

IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA
BEFORE SHRI J.SUDHAKAR REDDY, AM
&
S.S.VISWANETHRA RAVI, JM

आयकर अपील सं./ITA No.2716 to 2720/Kol/2013

(निर्धारण वर्ष /Assessment Year:2006-2007 to 2010-2011)

DCIT, CC-XXX, Kolkata	Vs.	M/s BESCO Ltd, 8, Anil Maitra Road, Kolkata-700019
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : A ABCB 2723 R		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से /Revenue by : Shri Niraj Kumar, CIT DR

निर्धारिती की ओर से /Assessee by: Ms. Manju L. Shukla, FCA

सुनवाई की तारीख / **Date of Hearing** : **26/04/2017**

घोषणा की तारीख/**Date of Pronouncement** **26/04/2017**

आदेश / O R D E R

Per J.Sudhakar Reddy, AM:

All these appeals filed by the revenue are directed against the common order of the Commissioner of Income Tax (Appeals)-III Kolkata, dated 30.09.2013 for the assessment years 2006-07 to 2010-11.

2. Since common issues are involved in all the appeals of the revenue, therefore, all the appeals are heard altogether and disposed off by this common order. The facts mentioned in ITA No.2716/Kol/2013 are taken into consideration for deciding all the appeals.

3. Facts of the case brought out by the Id. CIT(A) from para 5 to para 9 of his order are extracted below for ready reference :-

1. Introductory facts and circumstances of the case, the Groups, the issues, and the sequence of the assessment orders.

The case is peculiar, and therefore a prior brief of the facts and issues will help to better understand the case and its circumstances. Further details will be later at the relevant part in this order.

The Promoter of the appellant company - BESCO Limited [hereinafter referred to as 'BESCO'] - is the Tantia Family. BESCO has been in existence for past 75 years. It is a public listed company. BESCO is into the business of manufacturing of rail wagons/cars/bogeys/couplers etc for the Railways. BESCO has 2 major Divisions - the Foundry Division and the Wagon Division.

In the year 2004 the Tantia Family were the 2 brothers - Shri O. P. Tantia and Shri. A.K. Tantia along with their respective family members. The shareholding in BESCO was O.P Tantia [hereinafter referred to as OPT Group and A.K. Tantia [hereinafter referred to as OPT Group] each holding 17.86% shares. Other group companies/investment companies held 46.77% shares in the company. There are 12 such investment companies. In these investment companies, both OPT GROUP and AKT Group had shareholding.

Disputes and differences having arisen between the two brothers/groups, they entered into a Family Settlement in December, 2004. The family settlement provided for division of the assets of BESCO [i.e., for Demerger of the company] between the two groups, as also equal division of the investment companies. Further disputes arose in the implementation of the family agreement. By a separate agreement dated 27.12.2004 both the groups referred the disputes to an Arbitration Panel. Even so, the family settlement could not be amicably settled. OPT Group in the year 2005 filed petitions/applications under the Companies Act, 1956 before the Company Law Board [hereinafter referred to as 'CLB], Principal Bench, at New Delhi. The petitions were filed u/s 397 [application for relief in cases of oppression], and u/s 398 [application for relief in cases of mismanagement. Though the petitions were in the name of the Investment companies, both the groups submitted before the Hon'ble CLB that as the investment companies were holding companies in BESCO, the petition/disputes will cover the main company - BESCO. Thus BESCO demerger issue and disputes since then are before the Hon'ble CLB. Before the CLB, ever since then there have been spates of applications/allegations and counter applications/allegations by both the groups, which is still going on till date.

The Hon'ble CLB had since then passed some interim orders, Significant of which are:

A. CLB Order dated 03/10/2005 restraining that no Board or General Meeting of BESCO or any of the Finance Companies in the Groups will be held without leave of the Bench.

B. And vide other Orders culminating in the Order dated 28/04/2006 the Hon'ble CLB inter-alia had directed for the Exchange of

Management and control of Wagon Division, Rolling Mill, Infotech Division then with AKT Group to the OPT Group, and, vice versa Exchange of Management and control of Foundry Division, Rubber Division and Food & Flavours Division then with OPT Group to the AKT Group. The exchange was to take place in the presence of the Special Officer. Further, that the statutory audit was to be done by two statutory auditors. i.e., joint Auditors - each Group to nominate one Auditor and that the audit be completed by 30/06/2006; that status quo be maintained in respect of shareholding of BESCO and all investment companies till de-merger; that no Board or General Meeting of BESCO or investment companies is to be held nor any voting rights in respect of the share of BESCO or investment companies shall be exercised; and that the order regarding De-merger exercised would be issued separately.

The Exchange of Management took place on the 10/06/2006.

However thence and therefrom have arisen the further disputes. These further disputes pertain to receivables, bank liabilities bank reconciliations. inventories, etc. Thus the settlement of the accounts from 01.10.2005 to 31.03.2006, and, from 01.04.2006 to 10.06.2006 has ever since been in dispute.

The Hon'ble CLB vide its order dated 14-/09/2009 inter-alia directed that since the Exchange of Management took place on the 10/06/2006, this elate will be cut of date for the De-merger. The Hon'ble CLB also directed for joint statutory audit for the period From 01/10/2005 to 31/03/2006 and also from 01/04/2006 to 10/06/2006. Joint statutory auditors were appointed However, disputes again arose on the selection of Joint Auditors - which matter was further taken in appeal before the Hon'ble High Court; and further to the Hon'ble Supreme Court. The matter is back to the Hon'ble CLB. As on date, the matter of completion of the statutory audit for the period from 01/10/2005 is still going on in the proceedings before the Hon'ble CLB.

From the Income Tax perspective the impact of all the above events and orders was, and is still that:

- As the order for De-merger is still yet to be, BESCO still remains a single entity. That is, BESCO still remains in the same status as a single Person/Assessee as has been all along in earlier years.*

As there has not been/not yet completed the company statutory audit from 01/10/2005 onwards, there could not be Tax Audit Report or Return of Income from the A.V. 2006-07 onwards.

As the Hon'ble CLB had passed restraint orders since 03.10.2005 that no Board or General Meeting of BESCO or any of the Finance Companies in the Groups will be held without leave of the Bench, BESCO could not furnish its consolidated accounts in the assessment proceedings.

As no Return of Income had been/could be filed; the assessments had to be completed under Best Judgment u/s 144 of the Income Tax Act.

Thus, the Assessing Officer had to mandatorily proceed to make the assessments under Best Judgment u/s 144 of the Income Tax Act. In the assessment proceedings, both the Groups/Divisions submitted their respective financials and details, as also their part independently audited accounts.

The AYs concerned her-e aloe after the exchange of management - rather in effect, the cross-exchange of management. It is pest the exchange of the management that the allegations/counter allegations against each other were levied by both the Groups before the Hon'ble CLB. This has further stalled the implementation of the family settlement. As mentioned earlier, the allegations pertain to mainly receivables, inventory, bank liabilities, hank reconciliations, allocation of head-office expenses, allocation of statutory liabilities. etc. The onerous task before the Assessing Officer was to attempt to consolidate the broad financials of both the Groups/Divisions, and, to attempt to arrive at the Net Profit, i.e., Total Income. This was a very difficult task and therefore the Assessing Officer had to resort to estimation of the Net Profit; and the assessment also having to be made under best judgment.

The synopsis of the assessments in chronological sequence, and, the Estimation of the Net Profit are given in the Table hereunder:

Sl.	AY	Selections of the income Tax Act invoked	(A) Net Profit shown by the Wagon, and, Foundry Divisions respectively. (B) Basis of Estimation of Net Profit, and, the Percentage applied. (c) Assessed Income	Assessment Order Date						
(1)	(2)	(3)	(4)	(5)						
1	AY 2007-08	As no return of income was filed, notice u/s.148 was issued. Notices u/s.143(2), 142(1) issued Assessed u/s.144	<table border="1"> <thead> <tr> <th colspan="2">(A)</th> </tr> <tr> <th>Wagon Division</th> <th>Foundry Division</th> </tr> </thead> <tbody> <tr> <td>0.86%</td> <td>(Loss)</td> </tr> </tbody> </table> <p>(B) Preceding FY, i.e. F.Y.2005-06, Audited Accounts showed Net Profit at 1.17% of the Net Sales. Taking cue therefrom, the Assessing officer estimated the combined Net Profit at 1.14% of the Net Sales, considering that the Wagon Division was closed for brief period during the year</p> <p>(C) Assessed Income; Rs.1,73,59,979/-</p>	(A)		Wagon Division	Foundry Division	0.86%	(Loss)	30.12.2010
(A)										
Wagon Division	Foundry Division									
0.86%	(Loss)									
1	AY 2008-09	As no return of income was filed, notice u/s.142 was issued. Notices u/s.143(2), 142(1) issued	<table border="1"> <thead> <tr> <th colspan="2">(A)</th> </tr> <tr> <th>Wagon Division</th> <th>Foundry Division</th> </tr> </thead> <tbody> <tr> <td>3.46%</td> <td>(Loss)</td> </tr> </tbody> </table> <p>(B) Preceding FY, i.e. F.Y.2005-06,</p>	(A)		Wagon Division	Foundry Division	3.46%	(Loss)	
(A)										
Wagon Division	Foundry Division									
3.46%	(Loss)									

