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

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER

ITA No. 316/CHD/2013
Assessment Year : 2008-09

Shri Devi Prasad Gupta, Prop. M/s Shree Tools, 53, Industrial Area, Shoghi, Distt.Shimla.	Vs	The DCIT, Circle, Shimla.
PAN: AASPG5232A		
(Appellant)		(Respondent)

Appellant by : Shri Vishal Mohan
Respondent by : Shri Manjit Singh, DR

Date of Hearing : 22.06.2016
Date of Pronouncement : 23.06.2016

O R D E R

This appeal by assessee has been directed against the order of ld. CIT(Appeals) Shimla dated 22.01.2013 for assessment year 2008-09 challenging the order of ld. CIT(Appeals) in upholding and sustaining the application of provisions of Section 80IA(10) of the Income Tax Act confirming addition of Rs. 24,22,978/-.

2. Briefly the facts of the case are that the assessee had set his industry under the name and style of M/s. Shree Tools in Shoghi, Industrial area primarily for the manufacture of diamond tools, diamond wire etc. to be used in the cutting of granite,

marble, concrete etc. Order u/s 143(3) was passed by the Assessing Officer, wherein invoking the provisions of Section 80iA (10) read with 80 1C (7) of the income Tax Act, 1961, a sum of Rs.24,22,978/- was added to the taxable income of the assessee holding the same to be excess profit on the ground that the assessee had not booked any expenses in respect of the technical know-how and goodwill. The AO was of the opinion that the sister concern of the assessee being run under the name and style of M/s Stoneage Industrial Diamond Products at Jaipur had provided the technical knowhow and goodwill to the assessee, but no expenditure in respect of the said technical knowhow, technology and goodwill had been booked by the assessee. The Assessing Officer also opined that the provisions of constructive res judicata as envisaged by the Hon'ble Supreme Court of India in the case popularly known as Radha Swami Satsang case were clearly attracted, as in the immediately preceding year also the assessee had agreed to such an addition. He, therefore, calculated 5% of the sales as notional expenditure for the use of technical know-how and 5% for the use of customer base and goodwill and thus, made an addition of Rs. 24,22,978/- which is the subject matter of present appeal.

3. The assessee challenged the addition before ld. CIT(Appeals) and submission of the assessee is

reproduced in the appellate order in which assessee briefly explained that in the preceding assessment years, assessee was forced to agree to the similar addition. It was submitted that assessee had the requisite know-how to set up the plant in the industrial area of Shoghi. He had been a partner in the concern which was earlier into a similar business and as such, there was categorically mentioned that the business of the assessee and business of the sister concern were entirely different and moreover on the technical side, the services of an Engineer were duly taken by the assessee and the said fact was made to the Assessing Officer during the assessment proceedings. It was submitted that addition cannot be made on the basis of earlier year's order because each year is independent year.

4. The ld. CIT(Appeals), considering submissions of the assessee and material on record, dismissed appeal of the assessee. His findings in paras 4 to 4.6 of the impugned order are reproduced as under :

> *"4. The rival submissions have been carefully considered w.r.t. the facts of the case, the related assessment records and the case laws relied upon. It is noted that the appellant Sh. Devi Prasad Gupta was an active partner in M/s. Stoneage Industrial Diamond Products, Jaipur and was regularly drawing salary from the said firm in that capacity. M/s. Stoneage had long been in the business of manufacturing and sale of diamond wire which is used in the granite mines. The appellant thereafter set*

up an industrial unit at Shoghi as his proprietorship concern in order to avail the tax. benefits u/S: 8'OIC of the Act. The said industrial unit was set up under the name and style of M/s Shree Tools. In the very first year of its assessment, i.e. A.Y. 2006-07, it was noted by the A.O. that the assessee had returned heavy net profit of 49.31%, whereas his sister concern M/s. Stoneage Industrial had returned a net profit of only 8.51% in the same line of business. The assessing officer examined the facts of the case at length and concluded that many essential expenses had not been booked by the assessee in order to return higher profits, as he was eligible for 100% deduction u/s 801C of the Act. The A. O. inter-alia noted that no expenditure on technical know-how, goodwill and customer base was booked by the assessee even though he had used the technical know-how developed by the firm M/s. Stoneage and even though he had exploited the goodwill and the customer base of the firm to his advantage. Thus the A.O. concluded that the arrangement between the assessee and his firm resulted in more than the normal profits to the assessee. He accordingly invoked the provisions of section 80IA (10) of the Act and made an addition to the taxable income of the assessee by calculating 10% of the turnover as expenditure on account of technical know-how, customer base and goodwill. The assessee duly agreed to the said addition subject to no penalty u/s 271{1)(c) of the Act. Similarly, in the A. Y. 2007-08 also, the A. O. noted the same trend and again made the similar addition which was agreed to by the assessee, again subject to no penalty u/s 271(1)(c) of the Act. In the year under appeal, the A.O. noted that there was no change in the facts of the case. In the given year also, the assessee had returned the net profit of 59.22% at Rs.1,80,97,505/-, whereas his sister concern the firm M/s. Stoneage, had returned a net profit of only 10.46% at Rs.9,49,628/-. Therefore, the A.O, p*roposed to make the similar addition to the assessee's income as was made in the preceding two assessment years. But this time the assesses opposed the said addition stating that the products manufactured by him are different from those manufactured by M/s. Stoneage. He also*

argued that he had hired the experienced engineers and that he had also hired his own marketing staff who marketed the products manufactured in his factory. The same arguments were reiterated during the course of appellate proceedings.

4.1 It has been argued by the appellant that he was forced to agree to the addition in the earlier two assessment years in order to keep good relation with the Deptt. The said argument of the appellant, however, is not supported by the records of the assessment proceedings of the given assessment years. The fact of the matter is that the A.O. had duly confronted the issue of extra ordinarily large profits returned in the very first year of business in his case as compared to the meagre profits returned by his partnership firm carrying out a similar business for a number of years. The assessee *had no explanation to the fact that many important expenses, such* as *the fee for technical know-how and the goodwill and customer base had not been debited, which he would have been under an obligation to pay had the technical know-how and the customer base not been available to him by virtue of his partnership firm, it was on these specific facts that the assesses had agreed to the addition to his taxable income to the tune of 10% of his turnover for use of technical know-how and goodwill etc.*

4.2 As regards the appellant's submission that he had the requisite technical know-how to set up the plant, he has, intact, himself admitted in Para 3(c) of his written submissions that there was mo dearth of technical know-how to him as he had been a partner in a concern which was into a similar business. Thus the Appellant has categorically conceded that it was by virtue of his experience of working as a partner in M/s. Stoneage that he was in possession of the requisite technical know-how. As per the accepted principles governing Partnership Firms, no partner is allowed to set up a parallel and similar business in his individual capacity without any consideration. Hence there had to be attributed a certain cost to the technical know-how developed by the partnership firm which the assessee had admittedly used for his separate individual business. Therefore, the principle of arm's

length price has been rightly invoked by the A. O. on the given facts. The appellant's argument that he had hired the services of qualified engineers also does not help his case, as technical manpower is always hired in order to run the business smoothly and efficiently. But this does not mean that the credit for the basic technical know-how developed by his partnership firm can be shifted to the staff hired by him.

4.3 As regards the appellant's argument that his business was different from the business of his sister concern, the same is found to be without any merit. It is noted that the assessee *was also primarily engaged in the production of diamond wire. Besides, he manufactured wire saw beads. It is further noted that during the year under consideration, the major portion of his sales was on account of the sale of the diamond wire. The sales worth more than 1.55 crores were on account of the safe of diamond wire. The appellant has not been able to show the production' and sale of any item which* was *substantially different as regards its manufacturing process and the raw material used as compared to the production process and the raw material used by his* sister concern. *Thus, as per the details available on record, no difference was noticed in the business of the assessee and the business of his sister concern.*

4.4 The appellant's reliance on the case of S.A. Builder 288 ITR 1 (SC) also does not come to his help, as the said judgment was delivered in an altogether different context. The provisions relating to ring fencing under specific conditions can certainly be invoked by the A.O. if the facts of the case so warrant. And the facts of the appellant's case do justify the invoking the provisions of section 80IA(10) of the Act r.w.s, 80IC (7). When the assessee claims 100% deduction u/s 801C, it is the A.O.'s duty to ensure that the deduction has- been claimed in respect of that income only which the assessee could earn by selling his goods at an arm's length price. There is no denying the fact that the assessee and the partnership firm in which he is a partner are associates and there exists an implicit agreement or arrangement between the two, whereby the technical know-how and goodwill developed and exploited by the firm for years has been allowed to be used

by the assessee in his individual capacity free of any cost. By this tactical arrangement, the assessee has garnered abnormal profits, while the firm has shown drastic reduction in its sales and has also returned meagre profits. The obvious reason behind the said arrangement is the availability of 100% deduction u/s 80IC to the assessee in respect of his profits, while the said deduction was not available to the firm located at Jaipur. Thus, under this arrangement, the firm has consciously allowed its market share to be diverted to its partner, and that too without charging any price.

