THE HONBLE SRI JUSTICE L.NARASIMHA REDDY AND THE HONBLE SRI JUSTICE CHALLA KODANDA RAM

I.T.T.A.Nos.145 of 2003 and batch

29-10-2014

Commissioner of Income Tax appellant.

M/s. Shri Girija Smelters (P) Ltd., Raipur.Respondent.

Counsel for appellant: Sri S.R. Ashok

Counsel for Respondent : Sri Y.Ratnakar

THE HONBLE SRI JUSTICE L.NARASIMHA REDDY

AND

THE HONBLE SRI JUSTICE CHALLA KODANDA RAM

I.T.T.A.Nos.145 and 230 of 2003

COMMON JUDGMENT: (Per the Honble Sri Justice L.Narasimha Reddy)

These two appeals arise out of the order, dated 21.05.2002, passed by the Visakhapatnam Bench of the Income Tax Appellate Tribunal (for short the Tribunal) in I.T.(SS) A. No.8/Vizag/1998. While I.T.T.A.No.145 of 2003 is filed by the assessee, I.T.T.A.No.230 of 2003 is filed by the Department.

For the sake of convenience, the parties are referred to as Revenue and Assessee.

The assessee is a Company undertaking the activity of manufacture of Alloy Metals. It has also a sister concern, by name, M/s. Srinivasa Ferro Alloys Limited (SFAL). Each company is an independent assessee.

A search was conducted in the premises of SFAL, on 27.09.1996. The Managing Director for both the companies is said to be the same individual. During the course of search, his statement was recorded. According to the Revenue, the discrepancy between the undisclosed income and unexplained one, to the extent of Rs.1.03 crores, was noticed. Proceedings were initiated under Chapter XIVB of the Income Tax Act, 1961 (for short the Act), and notice under Section 158BD of

the Act, was issued on 03.03.1997. A sum of about Rs.16.00 lakhs was collected as income tax. M/s. SFAL submitted a return on 22.09.1997, disclosing NIL income. In addition to that, it has claimed refund of Rs.16.00 lakhs, collected from it during the course of search. An order of block assessment was passed in relation to M/s. SFAL, for the assessment years 1988-89 to 1997-98.

On the basis of the material gathered during the course of the search, in the premises of SFAL, a show cause notice was issued to the assessee herein, i.e. M/s. Girija Smelters (P) Limited, Raipur, on 20.08.1997, requiring it to explain the discrepancies. Ultimately, an order of assessment was passed on 30.03.1998 to the effect that the assessee has undisclosed income of Rs.1.78 crores, in the form of suppression of production of the material.

The assessee filed an appeal before the Tribunal. It was pleaded that most of the figures were arrived at by the Assessing Officer, on the basis of surmises and imaginations, and for all practical purposes, the Assessing Officer acted as though he is an authority under the Central Excise Act. The Revenue opposed the appeal and supported the order of assessment. The Tribunal partly allowed the appeal, deleting a sum of Rs.89,45,465/-, being the cost of the alleged stock of finished products, noticed through discrepancies, and a sum of Rs.23,80,000/- representing the alleged unexplained share capital. The order of assessment in respect of other items was upheld. While department felt aggrieved by the said deletion, the assessee is of the view that the order of assessment ought to have been set aside, in its entirety.

Sri S.R.Ashok, learned Senior Counsel for the Revenue, submits that the search of the premises of the said concern has yielded valuable information, and on the basis of the same, the block assessment order was passed, duly giving opportunity to the assessee. He contends that the findings arrived at by the Assessing Officer were based on the material that was seized in the course of search and on comparison of the same with the RG-I register maintained under the Central Excise Act and the Rules made thereunder. He submits that the Managing Director of the assessee has accepted in his statement, that there existed discrepancies, but in the explanation, he has come forward with a different version. Learned Senior Counsel contends that there was no basis for the Tribunal to delete the substantial amounts from the order of assessment.

Sri Y.Ratnakar, learned counsel for the assessee, on the other hand, submits that the search did not result in any discovery of incriminating entries or undisclosed wealth, but the Assessing Officer has taken upon himself, the task of undertaking comparison and

verification, which cannot be expected even from the authorities under the Central Excise Act. He contends that several phenomena, such as, burning losses, or the marketability of the waste that emerges in the course of manufacturing of the finished products, were not only taken note of, but also were treated as undisputed facts and huge financial liability was fastened upon the assessee. He submits that the Tribunal ought to have set aside the order of assessment, in its entirety, since it is based upon a totally untenable exercise.

For the most of it, the Revenue relies upon the facts and figures furnished in the returns, or those mentioned in the books of accounts. However, when serious suspicion arises as to the accuracy of the facts and figures so furnished, a search is conducted under Section 132 of the Act. If, in the course of search, any incriminating material or unexplained wealth or bullion, is discovered, the Act provides for passing of an order of block assessment, covering a period of 10 years, preceding the date of search. The manner in which the assessment must be made in such cases, is provided for in Chapter XIVB of the Act. The statement recorded under Section 132(4) of the Act also assumes significance in this behalf.

In the instant case, the assessee is a manufacturer of Manganese Alloys. Several registers are maintained and a typical procedure is followed for manufacture of the alloys of the relevant description. The finished product is subject to levy of excise duty. For all industries, that undertake the activity of processing or manufacturing metals, the Central Excise Department, insists on maintenance of registers, to monitor the activity of manufacture and the removal of finished products. This is obviously because, they cannot be expected to remain in the premises of the factory throughout. One such register is RG-I.

Even where the authorities of the Central Excise Department doubt the accuracy of figures mentioned in the registers, or if they find it difficult to understand the complexity of the manufacturing process, they seek the help of the experts. Sometimes experts are on the rolls of the department itself, and on the other occasions, the service of experts outside the department are availed. The Assessing Officer under the Act can certainly look into various records of the assessee, to satisfy himself about the correctness of the facts and figures, or to come to his own conclusions about the income of the assessee. If it is a case of mere verification of books of account, or the registers that reflect the sale of any product, the Income Tax Officer can undertake the exercise by himself. Where, however, he entertains a doubt about the correctness of the facts and figures that are mentioned in the registers, which are required to be maintained under the Central Excise Act or the Rules made thereunder, the proper course for him would be to take the

assistance of the concerned authority under the Central Excise Act. Howsoever anxious or willing he may be to verify the registers, by himself, outcome of the exercise may not be accurate. Just a Superintendent of Central Excise Department, cannot be expected to verify the correctness of the income tax returns, submitted by a manufacturer, it is not at all safe for any Income Tax Officer to undertake verification of the records referable to the department of Central Excise. Unfortunately, this is what exactly has happened in the instant case. A perusal of the order of assessment discloses that the Assessing Officer did not feel any inhibition to express his views on a matter, which does not genuinely fall in his purview. In a way, he has undertaken certain activity, which a Superintendent of Excise Department would have hesitated. For instance, in para 3.7 of the order, the following discussion was undertaken:

3.7 During the course of search, evidence was seized in the for of a register A3/24 in the case of M/s. Srinivasa Ferro Alloys Ltd., - sister company of the assessee Company which indicated that the assessee claimed higher burning loss in respect of Manganese ore. The burning loss as per the register A3/24, (the detailed working of which has been elaborately discussed in the Asst. Order dt.30.09.97 in the case of M/s. SFAL) came to 56.33%.

When the returns of income of the assessee company are verified, it is found that the assessee has claimed the burning loss at 61.72% for IF.Y.94-95 and 60.03% for F.Y.95-96 which are quite on the higher side as seen from the following table:

	94-95	95-96
Burning loss as per return	61.72%	60.03%
Burning loss accepted	56.33%	56.33%
Excess burning loss claimed	5.39%	3.70%

The assessee has been given an opportunity vide this office letter dt.20.08.97 to furnish full details of the burning loss. During the course of hearing, the assessee was also given an opportunity to explain why the production suppression should not be estimated because a higher burning loss was claimed in the return of income.

In its reply dt. 27.02.98, the assessee made similar submissions as in the case of M/s. Srinivasa Ferro Alloys Ltd. the assessee claimed that the burning losses was within reasonable limits. It may be mentioned here that the burning loss of 56.33% the A3/24 register. The production processes for the production of manganese based alloys are same in the case of the assessee company and M/s.SFAL. therefore, there is no reason why the burning loss should be

higher in the case of the assessee. Therefore, the objection of the assessee for the adoption of the same standard of burning loss as in the case of its sister company does not hold good. The higher claim of burning loss is on account of the fact that the assessee has carried out unaccounted production which is also evidenced by the existence of excess stocks of finished products as discussed above.

In the background of the above discussion, the unaccounted production owing to the higher claim of burning loss of manganese ore is arrived at in the same method as was adopted in the case of M/s. Srinivasa Ferro Alloys Ltd.

F.Y.	Manganese ore consumed	Production Recovery (%) (II/IX 100)	Excess burning loss	Suppression of production (V & IV)	Value Per M.T.	Total Value
I	II	III	IV	V	VI(Rs.)	VII (Rs.)
VIII						
94-95	6454	2470	38.27%	5.39		

347.87
123.5
15272
20,33,159
95-96
9289
3712
39.96%
3.70
343.69
185.6
20000
27,46,794

Total

47,79,953

All said and done, the occasion to levy income tax would arise, only when the product in question was found or alleged to have been sold, and the sale proceeds, constituting income were not reflected in the returns. It was not even alleged that the product shown in the form of discrepancies, was sold at all.

We are sure that when faced with a situation of that nature, even a Superintendent of a Central Excise would not have ventured to record his own findings about the maters like burning losses or other relevant issues and would have chosen to avail the services of a Metallurgical Expert. What we have extracted above is just a sample. The whole order is full of such discussions and instances. It is on the basis of such an exercise, that the Assessing Officer arrived at the conclusions that the undisclosed income on account of the improper disclosure, or suppression of the production for various assessment years is Rs.1,22,86,712/-. Even the expenditure incurred for purchase of raw materials became the subject-matter of extensive discussion, without indicating as to how the purchase of raw material can have any impact upon the income of an assessee, that too, of a manufacturing company. In the order of assessment, which runs into 31 closely typed pages, such instances are galore.

Obviously, to analyse and understand the approach of the Assessing Officer, the Tribunal discussed the matter at length. The order passed by it runs into 48 pages. At more places than one, it was pointed out that the stock available on ground, cannot be compared or verified with reference to the RG-I register. It was also pointed out that by-products or waste materials, such as slag, was treated by the Assessing Officer as the main product or an income yielding material

and the conclusions were arrived at, only on the basis of assumptions. We agree with the findings recorded and view expressed by the Tribunal.

An Income Tax Officer cannot carry out the functions of an authority under the Central Excise Act and arrogate to himself the power to determine the quantity of production, or to utter a final word on the intricacies of the manufacturing process, that too, without referring to any reliable material. The Assessing Officer, in the instant case, was totally unsuited for undertaking the activity of determining the exact production of the material, which itself involves very complicated procedures.

In the appeal of the assessee also, we do not find any substance. The amounts that were untouched by the Tribunal represent the value of the land that was purchased during the block period. The relevant facts and figures were taken into account and a proper conclusion was arrived at. We do not find any basis to interfere with the same.

Hence, both the appeals are dismissed. There shall be no order as to costs.

The miscellaneous petition filed in this appeal shall also stand disposed of.

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L.NARASIMHA REDDY, J.

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CHALLA KODANDA RAM, J.

Date:29.10.2014