

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA*

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No.1990/Kol/2013 & C.O. 47/Kol/2014 Assessment Years:2009-10

Income Tax Officer, Ward-54(1), Govt. Place, West, 1 st Floor, Kolkata- 01	बनाम / V/s.	Bijaya Kumar Sahoo 16/2, K.M. Naskar Road, Kolkata-700 069
Bijaya Kumar Sahoo 16/2, K.M. Naskar Road, Kolkata-700 069 [PAN No.AKRPS 9342 J]	बनाम / V/s.	ITO Ward-54(1), Govt. Place, West, 1 st Floor, Kolkata-01
अपीलार्थी /Appellant/Cross Objector	..	प्रत्यर्थी /Respondent

आवेदक की ओर से/By Assessee	Shri Miraj D Sha, Advocate
राजस्व की ओर से/By Department	Shri Debasish Lahiri, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	10-08-2016
घोषणा की तारीख/Date of Pronouncement	09-09-2016

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal is preferred by Revenue against the order of Commissioner of Income Tax (Appeals)-XXXVI, Kolkata dated 25.04.2013 for the Assessment Year (AY) 2009-10 and the same is being disposed of along with Cross Objection (CO) filed by the assessee being C.O. No.47/Kol/2014. Assessment was framed by ITO Ward-54(1), Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 28.12.2011.

Shri Miraj D Shah, Ld. Authorized Representative appeared on behalf of assessee and Shri Debasish Lahiri, Ld. Departmental Representative appeared on behalf of Revenue.

First we take up Revenue's appeal in ITA No.1990/Kol/2013

2. The grounds raised by the Revenue per its appeal are as under:-

"1. The Ld. CIT(A)-XXXVI, Kolkata erred in his decision that the assessing officer was partly believing the business activity of the assessee, as the Assessing Officer wanted to establish the act in all respect that no business could be run by the manner, the assessee has stated in the records. Discrepancies and contradictions in all respects were occurred in the statements of the assessee regarding land used, quantification and conversion ratio of the raw material and final product, workmen engaged in the business as well as the statements and certificates made by the Sarpanch of that time and his father also.

2. That on the facts and in the circumstances of the case the Ld. CIT(A)-XXXVI, Kolkata was not justified in his decision to dismiss the addition of the AO without verifying the genuineness of the business.

3. That the Ld. CIT(A)-XXXVI, Kolkata erred in dismissing the addition of the AO without taking into consideration of the fact that the claim of the assessee of running a business, being a Chartered Accountant in profession, is totally unethical according to the Law & Ethics of the Institute of Chartered Account.

4. That the Ld. CIT(A)-XXXVI, Kolkata erred in dismissing the addition of the AO without taking into consideration of the fact that the Assessing Officer made this addition as unexplained cash credit and not as business income."

3. Issues raised by the Revenue in ground no. 1 to 3 are inter related and therefore being taken up together against the order of Id. CIT(A) regarding the allowance of deduction of Rs. 27,57,452 u/s 80JJA of the Act. As the issue is common so we decided to adjudicate all three grounds simultaneously.

4. Assessee in the present case is a practising Chartered Accountant and also engaged in the business of bio-degradable waste. Assessee filed its return of income for the year under consideration on 30.03.2010 showing income from remuneration Rs. 1.20 lakhs, income from the business of bio- degradable waste Rs. 27,57,452 and income from other sources Rs. 47,690/- The assessee has claimed the deduction u/s 80 JJA of the Act against the income from the sale of bio degradable waste. Thereafter

the case was selected for scrutiny under CASS and notices under section 143(2) r.w.s 142(1) of the Act were issued respectively.

Assessee in the present case is the native of Cuttack, in the state of Odissa and he is providing his professional services in Kolkata. Assessee was having an ancestral property in Narayanprasad, Post Office Gopapur, Police Station Baramba, District Cuttack, Odissa where he was running the business of processing of biodegradable waste. His biodegradable waste business was looked after Shri Behera (nick name Bulu) who resides next door to his native village house.

During assessment proceedings, it was observed by the Assessing Officer that there was no business carried by the assessee in the year under consideration. The necessary facts of the case are reproduced below.

1. The assessee being a Chartered Accountant should have taken prior permission from ICAI to engage himself in any other business other than professional services. But the assessee was failed to produce the evidence of permission taken by the ICAI.
2. The assessee residing in Kolkata and his business is in native place i.e. Orissa but travelling/ conveyance expenses is just of Rs. 23060.00. So it appears a framed story of running a business.
3. The business was carried on in ancestral property and the assessee has six more brothers and sisters. They are also the co owner of the property but the assessee was not able to produce any "No objection Certificate" from other co-owners. Further if they all are co-owners then the income should be shared by all of them.
4. The claim of the assessee that he has also used the common area of the village for his business is not tenable.
5. The report of inspector from Bhubaneswar Income Tax office states that 1) there was no factory 2) three small pits near to the village pond were found. 3) at the best the assessee can sell 200-300 bamboo ferries/ basket per annum. 4) the father of the assessee owns 10 acres of land.
6. However the report of the inspector attached to the ward no. 54(1) Kolkata has reported contrary facts to the report of the inspector of income office of

Bhubaneswar. The inspector also submits the report of the Sarpanch of the village in writing that there is so such business since last 10 years.

