal before the Tribunal.

2. Before us, the learned Counsel for the assessee submitted that the entire addition is based on estimation without rejecting audited books of accounts or pointing out any defect therein. During survey no evidence was found that the sale price shown in books of accounts is understated. In the statement of employee Mr Ashfaq Ahmed, he has only narrated about estimated price of the waste. He has nowhere admitted that there is suppression of sale price. There is no evidence of suppression of sale price and the entire addition is based on assumption, conjecture and surmise. Thus, the learned Counsel for the assessee prayed that the addition made be directed to be deleted.

3. The learned Departmental Representative supported the order of the Assessing Officer.

4. We have heard the arguments of rival parties, perused the material available on record and gone through the orders of the authorities below. It is observed that the Assessing Officer has not found any defect in the audited books of accounts of the assessee. The Assessing Officer has accepted all the figures such as purchases, sales etc. as appearing in the books of accounts. No evidence of any sale/purchase outside books has been noticed by the Assessing Officer. The Assessing Officer never felt the need to reject the assessee's books of accounts. The results as per the books of accounts have been accepted by the Assessing Officer. Hon'ble Orissa High Court in CIT Vs. Utkal Alloys Ltd. (2009) 319 ITR 339 (Orissa HC) pertaining to a search and seizure case has held that in absence of any defect found out in the books of account, maintained in regular course of business, no addition can be made to the income disclosed by the assessee in its return of income on the basis of discrepancy worked out on estimation of stock. Considering the facts of the case that no defect has been found in audited books of accounts, no evidence of any sale/purchase out of books has been noticed, the addition cannot be made merely on assumption and presumption of estimation of sale price. Mere suspicion cannot take the place of proof. No estimation of income can be made in search cases based on conjecture and surmise in absence of any corroborative evidence. We decline to interfere with the order passed by the learned CIT(A) which is hereby upheld by dismissing the grounds raised by the Revenue.

5. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on 27/01/2025

Sd/-
K.M. ROY
ACCOUNTANT MEMBER

Sd/-
V. DURGA RAO
JUDICIAL MEMBER

NAGPUR, DATED: 27/01/2025

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Nagpur; and
- (5) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Sr. Private Secretary
ITAT, Nagpur