IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'A' : NEW DELHI)

BEFORE HON'BLE PRESIDENT, SHRI G.D. AGRAWAL
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.1929/Del./2012
(ASSESSMENT YEAR : 2003-04)

ITA No.1930/Del./2012
(ASSESSMENT YEAR : 2004-05)

ACIT, Central Circle 22, New Delhi.	vs.	M/s. Accurate Transformers Ltd., 8, Local Shopping Centre, IIIrd Floor, Vardhman Siddharth Plaza, Savita Vihar, Delhi – 110 092.

(PAN : AAACM5903D)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : S/Shri Amit Goel & Nippun Mittal, CAs
REVENUE BY : Smt. Aparna Karna, CIT DR

Date of Hearing : 06.09.2018
Date of Order : 03.10.2018

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

Since common questions of facts and law have been raised in the aforesaid appeals, the same are being disposed off by way of consolidated order to avoid repetition of discussion.

2. The appellant, Assistant Commissioner of Income-tax, Central Circle 22, New Delhi (hereinafter referred to as 'the

Revenue') by filing the present appeals, sought to set aside the impugned orders both dated 13.02.2012 passed by Ld. CIT (Appeals)-III, New Delhi qua the assessment years 2003-04 & 2004-05 on the grounds inter alia that :-

"AY 2003-04

1. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the addition of Rs.17,12,565/- out of total addition of Rs.32,71,000/- made by the Assessing Officer on account of unaccounted income from scrap sales.

2. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in holding that the Assessing Officer was not justified in estimating speed money expenses at Rs.30,85,500/-.

3. On the facts and circumstances of the case, the CIT(A) has erred in law and on facts in deleting the addition of Rs.42,34,562/- made by the AO on account of value of transformer oil returned by the customers and not shown as closing stock.

4. On the facts and circumstances of the case, the CIT(A) has erred in law and on facts in deleting the addition of Rs.3,00,000/- made by the A.O. on account of allowance of unvouched business expenses.

AY 2003-04

1. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the addition of Rs.62,94,000/- made by the Assessing Officer on account of unaccounted income from scrap sales.

2. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in holding that the Assessing Officer was not justified in estimating speed money expenses at Rs. 46,37,000/-.

3. On the facts and circumstances of the case, the CIT(A) has erred in law and on facts in deleting the

addition of Rs. 1,00,000/- out of total addition of Rs. 4,00,000/- made by the A.O. on account of disallowance of unvouched business expenses."

ASSESSMENT YEAR 2003-04

3. Briefly stated the facts necessary for adjudication of the controversy at hand are : Search and seizure operation was conducted at the premises of Accurate Group of cases on 26.07.2006. Pursuant to the notice issued under section 153A of the Income-tax Act, 1961 (for short 'the Act') and notice u/s 142 (1) along with detailed questionnaire, assessee declared income of Rs.1,38,77,980/- for AY 2003-04 which is the same as declared by the assessee in its original return. AO noticed a scrap sale by the assessee for which it did not furnish any details of stock. From the chart provided by the assessee containing the value of the scrap sale at Rs.15,58,435/- for AY 2003-04, AO worked out the value of the scrap sale at Rs.32,71,000/- for AY 2003-04 and made addition thereof to the total income of the assessee. AO further estimated the speed money expenses @ 0.75% of Rs.41.14 crores on account of speed money which have not been booked in the books of account. However, the AO has not made any separate addition on this account as the same has been paid from the unaccounted income generated from the scrap sale but has not allowed this

expenditure u/s 37 of the Act. AO further made addition of Rs.42,34,562/- on account of sale of transformer oil of 1,70,460/- liters of Rs.42,34,562/- returned by the customers which was not taken in the sales figure. AO further made addition of Rs.3,00,000/- on failure of the assessee to prove the genuineness of the expenses.

ASSESSMENT YEAR 2004-05

4. AO made addition on account of scrap sale of Rs.62,94,000/- by way of estimation @ 1% of the total raw material consumed (i.e. 1% of Rs.62,94 crores = Rs.62,94,000/-). AO further worked out an amount of Rs.46,37,000/- @ 0.75% of Rs.61.83 crores on account of speed money paid by the assessee company on the basis of seized material showing payment of speed money @ 0.8% to 2.58% of the project value/contract value. AO further made addition of Rs.4,00,000/- on failure of the assessee to prove the genuineness of the expenses.

5. Assessee carried the matter by way of appeals before the ld. CIT (A) who has given part relief by partly allowing the appeals. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeals.

6. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and

orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

GROUND NO.1 OF
ITA No.1929/Del/2012 (AY 2003-04)

7. Undisputedly, the assessee company has been making sale of scrap which has not been reflected in the books of account. It is also not in dispute that the assessee company has declared additional undisclosed income of Rs.40,77,693/-, Rs.1,99,79,532/- and Rs.29,36,340/- for AYs 2005-06, 2006-07 & 2007-08 respectively. It is also not in dispute that the AO has made addition on account of scrap sale on the basis of estimation only by relying upon the statement of Subhash Chand Sharma. It is also not in dispute that assessee has offered an amount of Rs.15,58,345/- for AY 2003-04 on account of scrap sale for taxation out of additional declared income.

8. In AY 2003-04, ld. CIT (A) has deleted the addition of Rs.17,12,565/- out of total addition of Rs.32,71,000/- made by the AO on account of unaccounted income from scrap sale. When we examine document A-2/B-3 scrap sale pertaining to AY 2003-04 is of Rs.15,58,435/-. When it is not in dispute that incriminating material A-2/B-3 containing detail of scrap sale was seized during search and seizure operation, the AO was not permitted to resort to

estimating to make addition on account of sale of scrap @ 1% of the total raw material consumed, particularly when the assessment is being made u/s 153A of the Act. So, we are of the considered view that in AY 2003-04, ld. CIT (A) has rightly deleted the addition of Rs.17,12,565/- by confirming the remaining addition of Rs.15,58,435/-. So, ground no.1 in AY 2003-04 is determined against the Revenue.

GROUND NO.1 OF
ITA NO.1930/DEL/2012 (AY 2004-05)

9. So far as addition of Rs.62,94,000/- made by the AO and deleted by CIT (A) on account of scrap sale is concerned, AO has again estimated the scrap sale @ 1% of the total raw material consumed and the ld. CIT (A) has deleted the entire addition on the ground that since no incriminating material was found in AY 2004-05 on account of scrape sale, no such addition can be made on the basis of estimation. When we examine the additional income declared by the assessee on account of scarp sale for AYs 2004-05, 2005-06, 2006-07 and 2007-08 and further offered an amount of Rs.3,97,850/-, Rs.16,96,105/- & Rs.15,58,345/- for AYs 2001-02, 2002-03 & 2003-04 respectively, the same is on the basis of actual scrap sale made by the assessee and this fact got corroborated from the seized material. Moreover, we are of the considered view that

there cannot be a set pattern for generating the scrap sale every year as it depends upon various factors viz. quality of the raw material, use of the particular raw material etc. So, merely estimating the scrape sale on the basis of statement of Subhash Chand Sharma recorded during search and seizure operation without having any incriminating material is not permissible under law. Moreover, the assessee has brought on record variation of the scrap sale in different years by declaring the scrap sale at 2% in AY 2004-05 of material consumed as against 1% estimated by the AO. This fact goes to prove that generation of scrap sale in all the years cannot be uniform.

10. In these circumstances, we are of the considered view that in case of assessment u/s 153A/143(3) addition cannot be made merely on the basis of estimation but on the basis of incriminating material only, if any, seized during the search operation, which is undisputedly not there on the file for AY 2004-05. Reliance in this regard is placed on the decision rendered by Hon'ble jurisdictional High Court in case of ***CIT vs. Kabul Chawla - 380 ITR 173 (Del.)***. Operative part of which his reproduced below :-

> *"37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:*

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. ***Obviously an assessment has to be made under this Section only on the basis of seized material."***

v. In absence of any incriminating material, ***the completed assessment can be reiterated and the abated assessment or reassessment can be made.*** *The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.*

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. ***Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.***

vii. Completed assessments can be interfered with by the AO while making the assessment under ***Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.***

38. The present appeals concern AYs 2002-03, 2005-06 and 2006-07. On the date of the search the said assessments already stood completed. ***Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed."***

11. So, ld. CIT (A) has rightly deleted the addition for AY 2004-05 on account of scrap sale. So, ground no.1 in AY 2004-05 is determined against the Revenue.

GROUND NO.2 OF
ITA No.1929/Del/2012 (AY 2003-04) &
ITA No.1930/Del/2012 (AY 2004-05)

12. Undisputedly, there was seized material unearthed during the search showing that assessee has made payment ranging from 0.8% to 2.5% of the project value in cash as speed money/bribe and thereby evidences of speed money of Rs.10,00,000/- at many

instances. In the absence of further detail provided by assessee as to making payment of speed money to various persons shown in the seized material, AO proceeded to estimate speed money paid by the assessee @ 0.75% of Rs.41.14 crores, the sale figure of the transformers but has not made any separate addition as this amount is treated to have been paid out of unaccounted income generated from sales of scrap.

13. Ld. CIT (A) deleted the addition by providing the benefit of telescoping. However, when Annexure A-4-6 annexed with the assessment order is perused, it contains the details of various expenses and has been categorically mentioned the payment made in cash and at many places payment of Rs.10,00,000/- as speed money is shown to have been made. Assessee himself furnished a consolidated utilization chart of the group to meet expenses like business expenses, household expenses, marriage expenses, speed money/bribe expenses etc. for AY 2003-04 to the tune of Rs.2,13,43,320/- and has intentionally not preferred to give the detail of speed money paid during the years under assessment.

14. When it is not in dispute that the assessee has been making payment on account of speed money varying from 0.8% to 2.58% of the project value/contract value, the AO has rightly assessed the amount of Rs.30,85,500/- @ 0.75% of Rs.41.14 crores for AY

2003-04 and Rs.43,37,000/- @ 0.75% of Rs.61.83 crores for AY 2004-05 by treating the same to have been paid out of unaccounted income generated from scrap of sale. Since the assessee has failed to explain the availability of funds with him to explain the entries made in the seized material pertaining to the speed money so as to work out as to which of the amount pertains to a particular assessee in group cases on account of speed money, the benefit of telescoping cannot be given to it. So, in these circumstances, ld. CIT (A) has erred in reversing the order of the AO in assessing the speed money at Rs.30,85,500/- & Rs.43,37,000/- for AYs 2003-04 & 2004-05 respectively. So, the findings returned by the ld. CIT (A) on this ground are hereby reversed and findings of AO are restored. Consequently, ground no.2 for AYs 2003-04 & 2004-05 is determined in favour of the Revenue.

GROUND NO.3 OF
ITA No.1929/Del/2012 (AY 2003-04)

15. AO noticed from the Schedule to Accounts 8(c) relating to sales that transformer oil of 1,79,460 liters worth Rs.42,34,562/- has been returned by the customer during the year under assessment but has not been shown in the sales figures. On failure of the assessee to produce the documents / books of account to verify the claim, the AO made addition of Rs.42,34,562/-.

16. Undisputedly, the transformer oil of 1,79,460 liters amounting to Rs.42,34,562/- @ Rs.24.84 per liter was returned by the customers, was not taken in the figure of sales in FY 2002-03 as per audit report. It is the case of the assessee that it had actually sold transformer oil to M/s. UPPCL vide Bill Nos.668 to 676 and 740 to 749 dated 31.03.2002 which was duly accounted for the year ending 31.03.2002 but the same was not accepted by the customer and was received back by the company on 30.09.2002 and were debited against the sale related to FY 31.03.2003. So, the quantity in question was taken in stock and was consumed in regular course of business during the financial year.

17. However, to explain all these facts, the assessee has not produced stock register showing returned quantity of transformer oil and the said sale made because of the fact that due to search and seizure operation their record was scattered. Merely because of the fact that assessment for the year under consideration as completed u/s 153A / 143 (3), particularly when incriminating material was seized on the basis of which different additions were made and the fact that the assessee has itself admitted the sale and then alleged return of the transformer oil in question, the ld. CIT (A) could not have arrived at the decision to delete the addition made by the AO. However, we are of the considered view that this issue is required

to be remanded back to the AO to decide afresh on the basis of stock register and other necessary record to be produced by the assessee who shall be given adequate opportunity of being heard. So, ground no.3 of AY 2003-04 is determined in favour of the Revenue for statistical purposes.

GROUND NO.4 OF
ITA No.1929/Del/2012 (AY 2003-04) &
ITA No.1930/Del/2012 (AY 2004-05)

18. So far as question of deleting the addition of Rs.3,00,000/- by ld. CIT (A) made by the AO for AY 2003-04 is concerned, when books of accounts to corroborate with bills and vouchers to explain the business expenses have not been produced before AO, the ld. CIT (A) was not right in deleting the same. So, this issue is also required to be sent back to the AO to decide afresh after providing an opportunity of being heard to the assessee.

19. The deletion of Rs.3,00,000/- for AY 2004-05 as against the addition of Rs.4,00,000/- disallowed by the AO claimed by the assessee on account of business expenses, was made by the AO again for non-furnishing the complete details like books of accounts, bills and vouchers, so as to verify the genuineness of the expenses. However, the ld. CIT (A) has restricted the addition to Rs.1,00,000/- by taking into account the facts highlighted by AO

during framing of assessment of the assessee u/s 143 (3) on 29.12.2006, the addition of Rs.3,00,000/- was made on the admission of the assessee, and confirmed the remaining addition of Rs.1,00,000/-. Keeping in view the fact that when, as per findings returned by the AO, addition of Rs.3,00,000/- made in the assessment u/s 143 (3) was confirmed vide impugned order only remaining addition of Rs.1,00,000/- was to be explained by the assessee who has not preferred to produce the account books supported with bills and vouchers to explain the genuineness of the expenses. So, we are of the considered view that this issue also requires to be sent back to the AO to decide afresh after providing an opportunity of being heard to the assessee. So, ground no.4 in AYs 2003-04 & 20044-05 is determined in favour of the Revenue for statistical purposes.

20. Resultantly, both the appeals filed by the Revenue for AYs 2003-04 and 2004-05 are partly allowed for statistical purposes.

Order pronounced in open court on this 3rd day of October, 2018.

Sd/-	**sd/-**
(G.D. AGRAWAL)	**(KULDIP SINGH)**
PRESIDENT	**JUDICIAL MEMBER**

Dated the 3rd day of October, 2018
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Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A)-III, New Delhi.
5.CIT(ITAT), New Delhi.

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NEW DELHI.