7. The father of the assessee Maguni Sahoo who himself is the teacher also denied existence of any such business in that area.
8. No details with regard to the business were submitted such as sale/ purchase, registration, quantity produced, machinery used etc.
9. There was no neighbour of the assessee with the name of the Shri Behera (nick name Bulu) working as employee.
10. Assessee was given an opportunity under section 142(3) where he submits two letters one from Mrs. Pratima Swain and other his father Mr. Maguni Sahoo stating that the assessee was conducting the business of processing of biodegradable waste.
11. On demand of the AO the assessee was unable to produce the details of the labourers engaged in this business. So charging of labour expenses were just a book entry.
12. The all transaction shown in the accounts were in round figures. Assessee was not able to provide any list of the purchases and sales.
13. It was also observed by the AO that the assessee himself claimed that it is a seasonal income while the transactions were shown throughout the year.

Based on the above observations AO has added back Rs.27,57,452/- as cash unexplained credits u/s 68 of the Act.

5. Aggrieved, assessee preferred an appeal before CIT(A) whereas assessee submitted that during the course of assessment proceedings, AO has erred in disbelieving the business activity and he relied on the reports of Inspector to his charge but rejected the reports submitted by the Investigation Wing, Bhubaneswar, Fresh affidavit by the Sarpanch and his father as well as Reports of Assistant Agriculture Officer, Baramba Block, Cuttack, Odissa where it was certified by them that the assessee has carried out the business of processing of bio degradable waste and selling of fertilizers. Further, assessee also submits that the Inspector attached to the AO has taken the statement of the Sarpanch and his father under coercion on the date of issue of notice to them. Considering the submission of assessee Ld.CIT(A)

initiated to call a report u/s 250(4) of the Act. The enquiry report of Ld. JCIT reiterated that the assessee was not engaged in the business of processing of bio degradable waste. In reply the assessee submits that in this line of business there is no any requirement of trade license. Ld.CIT(A) considering the same allowed the deduction to the assessee u/s 80JJA of the Act by observing as under:-

“7.3 I have also noted the facts that no attempt was made to controvert the Affidavit, wherein it is a well settled Law that when an Affidavit is filed, the averment therein are assumed to be correct unless the same is proved otherwise as held by the Honorable Supreme Court in case of M/s Mehta Parikh & Co. Vs. Commissioner of Income Tax, Bombay, 30 ITR 181.

7.4 I have also gone through the fact that the assessing officer in her remand report mentions that the Commission Reports of the investigation Wing, Bhubaneswar found 3 small pits of such Bio-fertilizers, i.e. too after 6-7 months after the closure of the said business. She has also calculated the quantitative details and has thereafter opined that only 300 bamboo ferries of Bio-fertilizer could have been sold against 30000 bamboo ferries claimed by the se, I find such action of assessing officer in partly believing the business activity of the assessee of processing of Bio-degradable waste and producing & selling Bio-fertilizers is bad in Law, since the Assessing Officer has believed though particularly the business activity of the assessee, still has ruled out any existence of business which are two contrary opinions of the assessing officer, wherein the Honorable Supreme Court in its Landmark Judgment in case of Commissioner Income Tax Vs. Vegetables products Limited, 88 ITR 192 has held that if two reasonable views are possible then view favouring to the assessee must be adopted, identical views was taken by Honable Supreme Court in case of Birla Cement works Vs. The Central board of Direct Taxes & Others, 248 ITR 216, wherein your Lordship held:

*‘Two interpretations are reasonably possible on the question whether the contract for carrying of goods would come or not within the ambit of the expression “**carrying out any work:**” One of the two possible interpretations of a taxing statute, which favours the assessee and which has been acted upon and accepted by the Revenue for a long period should not be disturbed except for compelling reasons.’*

In the present case also, the AO himself/herself believed though partially, the existence of business of processing of Bio-degradable waste and producing & selling of Bio-fertilizers, while calculating the quantitative details and observing the Commission Reports of the Investigation Wing, Bhubaneswar, still he/she disbelieved the existence of such business only on the basis of Reports of the Inspector attached to his/her Office on mere suspicion. Such action of the Assessing Officer is not justified in view of the above Judgement.

7.5 I have also considered the fact that barring the inspector's report attached to the assessing officer, none of the reports i.e., two Commission Reports of the Investigation Wing, Bhubaneswar, Report of the Assistant Agriculture Officer, Baramba Block, Cuttack, Orissa, V.A.W. Baramba Block, Cuttack, Orissa, Sarpanch of Local Grama Panchayata & Chairman of Baramba Block, Cuttack, Orissa, delegates / endorses the view adopted by the assessing officer, rather all the above reports / certificates affirm the contention of the assessee as to have carried out the business of processing of Bio-degradable waste and producing & selling the Bio-fertilizers.

8. I, therefore, hold that the assessing officer was not justified in disbelieving the business activity of processing of Bio-degradable waste and producing & selling the Bio-fertilizers by the Assessee and thereafter considering the same as unexplained Cash Credit U/s 68 and thereafter rejecting the consequential deduction U/s 80JJA. I set aside such order of the assessing officer, in disbelieving the claim of the assessee of having carried out the business activity of processions of Bio-degradable waste and producing & selling Bio-fertilizers and accordingly allow the appeal in this regard & direct the assessing officer to allow the deductions U/s 80JJA on such income to the assessee."

Being aggrieved by this order of Id. CIT(A), Revenue is in appeal before us.

6. Before us Id. DR submitted that as per the report of the inspectors there was no business. The assessee has closed down its business immediately after the year under consideration. The main reason for the closing down of the business is that the AO has caught him under the scrutiny assessment for converting his unaccounted money into accounting form in the guise of business activity. Whatever profit shown by the assessee was claimed deduction under section 80JJA of the Act. The assessee could not substantiate the sale/ purchase of the business with the supporting evidence. The Id. DR vehemently supported the order of the AO.

7. On the other hand the Id. AR submitted that the journey from Kolkata to the village of the assessee is of 6 hours. The investigation agency of income tax department based in Bhubneshwar has not denied the business existence of the assessee. The inspector attached to the ward of the AO was influenced by the AO so he has given adverse reports. The assessee was doing the business in the open area because the bio degradable waste business does not require factory building. The bio degradable waste business requires sun, earth and rain etc. The allegation of the AO that the assessee did not share the business profit with his father, brothers and sisters

as the land was on which the assessee was doing the business was belonging to all of them is baseless. It is because the father of the assessee was alive and he was the owner of the ancestral land. So the question of sharing the profit does not arise. Besides the Id. AR submitted that the father of the assessee has four sons and three daughters. The first son is the assessee who is a qualified chartered accountant. The second son is employed with North Coal India Ltd. as Finance Manager. The third son is the computer engineer settled in Bangalore and the fourth son is employed as design engineer in BHEL. All the daughters are married. The Id. AR as such submitted that all the members of the family were employed and do not require share the profit of the assessee business. The Id. AR vehemently supported the order of the Id. CIT(A).

8. We have heard the rival contentions of both the parties and perused the materials available on record. From the foregoing discussion we find that the assessee has claimed the deduction under section 80JJA of the Act for its bio-fertilizer business. But the AO has held that there was no such business activity and entire sales proceeds for Rs. 37,05,680.00 was treated as income under section 68 of the Act. However the Id. CIT(A) on appeal allowed the relief to the assessee. From the perusal of the orders of lower authorities we find that various reports were called for by the AO to check whether the business of the assessee was into existence or not. We find that the contradictory reports were submitted from the inspector of the ward of the ITO having jurisdiction on the assessee and the inspector from Bhubaneswar Income Tax office. As per the report of inspector of the ITO there was not business but as per the inspector from Bhubaneswar Income Tax office, the business was there but it was negligible in volume. The AR in support of his claim has submitted various reports and certificates about the existence of the business which are placed on record. From the above fact we are inclined to hold that there was business in the existence. We also find support from the consistent claim of deduction under section 80JJA of the Act from the last several years. The question of the disallowance of deduction or non-existence of the business has never been raised in the earlier years. The allegation of the AO that the assessee being chartered accountant has not taken permission from the institute of chartered accountant has no connection in the income tax proceedings. Similarly the allegation of the AO that the assessee is doing the business in the land

belonging to his father without sharing the profit with his other brother and sisters has no base. The reasons for holding that there was no business were not correct. In view of above we are inclined not to interfere in the order of Id. CIT(A). Hence this ground of appeal of the revenue is dismissed.

Coming to assessee's CO No. 47/Kol/2014

9. At the outset we find that the grounds raised by the assessee in the Cross Objection are supportive to the order of Id. CIT(A). Hence in our considered view these grounds of cross objections do not require any adjudication. Therefore we dismiss the same as infructuous.

In the result, the appeal of the revenue as well as the cross objection of the assessee are dismissed.

Order pronounced in open court on 09 /09/2016

Sd/-
(S.S.Viswanethra Ravi)
Judicial Member

Sd/-
(Waseem Ahmed)
Accountant Member

*Dkp

दिनांक:- 09 /09/2016 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-Bijaya Kumar Sahoo, 16/2 K.M..Naskar Road, Kolkata-69
2. राजस्व/Respondent- ITO Ward-54(1), 3, Govt. Place, West, 1st Floor, Kolkata-01
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता

