आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "बी", चण्डीगढ़

IN THE INCOME TAX APPELLATE TRIBUNAL,
CHANDIGARH BENCH 'B', CHANDIGARH

श्रीमती दिवा सिंह, न्यायिक सदस्य एवं, एवं श्रीमती अन्नपूर्णा गुप्ता, लेखा सदस्य

BEFORE: SMT.DIVA SINGH, JUDICAL MEMBER
AND SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER

आयकर अपील सं./ **ITA No.959/Chd/2019**
निर्धारण वर्ष / Assessment Year : 2012-13

The D.C.I.T., Circle Mandi Gobindgarh, Hq. Sirhind.	बनाम	M/s Sahil Concast (P) Ltd., Amloh Road, Mandi Gobindgarh.
स्थायी लेखा सं./PAN NO: AAMCS2652K		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by: Shri Deepak Aggarwal, Adv.
राजस्व की ओर से/ Revenue by : Shri Ashok Khanna, Addl.CIT

सुनवाई की तारीख/Date of Hearing : 31.03.2021
उदघोषणा की तारीख/Date of Pronouncement: 06 .04.2021

(Virtual Court)

आदेश/Order

Per Annapurna Gupta, Accountant Member:

The above appeal has been preferred by the Revenue against the order of the Commissioner of Income Tax (Appeals)[in short the 'Ld.CIT(A)], Patiala dated 08.04.2019 relating to assessment year 2012-13 passed u/s 250(6)) of the Income Tax Act, 1961 (hereinafter referred to as 'Act'.

2. The solitary ground raised by the Revenue is as under:

> *"1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) is correct in deleting the addition of Rs.2,11,54,2887- made by the Assessing Officer on account of unaccounted income from unaccounted production.."*

3. On the earlier date of hearing i.e. 25.03.2021, it was contended by the Ld.Counsel for the assessee that the issue stood covered in favour of the assessee vide the order of the ITAT in the case of ITO, Ward-1 Vs. M/s Service Iron & Steel Rolling Mills in ITA No.251/Chd/2019 dated 28.02.2020. Copy of the order was placed before us. The Ld. DR fairly agreed to the same, but he was directed by the Bench to submit in writing showing how the issues are the same in both the cases and hence covered by the aforesaid decision of the ITAT in the case of M/s Service Iron & Steel Rolling Mills (supra). The submissions in writing were filed before us dated 25.03.2021, bring out the facts of the case and the basis on which the Ld.CIT(A) had adjudicated the appeal of the assessee and further stating that on similar line the appeal of the Revenue was dismissed in the case of M/s Service Iron & Steel Rolling Mills (supra). The contents of the submissions of the Ld. DR are reproduced hereunder:

"Brief note in the case of DCIT Mandi Gobindgarh vs. M/s Sahil Concast Pvt. Ltd., for A.Y. 2O12-13 in ITA No. 959/chdy2019

The assessee firm submitted the return of income for the A.Y. 2012-13 on 29.09.2012. The income returned was Rs. 63,667/-. The assessee firm manufactures MS INGOTS.

The appellant firm was one of the many manufacturers of steel and similar industries in the Mandi Gobindgarh and surroundings region which were investigated with regards to alleged undisclosed production based in part on the inconsistent consumption electricity qua the unit production of finished goods.

During the course of the assessment proceedings the A.O. analyzed the specific production process of the appellant and the issue of alleged unaccounted production (para4 of the assessment order) and his findings regarding the production process are summarized as under:

i. *The process involves heating of raw material and passing the same through various rollers to get final finished goods that may vary as per requirement of sizes/sections.*

ii. *Power utilization is directly proportional to the production.*

iii. *To make finer sizes/sections more power per metric ton (PMT) is used.*

The A.O. has further sought to establish that the production of finished goods is directly proportional to the units of electricity consumed. In order to co-relate the consumption of electricity vis-a-vis the production shown, the A.O. collected the granular data regarding metered electricity consumption from the Electricity Board. It was observed that the average consumptions of electricity PMT production of finished goods varies from 108.13 units to 2964.33 units while the average for the entire year is 310.64 units/pmt. The A.O. observed that there were days, when electric units consumed were very low whereas firm finished goods produced were very high, giving a very low value of units consumed per ton of finished goods and on some days electric units consumed were very high whereas finished goods produced were low, giving very high value of electric units consumed *per unit of finished goods. Further, there are certain days when there is high consumption of electricity, but no production of finished goods as has been reported as per the production records. He observed that the firm was involved in unaccounted production of finished goods which resulted in unaccounted purchase and sale.*

The A.O. went on the reject the books of account u/s 145(3) of the Act holding that he was not satisfied with the correctness of the books of account of the appellant for determination of the profit of the business for the reasons detailed in the assessment order. The A.O., thereafter, adopted the value of electricity consumed pint, on the basis of minimum average value for a period of 10 days assuming that within a period of 10 days various types of raw materials would have been used and other factors contributing to the variation in consumption of electricity PMT of finished goods would have been taken care of. Thereafter, on the basis of average sales rate total unaccountedproduction of Rs. 18556408.08/- was estimated in monetary terms and then adopting the gross profit rate shown by the appellant, the unaccounted profit of out of the unaccounted production was worked out as Rs. 2597880.00/-.

During the course of appellate proceedings, the CIT (Appeals) after considering the submissions of the appellant, the remand report and counter comments and considering the same observed that the AR's reworking of annexure E demonstrating lowest SPC of 916.269 units inspires more confidence and is more scientific as the A.O's. benchmarked period of 19.10.2011 to 29.10.2011 includes non-production days also. <u>That the reworked SPC (Annexure E) shows no variation in excess of 15% is a matter of record and the Ld. A.O. has not refuted the same during remand proceedings.</u>

Further, based on the A.O. response in the remand report and the appellant's submission that the variation of the appellant's production falls within the safe harbor of the Expert Committee's report referred to supra of 15% as per the reworked Annexures E which is predicated on scientific working rather than the unreliable working of the A.O., the CIT (Appeals) concluded that the appellant does not breach the 15% safe harbor. It was further observed that in the case, the variation in power consumption, as has been discussed cannot be treated as being in excess of the 15% window mentioned supra. In contra to the above, there are *arguments that the statistical benchmark of 15% is arbitrary and that a sustained variation of 14% may be a greater risk to revenue that above 15% days for a limited number of days during an assessment year. Further, it may also be argued that such a statistical model punishes those who report a higher GP against those who under report. Alternately unmetered power consumption is also a reality in this country while these arguments do merit attentions in general; the impugned appeal has to be decided based on the precedents and facts. Keeping in view the entire set of discussion above, it was concluded that in the instant case the power variation cannot be taken as being in excess of 15% for any period.*

In view of the above observation the CIT(A) allowed the appeal of the assessee firm holding that variation in power consumption was within the window of 15% as fixed by the Expert Committee.

On similar lines the appeal of the Revenue was dismissed in the case referred by the assessee viz-a-viz ITA No. 251/chd/2019 in ITO Ward-1, Mandi Gaobindgarh vs. M/s Service Iron & Steel Processing Mills, Mandi Gohindgarh for A.Y. 2011-12, by the Hon'ble Bench vide its order dated 28.02.2020 (copy enclosed for reference).”

4. Both the parties were so heard and submissions made the Ld. DR also gone through as also the order of the ITAT in the case of M/s Service Iron & Steel Rolling Mills (supra).

5. The issue, we find, in the present appeal pertains to the addition made on account of unaccounted income from unaccounted production, which was deleted by the Ld.CIT(A). The assessee, we have noted from the facts recorded in the orders of the lower authorities, was a manufacturer of steel and one among many such industries in Mandi Gobindgarh which had been investigated with regards to alleged

undisclosed production, based in part on the inconsistent consumption of electricity qua the unit production of finished goods. During the assessment proceedings the AO had analyzed the production of the assessee and had found that the process involved heating of raw material, passing the same through various rollers to get finished goods and that the production of the final product was in direct proportion of the power consumed. The AO collected the granular data regarding metered electricity consumed from the Electricity Board and analyzed this data with the quantity in metric tons from finished goods produced on a given day, arriving thus at the per metric ton of electricity consumed with regard to the finished goods produced on that particular day, as per the production records of the assessee. This analysis data is reproduced in five reports which form part of the assessment order, as Annexure A to E. From the same, the AO found that the average consumption of electricity per MT of finished goods produced varied from 108.13 units to 2964.33 units while the average for the entire year was 310.64 units per MT. He further noted from the data collected that there was wide variation in the consumption of electricity per MT of finished goods produced, with some dates showing very low consumption of electricity against high production of finished goods, while other days showing just the reverse i.e. from high consumption of electricity against very low production of finished goods. The AO also noted that there were days showing high consumption of electricity and no production of finished goods. The aforestated anomalies were brought to the notice of the assessee and his explanation sought for the same. Due reply was filed by the assessee contending the variation to be on account of assessee using low grade technology, using different types and qualities of raw material, using a manual plant, breakdown of machinery, frequent power failure, etc. The AO rebutted the contentions of the assessee and thereafter went on to reject the books of account of the assessee u/s 145(3) of the Act holding that he was not satisfied with the correctness of the books of account of the assessee for determination of the profit of the business. He thereafter proceeded to calculate the production actually done by the assessee during the year by first working out the average consumption of electricity per MT, on the basis of minimum average value for a period of 10 days and on the said basis he estimated the unaccounted production. The AO estimated the finished goods produced and thereafter estimated the unaccounted production for each month after deducting finished goods produced during the months as reflected in the books of account. Applying the average sales rate in so calculated unaccounted production, the AO estimated the unaccounted sales at Rs.1,85,56,408/-. Adopting the gross rate shown by the assessee he thereafter worked out the unaccounted profit earned by the assessee from the unaccounted production at Rs.25,97,880/- making addition of the same to the income of the assessee.

6. The matter was carried in appeal before the Ld.CIT(A), who noted the fact that a number of units with the similar manufacturing process as the assessee had been subjected to investigation and that detailed study had been conducted by a Committee constituted by the Principal Commissioner of Income Tax, Patiala, to determine the legitimate variation in the consumption vis-à-vis the production of finished goods in rolling mills and induction furnaces of the area. The Ld.CIT(A) noted that the Committee was a broad-based multi member body with the Addl.CIT, Range Mandi Gobindgarh as its head and all the AOs of the range as its members. He noted that the Committee was assisted by experts from National Institute of Secondary Steel Technology and industries representatives. The Ld.CIT(A) accessed the report of the Committee from the Addl.CIT, Range Mandi Gobindgarh and noted from the same that the Committee had decided to give benefit of 15% variation

in consumption of electricity per MT of finished goods produced from the average worked out on yearly basis. He noted that this 15% variation in power consumption per MT of finished goods was the industrial norm warranting no adverse cognizance and, therefore, any variation within this range did not warrant rejection of books of account. He noted that the AOs had followed this norm while making assessments in similar cases and in similar set of circumstances and accepted the book results where the variation was within 15% window.

7. Before the Ld.CIT(A), the assessee filed detailed submissions and contended therein that variation of electricity in its case was within 15% range recommended by the Committee. The submissions of the assessee were forwarded to the AO seeking his comments on the same which were duly submitted and on which the counter comments of the assessee were also sought. After considering all the above, the Ld.CIT(A) noted several discrepancies in the working of the AO vis-à-vis power consumption per MT and averages so calculated and found that the assessee's reworking of the same inspired more confidence and was more scientific. He further noted that the re-worked data showed no variation in excess of 15%. Accordingly, considering the report of the Committee and the

facts before him, he held that there was no possibility of any unaccounted production in the case of the assessee since his power consumption data per Mt fell within the prescribed norms of the Committee. Accordingly, he deleted the addition made by the AO. Detailed findings of the CIT(A) holding so are as under:

> ***"Discussion & Determination***
>
> *The Ld. AO has placed considerable reliance on the judgement of the apex court in the case of Melton India vs. Commissioner of Trade of Tax (UP) Appeal No. (Civil) 373 of 2007 (SC) cited supra. A discussion of the case would be in order*
>
> *In line with the appellant's submission in this case, in the Melton case the concerned appellant has argued that power consumption for different end products/raw material were different. The concerned appellant:*
>
> > *explained that during the period in question it had switched over from production of 23 micron goods to production of 12 micron goods. According to it, electricity consumption in the manufacturing of 23 micron goods was less than that in manufacturing 12 micron goods. It was explained that the appellant was now manufacturing goods of 12 micron, which requires more electricity consumption as compared to the goods of 23 micron as the length of 12 micron is more than the length of 23 micron. The weight of 23 micron is 33 gm. per sq. meter, whereas the weight of 12 micron is almost half i.e. 17 gram per sq. meter, and therefore to manufacture 1 kg. goods of 12 micron the consumption of electricity is almost double than the consumption of electricity for manufacture of 1 kg. of 23 micron.*
>
> *The Hon'ble Apex did not accept the contention of the applicant and stated as under:*

> *Ordinarily, when electricity consumption goes up, a reasonable inference can be drawn that the production will also have gone up. If the electricity consumption is going up but the production is seen to be going down, a reasonable inference can, prima facie, be drawn that there was suppression of production and consequently suppression of sales in order to avoid sales tax. The appellant also had not maintained separate accounts for its own manufacturing and the job work, and it could not inform which raw materials have been used in the manufacturing of job work and which goods have been used on the assessee's own manufacturing.*

In view of the above, we agree with the High Court that excessive power consumption, prima fade, establishes the assessee's intention to suppress the production and the turn over.

Under such circumstances A.O. may proceed under Section 145(3) under any of the following circumstances:

(a) *Where he is not satisfied about the correctness or completeness of the accounts*

(b) *Where method of accounting cash or mercantile has not been regularly followed by the assessee*
(c) *Accounting Standards as notified by the Central Government have not been regularly followed by the assessee.*

Hon'ble Madras High Court in the case of Alagappa Cement Pvt. Ltd. Vs. CEGAT & CCE, Trichy 2010-TIOL-770-HC-MAD-CX) has held that the Revenue cannot be faulted for demanding duty on the steel ingots which could have been manufactured by consuming excess quantity of electricity.

While the Ld. AO has sought to establish that the day to day records of production quality and size wise were not maintained or produced. Cases where day-to-day manufacturing or production account is not maintained can be regarded as fit cases for rejection of books of accounts. Such a stand is supported by the following judicial precedent

i. *The decision of the Hon'ble Allahabad High Court Bharat Milk Products*

ii. *Commissioner of Income Tax 128 ITR 682, Allahabad; and*

ii. *Punjab Trading Co. Ltd v. CIT 53 FTR 335 Punjab;*

The Ld. AO has while making the estimation used the benchmark of the minimum value of the average of electric units consumed per metric tons of finished goods over a period of 10 days and the lowest average value of electric units consumed per metric tons for evaluating the unaccounted production and taking average stock holding thereafter the suppression of income. That the Ld AO has taken the benchmark as the average units at 897.82 units per metric tonne based on the period from 19.10.2011 to 29.10.2011, as per the books of accounts of the appellant and also the benchmarked the GP at 3.79% is a matter of record and not in dispute. That the Ld. AO has worked out the Power consumption of electric units per metric ton of finished goods produced over a period of 10 for the period 19.10.2011 to 29.10.2011 at 897.82 in Annexure-E is a matter of record of record and not in dispute.

That the average production so arrived is near uniform and within the safe harbor of 15% is also matter of record and not in dispute. The Ld AO's, adopting the minimum average of 897.82 relating to the 19.10.2011 to 29.10.2011 period is in my considered view not scientific. That as per annexure E too, only five cycles of 10 days each go outside 15 % bench mark out of 35 production cycles is also matter of record and not in dispute. That the Ld. AO has given an allowance of 9.45 units/ day non-manufacturing load is a matter of record. It is my considered view that with non-production electric load of 200 kw, the allowance is not based on scientific estimation. That during the period 24/12/2011 to 02/01/2012 the minimum SPS was 916.269 units and therefore the scientific basis of the AO calculation is subject to questioning.

That there are a number of inconsistencies between the units consumed as given in Annexure C and Annexure of the Assessment Order is amply demonstrated by the Ld. AR.

There is considerable merit in the Ld. AR's submission that data in annexure E and annexure B, C and D are predicated upon alternate readings/ different footing and there is more than one version of statistical information and truth which the Ld. AO has failed to reconcile. That the Ld. AO has while determining Annexure E taken cognizance of non-production days thereby distorting the comparables is in my considered view amply demonstrated by the Ld. AR. The Ld. ARs reworking of the Annexure E demonstrating a lowest SPC of 916.269 units inspires more confidence and is more scientific as the Ld. AO's benchmarked period of 19/10/2011 to 29/10/2011includes *non-production days. That the reworked SPC (Annexure E) shows no variation in excess of 15% is a matter of record and the Ld. AO has not refuted the same during Remand proceedings.*

This is with reference to the captioned appeal wherein the Ld. Assessing Officer in response to appellant submission regarding Average SPC and other discrepancies in order, as per its letter F No/ JTO/ Ward-l/Mgg/2018-19/115 dt 15/05/2018 has stated as under:-

"2. In this regard, the assessee has contended that the variation was within 15% from the annual average of consumption of electricity for production of per metric tonne of goods. However, it has been verified from the record that the yearly average comes to 1019.10 units whereas the highest average per cycle of 10 days as per annexure E was 1250,43 units and lowest 897.82 units. As such, the variation is more than 15% of the yearly average."

The total electricity consumption for manufacturing purposes as stated by Assessing Officer in his order was 14542490 units and the finished goods product/on this year was 14293.62 units. From the above report it is very much clear that the Id. Assessing officer has offered no comments :-

4. *Regarding inclusion of non production days i.e. 17.10.2011to21.10.2011 in annexure E which is taken as base for calculation of SPC and unrecorded production. If the Id. Assessing officer has consider these days in calculating the production cycle of 10 days, the result will change automatically so the annexure E relied upon by the assessing officer is unreliable. The Id, Assessing officer has failed to comment on new annexure E submitted so its authenticity stand established. Hence the addition made by the assessing officer has become factually incorrect.*

5. *The Id. Assessing over has taken average of 1019.10 units per metric tonne of goods whereas average unit consumption comes to 1017.41 units. So the calculation given by the assessing officer is not factually incorrect Hence can not be relied upon in the matter.*

6. *The Id. Assessing officer has failed to comment on appellant observation that gp rate addition in absence*

of comparable cases or enquiry is not hold good Hence to be deleted.

As per guidelines of the committee constituted by Chief Commissioner of Income Tax, Chandigarh, We have submitted that average SPC should be taken at average of highest SPC and Lowest SPC as contained in annexure -E, The calculation comes to as under-

The minimum spc as per new annexure E comes to 933.569 units and maximum spc comes to 1250.425 units. Average SPc i.e average of two values comes to 1091.997 units. The calculation is as under:-

Min. SPC 933,569 units
Max. SPC 1250,425 units

Average SPC 2183.994/2 =1091.997 units

Leverage as per CCIT committee 15%

Maximum acceptable level 1091.997+15% =1255.80 units

Minimum acceptable level 1091.997-15% =928.19 units

In various appeals/assessment this formula has applied. Hence in this way no cycle is outside acceptable level hence no adverse view should be taken in the matter.

So in this way the observations given by the assessing officer is factually incorrect Hence can not be a base to reject books of accounts under section 145(3) of the act and to estimate income of the appellant company so it is requested that the assessee has shown genuine profits in this books, so no Gross Profit addition in the absence of any comparable cases or enquiry by the assessing officer, no addition on should be made.

In the instant case it is my considered view based on the Ld. AO response in the remand report and the appellant's submission that the variation of the appellant's production falls within the safe harbour of the Expert Committee's report referred to supra of 15% as per the reworked Annexure E which is predicated on scientific workings rather than the unreliable working of the Ld. AO. It is my considered view that the appellant does not breach the 15% safe harbour.

That Electricity is an important factor of production is in the manufacturing process of the appellant is established beyond a *shred of doubt. Further the Appellant having a significant turnover and getting his books audited was subject to maintaining production records adequate to the business of the appellant and that the Auditor was required to give findings related on the same. In addition, the Profit and loss accounts of the appellant are derived from the primary production registers. In the event the production registers do not inspire confidence and veracity of the books gets dented. The principle stated above has been upheld by the Hon'ble Supreme Court in the case of Melton India vs. Commissioner of Trade of Tax (UP) Appeal No. (Civil) 373 of 2007 (SC) and Kanchwala Gems vs. JCIT 288 ITR 10 (SC) and followed by the jurisdictional High court Sh. Ganpati Embroidery Pvt. Ltd. vs. CIT 16 DTR (P & H).*

However, in the instant case, the variation in power consumption, as has been discussed cannot be treated as being in excess of the 15% window mentioned supra. In contra to the above, there are arguments that the statistical benchmark of 15% is arbitrary and that a sustained variation of 14% may be a greater risk to revenue that above 15% days for a limited number of days during an assessment year. Further, it may also be argued that such a statistical model punishes those who report a higher GP against those who under report. Alternately unmetered power consumption is also a reality in this country while these arguments do merit attention in general; the impugned appeal has to be decided based on the precedents and facts. Keeping in view the entire set of discussion above it is my considered view that in the instant case the power variation cannot be taken as being in excess of 15% for any period. The appeal on this ground of appeal is allowed."

8. The Ld. DR has fairly admitted before us that identical issue has been considered by the ITAT in the case of M/s Service Iron & Steel Rolling Mills (supra) and adjudicated in favour of the assessee. We have also gone through the aforesaid order of the ITAT and find that the issue in the Revenues appeal in that case also, before the ITAT was identical. The assessee in the said case was in the identical business of manufacturing Iron and Steel goods and identical addition of unaccounted profits from unaccounted production calculated

from average PMT electricity consumed had been made in its case also. In the said case also, we find, that the Ld.CIT(A) had deleted the addition noting the report of the Committee specially formed for studying average variation in electricity consumption in similar mills of the Mandi Gobindgarh region ,accepting 15% as acceptable variation. That the Ld.CIT(A) had noted from the facts of the said case that the variation fell within the range so prescribed by the Committee and accordingly deleted the addition made by the AO. The said order of the Ld.CIT(A), we find was upheld by the ITAT, finding it well reasoned.

9. In the present appeal also, we have noted that the Ld.CIT(A) ,after noting the fact that the data submitted by the assessee regarding consumption of electricity and PMT production of finished goods therefrom was more reliable as opposed to that of the AO, went on to find therefrom that the variation in electricity consumption PMT of goods produced by the assessee fell within the acceptable 15% range. The Ld. DR has not controverted the aforestated findings of fact recorded by the Ld.CIT(A). The issue stands squarely covered therefore in favour of the assessee by the order of the ITAT in the case of M/s Service Iron & Steel Rolling Mills (supra).

10. Following the same therefore, We see no reason to interfere in the well-reasoned order of the Ld.CIT(A), and uphold the same.

Accordingly, the ground raised by the Revenue is dismissed.

11. In the result, the appeal of the Revenue is dismissed.

Order pronounced on 06.04.2021.

Sd/-	Sd/-
(DIVA SINGH)	**(ANNAPURNA GUPTA)**
न्यायिक सदस्य/ Judicial Member	**लेखा सदस्य/ Accountant Member**

Dated: 6th April, 2021
रती

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar