

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI**

**Before Sh. Saktijit Dey, Vice President
Dr. B. R. R. Kumar, Accountant Member**

ITA No. 2060/Del/2023 : Asstt. Year: 2020-21

GSR Industries, 1870188-189, NSEZ, Dadri Road, Phase-2, Noida (APPELLANT)	Vs	DDIT, International Taxation, Noida (RESPONDENT)
PAN No. AAJFG0729P		

**Assessee by : Sh. Prakash. K. Sinha, Adv. &
Sh. Kartik Garg, Adv.
Revenue by : Sh. Vizay B. Vasanta, CIT-DR**

Date of Hearing: 03.10.2023	Date of Pronouncement: 26.12.2023
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by assessee against the order dated 21.06.2023 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

"1. Because the whole assessment proceedings were nullity as it didn't comply the provision of section 144C. The provision of 144C mandates that the draft assessment order under section 144C (1) should be issued to the "eligible assessee" and the meaning of the term eligible assessee is defined under section 144C(15). As per the clause (b) of the section 144(15), the eligible assessee means:

"(i) any person in whose care the variation referred to in sub-section (1) arises as a consequence of the

order of the Transfer Pricing Officer passed under subsection (3) of section 92CA: and

(ii) any non-resident not being a company, or any foreign company."

Therefore, the variation referred in subsection (1) of 144C should arise as a consequence of the order passed by the Transfer Pricing Officer under section 92CA (3) and the assessee should be a non-resident. Therefore, both the conditions are cumulative and are mandatory to be covered under the term "eligible assessee". In our case, there was no order of the TPO in terms of section 92CA(3). The Ld. AO neither referred the matter to the TPO nor made any adverse comment on the benchmarking of the international transaction with the AE on cost plus 15% as submitted by the appellant assessee through TP report and other various submissions.

2. Because the impugned assessment order passed by the Ld. AO time barred and beyond the limitation as per section 153(1). This provision 153(1) mandates that the assessment order under section 143 should be passed within 18 months from the end of the assessment year. Since this matter was not referred to the TPO in of section 92CA, therefore the extension of 12 months will not be available the revenue. Therefore, the assessment order under 143 should have been passed by 30.06 2022. However, the Ld. AO has passed the draft assessment on 30.06.2022 and not the assessment order under 143.

The Madras High Court in the case of CIT. v. Roca Bathroom Products P. Ltd as reported in 445 ITR 537 has held that the limitation under section 153(1) is mandatory and includes the final assessment order passed under section 143(3) WS 144C (13). The period of limitation is qua the final assessment under section 143 and not the draft assessment order in terms of section 144C (1).

3. Because the impugned assessment order dated 21.06.2023 is perverse as the Ld. AO as well as the

Ld. DRP, both didn't appreciate the evidence of the transaction of credit note issued by the assessee and corresponding adjustment made by the AE. The allegation that the credit note was afterthought is baseless as the credit note was duly accounted in the sales for the purpose of benchmarking, the corresponding adjustment was made by the AE, and furthermore benchmarking was duly accepted by the Ld. AO. The assessment order is further perverse. Ld 40 erred in appreciating those documents which were neither relied by the assessee, nor accounted in the sales ledger nor the effect was not given in the revenue figure of audited financial statement.

4. Because the Ld. AO and subsequently Ld. DRP both erred in not appreciating that once the transaction has been benchmarked at the arm length and no adverse finding was there, then no further addition can be done, and no further attribution can be made. The Ld AO and subsequently Ld DRP both erred in not appreciating the judgment of Supreme Court in the case of DIT (International Taxation) Vs Morgan Stanley as reported in 292 ITR 416(SC).

5. Because the Ld. AO and subsequently Ld. DRP both erred in not appreciating the fact that the assessee has consistently benchmarked its international traction with the cost plus 15% markup and it has been consistently accepted by the department during the assessment procedure and has passed the assessment order u/s 143(3). The Ld. AO erred in not appreciating that issuance of credit note/debit note was a regular year end feature of the assessee to achieve such benchmarking of mark-up. Once such transaction is held to be at ALP, no further addition /attribution can be made to the assessee income.

6. Because the Ld. AO and subsequently Ld. DRP both erred in not appreciating the real income theory. Once the assessee has entered an arrangement with the AE under cost plus 15% benchmarking and that has not been disputed, the AO attempted to tax the hypothetical income of Rs 94,00,617 which never accrued to the assessee.

7. Because the Ld. AO and subsequently Ld. DRP both erred in not appreciating that the credit note adjustment was for the purpose of benchmarking of the international transaction with the AE under the Income Tax laws and has nothing to do with the GST. The basis of GST returns is as per the GST law and not as per the Transfer pricing provisions of Income tax. Once the assessee has complied the TP provisions for the purpose of benchmarking the international transaction and recognized the revenue accordingly, there was no occasion for the Ld AO to rely on the GST return figure without appreciating the different basis of reporting under different law.

8. Because the Ld. AO and subsequently Ld. DRP both, has erred in not appreciating that the all the inward and outward entry in the SEZ Area must pass through the checking of another wing of Ministry of Revenue i.e., custom department and the SEZ authority. Almost all the invoices were entered in the customs gate and after that only it comes to the premises of the assessee. Not appreciating the above facts and relying on the irrelevant material without giving the opportunity to controvert makes the order perverse and devoid of Natural justice.

9. Because the Ld. AO has erred in not issuing the 133(6) notices to the customs and SEZ authorities to verify the entry of the material at the SEZ area rather than issued 133(6) notices to the small vendors, who were not familiar with the income tax proceedings and could not reply to that notice. Because the Ld. AO erred in not appreciating that non-reply of 133(6) notices cannot lead to disallowance of any expenses. The AO could have further probed it and notice could have been issued to customs department or the SEZ authority to have more reliable evidence.

10. Because the Ld. AO and subsequently Ld. DRP both erred in not appreciating that the evidence submitted by the assessee for the purchase transaction. The appellant assessee submitted the Invoice copy with the stamping of the Custom department and SEZ department, the ledger and

online payment statement to justify the disallowances along with PAN and address detail. However, the Ld. AO erred in not appreciating the primary & direct evidence and rather undue reliance was placed on the issue of non-reverting of 133(6) notices by small vendors.”

3. After hearing the arguments, the Bench decided the issue on merits of the case.

4. The assessee, GSR Industries is a Partnership firm created on 01.04.2010 as per the Indian Partnership Act, 1932. As per the partnership deed, the firm consists of the three partners namely, Rajdip Singh, Mohdip Singh and Shaminder Kaur.

5. Brief facts of the case as taken from the order of the Id. DRP is as under:

6. The Assessee had filed a return of income declaring a total income of Rs. 85,21,980/- and availing of deduction under 10AA to tune 84,60,872/-, assessee has disclosed a net profit of Rs. 1,69,82,852/-. The AO proposed the following additions.

A. Addition on account of suppression of sales	Rs. 94,00,617/-
B. Addition on account of bogus creditors	Rs. 17,70,610/-
C. Addition on account of expenses disallowance	Rs. 1,38,893/-

7. The assessee objected to the above addition and furnished additional evidences before the Id. DRP. The Id. DRP obtained a remand report on all the above issues including additional document submitted from the AO. The AO submitted as under:

- During the course of assessment proceedings, discrepancy amounting to Rs. 94,00,617/- was noticed between the export sales declared by the assessee-firm in its profit

- and loss account and in its sales ledger. In order to explain the discrepancy, the assessee had submitted a debit note amounting to Rs. 94,00,617/-. Having realized its mistake, the assessee later submitted a credit note of the same amount issued on the same date. The self-contradiction in the replies of the assessee makes it evident that the assertions of the assessee are not genuine and it has deliberately attempted to misguide the tax authorities to suppress its sales and evade its taxes in India. The actual sales of the assessee are Rs. 10,36,95,673/- and not Rs. 9,42,95,056/- as declared by the assessee in its return. Further, it is emphasized that the assessee has reported the correct figure of sales revenue i.e. Rs. 10,36,95,673/- in its GSTR-9 and has not reconciled any amount of credit/debit note while reporting the sales revenue in GSTR-9 which was filed on 26.02.2021 much later than the date on which the credit/debit note was issued i.e. 31.03.2020. Since the assessee has not reconciled the sales revenue as reported in GSTR-9, the assertions of the assessee are evidently false. The assessee has suppressed its sales revenue such as the fact that the issuance of credit/ debit note finds no mention in the notes-on account of the assessee.
- During the course of the assessment proceedings, the assessee had failed to provide the basic information such address, PAN etc. regarding seven of its sundry creditors. In this regard, the liability of Rs. 4,38,039/- was proposed to be disallowed. The assessee has failed to provide any information regarding the seven sundry creditors during

the proceedings before the DRP. It shows that these creditors are bogus creditors claimed by the assessee.

- During the course of the assessment proceedings 17 sundry creditors were not found to be genuine and the corresponding liabilities amounting to Rs. 13,32,571/- were proposed to be disallowed. The assessee has in this regard, submitted certain invoices before the Id. DRP which have been examined and the genuineness of these invoices was not found verifiable.
- The vehicle used for delivery of the concerned goods whose vehicle no. DL1CL8444 was found to be mentioned in the invoices of M/s. Abuzar Handicrafts was already deregistered before the date on which the goods was supplied to the assessee. Hence, the handwritten invoice submitted by the assessee was not found genuine.
- The assessee has claimed that the entry and exit of goods is marked with SEZ/Customs stamps on the invoices. However, out of the seventeen invoices submitted by the assessee, inward entry stamps were not marked on five of the invoices which makes falsifies the claim of the assessee.
- Discrepancies were noticed in the addresses of the sundry creditors mentioned by the assessee in his replies during the assessment proceedings and the address mentioned on the invoices furnished.
- The perusal of the invoices submitted by the assessee shows that the some of the goods supplied are of capital in nature and the expenses in this behalf are not revenue expenses.

- Several invoices submitted by the assessee are handwritten (kutchra) and the visual examination shows that the handwriting on the invoices and pen used on them are identical indicating that they may have been forged. The genuineness of these invoices needs further verification.
- The expenses amounting to Rs. 1,38,893/- claimed as advertisement and publicity were proposed to be disallowed as the assessee had itself agreed that the same has been wrongly booked.

8. The assessee has filed its rejoinder to the remand report before the Id. DRP, the salient points are as under:

- The details of such credit or debit which are as under:

AY	Sales as per Export Invoice	Debit Note	Credit Note	Sales Turnover as per book	Corresponding Sales reported in ITR
2015-16	8,40,98,173	18,59,2757		10,26,90,930	10,26,90,930
2016-17	10,15,89,776	74,47,605		10,90,37,381	10,90,37,381
2018-19	9,78,41,160		1,16,47,255	8,61,93,905	8,61,93,905
2019-20	10,08,77,863		1,53,78,981	8,54,98,882	8,54,98,882
2020-21	10,36,95,673		94,00,617	9,42,95,056	9,42,95,056
2020-21	8,38,27,355	54,24,110		8,92,51,465	8,92,51,465

- It was submitted that the TP Study report was always on cost plus 15% benchmarking and it has always been regularly assessed under section 143(3) by the department.
- Before the Id. DRP, the assessee has submitted through its TP Study Report where in it has been characterized as the captive manufacturer, as it manufactures and exports such goods only to its the AE. In the TP study report the

assessee has benchmarked its transaction with the AE at cost plus 15% and it is more than any comparable and further it has not been disputed by the AO. The assessee has also submitted that this cost plus markup is much more than the safe harbour rule of 8.5%. Since this is the consistent practice of the assessee to benchmark its revenue on the cost plus 15% basis and to do so it has to pass year end debit note or credit note in order to achieve such markup for TP purpose. Such debit notes or credit note has been regularly passed by the assessee and the details have been submitted.

- The AO has not given any adverse comment on such consistent practice of year end debit note or credit note to achieve the revenue of the issue of cost plus 15%.
- The accounts of the assessee were duly audited and the ITR was filed with the turnover which was adjusted to achieve the cost plus 15% revenue. For this purpose, the year-end credit note was passed and the sales turnover as per the ITR were as under:

Particulars	Amount
Export sales to AE	10,36,95,673
Less: year-end credit note to achieve cost plus 15% markup	(94,00,617)
Revenue based on Cost-Plus markup	9,42,95,056
DTA sales	3,40,530
Total Sales in ITR	9,46,35,586

- Every such sales invoice issued by the assessee and the credit note issued has recognized by the AE also and the AE has also issued its auditor certificate which was

submitted during the assessment. The AO in its para 24 of draft assessment order has considered that certificate, to the extent of export invoice only and conveniently left the amount of the credit note which was there in the auditor certificate.

- The AO fails to appreciate that it was only the credit note which was accounted in the sales Ledger and after this credit note, the figure was captured in the P&L showing the turnover of Rs. 9,42,95,056/-. Therefore, the allegation of the AO that it is an afterthought is without any basis.
- It is well settled that once the transaction between the two AE's is at Arm Length and here is no dispute on this part nothing further can be attributed on the AE. The Supreme Court Has propounded this principle in the case of in the case of Morgan Stanley as reported in the 210 CTR 419 (SC).
- Therefore once the transaction is at Arm Length between the assessee and the AE and there is no dispute on that part, the credit note which has been issued to achieve such benchmark only and not be rejected on the basis mere clerical error or not matching with any other law which is not consistent with the TP provisions.

9. **Disallowance of Purchase** amounting to Rs. 4,38,039/- on the allegation that such a purchase is a bogus purchase.

