

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 10.02.2015

CORAM

**THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH**

**T.C.A. NOS. 1048 TO 1050 OF 2014
AND
M.P. NOS. 1 OF 2014 (2 Nos.)**

Commissioner of Income Tax
Trichy.

.. Appellant in all the appeals

- Vs -

M/s.Amman Steel & Allied
Industries, Silambudayanpatti
Nagamangalam, Trichy.

.. Respondent in all the appeals

Appeals filed under Section 260-A of the Income Tax Act against the order dated 23.08.2011 passed by the Income Tax Appellate Tribunal, Madras 'C' Bench, Chennai, made in ITA Nos.2058 to 2060/Mds/2010.

For Appellant : Mr. J.Narayanaswamy

COMMON JUDGMENT
(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order passed by the Tribunal in dismissing the appeals filed by it, the Revenue is before this Court by filing the present appeals. In these appeals, the following questions of law are sought to be canvassed before this Court :-

"i) Whether the Tribunal was right in holding that the

turnover determined by the Commissioner of Central Excise in his de novo adjudication proceedings consequent to the remand order of the CESTAT can be adopted for the purpose of determining the unaccounted turnover of the assessee for the relevant years?

ii) Whether the Tribunal was right in holding that when no deduction was sought on the expenditure, the provisions of Section 40A (3) cannot be applied when the assessable income was arrived by applying a percentage rate on the unaccounted turnover?"

2. The assessment in these appeals is relatable to the assessment years 2002-2003, 2003-2004 and 2004-2005. The facts, in a nutshell, are as hereunder :-

The respondent/assessee is alleged to be engaged in the business of manufacture and sale of steel ingots and billets. The respondent/assessee filed return of income for the above assessment years. It appears that the Central Excise Department conducted a search of the premises of the assessee on 24.6.04 and in the course of the said search, incriminating documents and evidence were seized, which were found in the computer and floppy disks. On the basis of the seized materials, the Central Excise Department issued a show cause notice in which it was alleged that the assessee indulged in evading central excise duty by making unaccounted purchase of raw materials, by suppressing production, indulged in clandestine removal of bars and rods without issue of invoice and without

payment of duty. In the course of investigation, it was found that the assessee was purchasing ingots and billets from certain persons and it was found to be unaccounted purchase. Based on the abovesaid show cause notice, the Assessing Officer concluded that the documents seized indicate collection of sale proceeds of unaccounted bars/rods by assessee in cash and unaccounted sale proceeds collected by cash. The Assessing Officer, based on the show cause notice issued by the Central Excise Department and the documents in support of the show cause notice, estimated the gross profit at 16.36% and, accordingly, demanded tax on the same. The assessee, aggrieved by the said order, moved the Appellate Authority, viz., the CIT (Appeals) by filing an appeal.

3. It was contended by the assessee before the CIT (Appeals) that the show cause notice and the papers seized by the Central Excise Department cannot be the basis for addition/disallowance under the Income Tax proceedings. The CIT (Appeals), accepting the contention, primarily directed the assessing officer to collect the materials seized by the Central Excise department and further directed the assessing officer to make independent enquiries on the additions/disallowances made and submit a report.

4. Pursuant to the said order, the assessee filed objections before the assessing officer during the remand proceedings and the same was dismissed by the assessing officer, who submitted a remand report to the

CIT (Appeals) and sought enhancement of income.

5. In the meanwhile, the show cause notice issued by the Central Excise Department came to be adjudicated by the Commissioner of Central Excise and against the said order, the assessee moved the CESTAT. The Tribunal, after elaborately discussing the merits of the case, came to hold that there was some inherent lacunae in the adjudication order and, therefore, set aside the adjudication order and remanded the matter to the Commissioner of Central Excise for de novo consideration. After remand, the Commissioner of Central Excise considered the matter and passed de novo order redetermining the demand.

6. In the interregnum, the assessee, pursuing the appeal before the CIT (Appeals), contended that the very basis for determining the gross profit was the show cause notice and the adjudication order, which has now been set aside and the matter remanded to the Commissioner of Central Excise for de novo adjudication and in such circumstances, pleaded that on the finding of the Tribunal and the materials filed in support thereof, the demand for tax proposed cannot be justified, as those evidences were found to be unreliable and inadmissible in evidence. Nevertheless, it was submitted that in view of the remand order, nothing survives for consideration for the purpose of determining the income as unaccounted transaction. On the said submission, the CIT (Appeals) came to the conclusion that the Assessing

Officer, without conducting an independent enquiry, either at the time of assessment or during the remand proceedings, as directed by the CIT (Appeals), has simply relied upon the documents retrieved in the course of the proceedings initiated by the Central Excise Department as gospel truth and, therefore, held that the income should be brought to tax based on cogent material and evidence and the order of the assessing officer merely placing reliance on the show cause notice, without making an independent enquiry, pursuant to the remand order, cannot be sustained. The CIT (Appeals) further held that the turnover was re-determined by the Commissioner of Central Excise in the de novo order and since the direction as given by the CIT (Appeals) in the remand proceedings having not been carried out, the CIT (Appeals) adopted the re-determined turnover as unaccounted turnover of the assessee by modifying the rate of gross profit after giving deduction towards power and labour charges. The findings of the CIT (Appeals), for better clarity, are extracted hereinbelow :-

"22. I have considered the rival contentions. I am of the considered opinion that any income can be brought to tax based only on cogent material buttressed by evidence. IN the present instance the Assessing Officer cannot claim to have any evidence to sustain the additions. He speaks at length only about the allegations contained in the show cause and some of them in material not worthy of admission in evidence. Under these circumstances I am inclined to hold that the turnover determined by the Commissioner of Central Excise in his de novo order giving effect to the directions of the Tribunal shall be the unaccounted turnover of the appellant for the

relevant years. The gross profit on this turnover shall be determined as under and added to the income returned. On the rate of gross profit I am in agreement with the contention of the AR that the power and labour charges have to be deducted in arriving at the rate of gross profit. Accordingly the rate of gross profit had been worked and I direct the income as per the following table be adopted and added to the income returned and balance addition made by the AO shall stand deleted.

Asst. Year Rs.	Net Turnover Rs.	Rate of GP as obtained each year Rs.	Net Profit Rs.
2002-03	21,17,688	14.67%	3,10,665
2003-04	96,13,485	8.22%	7,90,228
2004-05	4,82,55,983	7.33%	35,37,164
2005-06	2,56,18,539	7.00%	17,93,298

7. On the question of disallowance under Section 40A (3) of the Act, purchase of steel ingots from various persons in cash, the quantum of purchases alleged in the assessment order is based on the show cause notice issued by the Central Excise Department. On the said issue, the assessee contended that when the income is estimated by estimating the turnover no further expenditure can be separately considered. Reliance was placed by the assessee on the judgment of this Court in **CIT – Vs – Mohammed Dhurabudeen (4 DTR 218)**. The CIT (Appeals) held that since the basis of the additions itself is at fault, they are not valid and, therefore, the disallowance on the said income is not sustainable.

8. Aggrieved by the said order of the CIT (Appeals), the Department preferred appeals before the Tribunal. The Tribunal, on consideration of the entire matter and on considering the allegations raised in the show cause notice, issued by the Central Excise Department, which came to be finally decided by the CESTAT by way of remand and the further de novo adjudication by the Commissioner of Central Excise, held that the CIT (Appeals) has rightly ordered that turnover as determined by the Commissioner of Central Excise in the de novo adjudication order shall be the unaccounted turnover of the appellant for the relevant years and, accordingly, the gross profit was worked out. The Tribunal further took note of the fact that such a conclusion drawn by the CIT (Appeals) is correct since mere reliance on the show cause notice issued by the Central Excise Department is of no avail and the assessing officer has not made independent enquiries even pursuant to the remand order passed by the CIT (Appeals). The Tribunal further held that the assessing officer merely collected all the documents and forwarded the same with his report, which is not the correct procedure. The relevant portion of the order of the Tribunal, in our opinion, requires to be placed on record, for better clarity, and the same is extracted hereunder :-

"14. Undisputedly and admittedly, the Assessing Officer in this case has not made any independent enquiries. When the Hon'ble CESTAT has found those evidence unreliable and not a good evidence for framing assessment, the same cannot be made a basis for making assessment under Income Tax Act..

