IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER AND
LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.245/CTK/2017
Assessment Year : 2012-2013

Asst. Commissioner of Income Tax, Corporate Circle -1(2), Bhubaneswar.	Vs.	M/s. Prinik Steels Private Limited., Plot No.61, Industrial Estate, Khurda
PAN/GIR No.AABCP 9328 G		
(Appellant)	..	(**Respondent**)

Assessee by : Shri D.K.Sheth, AR
Revenue by : Shri Subhendu Dutta, DR

Date of Hearing : 15/10/ 2019
Date of Pronouncement : 04 /11/ 2019

O R D E R

Per C.M.Garg,JM

This is an appeal filed by the revenue against the order of the CIT(A),1, Bhubaneswar dated 30.3.2017 for the assessment year 2012-2013.

2. The sole issue raised by the revenue in this appeal is that the CIT(A) is not justified in law as well as on facts in deleting addition of Rs.1,84,25,409/- on account of suppression of production.

3. The facts in brief are that the assessee is a company engaged in the manufacturing and sale of M.S.Rods, M.S Structural, M.S.Ingots, M.S.Wire and M.S.Scraps. During the course of assessment proceedings, the

Assessing Officer noticed that the consumption in respect of raw material, electricity power consumptions units, labour wage sand manufacturing expenses decreased accompanied with decreased in production and the overall ratio with the finished products has been reduced as compared to that of the preceding year. The Assessing Officer found that on electricity consumption charges of Rs.1,00,000/-, the production to the tune of 19.5 MT has been made whereas on the same unit of electricity consumption, the production was to the tune of 24.45 MT in the preceding assessment year 2011-12. The Assessing Officer analysed the over all calculation and observed that production to the extent of 25.38% has been reduced. Further on over all comparison of manufacturing expenses per unit production and consumption of electricity per unit production, the assessee has incurred excess expenses in the two heads at 25.3% and 11.6%, respectively. The Assessing Officer noted that the assessee has not brought any evidence in support of its claim that production has not been suppressed by the assessee. The assessee has debited total expenditure on account of manufacturing at Rs.16,66,66,434/- and total production has been shown at 10520. Thus, the cost of production per MT shown by the assessee at Rs.15,842.82 per MT. Accordingly, the Assessing Officer calculated the suppressed production at 1163 MT and arrived at the value of Rs.1,84,25,409/- (i.e. 1163 MT x Rs.15,843) and added the same to the income of the assessee.

4. Aggrieved by the said assessment order, the assessee preferred appeal before the first appellate authority. The CIT(A) after considering the written submission of the assessee as well as the assessment order deleted the addition made by the Assessing Officer.

5. Hence, the department is in appeal before us.

6. We have heard the rival submissions and perused the relevant material placed on the record of the Tribunal.

7. Ld Departmental Representative (DR) supporting the addition made by the Assessing Officer, submitted that in the written submission filed by the assessee during assessment proceedings, no reason explaining the excess of consumption of manufacturing cost and electricity consumption had been furnished. Ld D.R. further contended that the assessee was using power since many years and it was noticed by the Assessing Officer that the trading expenses shows a marked increase by way of increase in consumption oil and fuel and no plausible explanation was filed by the assessee explaining the higher consumption of electricity, manufacturing cost and consumption of oil and fuel, etc. Ld D.R. pointed out that it was noticed from the assessee's own production unit, the production was compared with the last year wherein, the input and the expenditure used is more or less same and the assessee has not brought any evidence in support of its claim that the production has not been suppressed by the

assessee. Therefore, the addition made by the Assessing Officer should have been confirmed. Ld D.R. strenuously contended that the CIT(A) has granted relief to the assessee without any basis merely by following its own order dated 6.1.2017 in first appeal no.266/15-16 for the assessment year2011-12 in assessee's own case, which cannot be a basis for granting relief to the assessee. Ld D.R. lastly submitted that keeping in view the sustainability and correctness of the assessment order, the order of the CIT(A) may kindly be set aside by restoring the order of the Assessing Officer.

8. Replying to above, ld A.R. submitted a copy of the order of the CIT(A) dated 6.1.2017 for assessment year 2011-12 in assessee's own case and submitted that as per the observation of the Assessing Officer at page 5 of the assessment order for the present assessment year 2012-13, the Assessing Officer wrote that "Thus, it is found that the assessee has not brought any evidence in support of its claim that production has not been suppressed by the assessee". Ld A.R. vehemently pointed out that the assessee cannot be asked to prove a negative thing and when the totality of the facts and circumstances for the assessment year 2011-12, the CIT(A) after considering the allegation of the AO and submission alongwith explanation of the assessee, has found that the addition is made entirely on the basis of suspicion and surmises and the Assessing Officer has built an entire castle in the air which has no foundation. Ld counsel for the

assessee submitted that it is not justified and reasonable to tax unaccounted production based entire on consumption of electricity and on account of machinery suppressed production keeping aside the acceptance of production report/return reported by the assessee by the Central Excise Department and State Excise Department. Ld counsel drew our attention towards para 2.2 of the impugned order and submitted that the CIT(A) has deleted the addition keeping in view the findings of the Assessing Officer and written submission/explanation of the assessee alongwith the proposition laid down by ITAT Ahmedabad in the case of Rutvi Steel & Alloys (P) Ltd. (ITA No.3870/Ahd/2007) dated 10.6.2010, order of ITAT Hyderabad in the case of Balaji Steel Rolling Mills Pvt Ltd. in ITA No.225-230/Hyd/2012 order dated 19.2.2016 and the decision of CESAT in the case of Commissioner of Central Excise, Patna vs Universal Polyethylene Industries and another decision in the case of R.A.Castings Pvt Ltd vs Commissioner of Central Excise, Meerut, which is quite correct and reasonable. Ld counsel lastly submitted that there is no valid reason to interfere with the findings arrived at by the CIT(A). Therefore, same may kindly be upheld in view of the decision of ITAT Guwahati Bench in the case of ITO vs. Satyanarayan Pareek (2001) 071 TTJ 0997.

9. On careful consideration of the rival submission, first of all, from the order of the CIT(A) dated 6.1.2017 for assessment year 2011-12, we observe that similar issue was decided by the CIT(A) in favour of the

assessee and the same has been followed by the CIT(A) for granting relief to the assessee for the assessment year 2012-2013 on the identical facts and circumstances of the case. We find it appropriate and necessary to reproduce the relevant operating part of the findings of the CIT(A) for assessment year 2012-13, which are as under:

> "4, I have carefully considered the facts of the case and the reasons given by the AO for making the addition. The addition is made entirely on the basis of suspicion and surmises as has been rightly pointed out by the assessee in its written submission. The AO has built an entire castle in the air which has no foundation. The higher consumption of electricity with lower production may be the cause of a strong suspicion that something might be wrong somewhere, and for making further enquiries about the actual state of affairs. But on the basis of suspicion only, no sustainable addition can be made in assessment. The AO has not brought on record any material that there was really suppression in production and that the suppressed products were sold in the market leading to earning of profit. No materials have been brought on record by the AO to indicate that the assessee had any unaccounted purchases or unaccounted sales. The AO also has not questioned the purchases of raw materials, sale of finished products and closing stocks as disclosed in the books by the assessee. The AO has also not found out any defects in the accounts of the assessee to reject the book result. In fact, the book result has not been rejected by the AO. In the circumstances, therefore, it is too farfetched to tax the unaccounted production based entirely on consumption of electricity or by comparing manufacturing expenses. The AO has not made any enquiry with the Central Excise Deptt. and Commercial Tax Deptt. to find out whether they have any information about suppression of production or making of unaccounted sales by the assessee. It has been submitted by the assessee that the Central Excise Deptt. has accepted the production reports/returns as filed by the assessee, and the Sales Tax Deptt. has never detected any unaccounted sales by the assessee. The assessee in its written submission has rightly pointed out so many reasons which go to show that the AO could not have made the addition that he made on account of imaginary suppressed production in the case of the assessee. The accounts of the assessee are audited not only

as per Companies Act but also as per Income Tax Act and Central Excise Act, and the AO has not pointed out any defects in the maintenance of such accounts. It is settled law that suspicion, however strong, cannot take the place of evidence. In the case of Commissioner of Central Excise, Patna vs. Universal Polyethylene Industries, it has been held by the Central Excise Tribunal that *"Clandestine removal and clearance was a serious charge against tie manufacturer which was required to be discharged by the Revenue by production of sufficient and tangible evidence" Standard of proof in such cases had to be on the basis of absolute proof and not on the basis of the preponderance of probabilities".* In another case R. A. Castings Pvt.Ltd. vs. Commissioner of Central Excise, Meerfjt, , the Delhi Bench of Central Excise Tribunal has held as under in respect of addition on account of suppressed production on the basis of high consumption of electricity.

> *"High consumption of electricity by itself not a ground to infer suppression of production - Electricity consumption cannot be the only factor for determination of liability especially when Commissioner is required to prescribe norms first as per rules - Evidences not produced on receipt and non-accountal of raw materials, manufacture along with overheads, transportation and payments and receipts for alleged suppression of production - Clandestine removal not sustainable merely based on technical opinion "*

Though the aforesaid decision has been rendered by the Central Excise Tribunal with reference to Central Excise Act, it equally applies to the case of the assessee since production is a matter of consideration under the Central Excise Act.

In the case of Rutvi Steel & Alloys (P) Ltd. (ITA NO.3870/AHD/2007)dt.10.6.2010 for the AY 2005-06, Hon'ble ITAT, Ahmadabad Bench was confronted with similar situation where the AO had made addition for suppressed production on account of high electricity consumption. The Id. CIT(A), in that case had deleted the addition on account of suppressed production and the Department was in appeal before the ITAT. The Hon'ble ITAT while confirming the order of the CIT(A) and dismissing the appeal filed by the Revenue held as under:

"13. *We have heard the rival submissions and perused the materials available on record. In the instant case, the assessee is a Private Limited Company engaged in the business of manufacture of M. S*

and CTD Bars. The Learned Assessing Officer observed that there was huge variation between the production shown by the assessee and the units of electricity consumed in each month during the year held that the books of accounts are not reliable and rejected the same by invoking section 145 of the Income Tax Act, 1961. He thereafter, observed that in the month of May 2004, the assessee has shown production of 133MT against consumption of 82847 units of power. Thus, he held that for 1 MT of production, 622.9 units of power consumption has been declared by the assessee. He noted that 14,15,899 units of power was consumed by the assessee in the entire year and by taking the production rate as 1 MT against consumption of 622.9 units of power arrived at total production of 2329.264 MT. as against 1736.535 MT. and by adopting the average sale price of 22436.88 MT. shown by the assessee arrived at the value of suppressed production of 592.729 MT. at Rs.1,33,04,916/-. After allowing rebate for all adverse eventualities in the production process with reference to the consumption of power unit and also considering contention of the assessee that production cannot be compared with consumption of power only estimated 70% of Rs.1,33,04,916/- as suppressed production of the assessee which worked out to Rs.92,,89,426/- and made addition to the income of the assessee. In appeal, tie Learned Commissioner of Income Tax(Appeals) held that rejection of book result was not justified by the Learned Assessing Officer for the reason that the assessee maintained books of account which were audited under the companies act and also under section 44AB of the Income Tax Act and the Learned Assessing Officer has ought no material to show that they are not maintained as per provisions of the Income Tax Act, 1961. Further, the Learned Commissioner of Income Tax(Appeals) observed that the Learned Assessing Officer has not brought on record any material evidences which indicates that the assessee was indulging in unaccounted manufacturing and sales and made unaccounted purchases of raw materials to manufacture unaccounted products. The Learned Commissioner of Income Tax(Appeals) has also observed that the excise authorities have verified the production records of the assessee and has found no discrepancies in them. He also observed that in the similar facts and circumstances, the Delhi Bench of the Tribunal in the case of Pondy Metal and Rolling Mills P. Ltd. (Supra) deleted the addition made on account of suppressed production and deleted the addition of Rs.92,82,426/-made in the instant case of the assessee. The Learned Departmental Representative has merely relied upon the order of the Learned Assessing Officer. He could not point out any error in the above finding of the Learned Commissioner of Income

Tax(Appeals). The Learned Departmental Representative could not bring any material on record to show that the assessee has purchased raw materials outside the books of account for making unaccounted production. Further, the assessee has maintained books of account, purchase and sale register and no defects could be pointed out in the same by the Learned Assessing Officer. Further, no error could be pointed out in the submission pf the assessee that it has maintained RG-1 register which is subject to verification by Excise Authorities and no defect has been pointed out by them on their inspection and that the accounts of the assessee are audited under the Companies Act and the Income Tax Act, 1961 and no adverse comments were made by the auditors on the accounts of the assessee. Further, the Hon'ble Delhi Bench of the Tribunal in the case of Pondy Metal and Rolling Mills P. Ltd. (Supra) has held that where assessee is maintaining regular books of accounts and all the purchase and sales are duly vouched and supported by raw material register, production register and finished good register which are subject to check by excise authorities no addition can be made on account of alleged suppression of production simply on the basis of consumption of electricity. We also find that the contention of the assessee that the variation in consumption of electricity may be caused due to various reasons such as break down of machinery, quality of raw materials, thickness

of finished goods and frequency of power failure, etc. could not be controverted by the Learned Assessing Officer. Rather it is observed that the above argument of the assessee was accepted by the Learned Assessing Officer to the extent of 30% for which no basis could be cited. No material was brought on record to show that it was scientific to arrive at the quantity of production merely on the basis of consumption of units of electricity. Therefore, in our considered opinion merely on the basis of units of electricity consumption, it cannot be concluded that the assessee's books of account were not reliable or the assessee is engaged in producing finished goods outside the books of account. Keeping in view the above facts and circumstances of the case, we *do not find any good reason to interfere with the order of the Learned Commissioner of Income Tax (Appeals). It is confirmed and the ground of appeal of the revenue is dismissed."*

Similarly, in the case of M/s. Balaji Steel Rolling Mills (P) Ltd., the Hon'ble ITAT, Hyderabad Bench in ITA Nos..225-230/Hyd/2012 dt. 19,2.2016 held as under in respect of addition for suppressed production based on electricity consumption ratio while deleting the addition:

"06.3 *On a consideration of the facts of the case for the asst. year 2000-01, it is seen that in the instant case, the estimation on suppressed income is based only on the working done by the Assessing Officer, after considering the power consumed for production, which led him to the conclusion that such power consumption must have been made for higher production, which was not disclosed by the appellant. However, even if the power consumption was on a higher side, it is seen that the Hon'ble Supreme Court in their judgement dated 3U-1-2011, in the case of Commissioner of Central Excise, Meerut Vs. R.A. Casting (P) Ltd have opined that electricity consumption cannot be taken to be a reliable basis for estimating the production of a particular unit. Citing the said decision, the Hon'ble Chandigarh Bench of the ITAT in the case of Arora Alloys Ltd Vs. ITO* (271 *NO.78jCSDj2012 dated 1-3-2012) have opined that the reason for the above view is that consumption for electricity depends upon various factors like type and quality of scrap used, number of break downs, quality of labour/supervisory staff, diligence of management etc, Accordingly, in the said case, the Hon'ble ITAT held that the AO's action in estimating the production of the assessee company on the basis of alleged excessive consumption of electricity is erroneous and fallacious. It is seen that a similar view has been taken by the Hon'ble Ahmedabad Bench of the ITAT in the case of Eastern Enterprises Vs. ACIT (ITA NO.352/Ahd/2010 dated 15-6-2012) also, wherein they opined that the consumption of electricity may rise due to hundreds of factors and therefore, no addition is justified.*

06.4 It is clear that in the present case, apart from estimating production on the basis of excessive consumption of electricity, determined on comparison with the consumption figures of a large public sector undertaking, the Assessing Officer has not been able to bring on record any other evidence to support his conclusion regarding unaccounted production. Following the decisions of the Hon'ble ITAT cited above and also the appellate orders passed by the CIT(A), Guntur and CIT(A)-I, Hyderabad on identical facts and circumstances in the appellant's own case for Asst. years 2001-02 to 2007-08 and Asst.year 2008-09, it is held that there is no justifiable basis for the addition on account of suppressed income of Rs.35,97,380/- in the Asst.year 2000-01, and the said addition is deleted and the ground raised on this issue is decided in favour of the appellant".

> It is seen that in several other decisions, different judicial forums are unanimous on the point that no valid addition can be made on account of suppressed production merely on the basis of excessive electricity consumption or claim of excess manufacturing expenses when compared with the earlier years.
>
> It may be mentioned here that in the assessment for the immediately preceding AY 2011-12, the AO has made similar addition on account of suppressed production by comparing the electricity consumption of the relevant previous year 2010-11 with preceding previous year 2009-10. In my order dt.6.1.2017 in ITA No.0266/15-16 for the AY 2011-12 , I have deleted the addition made on account of suppressed production. In the AY 2012-13, the AO, queerly enough, has quantified the suppressed production on the basis of figures for the AY 2011-12. This itseif speaks of the utter non-application of mind on the part of the AO while making the addition on account of suppressed production for the AY 2012-13. The AO has not followed the same method for finding out the suppressed production as was followed for the AY 2011-12. What the AO has done for this year is to compare the manufacturing expenses per unit/MT of production shown in the previous year 2010-11 and apply the same ratio to the total manufacturing expenses claimed for the previous year 2011-12 to arrive at the suppressed production. This method itself is highly defective being based on wrong postulates and cannot be approved of.
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> Keeping the above discussions I in view, the addition of Rs. 1,84,25,409/- is directed to be deleted."

10. From a careful reading of the relevant part of the assessment order, we observe that the Assessing Officer has merely proceeded to make allegation of suppression of production on the basis of excess consumption of manufacturing cost and electricity consumption. In the top part at page 5 of the assessment order, the Assessing Officer has noted that "Thus, it is proved that the assessee has not brought any evidence in support of its claim that production has not been suppressed by the assessee" meaning

thereby the Assessing officer is expecting the assessee to prove a negative fact without bringing any material or evidence against the assessee establishing the allegation of suppressed production and it is not reasonable & justified. So far as findings recorded by the CIT(A) while deleting the addition and granting relief to the assessee is concerned, from the relevant operating part of the first appellate order, as reproduced hereinabove, we clearly note that the CIT(A) has followed its earlier order dated 6.1.2017 for assessment year 2011-12. Undisputedly, the Assessing officer made addition on the basis of facts and figures pertaining to assessment year 2011-12, which were considered by the CIT(A) while granting relief to the assessment for the earlier assessment year 2011-12, which reveals that there was non application of mind on the part of the Assessing Officer while making the addition on account of suppressed production for the present assessment year 2012-13. We also observe that the Assessing Officer picked up manufacturing cost per unit metric tonne of production shown in financial year 2010-2011 pertaining to assessment year 2011-12 and by applying the same ratio to the total manufacturing expenses claimed for financial year 2011-12 pertaining to present assessment year 2012-13, recorded the allegation of suppressed production and made the addition. We are in agreement with the conclusion drawn by the CIT(A) that this method itself is highly defective being based on wrong postulates and cannot be approved.

11. From a careful reading of relevant part of the assessment order, we clearly observe that the Assessing officer has proceeded to make addition on the basis of suspicion and noticing the factum of higher consumption of electricity and lower production which could be a case of strong suspicion but it is also settled law that suspicion, however strong, cannot take the place of evidence against the assessee for making a sustainable addition.

12. At this juncture, we take cognizance of order of the ITAT Gwahati in the case of Satyanarayan Pareek (supra), wherein, the Co-ordinate Bench held that for estimating suppressed production, the only basis of variance of electricity consumption is not legally tenable. In the same line, the Central Excise Tribunal in the case of Universal Polyethylene Industries (supra) held that "clandestine removal and clearance was a serious charge against the manufacturer which was required to be discharged by the revenue by production of sufficient and tangible evidence. Standard of proof in such cases had to be on the basis of absolute proof and not on the basis of the preponderance of probabilities. The Delhi Bench of Central Excise Tribunal in the case of R.A.Casting Ltd (supra), held that high consumption of electricity by itself is not a ground to infer suppression of production.

13. In the totality of facts and circumstances of the present case, we are inclined to hold that the CIT(A) was right in deleting the addition by following his own order for the preceding assessment year 2011-12, which was self-explanatory and justified and reasonable. We also find that there is allegation of the Assessing Officer regarding suppressed production, which were sold in the market. In our considered opinion, the ld CIT(A) was also quite correct in taking the cognizance of proposition rendered by ITAT Hyderabad Bench in the case of Balaji Steel Rolling Mills (P) ltd (supra), wherein, the Co-ordinate Bench of the Tribunal referring to the order of ITAT Chandigarh Bench held that the electricity consumption depends upon various factors like type of quality of scrap used, number of break downs, quality of labour/supervisory staff, diligence of management etc and thus, it was held that the action of the AO estimating the production of assessee on the basis of alleged excessive consumption of electricity is erroneous and fallacious. We also further note that ITAT Ahmedabad Bench in the order in the case of Eastern Enterprises vs ACIT (supra), as relied by the ld AR before the ld CIT(A) as well as before us, the Co-ordinate Bench held that consumption of electricity may rise due to hundreds of factors or reasons, therefore, addition based on only such allegation was not found to be sustainable. We note that, under similar facts & circumstances, under same line of business and on the same allegation of high consumption of electricity, the ld CIT (A) has deleted the

addition made by the AO on identical line for immediately preceding assessment year 2011-12 in order vide dated 6.1.2017. This fact has not been controverted by the ld DR arguing before us. Hence, we are not unable to see any ambiguity, perversity or any other valid reason to interfere with the reasoned order of the ld CIT(A) to interfere and thus, we uphold the same. Consequently, the sole ground of the revenue is devoid of merits and is dismissed.

14. In the result, appeal of the revenue is dismissed.

Order pronounced on 4 /11/2019.

Sd/-	sd/-
(Laxmi Prasad Sahu)	**(Chandra Mohan Garg)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cuttack; Dated 04 /11/2019
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : Asst. Commissioner of Income Tax, Corporate Circle -1(2), Bhubaneswar
2. The Respondent. M/s. Prinik Steels Private Limited., Plot No.61, Industrial Estate, Khurda
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT- 1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.

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By order

Sr.Pvt.secretary
ITAT, Cuttack