

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

Before **Shri Waseem Ahmed, Accountant Member** and
Shri K.Narsimha Chary, Judicial Member

ITA No.2432 & 2585/Kol/2013
Assessment Years:2010-11

M/s East India Holdings Pvt. Ltd., 501A, Diamond Prestige, 41A, AJC Bose Road, Kolkata-700 017 [PAN No.AAACE 6994 Q] DCIT, Circle-5 Kolkata	बनाम / V/s. बनाम / V/s.	DCIT, Circle-5, P-7, Chowringhee Square, Aayakar Bhawan, Kolkata-69 M/s East India Holdings Pvt. Ltd.
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri S.M.Surana, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri Niraj Kumar, CIT-DR
सुनवाई की तारीख/Date of Hearing	24-08-2016
घोषणा की तारीख/Date of Pronouncement	23-09-2016

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

These are cross-appeals by the assessee and Revenue against the common order of Commissioner of Income Tax (Appeals)-VI, Kolkata dated 30.08.2013. Assessment was framed by DCIT, Circle-5, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 25.03.2013 for assessment year 2010-11.

2. Since both the cross appeals relate to the same year and involve common issue so we decided to adjudicate both the appeals together by passing a consolidated order for the sake of convenience.

Shri S.M. Surana, Ld. Authorized Representative appeared on behalf of assessee and Shri Niraj Kumar, Ld. Departmental Representative appeared on behalf of Revenue.

3. Brief facts of the case as culled out from the records are that the assessee in the present case is limited company and engaged in the business of manufacturing and commission agent. The assessee filed its return of income as on 09.10.2011 showing a loss of Rs.1,03,17,888/-.The case was selected for scrutiny and notices u/s 143(3) and 142(1) was duly served upon the assessee. The assessment was framed u/s 143(3) of the Act at a total income of Rs. 7,25,03,870/- only.

4. The predominant issue raised in ground No. 1 to 6 of assessee's appeal is the addition of unaccounted purchases and corresponding sales for Rs.35,16,544/- sustained by the Id. CIT(A) out of total unaccounted purchase of Rs. 6,18,42,251/- added by the AO. The basic premise for sustaining the addition by the Id. CIT(A) is that there was unaccounted investment in the unaccounted purchase and sale of the goods.

4.1 The assessee was manufacturing MS Ingot. A search and seizure was conducted at the factory and other premises related to it by the DGCEI as on 03.07.2009. The DGCEI found from the seized documents that the finished goods have been dispatched from the factory without the payment of excise duty which was also admitted by one of the Director Mr. Rajeev Agarwal of the assessee company in his statement before the DGCEI. Further, it was observed the assessee did not show the unaccounted purchase, production of MS Ingots and removal of the goods. The fact of unaccounted purchase of goods/ production and removal of goods was detected from the various seized documents and the same fact was admitted by the directors of the assessee company in their deposition. It was also found that the assessee has made a payment of Rs50 crores by way of six post dated cheques to the Central Excise Department and accepted the clandestine removal of finished goods. The AO determined the value of unaccounted manufactured of goods and its removal of finished goods 2925.808 M.T. from the factory amounting to Rs. 6,18,42,251/- only. The AO called upon the assessee for the clarification of the above facts. In compliance to the above, the assessee submitted that it was engaged in the job work activities. The raw material received for the job work and its production and its removal was not recorded in its regular books of accounts including raw material stock/production/

finished goods registers. This job work was done to utilise the capacity of the factory and job work charges was received for Rs.3,170/- per M.T. which was offered to income tax. However the AO disregarded the explanation of the assessee and added total unaccounted purchases and sales to the income of the assessee.

