

आयकर अपीलीय अधिकरण न्यायपीठ, नागपुर में ।
IN THE INCOME TAX APPELLATE TRIBUNAL BENCH, NAGPUR

(At e-Court, PUNE)

BEFORE SHRI D. KARUNAKARA RAO, AM
AND SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA Nos.400 & 401/NAG/2016
निर्धारण वर्ष / Assessment Year : 2009-10 & 2012-13

ACIT, Circle-3,
Nagpur.

.....अपीलार्थी / Appellant

बनाम / V/s.

Unitech Power Transmission Ltd.,
A-33, MIDC Industrial Area,
Butibori, Nagpur-441103.

PAN : AAACH4430Q

.....प्रत्यर्थी / Respondent

Revenue by	:	Smt. Agnes Thomas
Assessee by	:	Shri K. P. Dewani

सुनवाई की तारीख / Date of Hearing : 20.02.2020

घोषणा की तारीख / Date of Pronouncement : 20.02.2020

आदेश / ORDER

PER D. KARUNAKARA RAO, AM:

There are **two appeals** under consideration filed by the Revenue involving two different assessment years i.e. A.Y. 2009-10 and 2012-13. The appeal-wise adjudication is as follows.

ITA No.400/NAG/2016 – A.Y. 2009-10

2. This appeal is directed against the order of the CIT(A)-II, Nagpur dated 07.04.2016 for the assessment year 2009-10.

3. In this appeal, the grounds raised by the Revenue are as under :-

“1. On the facts and in the circumstances of the case the learned CIT(A) erred in holding that reopening of the case is not in accordance with the provisions of section 147 of the Act.

2. On the facts and in the circumstances of the case the learned CIT(A) erred in holding that reopening assessment cannot be based on material and information already available on record at the time of original assessment and can be done only on the basis of availability of new material or information.

3. On the facts and in the circumstances of the case the learned CIT(A) erred in not appreciating that while completing the original assessment the relevant issue regarding the payment of Excise Duty on deemed export sales was never raised by a specific query/dealt by the Assessing Officer therefore no opinion was formed by the Assessing Officer on the relevant issue during original assessment proceedings and as such there was no “change of opinion” on the relevant issue while contemplating proceedings.

4. On the facts and in the circumstances of the case the learned CIT(A) erred in not following the ratio laid down by the decision of the Hon’ble Supreme Court in the case of A.L.A. firm Vs CIT, (1991) 55 Taxman 497 wherein the Hon’ble Apex Court has approved the view that the statute does not require that the information must be extraneous to the record but it is enough if the material, on the basis of which the reassessment proceedings are sought to be initiated, came to the notice of the Income-tax Officer subsequent to the original assessment.

5. On the facts and in the circumstances of the case the learned CIT(A) erred in holding that the action of the Assessing Officer to disallow Rs.1,45,78,655/- by applying the provisions of Section 43B is erroneous.

6. On the facts and in the circumstances of the case the learned CIT(A) erred in not appreciating that since the assessee company has claimed that Excise duty refundable from DGFT on sale of deemed export goods is a reimbursement of the excise duty paid of Rs. 1,45,78,655/- on such good, therefore there was no actual payment of Excise duty by the assessee company on sale of deemed export goods and was thus rightly disallowable u/s 43B of the Act.

7. On the facts and in the circumstances of the case the learned CIT(A) erred in not appreciating that since the assessee company has not accounted for the Excise duty refundable from DGFT of Rs. 1,45,78,655/- on sale of deemed export goods as income from incentive or subsidy thus leading to a irrefutable conclusion that it was being set-off against the Excise duty on sale of deemed export goods.

8. Any other grounds of appeal that may be raised from time to time during the course of appellate proceedings.”

4. Briefly stated the relevant facts include that the assessee is a company and is engaged in the business of manufacture and erection of Transmission Lines and other Galvanized Steel Towers. The assessee filed the return of income declaring loss of Rs.5,94,72,322/-. The assessment was finalized u/s

143(3) of the Act. Subsequently, the case was reopened by issue of notice u/s 148 of the Act. During the reassessment proceedings, the Assessing Officer noted that the assessee was following an “exclusive method” of accounting for valuation of purchase and sale of goods and inventory i.e. purchase, sales and the inventory were being accounted on the basis of net of taxes. The Assessing Officer also noted that in Annexure XI of Form No.3CD, the assessee shown Excise Duty (ED) amounting to Rs.1,45,78,655/- vide utilization of CENVAT credit by debiting to ED Receivable Account. Further, the Assessing Officer noted that there is no requirement of actual payment or actual debit of excise duty. However, invoking the provisions of section 43B of the Act, the Assessing Officer made the addition of Rs.1,45,78,655/- on account of income receivable from DGFT/Excise Authority and added the same to the returned income of the assessee. Against the said action of the Assessing Officer, the assessee carried the matter before the CIT(A).

5. The CIT(A), after considering the written submission filed by the assessee before him, deleted the said addition of Rs.1,45,78,655/- made by the Assessing Officer u/s 43B of the Act and allowed the appeal in favour of the assessee. The contents of para 7 onwards of the order of the CIT(A) are relevant in this regard.

6. Aggrieved with the said decision of the CIT(A), the Revenue is in appeal before us with the above extracted grounds.

7. Grounds no.1 to 4 relate to the correctness of reopening of assessment. Referring to the said grounds, ld. Counsel for the assessee reiterated the submission as made before the CIT(A) and filed a written note in this regard

before the Bench. For the sake of completeness, the said written note is extracted hereunder :-

“Gr.No.1 to 5: Validity of notice u/s 148 of I.T. Act 1961.

CIT(A) Para 5 Page 3 to 6

A) In case of assessee regular assessment has been framed u/s 143(3) on 30/12/2011 determining net loss at Rs.5,89,62,760/-. The aforesaid order was modified u/s 154 on 15/10/2013 determining total loss at Rs.5,63,39,936/-. A.O. had examined complete details and determined the loss in the order passed u/s 143(3) of I.T. Act 1961.

[CIT(A) Para 5 & 5.8)

B) On 27/03/2014 notice u/s 148 is issued P- 94. Reasons recorded are at page 99 & 100. The notice u/s 148 came to be issued pursuance to audit objection raised in the case of assessee. The copy of audit objection is at page 95 and 96.

C) Perusal of reasons recorded and audit objection would indicate that the reasons have been recorded only on the basis of audit objection without there being any new tangible material to derive satisfaction for belief of escapement of income at the hands of assessee. A.O. has not even applied his independent mind to have belief of escapement of income. It is case of mere change of opinion and thus notice issued u/s 148 is not in accordance with law.

Reliance on :

i) (2018) 403 ITR 0030 (Bom.)

CIT vs. Rajan N. Aswani (P-124 to 129) (138)

ii) (2008) 298 ITR 0032 (Bom.)

IL & FS Investment Managers Ltd. vs. ITO) & Ors.

(P- 130 to 133) (130)

iii) (2013) 355 ITR 0400 (Guj.)

Jagat Jayantilal Parikh vs. DCIT

(P- 134 to 143) (134, 135)

iv) Hon'ble High Court of New Delhi order in ITA No. 1444/2018 in the case of Lalit Bagai vide order dated 21/08/2019 (P-144 to 153) (151, 153)

D) A.O. in the reasons recorded has observed that Rs. 1,45,78,655/- is not allowable expenditure u/s 43B of I.T. Act 1961. The aforesaid amount is not payable and thus there is no case for any disallowance u/s 43B of I.T. Act 1961. The reasons recorded for escapement of income are factually incorrect and thus consequent belief of escapement of income is erroneous. Thus notice u/s 148 is bad in law.

E) The CIT(A) has correctly appreciated facts on record and followed the decision of jurisdictional High Court to hold that the notice u/s 148 is bad in law.

8. On hearing both the sides on this legal issue, we find that the CIT(A) correctly relied on the Hon'ble Bombay High Court's judgement in the case of Cartini India Ltd. vs. Addl. CIT & Anr., 314 ITR 275 (Bom.-HC) where it is held that the audit note/observation cannot constitute the opinion of the Assessing Officer when it comes to the applicability of the provisions of section 148 of the Act *qua* the 'reason to belief'. The CIT(A), as per discussion given in para 5 onwards quashed the validity of the reassessment proceedings and allowed the appeal of the assessee. The contents of para 5.5 and 5.8 of the order of the CIT(A) are relevant in this regard and the same are extracted hereunder :-

"5.5 The above perspective was further reiterated in the case of Cartini India Ltd vs. Addl. CIT & Anr. (2009) 314 ITR 275 (Bom) where the Court observed that what section 147 of the Act contemplates, is the existence of material on record on the basis of which a prima facie opinion could be formed by the Assessing Officer that any income chargeable to tax has escaped assessment and not the material on record on the basis of which a final decision has already been taken at the time of assessment under section 143(3) of the Act. Reopening of the assessment based on the very same materials to take a contrary view constitutes re-opening on account of change of opinion, which is not permissible under section 147 of the Act.

.....

5.8 In the present case, the information on which the re-opening is based was before the Assessing Officer at the time of the original assessment u/s 143(3) of the Act. Thereafter no new material has come on record. Thus the assessment has been reopened on a review of the information that was already on record. In view of the facts cited above and the citations discussed in the preceding paragraphs, I am of the view that reopening of the case is not in accordance with the provisions of section 147 of the Act and is required to be cancelled. The ground challenging the reopening raised by the appellant is therefore allowed."

9. Considering the finding of the CIT(A) on this issue and perusing the judgment of the Hon'ble Bombay High Court in the case of Cartini India Ltd. (supra), we find that the order of the CIT(A) is fair and reasonable on this issue and it does not call for any interference. The said judgement of the

Hon'ble Bombay High Court (supra) is squarely applicable to the facts of this case. Accordingly, grounds no.1 to 4 raised by the Revenue are dismissed.

10. Regarding the grounds no.5 to 8, ld. Counsel for the assessee submitted that though this is a case of low tax effect being below Rs.50 lakhs, the assessment is reopened u/s 148 of the Act in view of the audit objection by RAP. As per the audit objection, the assessee maintained the Excise Duty receivable from DGFT amounting to Rs.1,45,78,655/- and the said amount attracts the provisions of section 43B of the Act. It is argued vehemently by the ld. Counsel for the assessee that such amounts are outside the scope of the said section 43B of the Act and, therefore, the relief granted by the CIT(A) is reasonable. In fact, bringing our attention to para 7.7 to 9 of the order of the CIT(A), ld. Counsel for the assessee submitted that similar issue came up for adjudication because of similar audit objection in the earlier assessment year i.e. A.Y. 2008-09 in own case and the Assessing Officer chose not to make any disallowance u/s 43B of the Act. In fact, the Assessing Officer accepted the fact that such amounts are outside the scope of section 43B of the Act. In this regard ld. Counsel for the assessee brought our attention to the contents of page 121 to 123 of the Paper Book to ascertain the position.

11. On the other hand, ld. DR for the Revenue relied on the order of the Assessing Officer.

12. On hearing both the sides and considering the order of the CIT(A) on this issue, we find it relevant to extract the contents of para 8 and 9 of the order of the CIT(A) and the same are extracted hereunder :-

"8. Interestingly the case of assessee for earlier Assessment Year 2008-2009 was also reopened on the said issue of Cenvat Credit and payment u/s

43B. The appellant filed submissions before the ld. AO and after considering the same, the reassessment order U/s 143(3) r.w.s Section 147 was passed on 30.03.2014 in which the Cenvat Credit and excise duty payment issue was accepted and not added back to the income of the appellant. Thus this specific issue has already received the attention of the ld. AO in an earlier year and after giving due consideration to the submissions of the appellant, the proposed addition u/s 43B was not made even after reopening the assessment.

9. Thus the appellant has utilized the Cenvat credit for payment of excise duty and after making compliance of payment of excise duty, the assessee has made a claim from DGFT and in such facts it is erroneous to conclude that the assessee has used the Cenvat credit for claim of excise duty receivable from DGFT. From the submissions of the appellant and the above discussion, it is clear that the appellant has only utilized the Cenvat credit for the payment of Excise duty and such the proposed action to disallow of Rs. 1,45,78,655/- by applying the provisions of Section 43B is erroneous and the same is therefore directed to be deleted.”

13. From the above, it is evident that the principle of consistency demands no addition is warranted on this issue of applicability of the provisions of section 43B of the Act in respect of the “ED receivable from the DGFT”. Whatever receivable from the DGFT, the amount is actually to be paid at the time of the purchases/imports. In this regard, the ld. Counsel for the assessee filed a written note before the Bench and the same are extracted hereunder :-

Gr.No.5 to 7 : Addition of Rs.1,45,78,655/- u/s 43B of I.T. Act 1961.

A.O. Para- 4

CIT(A) Para- 7

A) The assessee is engaged in business of manufacturing and erection of transmission line. Assessee has followed exclusive method of accounting and thus excise duty paid as well as collected is not debited in profit & loss a/c.

B) The auditor of assessee at Annexure -VI has certified that there is no impact on profitability even after considering the provisions of section 145A of I.T. Act 1961. At Annexure-VI of tax audit report (Page-48) auditor has certified the various figures of excise duty which have bearing on profitability and has certified that as to how it has no effect on assessable income at the hands of assessee. The sum of Rs. 1,45,78,655/- is explained at Sr. No. 3 & 4 as same has neither been shown as receipt nor has it been claimed as expenditure. It is also certified that excise duty is paid on sale of finished goods. In view of above there is no case for making any addition at the hands of assessee by A.O.

C) The A.O. at para 4 has accepted that the sum of Rs. 1,45,78,655/- has been paid by utilizing the CENVET credit a/c. It is thus evident that the receivable amount shown in balance sheet is already paid by assessee on

making CENVAT (Central Value Added Tax) payment at the time of making of purchases. In view of above there remains nothing which requires any consideration u/s 43B of I.T. Act 1961.

D) A.O. has observed that the amount receivable on account of excise duty from DGFT for excise duty is taxable at the hands of assessee. A.O. having concluded that it is receivable and is shown on the asset side the same can in no manner of consideration be concluded as liable be assessed to tax at the hands of assessee.

E) In Asstt. Year 2008-09 similar audit objection was raised which is placed in paper book at page 122 and 123. The regular assessment has been framed on 30/03/2014 u/s 143(3) r.w.s.147 wherein identical fact were considered and no addition was made in respect to amount receivable on account of excise duty receivable from DGFT (Director General of Foreign Trade). The facts are identical to that in Asstt. Year 2008-09 and assessment for Asstt. Year 2008-09 is framed within 3 days of issue of notice u/s 148 for the year under consideration. Assessment order is placed at page 120 to 122.

F) In Asstt. Year 2010-11 identical facts are evident from tax audit report at pages 118 to 119. After considering the same assessment is framed u/s 143(3) on 14/12/2012 and order is placed in paper book at pages 116 to 117. No addition has been made for the amount receivable from DGFT. Such assessment has achieved finality. Similar facts exist for Asstt. Year 2011-12. (Pages 112 to 115). On identical facts no addition has been made in earlier and subsequent assessment years thus there is no justification for making addition during the year under consideration.

G) The CIT(A) has correctly appreciated the factual position and directed to delete the addition at the hands of assessee."

14. Considering the above finding of the CIT(A) on this issue and also the contents of the written note of the assessee filed before us, we are of the opinion that the order of the CIT(A) is reasoned one and is fair and reasonable on this issue and it does not call for any interference. Accordingly, grounds no.5 to 7 raised by the Revenue are dismissed.

15. In the result, the appeal of the Revenue in ITA No.400/NAG/2016 is dismissed.

ITA No.401/NAG/2016 – A.Y. 2012-13

16. This appeal is filed by the Revenue against the order of the CIT(A)-II, Nagpur dated 07.04.2016 for the assessment year 2012-13.

17. Before me, at the outset, ld. counsel for the assessee submitted that the appeal of the Revenue is liable to be dismissed on account of low tax effect in terms of latest CBDT Circular No.17/2019 [F.No.279/Misc.142/2007-ITJ (Pt)] dated 08th August, 2019 read with Circular No.3 of 2018 dated 11.07.2018. The ld. Counsel for the assessee submitted that the Revenue in appeal raised grounds assailing the findings of CIT(A) in deleting the additions. Thus, the tax effect on the said additions is less than Rs.50 lakhs.

18. The ld. DR for the Revenue fairly admitted that in the present appeal by the Revenue the tax effect is less than Rs.50 lakhs.

19. Both sides heard. The Revenue is in appeal against the order of CIT(A) in deleting the additions. Undisputedly, the tax effect involved in appeal is **less than** the monetary limit prescribed by the recent CBDT Circular No.17/2019 [F.No.279/Misc.142/2007-ITJ (Pt)] dated 08th August, 2019 read with Circular No.3 of 2018 dated 11.07.2018 for filing of appeals before the Tribunal by the Department. The CBDT vide circular dated 08-08-2019 (supra) has amended Para 3 of Circular No.3 of 2018 dated 11-07-2018 thereby enhancing monetary limit of tax effect from Rs.20 Lakhs to Rs.50 Lakhs for filing of appeals by the Department before the Tribunal. Thus, without going into merit of the issues raised in the appeal, in view of the CBDT Circular (supra) the present appeal of the Revenue is dismissed on account of low tax effect.

20. Before parting, we clarify here that the Revenue shall be at liberty to approach the Tribunal for restoration of appeal, with the requisite material to

show that the appeal is protected by the exceptions prescribed in Para 10 of the Circular dated 11-07-2018 and its amendment dated 20-08-2018.

21. In the result, the appeal of the Revenue in ITA No.401/NAG/2016 is dismissed.

22. Resultantly, both the appeals of the Revenue are dismissed as above.

Order pronounced in the open Court on this 20th day of February, 2020.

Sd/-

(PARTHA SARATHI CHAUDHURY)
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(D. KARUNAKARA RAO)
लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 20th February, 2020.
Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-II, Nagpur.
4. The Pr. CIT-II, Nagpur.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,
नागपुर / DR, ITAT, Nagpur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.