IN THE INCOME TAX APPELLATE TRIBUNAL
(CUTTACK BENCH, CUTTACK)

BEFORE SHRI N.S. SAINI, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA NO.143/CTK/2015
(ASSESSMENT YEAR : 2010-11)

DCIT, Rourkela Circle, Rourkela.	vs.	M/s. Scan Steels Limited, Main Road, Rajgangpur, Distt. Sundergarh.
		(PAN : AAECS5808F)
(APPELLANT)		**(RESPONDENT)**

ASSESSEE BY : Shri S. Ray, AR
REVENUE BY : Shri Kunal Singh, CIT DR

Date of Hearing : 27.04.2017
Date of Pronouncement : 29 .05.2017

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

The Appellant, Deputy Commissioner of Income-tax, Rourkela Circle, Rourkela (hereinafter referred to as 'the Revenue') by filing the present appeal sought to set aside the impugned order dated 15.01.2015 passed by the Commissioner of Income-tax (Appeals)-II, Bhubaneswar qua the assessment year 2010-11 on the grounds inter alia that :-

> ***"1. Whether in the fact and circumstances of the case, the Ld. CIT (A) is correct in deleting the***

addition of Rs.16,22,836/- on account of undisclosed receipt as per 26AS when the assessee failed to reconcile it during the time of hearing.

2. Whether in the fact and circumstances of the case, the Ld. CIT (A) is correct in deleting the brought forward loss of Rs.41,14,422/- when the Assessing Officer made addition on that account only after noticing that there was no brought forward loss mentioned in the assessment order for the A. Y. 2009-1 0.

3. Whether in the fact and circumstances of the case, the Ld. CIT (A) is correct in deleting the deduction claimed u/s 35D of Rs. 35,11,7791- without bringing any material fact in support of his decision.

4. Whether in the fact and circumstances of the case, the Ld. CIT (A) is correct in deleting the addition of Rs.6,00,10,013/- made under power generation stating it as addition made on surmise and conjecture when the Assessing Officer has brought out clear and valid basis of addition based on some logical foundation.

5. Any other grounds that may be urged at the time of appeal hearing."

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : Assessing Officer noticed difference in depreciation claimed as deduction by the assessee as claimed under the Income-tax Act, 1961 (for short 'the Act') to the tune of Rs.26,39,93,650/- and to the tune of Rs.10,94,66,547/- under the Companies Act leading to the difference between income returned and income computed u/s 115JB of the Act to the tune of

Rs.18,38,04,634/- on which the tax being MAT was levied. AO further noticed from Schedule IX of the audit report that an amount of Rs.83,76,882/- was disclosed as interest income/income from other sources under the anonymous head 'income from other sources'. AO then constructed and displayed a table employing data extracted from the 26AS statement showing total of the corresponding receipts (interest income/income from other sources) to the tune of higher value of Rs.97,29,931/- which created an ostensibly unexplained difference of Rs.16,22,836/-. On the failure of the assessee to reconcile the same, the AO added the amount of Rs.16,22,836/- to the taxable income of the assessee.

3. AO further disallowed the losses of Rs.41,14,422/- to be set off against the taxable income computed for the impugned AY 2010-11. From column no.51 of the audit report furnished by the assessee, the AO noticed certain expenses to the tune of Rs.35,11,779/- having been claimed by the assessee u/s 35D of the Act. In response to the certain queries raised by the AO, assessee stated that certain preoperative expenses were included in the aforesaid amount and assessee submitted the presence of trial run expenses etc. However, AO came to the conclusion that the assessee has already claimed trial run expenses separately as

deduction which has not been classified u/s 35D and consequently, made an addition thereof to the total income of the assessee.

4. AO further noticed that the assessee has generated 4,16,33,420 units during FY 2009-10 which was duly purchased by the assessee being a captive unit. AO determined the incurrence of expenses to the tune of Rs.8,90,37,630/- for generation of power as per statement furnished to the excise department. AO held that separate computation of profit is required to be given. So, the AO constructed two tables employing data extracted from assessee's account to justify his findings which are as under :

Table 1	Value of sale of power @ 2.14 per unit to Appellant	Rs.8,90,37,630/-
Table 2	Value of sale of power @ 3.58 per unit to Appellant	Rs.14,90,47,643/-

5. AO noticed that as the power unit, referred to above, was a captive one, the sale of power generated was made to the assessee itself and furthermore the difference of Rs.6,00,10,013/- between two sale values above of Rs.14,90,47,643/- will be equal to the corresponding differences between the losses of Rs.7,20,04,604/- and consequently, held the impugned difference of Rs.6,00,10,013/- as the taxable income of the assessee and made addition thereof to the taxable income of the assessee.

6. Assessee carried the matter by way of filing an appeal before the ld. CIT (A) who has allowed the appeal. Feeling aggrieved, the Revenue has come up before the Tribunal by filing the present appeal.

7. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

GROUND NO.1

8. While deciding the issue raised by the Revenue vide this ground, the CIT (A) proceeded to conclude on the premise that this addition made by the AO is the result of hasty decision without providing an adequate opportunity to the assessee. CIT (A) in para 6(b) of the impugned order further observed as under :-

> ***"since fresh evidence has been placed on record by the assessee in the form of explanation and documents, the AO may examine these and confirm for himself the veracity of the reconciliations offered and thereafter deleted the impugned addition which is to the tune of Rs.16,22,836/-."***

9. Aforesaid observations made by the CIT (A) while deciding the issue in controversy leads to the conclusion that the CIT (A) has restored the case back to the AO to decide the issue in controversy which he is not empowered to do. CIT (A) has the

only option to call for a remand report from the AO on the additional evidences brought on record by the assessee and then to decide the matter. So, in these circumstances, we are having no option except to set aside this ground to the file of CIT (A) to decide afresh in the light of the decisions rendered by Hon'ble Delhi High Court in ***CIT vs. Manish Buildwell (P) Ltd. reported in 204 Taxman 106***. So, ground no.1 is determined in favour of the Revenue.

GROUND NO.2

10. Ld. CIT (A) deleted the addition of Rs.41,14,422/- on the ground that same is part of the losses amounting to Rs.5,50,32,664/- brought forward from AY 2008-09, a portion of which i.e. Rs.4,46,81,769/- was set of in AY 2009-10. In case, due to mistake of the AO while passing assessment order for AY 2009-10, there was omission to mention the losses totaling to Rs.1,03,50,895/- allowed to be carried forward to the succeeding year i.e. AY 2010-11, the same cannot be exercised to the prejudice of the assessee because once the amount o Rs.41,12,422/- is found to be part and parcel of the brought forward losses of AY 2008-09, the same cannot be added to the income of the assessee. So, ld. CIT (A) has rightly deleted the addition of Rs.41,12,422/-, hence ground no.2 is determined against the Revenue.

GROUND NO.3

11. CIT (A) vide impugned order again deleted the addition of Rs.35,11,779/- by directing the AO to confirm and verify the explanation and document placed on record by the assessee during appellate proceedings and thereafter delete the impugned addition by making following observations :-

> *(e) It is clear that the kind of expenses claimed by the Appellant (trial run expenses and share issue expenses) fall within the ambit of the above section. The AO has clearly not bothered to check on: a) the facts of the case on what kind of investments or outflows the claims of amortisation made by the Appellant u/s 35D related to; b) the fact that such claims had been made by the Appellant in more than one Assessment Year after commencement of its business on other extensions made of its undertakings (or in connection with his setting up units), etc., which claims had also been accepted by Revenue; as well as c) the requirements and conditions provided u/s 35D on what kind of expenses could be legitimately allowed as deductions and when. The dispute on the claim made is seen to be resolved through a straightforward examination of the explanations and data available and placed on record. The AO could have arrived at the same conclusions had he exercised caution, patience and due diligence.* ***However, as fresh evidence has been placed on record by the Appellant in the form of the explanations and documents, the AO may examine these and confirm for himself the veracity of the Appellant's position and thereafter delete the additions made totaling Rs.35,11,779/-. The Appeal on the said count is allowed."***

12. Bare perusal of the finding of the ld. CIT (A) leads to the irresistible conclusion that CIT (A) again allowed the appeal

without providing an opportunity of being heard to the AO by calling remand report rather directed AO to consider the explanations and documents brought on record by the assessee during appellate proceedings which amounts to remanding the case to AO to which he is not empowered to. So, this ground is also restored to the CIT (A) to decide afresh in view of the guidelines issued by the Hon'ble Delhi High Court in case of ***Manish Buildwell (P) Ltd.*** (supra)

GROUND NO.4

13. CIT (A) deleted the addition of Rs.6,00,10,013/- on the ground that same is made on the surmises and conjectures and resultant conceptualizations of taxable income and computation that are without foundation, logic or law and primarily the claim is allowed because no claim of deduction has been made u/s 80IA and therefore no separate computation of profit is necessary and also no question can arise on any notional compensation payable to the society.

14. Ld. AR contended that since the assessee was not selling power generated by the captive unit and the entire power generated is used for own consumption, the entire capital incurred on the upgradation of the unit is to be treated as capital expenditure. The contention raised by the ld. AR is sustainable because,

undisputedly, the assessee is a captive power plant and has generated 4,16,33,420 units which have been consumed by itself and in these circumstances, the only issue was to be determined by AO/CIT (A) if the expenditure on erecting the captive power plant is capital expenditure or not. Both AO as well as CIT (A) have maintained silence on this issue. So, in these circumstances, we consider it necessary to restore the issue to the file of CIT (A) to decide afresh after providing an opportunity of being heard to the parties if amount of Rs.6,00,10,013/- is capital expenditure or not. So, Ground No.4 is determined in favour of the Revenue.

15. In view of what has been discussed above, the appeal filed by the Revenue is partly allowed for statistical purposes and the file is restored back to the file of CIT (A) for deciding afresh after providing an opportunity of being heard to the parties

Order pronounced in open court on this 29th day of May, 2017.

Sd/-	**sd/-**
(N.S. SAINI)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 29th day of May, 2017
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Copy of the order forwarded to:

1.Appellant - M/s. Scan Steels Limited, Main Road, Rajgangpur, Distt. Sundergarh.
2.Respondent - DCIT, Rourkela Circle, Rourkela.
3.CIT
4.CIT (A)-II, Bhubaneswar.
5.DR(ITAT), Cuttack.
6.Guard File
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BY ORDER

SR. PRIVATE SECRETARY,
ITAT, CUTTACK