		Assessed u/s.144	Audited Accounts showed Net Profit at 1.17% of the Net Sales. Taking cue therefrom, the Assessing officer estimated the combined Net Profit at 3.75% of the Net Sales, considering that the Wagon Division was closed for brief period during the year (C) Assessed Income; Rs.5,93,28,263/-					
1	AY 2006-07	As no return of income was filed, notice u/s.148 was issued. Notices u/s.143(2), 142(1) issued. Special Audit u/s.142(2A) was referred and made; however, both the OPT and AKT Groups disputed and challenged the Audit Report, and the Assessing officer also could not accept the Audit Report as presenting true and fair picture. Assessed u/s.144	(A) <table border="1"> <tr> <td>Wagon Division</td> <td>Foundry Division</td> </tr> <tr> <td>5.63%</td> <td>9.82%</td> </tr> </table> (B) The average of both the Divisions is at 7.36%. The Assessing Officer applied estimation at 10.50% of the combined Net Sales. (C) Assessed Income; Rs.8,73,39,031/-	Wagon Division	Foundry Division	5.63%	9.82%	30.12.2010
Wagon Division	Foundry Division							
5.63%	9.82%							
4	AY 2009-10	As no return of income was filed, notice u/s.148 was issued. Notices u/s.143(2), 142(1) issued. Special Audit u/s.142(2A) was referred and made; however, both the OPT and AKT Groups disputed and challenged the Audit Report, and the Assessing officer also could not accept the Audit Report as presenting true and fair picture. Assessed u/s.144	(A) <table border="1"> <tr> <td>Wagon Division</td> <td>Foundry Division</td> </tr> <tr> <td>5.15%</td> <td>(Loss)</td> </tr> </table> (B) The average of both the Divisions is at 2.79%. The Assessing Officer applied estimation at 6.50% of the combined Net Sales. (C) Assessed Income; Rs.13,43,48,793/-	Wagon Division	Foundry Division	5.15%	(Loss)	30.05.2012
Wagon Division	Foundry Division							
5.15%	(Loss)							
5.	AY 2010-11	As no return of income was filed, notice u/s.148 was issued. Notices u/s.143(2), 142(1) issued. Assessed u/s.144	(A) <table border="1"> <tr> <td>Wagon Division</td> <td>Foundry Division</td> </tr> <tr> <td>5.16%</td> <td>Loss</td> </tr> </table> (B) A different approach was adopted this time. The Assessing Officer proceeded to look for comparable companies. The Assessing Officer extracted from the "Prowess" Digital Database a List of companies having the parameters of wagon and foundry. The prowess Database showed 9 companies. The Assessing	Wagon Division	Foundry Division	5.16%	Loss	31.03.2013
Wagon Division	Foundry Division							
5.16%	Loss							

			<p>officer did not consider 8 companies as being comparable to BESCO. The remaining one company which was Titagarh Wagons Ltd. was considered as comparable. The Net Profit percentage of Titagarh Wagons Ltd. shown at 16.46% was applied as the estimation of Net Profit for BESCO.</p> <p>(C) Assessed Income; Rs.58,07,77,901/-</p>	
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4. Aggrieved with the order of AO, both the groups have filed appeals before the Id. CIT(A). Ld. CIT(A) upheld the rejection of books by the Assessing Officer (AO). This rejection of books and passing the order u/s.144 of the Act by the AO as upheld by the Id. CIT(A), has not been challenged by the assessee. Ld. CIT(A) was of the view that the estimation of income done by the AO is excessive. He held that the assessee has been in the business for the last 75 years and the accounts that it presented in those years, can be relied upon as true and correct. He devised a formula for estimation of profit. Hence, he estimated the profit by giving 20% weightage to the accounts of the previous year on the preceding years' average, assessed net profit percentage. For the current years account presented by the group, Id. CIT(A) gave 80% weightage for the net profit as per the accounts presented by both the groups for the relevant financial years. By adopting this formula, Id. CIT(A) granted part relief to the assessee. For the assessment year 2006-07, he accepted the income disclosed by both the groups put together. For the assessment year 2010-2011 the AO used the data base of the "PROWESS" and identified comparables and thereafter estimated the profit of the assessee at 16.46% by taking a comparable of Titagarh Wagons Ltd. after giving

reasons. Ld. CIT(A) has rejected this comparable on the ground that the same cannot be used for estimation of profits. He directed the AO to accept the net profit as per the accounts disclosed by the assessee. Both parties submitted that the only issue before the Bench is as to whether the estimation of profit by the Id. CIT(A) is reasonable or not.

5. We have carefully considered the detailed arguments of both the sides, which were basically supporting and opposing the orders of Id. CIT(A).

6. Ld. DR strongly contested the formula adopted by the Id. CIT(A) and submitted that there is no basis on which weightage of 20% and 80% were given to the past and present accounts submitted by the assessee. He prayed that the estimation made by the AO be restored.

7. Ld. Counsel for the assessee, on the other hand, supported the orders of Id. CIT(A) and submitted that the AO erred in estimating the profits at 10.50% for A.Y.2006-07, 1.14% for A.Y.2007-08, 3.75% for A.Y.2008-09, 6% for A.Y.2009-10 and 16.46% for A.Y.2010-11, respectively. She submitted that mere glance of these various percentage of net profit adopted by the AO shows that there is inconsistency and the same was rectified by the Id. CIT(A). She relied on the order of Id. CIT(A) and supported the same.

8. After hearing the rival contentions, we are of the considered view that the AO has erred in estimating the profits of various years in the manner in which he has done. There should be consistency in the percentage of profit adopted by the AO for the purpose of assessment.

The percentage cannot vary from 1.14% to 16.46%. Though the AO tried to justify such variation, we do not find any logic in such an action. Hence, we do not agree with the submissions of Id. DR on this aspect. We uphold the detailed finding of the Id. CIT(A) on this aspect of rejection of the estimation of profit by the AO. For the sake of brevity, we do not repeat these findings.

9. Coming to the formula adopted by the Id. CIT(A), we are unable to appreciate as to how he has come to a conclusion that 20% weightage should be given for the past data and 80% weightage has to be given to the current year's data. The fact remains that the assessee has not cooperated either with the auditors nominated by Company Law Board(CLB) or with the auditor nominated by the Hon'ble Supreme Court or with the auditor nominated u/s.142A by the Income Tax Authorities. No details were given and no documents were produced in support of their accounts. The company has not appealed against or objected any of the conclusion drawn by the AO for making best judgment assessment u/s.144 of the Act. The findings of the AO as confirmed by the Id. CIT(A) are that the books of account cannot be relied upon and hence rejected. While so, we do not approve of the Id. CIT(A) giving weightage of 80% to such rejected books of accounts.

10. Under these circumstances we are of the considered opinion that the end of justice should be met if the profit is estimated at the percentage which is an average of assessed net profit percentage for the six earlier assessment years i.e. A.Ys.2000-01 to 2005-06 i.e. before the dispute

started. Such average net assessed profit percentage works out to 1.98%. We direct the AO to apply the same for the A.Y.2007-08 and 2008-09.

11. As far as the assessment years 2006-07, 2009-10 & 2010-11 are concerned, the profits arrived at as per the books of the assessee are more than the average percentage of profit of 1.98% adopted and arrived at by us based on the past data. As the assessee is not in appeal, we confirm the findings of the First Appellate Authority for these three assessment years on the issue of estimation as the profit percentage adopted is more than 1.98%.

12. In the result, appeals of the revenue for the A.Y.2006-07, 2009-10 & 2010-11(i.e ITA Nos.2716, 2718 & 2720/Kol/2013) are dismissed and appeals for A.Y.2007-08 & 2009-2010 (i.e ITA Nos.2717 & 2719/Kol/2013) are allowed in part.

Order pronounced in the open court on this 26/04/2017.

Sd/-

(S.S.VISWANETHRA RAVI)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(J. SUDHAKAR REDDY)

लेखा सदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata; दिनांक Dated 26/04/2017

प्रकाश मिश्रा/Prakash Mishra, Sr.PS.

आदेश की प्रतिलिपि अग्रोषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-DCIT,CC-XXX, Kolkata
2. प्रत्यर्थी / The Respondent.-M/s BESCO Ltd.
3. आयकर आयुक्त(अपील) / The CIT(A), Kolkata.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण,
कोलकाता / ITAT, कोलकाता

सत्यापित प्रति //True Copy//