In these circumstances, the assessee is not required to explain the documents in so far as income tax proceedings are concerned. It is found for a fact that neither the managing partners of the firm nor any other person in-charge of the business had ever admitted on oath that all the materials seized by the Central Excise Department could be used by the ITO in framing the assessment order. On the contrary the relevant answer of the managing partner clearly states that the Hon'ble CESTAT had already found the retrieved data to be unreliable and requested to rely only on the de novo order made by the Commissioner, Central Excise Department. In our considered opinion, to the extent the Hon'ble CESTAT has found the documents/evidence to be unreliable, the same cannot be used in making assessment under Income-Tax Act, specially when not even a whit of enquiry has been independently made by him despite directed by the Id. CIT (A). The assessee has clearly explained the electricity charges and wages and has accounted the same completely, and similar explanation has been accepted by the same Assessing Officer, in his order made for assessment year 2002-03. The Hon'ble Madras High Court in the case of CIT – Vs – Vignesh Kumar Jewellers, 222 CTR 79, has clearly held that the findings of another Department cannot be simply incorporated in the assessment without any independent enquiry having been made. In this case, even a modicum of enquiry has not been made independently by the Assessing Officer. There is no corroborating or supporting evidence available on record. When the main evidence on the basis of which the assessment was framed has been found to be not reliable by the very same Department (Central Excise Department), the cumulative effect of finding given in the assessment order, remand report and submission of the parties, would lead to

only one conclusion that no addition can survive on the basis of unreliable evidence. The addition made by the Assessing Officer hinges on the show cause notice of the Central Excise Department which has been found to be unreliable to a greater extent. It is very strange that the remand report was sent after a lapse of three years and that too after repeated reminders having sent by the Id. CIT (A). In fact, the Assessing Officer has not conducted any enquiry, let alone, any independent enquiry in this case. He has simply obtained copies of the records from Central Excise Department and the statements recorded by them from four persons despite the fact that he was specifically directed by the Id. CIT (A) to trace the transaction-trails from the square one upto the end to establish the generation of unaccounted income, if any, as had been alleged. In the remand report, the Assessing Officer has canvassed even the enhancement of the addition by way of withdrawal of deduction allowed for furnace oil as explained. We are convinced that the additions which are made solely on the basis of the materials seized by the Central Excise Department and which have been dubbed as unreliable by Hon'ble CESTAT, no addition can be made by the Assessing Officer (Income Tax) in the eyes of law. There is no doubt about the legal position that any income which is based on material evidence found or gathered by the Assessing Officer can be brought to tax. In the given case, there is no such evidence available with the Assessing Officer to sustain the impugned addition. The allegations made in the show cause notice no longer survive. But we have to accept the facts which have been found by the Hon'ble CESTAT to be correct and reliable and on the basis of which de novo assessment has been made. The turnover determined by the Commissioner of Central Excise Department in his de novo order giving effect to

the Hon'ble CESTAT's order has to be treated as unaccounted turnover of the assessee for the relevant years. The gross profit on this turnover has to be determined and added to the returned income for the respective assessment years. The power and labour charges have to be deducted in arriving at the rate of gross profit. The rate of gross profit worked out by the Id. CIT (A) is as under :-

Asst. Year Rs.	Net Turnover Rs.	Rate of GP as obtained each year Rs.	Net Profit Rs.
2002-03	21,17,688	14.67%	3,10,665
2003-04	96,13,485	8.22%	7,90,228
2004-05	4,82,55,983	7.33%	35,37,164
2005-06	2,56,18,539	7.00%	17,93,298

15. Before us, the Id. AR has not disputed the addition of the income as per the above chart. The balance addition made by the Assessing Officer has been deleted by the Id. CIT (A). We are of the considered opinion that the action of the Id. CIT (A) is correct and affirm the same.” (Emphasis supplied)

The Tribunal concurred with the findings of the CIT (Appeals) in relation to Section 40A (3) and, accordingly, the appeals filed by the Department were dismissed. Aggrieved by the said order of the Tribunal, the Department is before this Court by filing the present appeals.

9. Learned standing counsel appearing for the Department/appellant submitted that the Tribunal erred in holding that the materials seized by the Central Excise Department cannot be the basis to conclude that the assessee had undisclosed income for the purpose of making addition/disallowance.

Learned counsel further submitted that the assessee maintained a 2nd set of account books where falsification of entries was found and, thereby, concealment of income is evident from the materials seized by the Central Excise Department. Further, the large scale unaccounted purchase, suppressed sales, which are evident from the documents seized by the Central Excise Department, have not been appreciated by the Tribunal in its proper perspective. Further, it is contended by the learned standing counsel for the Department/appellant that the assessing officer, during the remand proceedings, had recorded statements of the respondent/assessee, wherein admissions as to the veracity of the contents of the seized materials are available, which have not been appreciated in proper perspective by the CIT (Appeals) as well as the Tribunal. Learned standing counsel, placing reliance on the decision reported in **290 ITR 702 (Commissioner of Income Tax – Vs – Hynoup Food & Oil Industries P. Ltd.)** submitted that the payment in cash for expenditure not being disputed by the assessee, the Assessing Officer is justified in ordering disallowance under Section 40A(3) of the Act, which has not been considered by the Tribunal in its proper perspective and, therefore, the order passed by the Tribunal, in its entirety, is liable to be interfered with.

10. Heard Mr.Narayanaswamy, learned standing counsel appearing for the appellant/Revenue and perused the materials available on record as also the decision relied on by the learned counsel for the appellant.

11. We have considered the facts in issue. Here is a case where the entire assessment order is based on materials found in the show cause notice issued by the Central Excise Department. Thereafter, the adjudication order passed by the Commissioner of Central Excise came to be set aside by the CESTAT and on remand a de novo order was passed by the Commissioner of Central Excise redetermining the demand. The CIT (Appeals) has ordered that the said amount should be treated as unaccounted turnover of the assessee for the relevant years and gross profit on this turnover should be determined and added to the income returned. The procedure adopted by the CIT (Appeals), as stated above, is the logically correct way of determination of the unaccounted turnover. The reasoning of the CIT (Appeals) and the computation thereof being logically correct, the Department cannot have any grievance on the order passed by the CIT (Appeals), which has also been confirmed by the Tribunal. In the absence of any independent enquiry by the Assessing Officer concerned, as ordered by the CIT (Appeals), the question of placing reliance on the demand made by the Central Excise Department in its show cause notice, which has been redetermined in the final adjudication order passed by the Commissioner of Central Excise in the de novo proceedings, does not arise for consideration.

12. This Court is of the considered view that the finding of the CIT (Appeals) as well as the Tribunal that merely on the basis of the show cause

notice issued by the Central Excise Department, determination of tax under the Income Tax Act cannot be made, as it is not incumbent on the income tax authorities to take into consideration only the materials made available by the Central Excise Department, but the authorities are bound to make an independent enquiry, before passing any order, which enquiry has not happened in the present case. There is no provision to simply incorporate the demand made in the show cause notice issued under the Central Excise Laws for the purpose of computation of tax under the Income Tax Laws. The provisions under the two laws, viz., the Central Excise Act and the Income Tax Act, operate in two different fields. Without there being an independent enquiry by the concerned taxing authorities the demand made under the provisions of Central Excise Act cannot be incorporated as such, more so when the notice of demand has been modified by the adjudicating authority. The above view of this Court is further fortified by the decision of the Supreme Court in ***K.T.M.S. Mohammed & Ors. – Vs – Union of India (AIR 1992 SC 1831)***, wherein the Supreme Court while considering the scope of the provisions of Foreign Exchange Regulation Act and the Income Tax Act, held as under:-

"24. Needless to emphasise that the Foreign Exchange Regulation Act and the Income-tax Act are two separate and independent special Acts operating in two different fields.

25. This court in Rao Bahadur Ravulu Subba Rao v. CIT [1956] 30 ITR 163; AIR 1956 SC 604; [1956] SCR 577 (headnote of 30 ITR 163) has pointed out :

"The Indian Income-tax Act is a self-contained code exhaustive of the matters dealt with therein, and its provisions show an intention to depart from the common rule, qui facit per alium facit per se."

26. Further, in *Pannalal Binjraj v. Union of India* [1957] 31 ITR 565 AIR 1957 SC 397; [1957] SCR 233, it has been observed thus (at pages 583, 584 of 31 ITR) :

"It has to be remembered that the purpose of the Act is to levy income-tax, assess and collect the same. The preamble of the Act does not say so in terms, it being an Act to consolidate and amend the law relating to income-tax and super tax but that is the purpose of the Act, as disclosed in the preamble to the first Indian Income-tax Act of 1886 (Act II of 1886). It follows, therefore, that all the provisions contained in the Act have been designed with the object of achieving that purpose."

Coming to the Foreign Exchange Regulation Act, it is a special law which prescribes a special procedure for investigation of breaches of foreign exchange regulations. Vide Shanti Prasad Jain v. Director of Enforcement [1963] 33 Comp Cas 231; [1963] 2 SCR 297. *The proceedings under the Foreign Exchange Regulation Act are quasi-criminal in character. It is pellucid that the ambit, scope and intendment of these two Acts are entirely different and dissimilar."*

The above decision of the Supreme Court is squarely applicable to the facts of the present case and, therefore, we have no hesitation to hold that the method adopted by the CIT (Appeals) with regard to taxation under the Income Tax Act, as affirmed by the Tribunal, is the correct method of determining the income based on the unaccounted turnover.

12. The next question raised by the appellant/Revenue relates to disallowance under Section 40A (3) of the Act. For better appreciation of the issue, Section 40A (3) of the Act is extracted hereinbelow :-

"40A. Expenses or payments not deductible in certain circumstances.

** * * * **

(3)(a) Where the assessee incurs any expenditure in respect of which payment is made in a sum exceeding twenty thousand rupees otherwise than by an account payee cheque drawn on a bank or account payee bank draft, no deduction shall be allowed in respect of such expenditure;

(b) where an allowance has been made in the assessment for any year in respect of any liability incurred by the assessee for any expenditure and subsequently during any previous year (hereinafter referred to as subsequent year) the assessee makes payment in respect thereof, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, the payment so made shall be deemed to be the profits and gains of business or profession and accordingly chargeable to income-tax as income of the subsequent year if the amount of payment exceeds twenty thousand rupees:

Provided that no disallowance shall be made and no payment shall be deemed to be the profits and gains of business or profession under this sub-section where any payment in a sum exceeding twenty thousand rupees is made otherwise than by an account payee cheque drawn on a bank or account payee bank draft, in such cases and under such circumstances as may be prescribed, having regard to the nature and extent of banking facilities available, considerations

of business expediency and other relevant factors.

13. On the issue relating to disallowance under Section 40A (3) of the Act, the same was considered by the CIT (Appeals) by holding that income has been arrived at an estimate of turnover and computed applying the gross profit and, therefore, no expenditure shall be allowed, since the gross profit applied would take care of the amount incurred by purchases, etc. The CIT (Appeals), to justify the said stand, drew strength from the decision of this Court in *Mohammed Dhurabudeen's case (supra)*, wherein this Court has held thus :-

"The question for consideration is when no deduction was sought and allowed under S. 40A (3), was there any need to go into S. 40A (3) and Rule 6DD (j). We see force in the view taken by the Tribunal that when the income of the assessee was computed applying the GP rate and when no deduction was allowed in regard to purchases of the assessee, there was no need to look into the provisions of Section 40A (3) and Rule 6DD (j). No disallowance could have been made in view of the provisions of S. 40A (3) read with Rule 6DD (j) as no deduction was allowed to and claimed by the assessee in respect of purchases. When the GP rate is applied, that would take care of everything and there was no need for the A.O. to make scrutiny of the amount incurred on the purchases by the assessee."

14. Following the ratio laid down by this Court in the abovesaid

decision, the CIT (Appeals) held that the additions made under Section 40A (3) of the Act are to be deleted since the basis of the additions had been faulted and are no more valid and since the income is estimated, no disallowance on this account can be made. The said view of the CIT (Appeals) has been affirmed by the Tribunal.

15. This Court has already held in the former portion of the order, that the assessment order came to be passed only on the basis of the show cause notice issued by the Central Excise Department and no independent enquiry has been conducted by the Assessing Officer. Further, the ratio of the decision of the Supreme Court in *K.T.M.S. Mohammed's case (supra)*, clearly applies to the facts of the present case. Such being the case, in the absence of any independent enquiry by the Assessing Officer, the disallowance sought to be made under the Income Tax Act, by the Assessing Officer, on the basis of the show cause notice, issued under the Central Excise Act cannot be sustained. When the assessable income was arrived at by applying a percentage rate, as held by this Court in *Mohammed Dhurabudeen's case (supra)*, the said exercise would take care of everything and there is no need for the Assessing Officer to make scrutiny of the amount incurred on the purchases by the assessee for the purposes of disallowance. Therefore, this Court is of the considered view that the order of the Tribunal in concurring with the CIT (Appeals) on this issue is justified and this Court finds no reason to differ with the same.

15. In view of the above findings and reasoning as recorded above, this Court is of the considered view that no question of law, much less substantial question of law arises for consideration in these appeals.

16. In the result, these appeals fail and the same are dismissed. Consequently, connected miscellaneous petitions are also dismissed.

(R.S.J.) (R.K.J.)

10.02.2015

Index : Yes/No

Internet : Yes/No

GLN

To

1. Commissioner of Income Tax
Trichy.
2. Income Tax Appellate Tribunal
'C' Bench, Chennai.

R.SUDHAKAR, J.
AND
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