IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No.301/CTK/2017
Assessment Year : 2013-2014

ITA No.13/CTK/2018
Assessment Year: 2012-2013

Bhambra Service Centre, Plot No.1005, Nayapali, Bhubaneswar.	Vs.	ITO, Ward -5(2), Bhubaneswar.
PAN/GIR No.AABFB 3187 C		
(Appellant)	..	(**Respondent**)

Assessee by : Shri K.C.Jena, AR
Revenue by : Shri D.K.Pradhan, DR

Date of Hearing : 01/08/ 2018
Date of Pronouncement : 02 /08/ 2018

O R D E R

Per N.S.Saini, AM

These are appeals filed by the assessee against the separate orders of the CIT(A)-2, Bhubaneswar dated 24.5.2017 for the assessment year 2013-14 and dated 11.10.2017 for the assessment year 2012-13.

ITA No.301/CTK/2017: Asst.Year: 2013-14.

2. Ground No.1 of appeal reads as under:

"i. (i) That, the learned Commissioner of Income Tax (Appeals)[CIT(A) in short] erred in law in confirming the order under section 144 of IT. Act made without issue of valid notice under section 143(2) of I.T. Act.

(ii) That, the learned C1T(A) erred in law in confirming the order made under section 144 of I. T. Act, since the accounts are audited and most of the information/documents desired under section 142(1) have been complied.

(iii) That, the learned CIT(A) erred in law in confirming the order made under section 144 of I. T. Act, as the additions made are not related to documents/books/information pending to be complied out of details in notice under section 142(1) of I.T. Act. and instead all additions made could have been made under section 143(3) of I. T. Act.

(iv) That, the learned CIT(A) erred in law in confirming the order made under section 144 of I. T. Act, since ledger copies of many heads of accounts like ledger copies of purchase & sales, business promotion expenses, general repair & maintenance, consultancy charges, boundary wall expenses, accounting charges, bank interest, traveling expenses, sundry creditors, sundry debtors, extra premium rewards as extracted from tally package have been submitted during the assessment proceedings which are derivatives of cash book that to when books of accounts have not been rejected."

3. At the time of hearing, no arguments were advanced by ld A.R. of the assessee. Therefore, this ground of appeal is dismissed for want of prosecution.

4. Ground No.2 of appeal reads as under:

"That, CIT(A) erred in law in confirming the additions of Rs.73,09,872/- and Rs.4,38,350/-under suppressed sale and payments to partners respectively by not discussing the submissions made along with legal citations, thereby making biased, unreasoned and illegal order."

5. The Assessing Officer observed that the sales figure shown in profit and loss account vis-à-vis VAT return are as under:

Item	As per VAT return	As per income tax return	Difference
Purchase (Rs.)	41,70,23,934	41,41,36,492	28,87,442
Sale (Rs.)	43,14,30,522	42,41,20,650	73,09,872

6. The Assessing Officer observed that till date of passing the order, the assessee could not furnish any revised sales tax return/VAT return, therefore, he held that the assessee has suppressed sale of Rs.73,09,872/- in the return of income furnished in the relevant assessment year under consideration. Therefore, he held Rs.73,09,872/- as suppressed sale and added the same to the income of the assessee.

7. On appeal, the CIT(A) confirmed the action of the Assessing Officer by observing as under:

> "7.3 I have examined the findings of the assessing officer as well as the submissions of the appellant. During the appeal proceedings, I have been insisting that the appellant should furnish original sales ledger on the basis of which the original VAT return was filed, as well the revised sales ledger on the basis of which revised VAT return was filed. This is evident from my order sheet noting dated 06.12.2016. On this, the appellant has replied that (vide order sheet noting dtd.23.05.2017) that when the new figures were entered in the computer system pertaining to revised VAT return, the original sales figure pertaining to original VAT return got obliterated. Thus the appellant has no evidence whatsoever to show that the figures in the revised VAT return are correct. The sales of the appellant are of retail sales of petroleum products. The AO has asked the appellant to produce the bills and vouchers several times so that the correct sales could be computed. These bills and vouchers have not been submitted by the appellant before the assessing officer. It is therefore held that the claim of revised VAT return is an afterthought. The addition made by the assessing officer of Rs. 73,09,872/- is confirmed and the grounds of appeal are dismissed."

8. Before us, the only submission of ld A.R. is that if there is difference in sale between the assessee's return of income and the figure shown in the VAT return, then the only net profit should be added and not the

entire suppressed sale figure should be treated as income of the assessee.

9. Ld D.R. supported the orders of lower authorities.

10. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. In the instant case, the Assessing Officer observed that the sale shown by the assessee in its VAT return for the year under consideration is Rs.43,14,30,522/- whereas the sale as per audited accounts of the assessee is Rs.42,41,20,650/-. Thus, he inferred that the assessee has suppressed sales of Rs.73,09,872/- in its return of income. Therefore, the Assessing Officer added the entire Rs.73,09,872/- to the income of the assessee.

11. On appeal, the CIT(A) confirmed the action of the Assessing Officer.

12. Before us, ld A.R. of the assessee submitted that there was mistake in the VAT return filed by the assessee but could not point out the actual nature of the mistake. In absence of details of the mistake, the said argument cannot be accepted. However, we find force in the arguments of ld A.R. of the assessee that the entire sale proceeds cannot be treated as income of the assessee and only income element imbedded in the sale can be brought to tax. Our above view finds support from the decision of this Bench of the Tribunal in the case of Suresh Kumar Sahu vs ITO (ITA No.44/CTK/2016 for A.Y. 2010-2011) order dated 28.10.2016, which was

passed following the decision in the case of R.R. Carrying Corporation vs ACIT, (2009) 126 TTJ 240(Cuttack).

13. From the audited accounts filed before us, it is observed that the gross profit as per the audited accounts of the assessee of the year under consideration was Rs.2.54%. We, therefore, direct the Assessing Officer to restrict the addition on account of suppressed sale to 2.54% of the said sales. Thus, this ground of appeal of the assessee is partly allowed.

14. Ground No.3 of appeal reads as under:

> "That, the learned CIT(A) erred in law in confirming disallowance of interest and salary to partners by applying section 144 read with Sec. 185 & 184 since most of the documents/information/records have been submitted during assessment proceedings."

15. The brief facts of the case are that the Assessing Officer observed that the assessee failed to comply with the terms of the notice u/s.142(1) and assessment was made u/s.144 of the Act. Hence, in terms of section 185 read with section 184 of the Act, no deduction by way of any payment of interest and remuneration shall be allowed to the assessee for the relevant assessment year under consideration. Hence, amount of Rs.3,36,350/- and Rs.1,02,000/- debited to the profit and loss account under the head interest to partners" and "remuneration to partners" respectively were disallowed and addition of Rs.4,38,350/- was made to the income of the assessee.

16. On appeal, the CIT(A) observed that he has already upheld the decision of the Assessing Officer to complete the assessment u/s.144 of the Act. Therefore, the disallowance of interest and salary to partners of Rs.4,38,350/- u/s.184(5) of the I.T.Act, 1961 is correct and dismissed the ground of appeal of the assessee.

17. Ld A.R. reiterated the submission made before the lower authorities.

18. Ld D.R. supported the orders of lower authorities.

19. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. According to the Assessing officer, the assessee has not complied with the terms of the notice issued u/s.142(1) of the Act and, therefore, he made assessment u/s.144 of the Act and consequently in view of the provisions of section 185 of the Act has not allowed deduction for partner's interest of Rs.3,36,350/- and partner's remuneration of Rs.1,02,000/-.

20. The above action of the Assessing Officer was confirmed by the CIT(A).

21. We find that it is not in dispute that interest of Rs.3,36,350/- and remuneration of Rs.1,02,000/- paid to partners were in accordance with the terms of the deed of partnership and was within the permissible limit prescribed u/s.40(b) of the Act.

22. We find from the impugned order of assessment that the assessee has complied with the notice issued u/s.142(1) of the Act. The Assessing Officer himself has recorded in the assessment order as under:

> In response to various notices issued u/s. 143(2) and 142(1) of the Act, Sri J.K. Mishra, FCA and AR and Sri Sarbeswar Palai, FCA &. AR of the assessee appeared before the ITO, Ward-5(2), Bhubaneswar and before the undersigned from time to time. The case was discussed with them. The ARs of the assessee have produced the details of statutory audit reports, ledger copies of purchase & sale, reconciliation statements of UCO, HDFC & ICICI bank accounts, ledger copies of business promotion expenses, general repair and maintenance, consultancy charges, boundary wall repaid, accounting charges, bank interest, travelling expenses, sundry creditors, sundry debtors, extra premium reward, sale of MS & HSD and photocopies of EPF and ESI challans etc. “

23. We find that the Assessing Officer has just made general statement that the assessee has not complied with the terms of the notice u/s.142(1) of the Act. The above remark of the Assessing Officer is not only vague but also contrary to his quoted recording also. Thus, in our considered view, the Assessing Officer was not correct in holding that the assessment was made u/s.144 of the Act and consequently in disallowing deduction for partner’s interest and remuneration. We, therefore, delete the said disallowance and allow this ground of appeal of the assessee

24. Ground Nos.4 & 5 of appeal are general in nature and hence, requires no separate adjudication by us.

25. In the result, appeal filed by the assessee is partly allowed.

<u>ITA No.13/CTK/2018: A.Y. 2012-13.</u>

26. Ground Nos.1 to 3 of appeal read as under:

> "1. That, learned Commissioner of Income Tax (Appeals) [in short CTT(A)] erred on facts and in law in confirming rejections of books of accounts u/s 145 for A.Y. 2012-2013 only because customers from whom advances have been received did not confirm the balances at year-end, rather he could have added those advances only instead of rejecting the books of accounts.
>
> 2. That, learned CIT(A) erred on facts and in law in confirming the assessment order in not giving the assessee the opportunity to explain its stand on non-receipt of confirmations on advances from customers and also not giving opportunity of being heard before rejecting books of accounts and estimating the income.
>
> 3. That, learned CIT(A) erred on facts and in law by estimating the income at 0.5% on turnover which is unrealistic, unreasonably high &. not based on past achievements."

27. Since above grounds are inter-connected, they are being disposed of as under:

28. The brief facts of the case are that the Assessing Officer observed that inquiries were conducted with the persons shown as advance from customers in the books of account of the assessee. Letters were issued to the customers from whom the assessee claimed to have received the advance at their postal address given by the assessee to examine the genuineness of the claim. Out of 113 numbers of creditors (on account of advance from customers) letters were issued in 22 cases to examine the genuineness of the creditors, in 21 cases, letters were returned as unserved but in one case, the creditor i.e. Einstein Academy of Technology and Management has confirmed that it has to receive a sum of Rs.3,08,221/- as per their books of account. But in the list furnished by the assessee mentioning advance received from customers, it is seen that

the assessee-firm was to pay a sum of Rs.1,00,000/- to the above party. From the above, the Assessing Officer concluded that the assessee-firm does not maintain proper books of account in respect of its business activities. Therefore, the books of account claimed to have been maintained for the asst. year 2012-13 was rejected by invoking the provisions of section 145 of the income Tax Act, 1961.

29. From the audit report it was seen that the assessee-firm has declared net profit at 0.06% on the turnover. The net profit declared by the assessee appears to be very low in comparison to the other traders of similar line of business. Therefore, the net profit shown at 0.06% was not accepted and deem it proper to estimate the net profit of the assessee-firm at 1% of the total turnover. Accordingly, the net profit of the assessee-firm was computed at Rs.37,01,524/- subject to allowance of interest and remuneration to the partners. Depreciation as claimed in the books of account deemed to have been considered in computing the above net profit.

30. On appeal, the CIT(A) held as under:

> ”4.1In these grounds, the appellant has contested the action of the AO to reject the books of account and estimated the profit of the appellant at 1% of turnover. During the appeal proceedings, the appellant has sought that its net profit in the last five years ranges between 0.17% to 0.25%,, the average being 0.214, and therefore the profit percentage taken by the assessing officer is excessive. The details are as below:

F.Y	Turnover	Gross profit	Net profit before interest & salary to partners	Gross profit percentage	Net profit percentage
SiJ2007-08	17,17,63,428.95	26;80,465.94	4,38,407.00	1.56	0.25
2008-09	20,66,42,409.50	32,00,983.31	4,80,946.92	1.55	0.23
2009-10	21,85,37,841.47	44,12,768.65	5,17,236.65	2.02	0.24
2010-11	29,68,78,967.44	53,64,518.82	5,53,211.00	1.81	0.18
20J1-12	37,01,52,470.00	66,53,093.00	6,32,591.00	1.80	0.17

4.2 I have carefully analysed the assessment order and the submissions of the appellant. It is seen from the assessment order that there is a difference between audited accounts and revised audited accounts, in the amounts of sundry creditors, advance from customers and liabilities for expenses. Moreover, the assessing officer issued notices to 22 cases out of 139 creditors pertaining to 'Advance from customers'. Out of these 22 creditors, in 21 cases letters "were returned "as unserved and in the remaining one case the balance as per the party did not tally with the balance as shown by the appellant in its books of accounts. Due to this, the assessing officer rejected the books of accounts of the appellant u/s.145 of IT. Act, 1961 as the correct profit cannot be determined on the basis of books of accounts. I find that the assessing officer is well within his authority in rejecting the books of accounts of the appellant. However, I find that the percentage of the net profit taken by the assessing officer @1% of turnover is of higher side, after considering the earlier years percentage of net profit to turnover. In my considered view, the net profit percentage of 0.5% of total turnover will be more appropriate. Accordingly, the assessing officer is directed to determine net profit of the appellant @0.5% of the turnover. The grounds of appeal are partly allowed."

31. Before us, the only submission of ld A.R. is that in the preceding assessment years, the assessee has shown highest net profit of 0.25%, therefore, the order of the CIT(A) directing the Assessing Officer to compute the income of the assessee by applying the rate of 0.5% to the

turnover is higher and same should be accordingly reduced to 0.25% of the turnover.

32. Ld D.R. supported the order of the CIT(A).

33. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. In the instant case, the Assessing Officer rejected the books of account of the assessee and estimated the income at 1% of the turnover of the assessee and made addition of Rs.1,87,228/-.

34. On appeal, the CIT(A) estimated the income of the assessee at 0.5% of the total turnover considering the earlier years percentage of net profit to turnover.

35. We find from the order of the CIT(A) that the assessee submitted before him that the net profit in the last preceding five years ranges from 0.17% to 0.25% the average being 0.214%. The following chart was filed by the assessee, which is quoted by the CIT(A):

F.Y.	Turnover	Gross profit	Net profit before interest and salary to partners	Gross profit percentage	Net profit percentage
2007-08	17,17,63,428.95	26,80,465.94	4,38,407.00	1.56	0.25
2008-09	20,66,42,409.50	32,00,983.31	4,80,946.92	1.55	0.23
2009-10	21,85,37,841.47	44,12,768.65	5,17,236.65	2.02	0.24
2010-11	29,68,78,967.44	53,64,518.82	5,53,211.00	1.18	0.18
2011-12	37,01,52,476.00	66,53,095.00	6,32,591.00	1.80	0.17

36. From the perusal of net profit shown and accepted by the department in the preceding five assessment years, we find that the highest net profit shown was 0.25%. It is an established position of law that after rejection of book results of the assessee, the Assessing Officer cannot make a wild guess but has to estimate the income of the assessee on the basis of past accepted results. We find that in assessment year 2007-08, the assessee had shown the highest net profit at 0.25%. Therefore, we modify the order of the CIT(A) and direct the Assessing Officer to compute the income of the assessee for the year under consideration by applying net profit rate of 0.25% and partly allow the ground of appeal of the assessee.

37. Ground No.4 of appeal read as under:

> That, learned CIT(A) erred on facts and in law in confirming disallowance of ESI contribution of Rs. 6,976/- and EPF contribution of Rs.47,278/- since the amounts are deposited before due date of filing the return of income."

38. The facts of the case are that the Assessing Officer found that the assessee has not deposited an amount of Rs.6976/- being employee's contribution to ESI and Rs.47,278/- being employee's contribution to EFP within the due date prescribed under the respective Act and, therefore, he made addition to the income of the assessee.

39. On appeal, the CIT(A) confirmed the action of the Assessing Officer following the decision of Hon'ble Gujarat High Court in the case of Gujarat State Road Transport Corporation, 366 ITR 170(Guj).

40. Before us, ld A.R. submitted that as the employee's contribution is deposited before the due date of filing return of income u/s.139(1), therefore, same deserves to be allowed.

41. Ld D.R. supported the orders of lower authorities.

42. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. In the instant case, the Assessing Officer has disallowed Rs.6976/- being employee's contribution to ESI and Rs.47,278/- being employee's contribution to EFP not deposited within the due date prescribed under the relevant Act.

43. On appeal, the CIT(A) confirmed the action of the Assessing Officer.

44. On perusal of assessment order at page 4, we find that the assessee has deposited the employees' contribution to PF and ESI before filing of the return of income u/s.139(1) of the Act. We find that the Hon'ble Supreme Court in the case of Pr. CIT vs Rajasthan Beverage Corporation Ltd., (2017) 84 Taxman. Com 185 (SC), has held as under:

> "Section 43B, read with section 36(1)(va), of the Income Tax Act, 1961-Business disallowance-certain deduction to be allowed only on `actual payment (PF & ESI construction)- High Court by the impugned order held that amount claimed on payment of PF and ESI having been deposited on or before due date of filing of returns, same could not be disallowed under section 43B or under section 36(1)(va)- Whether SLP against said impugned order was to be dismissed-Held yes (para 2) in favour of assessee.

45. Respectfully following the decision of Hon'ble Supreme Court in the case of Rajasthan Beverage Corporation Ltd., (supra), we delete the addition of Rs.6976/- being employee's contribution to ESI and Rs.47,278/- being employee's contribution to EFP deposited before filing of the return of income u/s.139(1) of the Act and allow this ground of appeal of the assessee.

46. In the result, appeal of the assessee is partly allowed.

Order pronounced on 2/08/2018.

Sd/- sd/-

(**Pavan Kumar Gadale**) **(N.S Saini)**
JUDICIALMEMBER **ACCOUNTANT MEMBER**

Cuttack; Dated 02 /08/2018
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : Bhambra Service Centre, Plot No.1005, Nayapali, Bhubaneswar
2. The Respondent. ITO, Ward -5(2), Bhubaneswar
3. The CIT(A)-2, Bhubaneswar
4. Pr.CIT-2, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.

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BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack