IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI

BEFORE SHRI SANJAY GARG (JUDICIAL MEMBER)
AND
SHRI ASHWANI TANEJA (ACCOUNTANT MEMBER)

I.T.A. No.613/Mum/2015
(Assessment Year: 2008-09)

Daman Metallic Oxides Gala No.1/28, 1st Floor, C-Wing CTS-40, Durian Estate, Goregaon Mulund Link Road, Goregaon (E) Mumbai-62.	Vs	ACIT 24(3), Mumbai
PAN : AAAFD1840M		
(Appellant)		(Respondent)

Appellant by	Shri D.C. Saboo & Shyam Saboo
Respondent by	Shri Vachaspati Tripathi

Date of hearing : 06-10-2016
Date of pronouncement : 19 -10-2016

O R D E R

Per ASHWANI TANEJA, AM:

This appeal has been filed by the assessee against the order of Commissioner of Income-tax (Appeals)-42, Mumbai [hereinafter called CIT(A)] dated 21-11-2014 passed against the assessment order u/s 143(3) r.w.s. 263 dated 26-03-2013 for A.Y. 2008-09 on the following grounds:

1. CIT[A] has erred in confirming addition made by AO as per remark in audit report for vat refund of Rs 2515287/- without taking into consideration that appellant has offered for tax in the year in which it is

received appellant is followed for vat refund cash basis in the previous year and in subsequent year also department has accepted in all years.

2. CIT[A] has not taken into consideration meaning of ward accrued even it is shown audit memo but it is not payable by govt. hence not accrued.

3. CIT[A] has erred iii confirming excess addition by Rs 118854/-as per audit remark accrued rebind was of Rs 2515287/- whereas actually received Rs 2396433/-in spite of submitting all documents even though Cit[A] has confirmed Rs 2515287/

4. CIT[A] has erred in not deleting Rs 2274136/- which is pertaining to A.Y. 200607 and 2-credited on cash basis in profit & loss account for the year 31.3.2008 and AO has included while computing income in the assessment for the asst year 2008-09 Which was credited oil basis.

5. CIT[A] has not taken into consideration by confirming addition AO has disturb whole accounting system which followed continuously by appellant .vat refund is subject to but and if , and govt refund comes irregular and not certain amount.

6. CIT[a] has erred in adding vat refund by following mercantile system and not deleting vat refund which is credited oil basis. This vat refund is already offer $_{for}$ tax in the asst year9-10 Rs 1870943/- and 525690/- in the asst year 11-12

7. Same refund is subject to tax twice one in 2008-09 as per a.o. order and b^{y} not deleting from Asst year 9-10 and 11-12 which is against the income tax law.

8. CIT[a] has not taken to consideration that refund is always subject to fulfill of certain condition and after verification till it is approved it not accrued

9. CIT[a] has not taken into consideration that appellant is firm and rate of taxes is same there is no tax effect when appellant has already offer for tax on cash basis. Year in which it is received."

2. All the grounds in the appeal pertain to solitary issue of taxability of VAT refund is to be done on cash basis or on accrual basis.

3. The brief background and facts of this case are that original assessment was completed on 20-09-2010 determining total income at Rs.29,07,570. Subsequently, the CIT-24, Mumbai noted some discrepancies in the assessment order and issued show cause notice u/s 263 asking the assessee that since the assessee is following mercantile system of accounting, the VAT refund of Rs. 25,15,287 was due to the assessee, but the same was not included as part of income of the year under consideration. In reply, the assessee submitted that though the assessee was offering its income on mercantile basis, but with regard to VAT, cash basis was followed since there was no certainty in receiving the refund unless and until it was sanctioned by the concerned officer of VAT. But the CIT was not satisfied with the submissions of the assessee and, therefore, he revised the assessment order with the following directions:-

> *"As per Note No.4 to the accounts of Audit report, VAT refund of Rs25,15,287/- was due to the assessee. The assessee is following mercantile method of accounting. Despite this fact, assessee has not offered VAT refund for taxation in this year. In written reply, it is submitted that the assessee has been offering VAT refund on cash basis. It is submitted that sometimes VAT refund is actually made in later years in lesser amount, hence cash method is followed with regard to VAT refund.*
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> *The plea of the counsel of the assessee is not acceptable as the VAT refund is ascertained as per the Notes attached to the Audit report. In view of Mercantile method of accounting followed by the assessee, the assessee should have offered it to the income. If VAT refund is received less, in any of the subsequent years, the assessee can take recourse to write-off of a debt. In view of the above, this plea of the assessee is not acceptable. The Assessing*

Officer is directed to add VAT refund of Rs.25,15,287/- to the income of this year. At the same time, Assessing Officer may give effect in subsequent years on account of income actually offered on receipt basis. This effect should be given in subsequent years only when proceedings for this year reach to the finality on this issue."

4. Subsequently, assessee contested the revision order passed u/s 263 before the Income Tax Appellate Tribunal. The Tribunal, vide its order dated 23-05-2013 confirmed the revision order of the CIT with following observations:

"3. We have heard the parties, and perused the material on record.

3.1 Even as clarified by the Bench during the hearing, and as also sought to be highlighted in her arguments by the ld. DR, it is impermissible for the assessee to follow cash method of accounting in respect of the sales tax/VAT refund due to it; it admittedly following mercantile method of accounting. As such, in terms of s. 5 r/w s. 145, income becomes chargeable to tax when the assessee acquires the right to receive such income. In fact, apart from the auditor's report, to which reference has been made by the ld.CIT, the notes to the assessee's accounts itself state that the sales-tax (VAT) paid on purchases amounting to Rs.25.15 lakhs and, thus, included in the cost of the purchases, is, though refundable from the Sales Tax Department, not taken as income as the same is subject to acceptance by the Sales Tax Authority. At this stage, we may clarify that the issue of accrual of income (or expenditure for that matter) is a matter of fact. If, as claimed, there is uncertainty - a matter of fact - with regard to the acceptance of its claim, no income can be said to have accrued to the assessee. However, merely making a bald claim, without substantiating or showing the ground/s for the existence of uncertainty in its respect, the same cannot be entertained, so as to hold that there is, as a matter of fact, no accrual of income. The assessee has throughout completely failed to exhibit the uncertainty that it claims to have prevailed, and which weighed

with it in deferring the recognition of the said income, i.e., in its accounts. The assessee is rather, it is apparent, following the same, i.e., the said procedure, as a matter of course, regularly accounting for the VAT refund only upon receipt, and which, as explained, cannot hold in view of section 145 proscribing (w.e.f. A.Y. 1997-98) a mixed method of accounting in preference to a pure, i.e., either cash or mercantile, method of accounting.

The apex court in the case of CIT vs. Punjab Bone Mills [2001] 251 ITR 780 (SC) clarified that income by way of cash incentive accrued to the assessee at the time of filing of the claim in its respect (with the concerned authority). We have already noted that the assessee has not stated any factual reason/s with regard to the uncertainty that is stated to exist with regard to the claim for VAT refund. Once, therefore, a valid application for refund is submitted with the authorities in accordance with the law, following the prescribed procedure, the assessee is entitled to believe that its claim would be accepted.

The procedural delay in signifying the acceptance of the claim, or the actual refund, which could be delayed for various reasons, and which the ld. AR was at pains to impress upon us, would we are afraid be of little moment. Again, the fact that the income stands to be returned in another year by the assessee, which is a matter subsequent, would be to no effect. This is as income has to be subject to, notwithstanding it being returned for another year, tax in the right year; each year being an independent unit of assessment. Going by the assessee's argument, it would not make any difference if the assessee were to disclose any income, or claim any expenditure for that matter, either on cash or mercantile basis, irrespective of the year for which it is exigible as per the method of accounting adopted, rendering the same as of no consequence. In fact, where the difference in income followed a consistent though incorrect method of valuation of closing stock, so that its effect neutralized in the succeeding year, the argument was found not valid by the apex court in CIT v. British Paints India Ltd. (1991) 188 ITR 44 (SC).

The direction by the ld. CIT, therefore, for including the amount of VAT refund accrued to it is to be upheld. We decide accordingly."

Thereafter, the Assessing Officer passed order u/s 143(3) in

pursuance to the revision order u/s 263 of CIT. In the fresh assessment order so passed, the Assessing Officer carried out the direction of the CIT and brought to tax the VAT refund of Rs. 25,15,287/-. Being aggrieved, the assessee filed appeal before the Ld. CIT(A).The appeal of the assessee was dismissed on the ground that VAT refund has to be taxed on mercantile basis. Being aggrieved, assessee filed appeal before the Tribunal.

5. During the course of hearing before us, Ld. Counsel of the assessee vehemently made his arguments. His arguments can be divided into following two parts:

(1) VAT refund should be brought to tax on cash basis as there is no certainty in receiving the VAT refund till it is sanctioned by the competent officer of the VAT Department.

(2) There should not be double taxation of same amount of VAT in two years as the income tax law does not permit double assessment of same income in two different years.

6. Per contra, the Ld. DR relied upon the orders of the lower authorities. He submitted hat since revision order of Ld.CIT has been confirmed by the Tribunal, it has attained finality since no appeal has been filed before the Hon'ble High Court against the order of the Tribunal. Under these circumstances, VAT refund should be assessed on mercantile basis as has been directed by the Ld.CIT in revision order passed u/s 263. With regard to the second part of the

argument, it was fairly agreed by the Ld. DR that there should not be any double assessment of VAT refund in two years. But, he also submitted that while passing revision order, the Ld.CIT had himself directed the Assessing Officer to modify the assessments in subsequent years in case any double assessment had been done.

7. We have gone through the orders passed by lower authorities, order of the Tribunal as well as submissions made by both the sides before us. As far as first part of arguments of Ld. Counsel is concerned, it is noted that the CIT, while passing the revision order u/s 263, had given a clear direction to the Assessing Officer to assess VAT refund of Rs. 25,15,287/- as income of the impugned year on accrual basis. The direction of the CIT has been confirmed by the Tribunal. The order of Tribunal has not been contested by the assessee before the Hon'ble High Court. Thus, under these circumstances, the direction given by the CIT has attained finality. The Assessing Officer, while passing the order u/s 143(3) has merely followed the direction of the CIT. Nothing wrong has been done by him while following the direction of the CIT. Thus, VAT refund of Rs. 25,15,287/- has been rightly assessed as income of the impugned year. The assessee has lost the remedy by not filing appeal before the High Court. We, at this stage, cannot sit over the judgment of the Tribunal delivered in assessee's own case. Well settled doctrine of **'Coram Non Judice'** does not permit us to interfere into this aspect at this stage. Consequently,

under these circumstances, Grounds numbered as 1, 2 & 3 are dismissed.

8. With respect to the other grounds, wherein the assessee has requested for removing double taxation of VAT refunds in other years, it is noted by us that the CIT had himself given a clear direction to Assessing Officer that he should give effect in subsequent years on account of income actually offered on receipt basis. Since these proceedings have attained finality, the Assessing Officer is directed to ensure that no double taxation of the VAT refunds is made in any subsequent years. Thus, these grounds are allowed for statistical purposes in terms of our directions as given above.

9. As a result, appeal of the assessee is partly allowed.

Order was pronounced in the open court at the conclusion of the hearing.

Sd/-	Sd/-
(SANJAY GARG)	(ASHWANI TANEJA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt: 19th October, 2016

Pk/-

Copy to:

1. The appellant
2. The respondent
3. The CIT(A)
4. The CIT
5. The Ld. Departmental Representative for the Revenue, D-Bench

(True copy) By order

ASSTT.REGISTRAR, ITAT, MUMBAI BENCHES