- The AO has alleged that the purchase to the tune of 4,38,039/- is bogus purchase and the list of such purchase are as under:

S.No.	Vendor Name	Amount	Remarks
1	HK International	13,542/-	Supplier of glass accessories
2	Rajveer Singh	37,792/-	Supplier of Glass.
3	Manvi Food	50,657/-	Supplier of food for staffs
4	Shri Sai Freight	2,81,614/-	Forwarding Agent service. Certificate was enclosed (Page-394)
5	The software warrior	30,000/-	Service provider for Systems
6	Bhagirathi Plastic	22,5341-	Supply of Packing material
7	Dream Valley Store	1,900/-	Grocery Supplier for canteen
	Total	4,38,039/-	

10. These are small vendors supplying the ancillary goods, grocery items or foods for the staffs. Further, all these are regular vendors of the assessee.

11. The assessee has furnished the copy of invoices which is duly stamped at the customs gate and the SEZ authority.

Sr. No.	Name of the Sundry Creditor	PAN	Amount	Remark
1.	Abuzar Handicraft	CJHPM5251K	1,05,718/-	328-332
2.	KGN Handicraft	ARKPP9100E	36,369/-	333-335
3.	Modi Graphic	AALPG3572G	1,192/-	336-337
4.	Bansal Trading	AKGPK8277M	11,751/-	338-342
5.	Bharat Safety House	BCZPS5434C	10,241/-	343-344
6.	Om Jyoti Engineering Enterprises	AIBPM5938N	10,685/-	345-348
7.	Rajdhani Chemicals	ABWPG4543R	14,810/-	349-350
8.	Graphic Prints	AQCPS9419D	1,35,704/-	351-359
9.	INOX Air Products Ltd.	AAACI5569D	7,23,087/-	360-371
10.	Goel Craft House	ACEPG1902H	50,000/-	372
11.	Sam Engineers	ABOFS4319R	9,670/-	373-375
12.	N.K old Dhoti Suppliers	AMLPN5191N	8,400/-	376-378
13.	R.K. Handi Craft	AGQPK7315Q	29,736/-	379-380
14.	Sanjay Trading Co.	AECPG1178B	52,000/-	381-382
15.	Studio Prints	AKXPR8535Q	17,333/-	383-386
16.	Vikram Paints Sanitary Stores	AVAPS1375D	73,000/	387-389
17.	Veer Workshop	BOSPS0888F	42,875/-	390-393

- The AO after verification of the document has observed that in the following five cases the stamping of the SEZ authorities was absent.

<i>S. No</i>	<i>Name of sundry creditor</i>	<i>PAN</i>	<i>Remarks</i>
1.	Modi Graphic	AALPG3572G	Page no- 336-337 It has been entered in the store through entry no-627 which has not been denied by the AO.
2.	Bharat Safety House	BCZPS5434C	Page no- 343 to 344 It has been entered in the store through entry no-660 which has not been denied by the AO.
3.	Om Jyoti Engineering Enterprises	AIBPM5938N	Page no- 345 to 348 It has been entered in the store through entry no-651 and 652 which has not been denied by the AO.
4.	Inox Air Products Ltd.	AAACI5569D	Page no- 360 to 371 It has been entered in the store through entry no-748, 743, 731, 709 720, 696 673 which has not been denied by the AO.
5.	Vikram Paints & Sanitary Store	AVAPS1345D	Page no- 387 to 389

- These expenses are fully supported by the invoices with proper stamping and payment through NEFT.

Disallowance of advertisement and publicity expenses amounting to Rs. 1,38,893/-.

12. These expenses are Business promotion expenses mainly incurred by the assessee for the refreshment of the office guest and vendors. The ledger of the said expenses is enclosed in the Page 450 to 479 of the Volume-2 of the document submitted and the supporting documents are enclosed. From the analysis of the ledger, it comes out that these expenses are petty expenses incurred for the purpose of Business only. Merely

some of the vouchers are handwritten does not make such entry as false as all these expenses are supported by evidence and for the business purpose only.

13. After going through the remand report and the rebuttal of the assessee, the Id. DRP held that *"on the issue of credits notes of Rs. 94,00,617/-, it is seen that the credit note and debit note are been inserted by the assessee for account reconciliation which is not backed by actual transaction. Some of the argument to justify the credit notes being put forward by the assessee was on account of pricing difference with the parities. In fact with the issue of credit note the assessee sale figure of Rs.9,42,950,56/- in the IT return is not reconciling with the correspondence figure of sales of amount Rs.10,36,95,673/-disclosed by the assessee in the GSTR-9. Therefore, there is suppression of sale 94,00,617/-, for which no plausible exclamation has not been provided by the assessee."*

14. On the issue of bogus creditor of Rs. 17,70,610/- disallowed by the AO, Id. DRP held that *"it is seen that the expenses were not backed proper documentations and are mostly supported only through self-made vouchers. The AO has also found out during investigation that the suppliers were nonexistent in the addresses furnished by the assessee as notices issued to them came back unserved or returned. The assessee's argument that goods supplied, is marked by SEZ/Custom stamp on the invoices and therefore, have actually been purchased also falls flat as on most of the bills of entry there are no stamps of any SEZ/Custom authorities and the goods carried by the vehicles of above alleged purchases have also found to be deregistered during alleged period of transaction. Therefore, there is serious doubt about the existence and transaction of the above purchases/ sundry creditors. On the issue of advertainment expenses of Rs. 1,38,893/-, the assessee could only furnish self-made & hand written kacha vouchers without any other supportive evidences.*

The AO has conducted diligent enquiry on the above issues and assessee has not been able to controvert the evidences gathered by the assessing officer during the assessment proceedings and the remand proceedings. The Panel is of the view that the assessee has not been able to explain with proper reasoning and documentation on the queries raised by the assessing officer in the draft assessment order. The assessee's objection on this above is rejected."

15. Aggrieved the assessee filed appeal before us.

16. Heard the arguments of both the parties and perused the material available on record.

17. We find that the allegation of the revenue that the credit note was afterthought is baseless as the credit note was duly accounted in the sales for the purpose of benchmarking, the corresponding adjustment was made by the AE, and furthermore benchmarking was duly accepted by the Assessing Officer. Once the transaction has been benchmarked at the arm length and no adverse finding was there, then no further addition can be done, and no further attribution can be made. The AO and subsequently Id. DRP both erred in not appreciating the judgment of Hon'ble Supreme Court in the case of DIT (International Taxation) Vs. Morgan Stanley as reported in 292ITR 416(SC). We find that the assessee has consistently benchmarked its international transaction with the cost plus @ 15% markup and it has been consistently accepted by the department during the assessment procedure and has passed the assessment order u/s 143(3). The AO erred in not appreciating that issuance of credit note / debit note was a regular year end feature of the assessee to achieve such benchmarking of mark -up. Once such transaction is held to be

at ALP, no further addition /attribution can be made to the assessee income. The settlement of account of the assessee from A.Y. 2015-16 to A.Y. 2020-21 by the way of credit notes and debit notes has been already taken note and mentioned in the table in the preceding paragraph and repeated here.

AY	Sales as per Export Invoice	Debit Note	Credit Note	Sales Turnover as per book	Corresponding Sales reported in ITR
2015-16	8,40,98,173	18,59,2757		10,26,90,930	10,26,90,930
2016-17	10,15,89,776	74,47,605		10,90,37,381	10,90,37,381
2018-19	9,78,41,160		1,16,47,255	8,61,93,905	8,61,93,905
2019-20	10,08,77,863		1,53,78,981	8,54,98,882	8,54,98,882
2020-21	10,36,95,673		94,00,617	9,42,95,056	9,42,95,056
2020-21	8,38,27,355	54,24,110		8,92,51,465	8,92,51,465

18. Hence, we hold that the AO cannot treat the amount of Rs.94,00,610/- as an unaccounted sales

Disallowance of Expenses:

19. The argument of the assessee that the Ld. DRP has erred in not appreciating that the all the inward and outward entry in the SEZ Area must passed through the checking of another wing of Ministry of Revenue i.e., custom department and the SEZ authority cannot be accepted. Invoices pertaining to Modi Graphic, Bharat Safety House, Om Jyoti Engineering Enterprises, Inox Air Products Ltd. and Vikram Paints & Sanitary Store have not been stamped proving their entry into the premises. Hence, the same cannot be considered as proven correctly. The disallowance on account of these expenses is hereby upheld.

20. With regard to the other expenses, we find that they are very minor expenses, the AO erred in appreciating that non-reply of Section 133(6) notices cannot necessarily lead to disallowance of petty expenses ranging from Rs.9,000/- to Rs.1,00,000/- in the absence of any other proof of non-incurring of expenses. The assessee has provided primary and direct evidences along with the PAN & address and hence, no disallowance can be made merely on the reason of non-compliance of the parties to the notices issued u/s 133(6) of the Act.

21. The appeal of the assessee on the grounds of unaccounted sale is allowed and on the grounds of expenditure is partly allowed.

Order Pronounced in the Open Court on 26/12/2023.

Sd/-

(Saktijit Dey)
Vice President

Dated: 26/12/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR