

आयकर अपीलिय अधीकरण, न्यायपीठ – “C” कोलकाता,  
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA  
(समक्ष)Before श्री जे. सुधाकर रेड्डी, लेखा सदस्य एवं/and श्री ऐ. टी. वर्की, न्यायीक सदस्य)  
[Before Shri J. Sudhakar Reddy, AM & Shri A. T. Varkey, JM]

I.T.A. No. 759/Kol/2015  
Assessment Year: 2004-05

Kalpataru Electricals (PAN: AAFFK3191F)	Vs.	Income-tax Officer, Wd-50(1), Kolkata
Appellant		Respondent

For the Appellant	Shri Vigyaneshwar Nath Datta, Advocate
For the Respondent	Shri Sankar Halder, JCIT, Sr. DR

Date of Hearing	27.08.2019
Date of Pronouncement	27.09.2019

### ORDER

**Per Shri A.T.Varkey, JM**

This is an appeal preferred by the assessee against the order of Ld. CIT(A) – 15, Kolkata dated 10.03.2015 for AY 2004-05. The grounds of appeal raised by the assessee are as under:

1. *For that the reassessment proceedings is not accordance with law resulting in the reassessment order is an opposed to requirement of law, not tenable in law and bad in law.*
2. *For that the CIT(A) erred in confirming assessment order u/s. 144/145 of the Act is not tenable in law and bad in law.*
3. *For that the order of the CIT(A) in confirming the addition of Rs.4,22,636/- on account of undisclosed turnover is neither tenable in law nor in facts and is liable to be deleted.*
4. *For that the CIT(A) erred in restricting the addition to Rs.35,20,693/- under the head on incentive & sales commission and neither tenable in law nor in facts.*
5. *For that the appellant craves leave to amend, alter, add, delete or substitute any other grounds of appeal before or at the time of hearing of the appeal.”*

2. Ground nos. 1 and 2 are against the action of the Ld. CIT(A) in confirming the action of the AO in reopening the assessment u/s. 147 read with section 148 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”).

3. Brief facts of the case are that the assessee for the assessment year under consideration i.e. AY 2004-05 declared a total income of Rs.6,220/-. The case was thereafter processed u/s. 143(1) of the Act. Thereafter, the case was reopened u/s. 147 of the Act based on a survey report prepared after survey u/s. 133A of the Act conducted at the business premises of the assessee on 02.03.2005. During the survey, a typed Profit & Loss Account and the Balance Sheet of the assessee as on 31.03.2004 was found which was impounded in which the turnover stated was found to be more than Rs.3 cr. as against Rs.2,03,34,226/- shown by the assessee in its regular books of account. Taking note of this fact, the AO recorded the reasons to believe escapement of income and issued notice dated 04.11.2009 u/s. 148 of the Act proposing to reopen the assessment. Since the assessee asked for the copy of the reasons recorded u/s. 147 of the Act, the same was furnished by the AO to the assessee vide letter dated 10.11.2010. This action of the AO to reopen the assessment which was carried out u/s. 143(1) of the Act for the AY 2004-05 has been challenged before us.

4. According to Ld. Counsel, the assessee had filed return of income on 20.10.2004, which was processed by the department u/s. 143(1) of the Act. Thereafter, a survey was carried out on 02.03.2005 and the survey report as well as certain papers (typed P&L Account and Balance Sheet as on 31.03.2004) was impounded along with this documents were with the department and no action whatsoever was carried out for such a long time after the date of survey and the show cause notice was issued u/s. 148 of the Act proposing to reopen the assessment only on 04.11.2009 (after 4 years) which should not have been done without tangible material which has come in the possession of the AO. Since, according to Ld. AR, there was no tangible material the AO ought not to have reopened the assessment and for that he relied on the following orders:

- i) Ashok Kumar Tandon Vs. ACIT (2014) 34 ITR (Trib.) 381 (ITAT, Del.);
- ii) Debashis Moulik Vs. ACIT (2015) 370 ITR 660 (Cal);
- iii) Common Cause (A Registered Society) And Others Vs. Union of India & Ors. (2017) 394 ITR 220 (SC);
- iv) ACIT Vs. Marvel Associates (2018) 92 taxmann.com 109 (Visakhapatnam Trib.)

Relying on the aforesaid orders of the Tribunal and Hon'ble High courts & Supreme Court the Ld. AR contended that the action of the AO to reopen was legally unjustifiable and bad in law.

5. On the other hand, the Ld. DR supported the action of the lower authorities in rejecting the contention of the assessee and relied on the order of the Ld. CIT(A) and does not want us to interfere in the order of the Ld. CIT(A).

