IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "SMC", MUMBAI

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.1125/M/2022
Assessment Year: 2008-09

Shri Amin Badruddin Keshwani, 2E/32, Taximen Colony, LBS Marg, Kurla West, Mumbai – 400 070 **PAN: AACPK2269F**	Vs.	Commissioner of Income Tax (Appeal), National Faceless Appeal Centre, New Delhi
(Appellant)		(Respondent)

Present for:
Assessee by : Shri P. Daniel, A.R.
Revenue by : Shri Anil Gupta, D.R.

Date of Hearing : 26 . 09 . 2022
Date of Pronouncement : 31 . 10 . 2022

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, Shri Amin Badruddin Keshwani (hereinafter referred to as 'the assessee') by filing the present appeal, sought to set aside the impugned order dated 27.03.2022 passed by the National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] qua the assessment year 2008-09 on the grounds inter-alia that :-

> ***"1) The Learned CIT (A) NFAC erred in confirming the initiation of reopening proceedings u/s. 147 of the I.T. Act, 1961.***
>
> ***2) The Learned A.O. erred in reopening an assessment after 4 years for the purpose of estimating the Production, Sales and Net Profit on assumptions, presumptions, surmises and conjectures.***
>
> ***3) The Learned A.O. & CIT (A) erred in estimating the income at Rs.***

5,45,497/- as against the income declared at Rs. 1,46,242/- on the basis of estimate of production on the basis of consumption of electricity which is not a valid method to arrive at a concealed income. "

4) The Learned A.O. and CIT(A), NFAC, erred in estimating the production at 2.5 kgs per unit of electricity consumption without any valid or cogent reasons whatsoever.

5) The Learned A.O. erred in basing his estimate of production on the basis of advertisements to boost the sale of their machines without having any basis whatsoever.

6) The Learned CIT(A), NFAC erred in not considering the various submissions and the past appellate orders from 2000-01 to 2005-06 where the assessment orders are cancelled by the Learned CIT(A)/Tribunal.

7) The Learned A.O. erred in charging interest u/s. 234B and 234C and u/s. 234D of the Income Tax Act, 1961.

It is prayed that the assessment may please be cancelled or in the alternative the additions be deleted.

The appellant craves leave to adduce, add, amend, alter, and/or delete any of the above grounds of appeal before or at the time of hearing of this appeal."

2. Assessee sought to raise additional grounds by moving an application on the grounds inter alia that though the assessee has challenged the assessment order in ground No.1 of the appeal, but out of abandoned caution assessee is raising specific legal ground challenging the reopening by the AO under section 147 of the Income Tax Act, 1961 (for short 'the Act') and; that without the rejection of books of accounts under section 145 of the Act no addition of income could be made to the book result as under:

"1. The Ld. CIT(A) has erred in law and in facts in not appreciating that the assessment re-opened u/s. 147 of the Act was invalid and bad in law, as there was no incriminating material and ought not to have reopened for estimating a higher income.

2. The Learned C1T(A) erred in law and in facts in not appreciating the fact that without rejection of Books of Accounts u/s. 145 no addition of income could be made to the Book results..

The appellant craves leave to add, amend, alter and or delete any of the above grounds of appeal before or at the time of hearing of this appeal."

3. Keeping in view the settled principle of law that legal ground can be raised at any stage of the proceedings which requires no evidence to be laid by the assessee and as such to decide the issue in controversy once for all assessee is allowed to raise additional grounds.

4. Briefly stated facts necessary for adjudication of the issues at hand are: assessee is a proprietor of M/s. Power Back and Conductor engaged in manufacturing of steel wool. On the basis of information received from Electricity Authorities vide letter V&S/ENF/874 dated 18.03.2006 that the assessee had consumed 37.3 units of electricity per hour in his factory out of which steel wool making machine consumed 29.84 units electricity per hour i.e. 80% of the total consumption of 37.3 units per hour. On the basis of aforesaid information "reason for reopening" was recorded and proceedings under section 147/148 of the Act were initiated. Vide notice issued under section 142(1) of the Act necessary detail was called which the assessee has filed. Rejecting the contentions raised by the assessee in its submissions Assessing Officer (AO) proceeded to estimate the turnover and profit ratio thereon to the tune of 8.11% on the ground that assessee's total consumption of electricity for the year under assessment was 61147 units out of which 80% units is towards manufacturing process as per letter issued by electricity authorities (supra), which comes to 48,918 units. Taking the production @ 2.5 Kg per unit of electricity consumption is 122295 Kg, sales @ 55 per Kg works out to Rs.67,26,225/-. The AO thereby applied the profit ratio of 8.11%

which comes to Rs.5,45,497/- as against the net profit shown by the assessee at Rs.1,46,242/- and thereby the AO made the addition of Rs.3,99,255/- to the total income of the assessee.

5. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the addition by dismissing the assessee's appeal. Feeling aggrieved, assessee has come up before the Tribunal by way of filing present appeal.

6. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

7. Since assessee has challenged reopening by the AO under section 147/148 of the Act we proceed to decide the additional ground first raised by the assessee.

8. Undisputedly, the AO has merely estimated the income of the assessee at Rs.5,45,497/- as against the income declared at Rs.1,46,242/- on the basis of consumption of electricity. It is also not in dispute that initial assessment for the year under consideration was made under section 143(1) of the Act. It is also not in dispute that the reopening has been made on the basis of letter (supra) issued by electricity department that "the assessee has consumed 37.3 units electricity per hour in his factory out of which assessee's steel wool making machine consumed 29.84 units of electricity per hour i.e. 80% of total consumption of 37.3 units per hour". AO reopened the assessment by estimating the production

of the assessee @ 2.5 Kg per unit of electricity consumption and taken the same @ 55 per Kg as declared by the assessee and computed the turnover @ Rs.67,26,225/- and then estimated the net profit @ 8.1%.

9. In the backdrop of the aforesaid facts and circumstances of the case the Ld. A.R. for the assessee contended that there was no "tangible material" whatsoever with the AO to reopen the assessment, though, framed under section 143(1) of the Act.

10. The Ld. A.R. for the assessee challenging the reopening under section 147/148 of the Act contended that no "tangible material" was there before the AO to reopen the assessment and the letter issued by electricity department intimating the consumption of electricity units per hour is not a tangible material in any case and; that the AO proceeded to make reassessment merely on the basis of letter issued by the electricity department and relied upon the decision rendered by Hon'ble Bombay High Court in case of Indivest Pte Ltd. vs. Addl. DIT & ors. (2013) 350 ITR 120 (Bom), decision rendered by Hon'ble Delhi High Court in case of CIT vs. Orient Craft Ltd. (2013) 354 ITR 536 (Delhi) and the decision rendered by the co-ordinate Bench of the Tribunal in case of Power Pack Conductors vs. ITO in ITA Nos.7900 & 7901/Mum/2010 for A.Y. 2000-01 & 2001-02 order dated 3.03.20211.

11. Hon'ble Delhi High Court decided the identical issue in case of Orient Craft Ltd. (supra) wherein it is held that "it is open to the assessee to contend that notwithstanding that the argument of "change of opinion" is not available to him, it would still be open to him to contest the reopening on the ground that there was either "no

reason to believe" or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. Because expression "reason to believe" cannot have two different standards or sets of meaning, one applicable where the assessment made under section 143(3) of the Act.

12. So in this case also no doubt assessment was framed under section 143(1) of the Act but assessee has a right to challenge the reopening because of "change of opinion" as there was no reason whatsoever with the AO except the letter issued by the electricity department which was not relevant for confirmation of the belief. The AO has not taken into account while disposing of the objections filed by the assessee to the reopening under section 147/148 of the Act the facts explained by the assessee that consumption of electricity units and production thereafter is based upon numerous factors like assembled as well as branded machinery, nature of the raw material used and that estimation of the net profit cannot be made except by rejecting the books of account under section 145 of the Act.

13. Co-ordinate Bench of the Tribunal while deciding the identical issue of reopening on the basis of information received from Director Vigilance (Income Tax) in case of Power Pack Conductors (supra) that there is a theft of electricity by the assessee and some other persons and proceeded to hold that "the very reason for which the assessment was reopened did not actually being a role in estimating the income as finally assessed". So the production of the assessee cannot be estimated merely on the basis of intimation sent by the electricity department that assessee has consumed 37.3

units of electricity per hour in his factory nor which can be valid reason to believe to reopen the assessment.

14. Since the AO was not having any valid reason to reopen the assessment nor any intangible material was there, further estimating the income by merely calculating the production of the assessee on the basis of guess work is not sustainable on merits also. Because assessee's contentions which are sustainable that a locally assembled machine, which the assessee has been using consumes more electricity than the branded one. The AO has also not made any comparison with the assessee's own productions in the earlier years to arrive at the logical conclusion. Even in earlier years for A.Y. 2002-03, 2003-04 and 2005-06 the Ld. CIT(A) himself quashed the reopening which were made on the basis of information received from Maharashtra State Electricity Board that the assessee is involved in theft of electricity.

15. In view of what has been discussed above, very initiation of reopening in this case is not sustainable in the eyes of law, hence same is quashed and the addition made by the AO is also not sustainable on merits, hence ordered to be deleted.

Order pronounced in the open court on 31.10.2022.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 31.10.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.