

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'ई', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./ITA No.4323&4324/Mum/2013

(निर्धारण वर्ष / Assessment Years :2008-2009&2009-2010)

DCIT-8(1)(OSD), Mumbai-400020	Vs.	M/s Electropneumatics & Hydraulics India P. Ltd., Kharabiwadi, Gate No.254/255, New Chakan, Talegaon Road, Taluka, Rajguru Nagar, Chakan, Pune-410501
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACE 0877 G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

AND

आयकर अपील सं./ITA No.4711/Mum/2013

(निर्धारण वर्ष / Assessment Years :2008-2009)

M/s Electropneumatics & Hydraulics India P. Ltd., Kharabiwadi, Gate No.254/255, New Chakan, Talegaon Road, Taluka, Rajguru Nagar, Chakan, Pune-410501	Vs.	DCIT-8(1)(OSD), Mumbai-400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACE 0877 G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से /Revenue by : Manjunatha Swamy

निर्धारिती की ओर से /Assessee by : Shri Vijay Mehta

सुनवाई की तारीख / Date of Hearing : **18/03/2016**

घोषणा की तारीख/Date of Pronouncement **27/05/2016**

आदेश / O R D E R

PER R.C.SHARMA (A.M):

These are the cross appeals filed by the revenue and assessee against the order of CIT(A)-Mumbai, for the assessment year 2008-2009, in the matter of order passed u/s.143(3) of the I.T.Act.

2. Rival contentions have been heard and record perused. The facts in brief are that the assessee company is engaged into the business of manufacturing of various types of machines right from simple presses product line and turnkey systems. The assessee company is having three Divisions namely Machine Manufacturing Division, Fluid Power Division and Component Manufacturing Division, having its plant at Gat No 254/255, Kharabewadi, Chakan-Talegaon Road, Pune 410 501. The AO, while finalizing the assessment for A.Y. 2008-09, invoked the provision of Section 145(3) of the Act and accordingly rejected the assessee's books of accounts and after considering the various statements of stock as on different dates and also taking into account the financial statements of the assessee company, adopted the G.P. ratio at 60% as against 23.42%' declared by the assessee company. The AO observed that the assessee company has not maintained day-to-day consumption month-wise consumption record of machine-wise production and similarly day-to-day record of other consumables and other expenses claimed and also the assessee could not even produce the Manufacturing Register. The AO also observed certain discrepancies in the figures as appearing in the statements furnished by the assessee to the Saraswat Co-operative Bank Limited from which the assessee company has availed overdraft facility, in contrast to the figures appearing in the audited financial statements of the assessee company. Based on these observations, the AO came to the conclusion that the assessee company has wrongly declared the gross profit @ 23.42% and he arrived at gross profit @ 60%. After applying the provisions of section 145(3) the AO estimated gross profit rate of 60% over the disclosed sales and service charges and job work as against 95% worked out by him for the period 1st April, to 30th November and 65% as worked out by him in trading of packing materials. The AO made an

addition of Rs.15,24,83,871/- by estimating the gross profit margin at the rate of 60%. The AO held that the assessee has made either some unaccounted purchase during the above period or previous years' suppressed stock has been used towards manufacturing account. Comparing the figures of stock given to the bank and as recorded in the books, the AO also held that there is suppression of stock. While estimating GP as mentioned above, the AO stated that no separate addition for suppression in stock not shown in books of account has been made as the above extra profit addition will take care of suppressed stock also. The AO also stated that as discussed in the assessment order there is unaccounted purchases / or suppressed stock of previous years which has been used by the assessee towards manufacturing account and in manufacturing account, G.P. of 60% has been applied and in this way, applying the same G.P. towards sales shown at Rs.39,49,83,367/-, the G.P. comes to Rs.23,69,90,020/- as against Rs.37,35,26,651/- worked out and in this way, there will be an addition of Rs.13,65,36,631/- (37,35,26,651 - 23,69,90,020) u/s. 69 which will be added to the total income of the assessee.

3. By the impugned order the CIT(A) deleted the addition on account of GP rate after observing as under :-

Coming to the merits of the addition to the GP, for the reasons mentioned in detail after examining the appellant's books of account, details obtained from the bank including stock statements and submissions as also additional evidence, the fact that the basis taken of GP of manufacture of valves and also of packing material is not a representative picture of the totality of the appellant's operations, and the fact that the main item of manufacture being hydraulic presses and tube benders on which GP margin varies from item to item and is not uniform, the AO in his remand report, has conceded that the GP ratio worked out by the then AO in the assessment order is not borne out from the records examined and is not maintainable. However the AO has suggested that a GP rate of 26 % be adopted basing his conclusion on (a) the fact that declared GP of AYs 2006-07, 2007-08, 2008-09 and 2009-10 are between 23 to 24%, (b)

various factors taken into account while finalizing assessment of AY 2009-10 wherein GP of 26% has been assessed as against declared GP of 24.31 %, and (c) noting that the claim of discount of factor of 15-17% is not substantiated.

As regards factor (c) the appellant has already explained that discount given by it to its dealers is entered into its books of account and given effect to in the succeeding year. Thus this cannot be a ground for estimating a higher GP rate. In respect of the basis of GP of various AYs, the appellant has shown that declared GP of AY 2008-09 was 24.31 % as against declared GP of 24.13% in AY 2009-10 and 24.17% in AY 2007-08. The main ground for estimating GP at 26% is that this was the rate estimated and assessed in AY 2009-10 after considering various factors. In appeal for AY 2009-10, (Order dated 15/03/2013 in Appeal No. CIT(A)-16/ ACIT-8(1)(OSD)/ IT-265/ 2011-12), it has been held that:

The AO's order, the contentions of the appellant, and materials on record have been considered. Some of the objections/discrepancies pointed out by the then CIT(A) when remanding the issue back to the AO for examination in appeal proceedings for AY 2008-09 (contained in brief in appeal order dated 15/03/2013 in Appeal No. CIT(A)-16/DCIT- 8(1)(OSD)/IT-207/2010-11) remain valid even for AY 2009-10. The AO has relied upon the fact that stock statements given to bank in AY 2008-09 did not match with the stock statement in the final accounts of the appellant, which fact has been clarified in remand proceedings and the AO has now accepted the appellant's version as correct. The AO has also not found fault with the sales turnover, nor stated that the accounts of the appellant are incomplete. The AO has also not pointed out any discrepancy in the purchases made or the opening and closing stock either. There was an audit by the Excise Department and neither the Excise Department nor the Sales Tax/V AT has found the accounts of the appellant faulty. The sample size/ sample item taken by the AO for arriving at a general GP rate for all items, as pointed out by the appellant is not representative of the whole. As also mentioned by the AO in remand report for AY 2008-09, the GP margin on item to item basis cannot be compared on uniform basis and is impracticable. The AO has assessed the GP rate at 26% on the basis that GP rate of 31 % on one item (on the basis of details called for/furnished by the appellant) viz., of hydraulic press (one of the major items manufactured), and basing her estimate on the average GP rate of earlier years at around 24% in effect holding that GP rate should be somewhere between 31% and 24% and thus arrived at a figure of 26%. However this figure is arrived at notwithstanding the lacunae pointed out in the beginning part of this paragraph, and without pointing out the percentage of production/sales of hydraulic press vis-a-vis the entire production/sales of other items, and also without giving GP rates of other comparable cases. The appellant contends that GP ratios of five other items were also given (as detailed in the foregoing

paragraph), some of the items are also Hydraulic presses and bender, and have widely varying and significantly lower GP rates, varying from -5.84% to 17.63 %. The AO has not taken this factor into consideration, but based the estimated GP rate on the basis of GP rate of one machine only. The one item on which the GP rate is based is also found to be ordered and sold in the succeeding year. The GP ratios of cases furnished by the appellant were rejected on the basis that the results pertained to an earlier year, however the AO has not provided comparable cases on the basis of which the GP rate has been finally assessed. The items being excisable, audit by the Excise Department in the earlier year without finding the books faulty, would lend greater weight to the appellant's claim that its books of account are in order and represent a true picture. The GP rate having been assessed on the basis of surmises and conjectures, without even a finding that books of account are incomplete cannot be held to be justified. The addition made by the AO on account of the GP rate is thus deleted.

In view of the foregoing reasons as also the finding given in appeal order for AY 2009-10, the addition made by the AO on account of GP rate as estimated by the AO is deleted.”

4. With regard to addition made u/s.69, the CIT(A) observed as under:-

“As regard, addition u/s 69 on account of unaccounted purchases and suppressed stock, the AO has not been able to establish by means of any evidence, or any single bill etc., that there were in fact unaccounted purchases or suppressed stock. The AO has made addition merely on the presumption that since GP rate (of 60%) as estimated by him is so high, and taking into account the stock statement furnished to bank (which has later in the remand report been verified and appellant's version accepted), there must have been unaccounted purchases and therefore unaccounted / suppressed stock. Since the basis of the AO's working is the stock statement which has now been verified in remand proceedings and revised to match with the appellant's claim, the addition on this count of unaccounted purchases/ suppressed stock is not maintainable. Addition made on mere conjectures and surmises is not justified. The addition u/s 69 of the Act is accordingly deleted.”

5. Against the above order of CIT(A), revenue is in further appeal before us.

6. We have considered rival contentions and carefully gone through the orders of authorities below and found from the record that the AO has rejected books of account by invoking provisions of Section 145(3) on the

plea that stock statement filed with the bank was different from the stock reflected in the books of account and that assessee company has not maintained day-to-day consumption records. The CIT(A) called for a remand report wherein after considering the facts and circumstances the AO has suggested gross profit rate of 26%. From the record we found that gross profit shown by the assessee during the year under consideration was highest as compared to the gross profit rate shown in earlier and subsequent year. The highest gross profit rate shown in the assessment year 2008-09 works out to be 24.31%, accordingly the CIT(A) after giving detailed finding at page 12-17 of his appellate order modified the GP rate to 24.31%. The detailed finding recorded by CIT(A) has not been controverted by department by bringing any positive material on record. Accordingly, we do not find any infirmity in the order of CIT(A) for deleting the addition on account of GP after considering rate at 24.31%.

7. On the similar reasoning ground raised by the revenue in the assessment year 2009-2010 is also dismissed.

8. With regard to addition made u/s.69 and deleted by CIT(A), we do not find any merit in the addition so made by the AO on account of unaccounted purchases and suppressed stock in so far as the AO has not been able to establish by means of any evidence that there were in fact unaccounted purchases or suppressed stock. We found that the AO has made addition merely on the presumption that since GP rate of 60% has been estimated by him, there must have been unaccounted purchases. We found that even during the remand proceedings, the AO has verified

assessee's version and accepted the same with regard to no unaccounted purchases. The CIT(A) has given due reasoning for deleting the addition. The finding recorded by CIT(A) has not been controverted. Accordingly, we do not find any reason to interfere in the order of CIT(A) for deleting the addition made u/s.69 of the I.T.Act.

9. In the result, appeal of the revenue for both assessment year 2008-09 & 2009-2010 are dismissed.

ITA No.4711/Mum/2013(AY : 2008-2009)

10. This is an appeal filed by the assessee against the order of CIT(A) for the assessment year 2008-09, wherein the assessee is aggrieved by the action of the CIT(A). Confirming the action of learned Assessing Officer (A.O.) of curtailing the deduction of Rs. 23.63 cr. claimed by the appellant under Section 54G of the Income Tax Act and allowing deduction only to the extent of Rs.15,26,23,584/- in respect of long term capital gains earned on transfer of assets of appellant's industrial undertaking in an urban area consequent to shifting of the undertaking and utilised fully for setting up an industrial undertaking in non urban area by way of purchase of new machinery, land and building within a period of one year before or 3 years after the date on which the transfer of assets of the urban undertaking took place. As per our considered view both the lower authorities have erred in coming to the conclusion that time period of one year before or three years after the transfer of undertaking should be considered under the alternate and not cumulative. The AO noted that the assessee can claim benefit u/s. 54G in purchase of New Machinery, plant,

land and building and other expenses incurred over it " within a period of one year before or three years after the date of which transfer took place" or in other words, both the claims / i.e. one year before or 3 years after) is not available to the assessee. Only one claim is available to the assessee i.e. assessee either can claim investment for the period from 25/09/2006 to 24/09/2007 or from 25/09/2007 to 24/09/2010 and not both. The second condition is that the assessee should deposit the balance amount in capital gain account before furnishing return of income u/s. 139(1) of the Act. As per the details furnished by the assessee, there is a deposit of Rs. 9.00 crores under the capital gain scheme on 29/09/2008, i.e. before the filling of return of income u / s. 139(1) as per copy of bank pass book furnished.

11. From the record we found that during the financial year ended 31 March 2008, the assessee shifted its factory from MIDC, Marol, Andheri (Urban Area) to Chakan, Pune (Rural Area). The assessee sold its leasehold Land and Building situated at MIDC Andheri and shifted its plant and machinery to Chakan, Pune as well purchased new plant and machinery. The assessee received a sum of Rs. 25,00,00,000/- on sale of its leasehold land and building. The profit on sale of leasehold land and building amounting to Rs 24,86,30,844/- was directly credited to capital reserves account being a capital profit. The assessee claimed a deduction against the aforesaid long term capital gains under section 54G by way of transfer of/ investments in the assets to Chakan, Pune. The details of such transfer of investments is tabulated as under:

Period	Land & Building & Plant & Mach.	Computers	Vehicles	Total
Sept,06 to Sept,07	2,73,85,545/-	15,26,825/-	61,34,218/-	3,50,46,588/-
Oct,07 to Mar,08	6,12,12,486/-	15,58,459/-	0	6,27,70,945/-
April,08 to Sept,09	5,08,00,290/-	97,03,516/-	0	6,05,03,806/-
Oct, 09 to Sept 10	8,34,04,626/-	0	0	8,34,04,626/-
Total Rs.	22,28,02,947/-	1,27,88,800/-	61,34,218/-	24,17,25,965/-

Accordingly, an amount of Rs.24,17,25,965/- has been claimed as a deduction (to the extent of 23.63 crores) under section 54G of the Act. For claiming the same, it had deposited Rs.9 crores in the "Capital Account Scheme". The amount was to be utilised after the due date of filing of the return. Further, an amount of Rs.50 lacs has been claimed as a deduction under section 54EC of the Act by way of investment in REC bonds.

12. With regard to claim u/s.54EC, the LTCG on sale of the land is of Rs.22.18 crores (Rs.23 crores – indexed cost Rs.82 lacs). Thus, the same is duly qualified for reinvestment under section 54G and 54EC. The STCG is covered under the concept of "block of assets" and hence the benefit of section 54EC as such is not required for STCG.

13. As per our considered view for claiming exemption u/s.54F, the assessee is entitled to make investment within a period of one year before or three years after the transfer of capital asset. Both these are exclusive. Assessee can invest part of the amount within a period of one year before sale of original assets and the balance part may be invested within a period of 3 years after the sale/transfer of asset. Accordingly, we direct the AO to give benefit of Section 54G by verifying the investment so made by the assessee within a period of one year prior to sale of asset and also investment made within a period of 3 years after the sale of asset. We direct accordingly.

14. With regard to adjustment made by the AO being profit on sale of land and building in Urban area which was directly credited by the assessee to the capital reserves in its books of account, we direct the AO to first calculate the exemption u/s.54G in terms of our above direction and for deciding this issue of book profit accordingly.

15. In the result, appeals of revenue are dismissed, whereas appeal of assessee (i.e. ITA No.4711/Mum/2013) is allowed in part, in terms indicated hereinabove.

Order pronounced in the open court on this 27/05/2016.

Sd/-
(SANDEEP GOSAIN)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 27/05/2016

प्र.कु.मि/pkm, नि.स/ PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

Sd/-
(R.C.SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai