

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC", NEW DELHI
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

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| | ITA No.5847/Del/2016 | |
| | A.Y. : 2004-05 | |
| Sh. Pradeep Kumar Chaudhery, C/o Sh. Prem Prakash Advocate, 183/2, North Civil Lines, Muzaffarnagar-251001 (PAN: ANVPP8280H) | VS. | ITO, Ward 2, Roorkee Uttarakhand |
| (APPELLANT) | | (RESPONDENT) |

Assessee by : Sh. Prem Prakash, Adv.
Department by : Sh. Rakesh Kumar, Sr. DR

ORDER

The Assessee has filed the present appeal against the impugned order dated 16/12/2010 passed by the Ld. Commissioner of Income Tax (Appeals-I), Dehradun on the following grounds:-

1. That the order is against law and facts on the record.
2. That Ld. CIT(A) was wrong in confirming the addition of Rs. 6,49,910/-.
3. That Ld. CIT(A) was wrong in confirming the addition of Rs. 3,69,889/- u/s. 40A(3).
4. That Ld. CIT(A) was wrong in not giving allowance of addition on account of net profit against addition of Rs. 6,49,910/- and Rs. 3,69,889/-.

2. The brief facts of the case are that the assessee filed the original return on 31.3.2006, declaring income of Rs. 1,03,450/-. The AO observed that assessee had made payments aggregating Rs. 18,49,449/-

in violation to section 40A(3) of the I.T. Act, 1961. Consequently, AO added 20% of the said sum i.e. Rs. 3,69,889/- to the assessee's income, as per the provisions of that section. AO further observed that an amount of Rs. 6,49,910/- was paid by the Assessee to the Excise Authority towards Excise Duty and license fee in the month of May, 2003 was held to be unexplained by the AO as the assessee had neither his own capital available for that purpose nor was there any tangible source of cash. Accordingly, the assessment was made on total income of Rs. 18,93,850/- on 22.12.2006 u/s. 144 of the I.T. Act, 1961.

3. Aggrieved with the aforesaid order dated 22.12.2006, assessee filed the Appeal before the Ld. CIT(A), who impugned order dated 16.12.2010 has partly allowed the appeal of the assessee.

4. Against the aforesaid order dated 16.12.2010 passed by the Ld. CIT(A), assessee is in appeal before the Tribunal.

5. At the time of hearing Id. Counsel of the assessee has stated that assessee had made payments aggregating Rs. 18,49,449/- in violation to section 40A(3) of the I.T. Act. Consequently, AO added 20% of the said sum i.e. Rs. 3,69,889/- to the assessee's income by applying NP rate of 8%. He further stated that it is settled law that when the gross profit/net profit is applied, that would take care of everything and there was no need for the AO to make scrutiny of the amount incurred on the purchase made by the assessee. Therefore, he requested that the addition of Rs. 3,69,889 may be deleted and ground no. 3 may be allowed. To support his contention he relied upon the various case laws:-

- CIT vs. Banwari Lal Banshidhar (229 ITR 229-All)

6. With regard to ground no. 2 relating to confirmation of addition of Rs. 6,49,910/- is concerned, Ld. Counsel of the assessee has stated that an amount of Rs. 6,49,910/- which was paid by the assessee to the Excise Authority towards Excise duty and license fee in the month of May, 2003 was held to be unexplained by the AO as the assessee had neither his own capital available for that purpose nor was there any tangible source of cash. Hence, he requested that addition in dispute may be deleted and ground no. 3 may also be allowed in favour of the assessee or in the alternative the issue may be set aside to the file of the AO to decide the same afresh under the law, because sufficient opportunity was not granted by both the lower authorities.

7. On the other hand, Ld. DR relied upon the order passed by the revenue authorities and opposed the request of the Id. Counsel of the assessee on both the issues.

8. I have heard both the parties and perused the relevant records especially the order passed by the Revenue Authorities. I find that assessee had made payments aggregating Rs. 18,49,449/- in violation to section 40A(3) of the I.T. Act. Consequently, AO added 20% of the said sum i.e. Rs. 3,69,889/- to the assessee's income by applying NP rate of 8%. I further note that the Hon'ble Allahabad High Court in the case of CIT vs. Banwarilal Banshidhar reported in 229 ITYR 0229 has held as under:-

"When income of the assessee was computed applying the gross profit rate and when no deduction was allowed in regard to the purchases of the assessee, there was no need to look into the provisions of s. 40A(3) and r. 6DD(j). No disallowance could have been made in view of the provision of section 40A(3) r/w r. 6DD(j) as no deduction was allowed to and claimed by the assessee in respect of the purchase. When gross profit rate is applied, that would take care of everything and there was no need for the AO to make scrutiny of the amount incurred on the purchases by the assessee."

9. In the background of the aforesaid discussions and respectfully following the precedent as aforesaid, I am of the considered view that action of the AO in making the addition in dispute and confirmation thereof by the Ld. CIT(A) is contrary to law and hence, I delete the addition in dispute and allow the ground no. 3 of the appeal of the assessee.

10. With regard to ground no. 2 relating to confirmation of addition of Rs. 6,49,910/- is concerned, I find that an amount of Rs. 6,49,910/- was paid by the assessee to the Excise Authority towards Excise duty and license fee in the month of May, 2003 was held to be unexplained by the AO as the assessee had neither his own capital available for that purpose nor was there any tangible source of cash. The Ld. CIT(A) confirmed the action of the AO. On perusal of the record, it revealed that the assessee made the payment of Rs. 6,49,910/- was made in the May, 2003. AO observed that the source of investment in such payments remains unexplained in the absence of any explanation and documentary evidences in support of the same. Hence, he added Rs. 6,49,910/- to the income of the assessee for the year as unexplained investment towards initial payment of excise duty/ license fee and other charges. I also note that Ld. CIT(A) also upheld the action of the AO by holding that the theory of unsecured loans itself is implausible; even then, a fresh opportunity of being heard was given to the assessee in the course of appeal and compliance was yet not made by him and confirmed the addition. However, Ld. Counsel of the assessee has stated during the

hearing that lower authorities have not granted sufficient opportunity of being heard to the assessee to produce the relevant documents. Keeping in view the above facts and circumstances of the case, I am of the view that sufficient documents were not produced before the lower authorities, as a result the addition was made and later confirmed by the Ld. CIT(A). Therefore, the issue in dispute is set aside to the file of the AO to decide the same afresh under the law, after giving adequate opportunity of being heard to the assessee to substantiate its case before the AO. The assessee is also directed to produce all the relevant documents related with that issue before the AO in order to decide the same afresh.

11. In the result, the appeal of the Assessee is allowed for statistical purposes.

Order pronounced in the Open Court on 03/03/2017.

Sd/-

[H.S. SIDHU]
JUDICIAL MEMBER

Date 03/03/2017

SRbhatnagar

Copy forwarded to: -

1. Appellant -
 2. Respondent -
 3. CIT
 4. CIT (A)
 5. DR, ITAT
- TRUE COPY

By Order,

Assistant Registrar, ITAT, Delhi Benches