5. Aggrieved, assessee carried the matter before Ld.CIT(A) whereas assessee submitted that there was no any unaccounted sales and purchases of the goods but the goods were received from several parties on job work basis. The assessee on such job work charged Rs 3170 per M.T. and it has been shown in its books of accounts as Job work amounting to Rs.77,17,440/-. Income from the Job work done has been properly disclosed in its books of account. The AO failed to bring any defect in the books of accounts and therefore the AO has not rejected same. AO has added back the entire goods removed from the factory without the invoice cover. Even if the assessee has not substantiated the transaction then also only profit element should have been added to the income and not the entire sale proceeds. The assessee also submitted that the details of the job work charges were filed before the AO at the time of assessment depicting the truck number used for the delivery of the Job work goods, the date of loading, rate, weight and name of the party from the job work was received. Similar details were also prepared by the DGCEI for finding out the unaccounted manufactured goods which is exactly matching with the details prepared by the assessee for the job work charges. It was also submitted that the assessee was not liable for the payment of Excise Duty on the job charges by virtue of the General Exemptions 4 under the Central Excise Laws. The liability for the payment of Excise duty was fasten on the assessee as it failed to furnish the details of the parties for whom it manufactured the goods on job work basis.

Ld.CIT(A) disregarded the plea of the assessee by observing that the settlement Commission of the excise has also upheld the findings of the excise authority so contention that the goods were received by the assessee for job work and same has already been disclosed as the income in the books of accounts was not tenable. As such the assessee did not make any claim before the excise authorities that the goods were received for the job work. Even the deposition of director Mr. Rahul Agarwal

took on 29.01.2010 and confirmed the clandestine purchases of goods. Assessee was also not able to produce any details of the parties for whom job work has been done. Mere presentation of few names without any address and other supporting documents does not discharge the assessee from the onus of producing the evidence.

However the Id. CIT(A) accepted the plea of the assessee with regard to the quantum of addition. The addition made by the AO consists of two parts one profit element and second unaccounted investment in unaccounted purchases. Ld. CIT(A) observed that the job charges claimed by the assessee shows a higher gross profit than the production of the goods. Assessee has already disclosed the job work income so no other addition shall be made on this count.

Now the addition has to be made on account of unaccounted investment made through unaccounted purchases. The purchases has not been made in one go rather it is a rotation of funds throughout the year. Ld CIT(A) has made a reasonable basis for determination of estimated investment. Average of the opening and closing inventory was 5.68% of the assessee's total sale $(7,02,81,200 + 11,91,26,248.00/2 * 1,66,54,68001)$. Same ratio was applies to the unaccounted sale i.e. $6,18,42,251 * 5.68%$ i.e. Rs 35,16,544.00. Accordingly Ld. CIT(A) has confirmed the addition of Rs 35,16,544.00 on account of unaccounted purchases and sales.

Being aggrieved by the order of the Id. CIT(A) both assessee and Revenue are in appeal before us.

6. The assessee filed appeal for the addition sustained by the Ld. CIT(A) on account of investment in unaccounted purchases, manufacturing and sales amounting to Rs 35,16,544.00. While the Revenue is in appeal before us for the deletion made by the Ld. CIT(A).

First we take up assessee appeal ITA 2432/Kol/2013.

7. The grounds of appeal raised by the assessee are as under:-

- “1. For that the order of the Ld. CIT(A) is arbitrary, illegal and bad in law.*
- 2. For that the Ld. CIT(A) erred in holding the view that the clearance of the goods without payment of Excise duty was unaccounted transactions of the appellant ignoring the fact that on the same transactions job charges were disclosed which was duly accepted by the department and even by the Ld. CIT(A) and therefore simply because the Excise Authorities levied Excise duty*

on such clearance of goods the same cannot be treated as undisclosed transactions of the appellant.

3. For that on the facts and circumstances of the case the Ld. CIT(A) erred in treating the clearance of goods without payment of Excise duty as assessee's unaccounted transactions.

4. For that the Ld. CIT(A) erred in confirming an addition of Rs.35,16,544/- as average inventory level when no capital was required for the job working charges and even otherwise no evidence to suggest that the assessee made any investment in the transactions.

5. For that on the facts and circumstances of the case the addition of Rs.35,16,544/- was not justified.

6. For that on the facts and circumstances of the case the order of the CIT(A) be modified and the assessee be given the relief prayed for.”

The Revenue has raised the following grounds of appeals:-

“1. That the CIT(A) erred in upholding only the addition to the extent of profit element on unaccounted sale, when the AO had rightly added the entire suppressed production and related expenses as they were entirely out of books.”