4.5 It was vehemently argued by the appellant that the additions made in the last year cannot be made a basis for making the addition in the instant year as each year is an independent year. The said argument of the appellant is also found to be devoid of any force, as he -has not been able to show as to how the facts of his case are any way different from those of the earlier two assessment years. The A.O. has rightly referred to the decision of the Hon'ble Supreme Court in the case of Radha Swami Satsang 193 ITR 321 wherein the Hon'ble Court has held that where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and the parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year, In the appellant's case, a *finding of fact was given in the earlier years and the addition made on that account was allowed to be sustained by the appellant by way of acceptance of the A.O.'s order. As already mentioned, the appellant has not been able to show any change in the given facts in the instant year. Hence, even though res judicata does not apply to IT proceedings, the status QUO cannot be disturbed in the appellant's case on the given facts as per the judgment of the Hon'ble Supreme Court supra. In the absence of any change in the facts of the appellant's case, a view different than that taken in the earlier two assessment years, cannot possibly be taken.*

4.6 In view of the discussion above, I am also of the considered opinion that the availability of technical know-how, goodwill and

customer base to the appellant free of any cost has resulted in yielding abnormal profits to the appellant which stand in glaring contrast to the profits returned by his sister concern, M/s, Stoneage in the same line of business. The appellant certainly would have been under an obligation to pay a suitable price for the technical know-how, goodwill and the consumer base had he followed the arm's length principles while dealing with M/s. Stoneage Industrial. The appellant and the firm M/s. Stoneage are the "Associated Enterprises", as the appellant is directly participating In. the management control and capital of the firm M/s Stoneage. Hence the arm's length price assessed by the A.O., following the assessment made in the appellant's case' in the earlier two assessment years, is found to be in order. The addition of Rs.24,22,978/- is accordingly upheld.

5. After considering rival submissions, I am not inclined to interfere with the orders of the authorities below. Vide order dated 07.05.2015, assessee was asked to file copies of assessment orders under section 143(3) and audited accounts for preceding assessment years 2006-07 and 2007-08. The ld. counsel for the assessee placed copies of the same on the record. The ld. counsel for the assessee admitted that facts and circumstances in assessment year under appeal are identical as have been considered in preceding assessment years 2006-07 and 2007-08. In view of the admission of the assessee that facts are same in assessment year under appeal, making the above disallowance which were considered in preceding assessment year 2006-07 and 2007-08, there is no reason to take a contrary view in assessment year

under appeal. The assessment orders under section 143(3) for assessment year 2006-07 and 2007-08 alongwith the audited accounts are filed on record which supports the findings of the authorities below that issue is identical as have been considered in preceding assessment year 2006-07 and 2007-08. The assessment orders for preceding assessment years show that Assessing Officer raised specific query with regard to disallowance under section 80IA(10) of the Income Tax Act and the assessee in reply to the Show Cause Notice issued by Assessing Officer agreed that the proposed Show Cause Notice and opinion of Assessing Officer for profits be revised as proposed. The Assessing Officer even after admission of the assessee for agreed addition, also discussed the issue in detail and has given specific finding of fact for the purpose of making the similar additions in earlier years .

6. The ld. counsel for the assessee now admitted before me that issue is same as have been considered in earlier years in which finding of fact on identical issue has reached finality because the assessee agreed for the additions. It is well settled law that rule of consistency apply to the Income Tax proceedings. No change in facts and circumstances have been proved, therefore, by following the rule of consistency, the addition have been correctly made by the Assessing Officer. I rely upon decision of Hon'ble Supreme Court

in the case of Radha Soami Satsang Vs CIT 193 ITR 321, decision of Delhi High Court in the case of Escorts Ltd. 338 ITR 435, decision of Madhya Pradesh High Court in the case of Godavari Corporation Ltd. 156 ITR 835 and decision of Hon'ble Punjab & Haryana High Court in the case of Vikas Chemi Gum India 276 ITR 32. Hon'ble Delhi High Court in the case of A.R.J. Security Printers 264 ITR 276 held that, *"For sake of consistency and finality of litigation, earlier decisions on the same question should not be reopened unless new facts come to the knowledge".*

7. Apart from above, the ld. CIT(Appeals) discussed the issue in detail in the impugned order after verifying the facts from the record and noted that all the facts have been confronted to the assessee and arguments of the assessee have not been supported by any evidence on record. The assessee was not able to show any change in the given facts in the instant year. The ld. CIT(Appeals), after discussing the issue in detail was of the opinion that availability of technical know-how, good will and customer base to the assessee free of cost has resulted in yielding abnormal profits to the assessee which stand in glaring contrast to the profits returned by his sister concern M/s Stoneage in the same line of business. The ld. CIT(Appeals) was, therefore, of the opinion that assessee certainly would have been under an obligation to pay suitable price for

the technical know-how, good will and customer base, had he followed the arm's length principles while dealing with M/s Stoneage Industrial. Therefore, ld. CIT(Appeals) correctly followed the decisions of earlier years while deciding the issue against the assessee. The finding of fact recorded by the authorities below in assessment year under appeal as well as in earlier years, have not been rebutted through any evidence or material on record. I am, therefore, of the view that there is no merit in the appeal of the assessee. The same is, accordingly, dismissed.

8. In the result, appeal of the assessee is dismissed.

Order pronounced in the Open Court.

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Dated: 23rd June, 2016.
'Poonam'
Copy to:
The Appellant, The Respondent, The CIT(A), The CIT,DR

Assistant Registrar,
ITAT/CHD