6. We have heard rival submissions and carefully gone through the material available on record. We note that the AO had given a copy of the reasons recorded for reopening the assessment a copy of which was given to us which reads as under:

*“There was a survey u/s. 133A of the I. T. Act, in the business premises of the assessee on 02.03.2005. It was reported to the CIT on 03.03.2005 by the then AO that during the course of survey a typed profit and loss account and balance sheet of the assessee as on 31.03.2004 was found which was impounded in which the turnover declared was found at more than Rs. 3 crores as against Rs.2,03,34,226/- shown in the regular books of accounts. Besides above, it was found that the assessee has received incentive of Rs.31 lakhs and sales commission at Rs.15 lakhs which were not found disclosed in the regular books of accounts.*

*Under the above circumstances I have reason to believe that the income arisen out of the amount mentioned above, chargeable to tax has escaped assessment for the AY 2004-05 within the meaning of Section 147 of the I. T. Act, 1961 and such escapement has occurred by reason of the omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment for the AY 2004-05.”*

7. From a perusal of the aforesaid reasons recorded, we understand that a survey was carried out on the premises of the assessee u/s. 133A of the Act on 02.03.2005. During the survey, the survey team came across a typed P&L Account and Balance Sheet of the assessee as on 31.03.2004 which was impounded wherein turnover declared was found to be more than Rs. 3 cr. as against Rs.2,03,34,226/- shown in the regular books of account. Besides, it was found also that assessee had received incentive of Rs. 31 lakhs and sales commission of Rs. 15 lakhs which was also not found to have been disclosed in the regular books of account. Based on these suppression of facts, the AO had reason to believe that income chargeable to tax had escaped assessment for AY 2004-05. We note that though the reopening has been carried out after four years, the proviso u/s. 147 of the Act would not come into play because the original assessment was only an intimation u/s. 143(1) of the

Act. Since the reopening is based on material found and impounded during survey it does not lie in the mouth of the assessee to say that there was no material on the basis of which the reopening was carried out, therefore, we do not find any infirmity in the order of the AO to reopen the assessment which was an intimation u/s. 143(1) of the Act. The case laws referred to by the Ld. AR does not come to the rescue of the assessee because facts in these cases were different. Therefore, ground nos. 1 and 2 of the assessee stands dismissed.

8. Coming to the merits of the addition, the facts of the case as noted by the AO is that the assessee for the assessment year under consideration i.e. AY 2004-05 declared a total income of Rs.6,220/-. The case was thereafter processed u/s. 143(1) of the Act. Thereafter, the case was reopened u/s. 147 of the Act based on a survey report prepared after survey u/s. 133A of the Act conducted at the business premises of the assessee on 02.03.2005. During the survey, a typed Profit & Loss Account and the Balance Sheet of the assessee as on 31.03.2004 was found which was impounded in which the turnover declared was found to be more than Rs.3 cr. as against Rs.2,03,34,226/- shown by the assessee in its regular books of account. Taking note of this fact the AO recorded the reasons to believe escapement of income issued notice dated 04.11.2009 u/s. 148 of the Act proposing to reopen the assessment. Moreover, during the survey it was also found that the assessee has received incentive of Rs. 31 lakhs and sales commission of Rs. 15 lakhs which were also not found to be disclosed in the regular books of account. Thereafter, the AO after issuing notice u/s. 148 of the Act on 04.11.2009 reopened the assessment. During the course of reassessment the AO noticed that despite statutory notices u/s. 143(2) and 142(1) of the Act, none appeared before him. Thereafter, the AO noticed that the assessee was dealing the business of electrical goods and distributor of various fans and electrical goods. Thereafter, the AO issued notice u/s. 133(6) of the Act to the Branch Manager, West Bengal State Cooperative Bank, who brought to the notice of AO the fact about new loans which the assessee had taken and also had filed details of valuation of closing stock as on 31.03.2004. From the Balance Sheet and P&L Account submitted by the assessee to the bank, the AO noted that the closing stock was shown as on 31.03.2004 valued at Rs.45,01,120/- whereas as per the P&L Account and Balance Sheet filed along with the return of income was to the tune of

Rs.25,19,149/- and since there was a difference in closing stock of Rs.19,81,971/- which could not be explained by the assessee pursuant to the show cause notice issued to it, the AO added Rs.19,81,978/- as undisclosed stock. Thereafter, the AO noted from the typed copy of the P&L Account and Balance Sheet of the assessee impounded during the survey as on 31.03.2004 the turnover declared was found to be at Rs.3,00,50,000/- as against Rs.2,03,34,226/- shown by the assessee in the regular books of account. Taking note of the difference of Rs.97,15,774/- the AO applied GP rate of 4.35% which was applied by the assessee during the year and AO calculated the gross profit at Rs.4,22,636/-. Thereafter, the AO taking note that the assessee has not disclosed the commission and incentive received by it during the year under consideration (incentive of Rs. 31 lacs and commission of Rs. 15 lacs) was added. Thus Rs.46 lacs was also added to the income of the assessee, so the total amount of Rs.70,10,830/- was added as total income of the assessee. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who gave partial relief to the assessee i.e. in respect of addition of Rs.46 lacs on the incentive and sales commission and restricted the addition to Rs.35,20,693/-. Aggrieved, the assessee is before us.

9. After hearing the rival submissions, we note that based on the survey the case was reopened u/s. 147 of the Act based on a survey report prepared after survey u/s. 133A of the Act conducted at the business premises of the assessee on 02.03.2005. During the survey a typed Profit & Loss Account and the Balance Sheet of the assessee as on 31.03.2004 was found. And which was impounded in which the turnover declared was found more than Rs.3 cr. as against Rs.2,03,34,226/- shown by the assessee in its regular books of account. Taking note of this fact the AO recorded the reasons to believe escapement of income, and thereafter issued notice dated 04.11.2009 u/s. 148 of the Act proposing to reopen the assessment. However, the AO noticed that the assessee did not participate in the re-assessment proceedings. Thereafter, the AO has rejected the books of account of the assessee by making a finding as under:

*“The assessee failed to give any explanation till date. So the accounts of the assessee is rejected u/s. 145(3) of the I. T. Act as I am not satisfied about the correctness or completeness of the accounts of the assessee for the FY 2003-04 Act for the reason mentioned above. It is clear from the fact stated above that the assessee made unaccounted purchase, which has not been reflected in the books of accounts of the assessee for which the captioned*

*difference/Discrepancy of purchase has arisen. The sources of fund has definitely come from some undisclosed sources of income of the assessee. Because of the unaccounted purchase discrepancy of the S/creditors has arisen and ultimately the difference of closing stock of Rs.19,81,971/- is the product of the same.”*

10. In respect of the turnover though the assessee has shown as Rs.2,03,34,226/- in its regular books of account, however, the survey team had come across a typed P&L Account and Balance Sheet of the assessee as on 31.03.2004 which reflected turnover as Rs.3,00,50,000/- which means a difference of Rs.97,15,774/- and the AO has adopted the assessee's own GP of 4.35% on Rs.97,15,774/- and added GP of Rs.4,22,636/- which action has been confirmed by the Ld. CIT(A) which action of Ld. CIT(A) per-se cannot be faulted. However, the AO taking note of the report of the survey team that the assessee has received incentive of Rs. 31 lacs and sales commission at Rs. 15 lacs which was not disclosed in the regular books of account have made the addition separately of Rs. 31 lacs and Rs. 15 lacs [totalling Rs.46 lacs]. When this action of AO was challenged by the assessee, the Ld. CIT(A) has restricted addition to Rs.35,20,693/- which action of the Ld. CIT(A) cannot be countenanced, for the reason that the Ld. CIT(A) has misdirected himself and has made the extrapolation of the commission/incentive on the entire turn-over, whereas during survey it revealed only that the assessee has received from M/s Metro Rs. 31 lacs and Rs. 15 lacs. We note that the Ld. CIT(A) took note of the fact from the assessment records that the AO “got the details of purchases made by the assessee from M/s. Metro Tyres Ltd. and the supplier has reported that it has made sales of Rs.50,91,578/- to the assessee during FY 2003-04 and it has allowed a discount of Rs.7,95,447/- to the assessee. The purchase returns in this case were Rs.98,336/-. Thus on a net purchase of Rs.49,93,242/- (Rs.50,91,578 – Rs. 98,336 = Rs.50,91,578- Rs.98,336 = Rs.49,93,242/-). The assessee received a discount of Rs.7,95,447/- i.e. @ 16%. The same ratio of 16% if applied to the declared turnover of Rs.2,03,34,226/- given a likely discount received at Rs.32,53,476/- and if the figure of 16% is applied to the turnover mentioned in the typed sheet at Rs.3,00,50,000/- likely discount/incentive comes to Rs.48,08,000/- which is very closed to the figure of Rs. 46 lacs added by the AO.” Thereafter, the Ld. CIT(A) taking note that the assessee had declared credit notes received at Rs.10,79,000/- in the P&L Account gave

deduction to the same from Rs.46 lacs addition made by AO and thus, the restricted the addition to Rs.35,20,693/-. We do not subscribe to such an action/exercise conducted by the Ld. CIT(A). We note that the AO has taken note that after enquiry from M/s. Metro Tyres that it (M/s. Metro Tyres) had supplied goods worth Rs.50,91,578/- out of which the goods returned to it were only Rs.98,336/-. Thus, the net purchase from the M/s. Metro Tyres by the assessee was to the tune of Rs.49,93,242/- and Metro Tyres gave an incentive/discount of Rs.7,95,447/- to the assessee for the sales target achieved by it. Taking note of this incentive/discount, the Ld. CIT(A) has made a backward calculation on the entire turnover as supra [*if the figure of 16% is applied to the turnover mentioned in the typed sheet at Rs.3,00,50,000/- likely discount/incentive comes to Rs.48,08,000/- which is very closed to the figure of Rs. 46 lacs added by the AO.*] which action was nothing but based on surmises and conjectures and on an erroneous presumption that the assessee had received similar discount from the turnover of Rs. 3 cr. We note that the assessee's income termed as incentive and sales commission is only on attainment of sales target from the same line of business and, therefore, when the assessee receives incentive/discount a part of it is also passed on to the consumers to attract more consumers. Therefore, in the facts and circumstances of the case discussed above, when the books of account of the assessee has been rejected, there was no necessity for separate addition of the commission/incentive/discount which the assessee had undisputedly received in the same business and it is not the case of the revenue that the assessee was engaged in any other business from which assessee had received separate incentive/commission for doing certain other services the said income. Therefore, in the facts and circumstances of this case, we are of the opinion that once the books of account of the assessee were rejected by the AO, then he should have only estimated the profits of the assessee. For this proposition of ours, we rely on the order of the Hon'ble Andhra Pradesh High Court in Indwell Constructions Vs. CIT (1998) 232 ITR 776 (AP), wherein the Hon'ble High Court has held as under:

*“The pattern of assessment under the Income-tax Act is given by section 29 which states that the income from profits and gains of business shall be computed in accordance with the provisions contained in sections 30 to 43D. Section 40 provides for certain disallowances in certain cases notwithstanding that those amounts are allowed generally under other sections. The computation under section 29 is to be made under section 145 on the basis of the books regularly maintained by the assessee. If those books are not correct or complete, the Income-*

*tax Officer may reject those books and estimate the income to the best of his judgment. When such an estimate is made it is in substitution of the income that is to be computed under section 29. In other words, all the deductions which are referred to under section 29 are deemed to have been taken into account while making such an estimate. This will also mean that the embargo placed in section 40 is also taken into account.”*

11. We also rely on the decision of Hon’ble Andhra Pradesh High Court in Maddi Sundarsanam Oil Mills Co. Vs. CIT (1959) 37 ITR 369 (AP) wherein the Hon’ble High court has observed as under:

*“If once the income tax authorities have rejected the books, they cannot have it both ways, namely, adopting a flat rate to compute gross profit as well as rely on the books for the purpose of adding unexplained cash credits which were part of the scheme of balancing the accounts..... ”*

12. Therefore, in the facts and circumstances of this case as discussed (supra), we are of the opinion that once the books of account of the assessee were rejected by the AO, then he should have only estimated the profits of the assessee. We note that the turnover found in the impugned typed Balance Sheet and P & L Account during survey was to the tune of Rs.3,00,50,000/- and the sales incentive and sales commission was to the tune of Rs.31 lacs and Rs. 15 lacs, so the total amounts comes to Rs.3,00,50,000 + Rs.31,00,000 + Rs. 15,00,000 = Rs. 3,46,50,000/-. Though the assessee had shown a GP of 4.35%, in the interest of both the parties, we enhance the same to 6% and thus the GP comes to Rs.20,79,000/- and thus the assessee receives a relief of Rs.49,31,830/-.

13. In the result, the appeal of the assessee is partly allowed.

Order is pronounced in the open court on 27th September, 2019.

Sd/-  
(J. Sudhakar Reddy)  
Accountant Member

Sd/-  
(A. T. Varkey)  
Judicial Member

Dated: 27th September, 2019

Jd.(Sr.P.S.)



Copy of the order forwarded to:

- 1) Appellant – M/s. Kalpataru Electronics, Gobardanga Station Road, Gobardanga, 24 Parganas (North)-743243.
- 2) Respondent – ITO, Ward-50(1), Kolkata.
- 3) CIT(A)-15, Kolkata. (sent through e-mail)
- 4) CIT , Kolkata
- 5) DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Assistant Registrar