8. The Id. AR before us filed a paper book which is running from pages 1 to 68 and submitted that the goods on which job work was done were not included in the stock register. But the job charges were duly reflected in the audited financial statements. As such there was no evasion of income tax. Therefore there was no investment in the form of unaccounted purchase and sale of the goods. The Id. AR drew our attention on pages 1 to 16 of the paper book where the details of the job charges received and details prepared by the excise department are placed and further submitted that it is completely matching. The AO has not brought any defects in the books of accounts of the assessee including the stock register.

On the other hand the Id. DR submitted that the assessee has not furnished the details of the job work details. The Id CIT(A) has presumed the rotation of fund involved in the unaccounted purchase and sale of the goods. The Id CIT(A) has not taken any remand report from the AO and therefore the order of Id CIT(A) is a non-speaking order. The Id DR before us requested to restore the matter to the AO for further adjudication. Both the Id. AR and DR relied on the orders of authorities below as favourable to them.

9. We have heard the rival contentions and perused the materials available on record. From the foregoing discussion we find that the AO has made the addition for the entire value of the goods which was removed from factory of the assessee without making any accounting entry in the books of accounts. The fact of non-accounting for the purchase, manufacturing and sales of the goods was detected by the AO on the basis of search documents which was conducted by DGCEI on the assessee. However, the Id CIT(A) sustained the addition only to the extent of unaccounted investment in the aforesaid transaction by observing that the entire value cannot be brought to tax but the profit element on such unaccounted transactions along with unaccounted investment are subject to tax. Now the questions before us arise so as to whether the addition made by the AO in the aforesaid facts and circumstances is justified. It is clear from the facts that the assessee has not accounted the purchase, manufacturing and sales of the goods worth of Rs. 6,18,42,251/-. But in our considered view the entire addition of the amount by the AO is not as per well settled income tax laws. It is because the amount of profit and undisclosed fund invested in such activity can alone be brought to tax. In view of above, we concur with the view of the Id. CIT(A). Therefore the appeal filed by the Revenue is hereby dismissed.

Now coming to Assessee's appeal in ITA No. 2432/Kol/2013.

10. We find that the assessee in the instant case has duly accounted the income arising from the job charges which is reflecting in the audited financial statement. However, the Id CIT(A) found that the assessee has failed to furnish the details of the parties for whom the assessee has done the job work during the year under consideration. The Id CIT(A) also observed that the Director of the company in his statement has admitted the fact that unaccounted purchases and sales were not accounted for. However, from facts we find that the Id CIT(A) has not brought any documentary evidence showing that the assessee has made any unaccounted purchase and sales. The Id CIT(A) has heavily relied on the statement given by the Director of the assessee company, excise documents and the failure on the part of the assessee to furnish the details of the parties who got the job work done by the assessee. The Id CIT(A) has not taken any remand report from AO before making any addition. The assessee has undoubtedly shown the income from the job charges which has been

accepted by the Id CIT(A). This fact reveals that the assessee has not made any transaction of purchase and sale without recording in the books of accounts. Therefore in our considered view the question of making the addition for the money invested in the unaccounted purchase and sale of the goods does not arise. The lower authorities had not brought any defect in the books of accounts of the assessee. In our considered view any income can be brought to tax effect if based on some cogent materials and evidence. Accordingly we disagree with the order of the Id CIT(A) holding that the assessee has explained the job charges in the income tax return but the unaccounted money in involved the purchase and sale of the goods in relation to the job charges has remained unexplained. In our considered view the Id CIT(A) has given contrary finding with regard to the job charges, unaccounted purchase and sale of the goods. In this connection, we rely in the case of *George Oommen Vs. Commissioner of Agricultural Income Tax* 52 ITR 977, where the Hon'ble High Court of Kerala has held as under :-

*“The accounts of the assessee cannot be rejected on mere suspicions, but only on positive evidence of their unreliability. The law does not permit the IT authorities to reject the accounts produced by an assessee as incorrect or unreliable unless there is some positive material to hold so. Acceptance of accounts kept in the usual course of business is the rule, and their rejection must be the exception for proper reasons only. If the authority sees any reason to suspect the accounts, he is to require proof from the assessee on **“specified points”** and the assessee is bound to give convincing proof thereon. The ITO has stated the accounts to be supported by check-roll, wages-book and bills for purchases of manure and like vouchers. It was then a matter for verification of the accounts with the relative vouchers, and not for speculation or suspicion. The proposition **“the higher the income derived the lower would be the expenses”** appears novel. Normally, it is higher expenditure that brings higher income. The observation that the ITO has “estimated and reduced the yield for the two years lower than that determined for the previous year” is also against the evidence on record. The yield for the previous year determined by the Asstt. Commissioner was 375 lbs. per acre, while that determined by the Agrl. ITO for the years concerned was above 435 lbs. per acre. It is then clear that the Commissioner has overlooked material facts found by the Agrl. ITO and has set aside the orders of assessment without proper justification. The Commissioner's order does not disclose any material for disbelieving the assessee's accounts and vouchers. Therefore, the Commissioner had no justification to reject the assessee's accounts or to set aside the assessment made by the Agrl. ITO. Accounts of assessee cannot be rejected on mere suspicious, but only on positive evidence of their unreliability”*

Similarly we also rely in the case of *CIT Vs. Amitabh Gunvantbhai* 129 ITR 573 where the Hon'ble High Court of Gujarat has held as under:-

“It is a basic principle of civil law that if there is no challenge to the transaction represented by the entries or the genuineness of the entries, then it is not open to the other side - in this case the Revenue - to contend that that which is shown by the entries is not the real state of affairs. The Tribunal, in the instant case, has overlooked one important fact, namely, that the entries in the books of account of G (HUF) were not challenged by the Department as a device or as a cloak to evade the tax. Nowhere on the record the Department challenged that the entries did not reflect the real transaction between the parties. In the absence of any such challenge, it was not open to the Tribunal to come to the conclusion that the money was not received by G in his capacity of HUF but was received by him in his capacity as the guardian of A. This is particularly so in view of the fact that no further attempt was ever made by the Department to show that, in fact, though the entries were made in the books of account of the HUF, the moneys were received or passed on to A or that the moneys were received by G in his capacity as the guardian of A. That apart as is open to the Department in a case where a minor is the assessee, either to treat the guardian of the minor as representative assessee or to treat the minor himself as the assessee, in the instant case, all throughout the assessee is the minor, A, though he may be represented by his natural guardian G, but G was not being assessed in his own name as representative assessee on behalf of A. Therefore, to say that G was representative assessee or that the amount did reach the representative assessee in his capacity as guardian of A, is not correct so far as the record of this case is concerned.

As it was not open to the Tribunal in law to draw the inference when the entries in the books of account of G (HUF) were not challenged as a device or as a cloak to evade tax, the Tribunal's conclusion that the money had in fact reached the hands of the natural guardian of A and hence the assessee, is not based on any evidence on record.

If the benefit of the supplementary award in the shape of reduction in the price from Rs. 80 per share to Rs. 50 per share had not been passed to the assessee A and has not in fact reached him, the ITO was not justified in assessing the assessee on the additional amount of capital gains of Rs. 36,000.

There being no evidence to show that the amount of difference in the price of share actually reached the assessee, the assessee cannot be charged for capital gains. Accounts—Rejection—It is not open to Revenue to say that what is shown by the entry is not real state of affairs if there is no challenge to transaction represented by the entry or to genuineness of the same.”

In view of above, we are of the view that the Id. CIT(A) failed to bring any cogent evidence based on the documents that the assessee is in the practice of the making unaccounted transactions for purchase & sale of the goods. Any default committed by the assessee under the Excise law cannot be imported under income tax proceedings until and unless there are sufficient evidence to establish the live link with the income tax proceedings. Accordingly, we reverse the order of authorities below and ground raised by the assessee is allowed. AO is directed accordingly.

11. In the result, appeal of Revenue stands dismissed and that of assessee is allowed.

Order pronounced in open court on 23/09/2016

Sd/-
(K.Narsimha Chary)
Judicial Member

Sd/-
(Waseem Ahmed)
Accountant Member

*Dkp

दिनांक:- 23/09/2016 कोलकाता / Kolkata

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

1. अपीलार्थी/Appellant-M/s East India Holdings Pvt. Ltd., 501A, Diamond Prestige, 40A, AJC Bose Road, Kolkata-700 017
2. प्रत्यर्थी/Respondent-DCIT, Circle-5, P-7, Chowringhee Square, Aayakar Bhawan, Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
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