IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI M. BALAGANESH, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.2061/Mum/2016 & 2162/Mum/2016
(**निर्धारण वर्ष** / Assessment Years: 2005-06 & 2006-07)

M/s. Regent Steel Ltd. 28/30, Baroda Street, Carnac Bunder, Iron Market, Mumbai - 400009	**बनाम** / Vs.	Assistant Commissioner of Income Tax, Circle 7(2), Mumbai.

आयकर अपील सं/ I.T.A. No.2167/Mum/2016, 2168/Mum/2016, 2169/Mum/2016 & 2170/Mum/2016
(**निर्धारण वर्ष** / Assessment Years: 2005-06, 2006-07, 2007-08 & 2008-09)

Assistant Commissioner of Income Tax 8(1)(1) Room No.624, 6th Floor, Aayakar Bhavan, M. K. Marg, Mumbai - 400020	**बनाम** / Vs.	M/s. Regent Steel Ltd. 28/30, Baroda Street, Carnac Bunder, Iron Market, Mumbai - 400009
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCR4092H		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Ajay Singh
Revenue by:	Vidisha Kalra

सुनवाई की तारीख / Date of Hearing: 21.01.2019
घोषणा की तारीख /Date of Pronouncement: 30.01.2019

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee as well as the revenue have filed the above mentioned appeals against the different orders passed by the Commissioner of Income Tax (Appeals)-14, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2005-06 to 2008-2009.

ITA 2061/MUM/2016

2. The assessee has filed the present appeal against the order dated 28.01.2016 passed by the CIT(A)-14, Mumbai relevant to the A.Y.2005-06. The assessee has raised the following grounds of appeal:-

"I. ***Reopening is bad in law.***

1. *The learned CIT(A) erred upholding the action of AO in issuing the notice u/s.148 of the act dated 28.03.2011 which is beyond the period of four years from the end of the relvant assessment year merely on presumption basis, without there being any material to establish that income has escaped assessment on account of assessee's failure to disclose truly and fully all material facts necessary for the assessment.*
2. *The learned CIT(A) failed to appreciate that the notice u/s.148 is issued merely on information received from Central Excise and Customs Department on 29.03.2010, however the Assessing Officer has failed to apply its own mind nor has done any independent investigation or verification so as to arrive at his own reason to believe that any income has escaped assessment.*

II. ***Disallowance u/s.40A(3) of Rs.19,50,580/-***

3. *The learned CIT(A) erred in upholding the disallowance of payments made to the transporters u/s.40A(3) without appreciating that the said provisions are not applicable as payments are below the ceiling limits, as per the Rule 6DD as prevailing during the relevant year.*
4. *The learned CIT(A) erred in disallowing payments made to the transporters in cash in excess of Rs.20,000/- u/s.40A(3) of the Act, without appreciating that where more than one payment is made to party on the same day for different independent transaction no disallowance could be made u/s.40A(3) as the ceiling limit applies to each such payment and not to aggregate payment.*
5. *The learned CIT(A) failed to appreciate that the transporter are outside parties and reside at distant places therefore payment could not be made through account payee cheque more so the transporter driver requires cash to get the lorry refuelled and for other petty expenses, therefore having regards to the nature of transaction the disallowance may be deleted."*

3. The brief facts of the case are that the assessee filed its return of income declaration income to the tune of Rs.18,64,750/-. The return was

processed u/s.143(1) of the Income Tax Act, 1961 (in short "the Act") and thereafter the case was reopened by way of issuance of notice u/s. 148 of the Act for the following reasons:-

> "Information was received from Central Excise and Customs Department, Aurangabad on 29th March, 2000 that on the basis of information of raw material purchases, production, clearances, value of clearances, duty paid, electricity consumption, they had established that the assessee had indulged in suppression of production and clandestine removal of finished products without payment of excise duty during the Financial years 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09 corresponding to assessment years 2004-05, 2005-6, 2006-07, 2007-08, 2008-09 & 2009-10.
>
> The Central Excise and Customs Department had taken on to account all the important parameters on productivity like thermal efficiency, nature of mix of raw material, design of furnace, use of capacitors, melting practice, heat balance as reported by IIT, Kanpur in their Technical Opinion Report. On the basis of this report and per MT power consumption as reflected in various other technical studies, which form the benchmark for supervising productivity in this trade, the highest power consumption i.e.1026 units of power, per MT production was adopted as the mean power consumption as against average consumption shown by the assessee, which is much higher

than the established industrial norms of every MT of production. It also took into account the variations in consumption of electricity, spikes in electricity consumption vis-à-vis production, input-output ratios, consumption of raw material etc. Accordingly shortage in reporting of production and the duty payable thereon was worked out as per the table below:-

Year	**Difference in production (MT)**	**Rate per MT**	**Value under reported production**	**Base Excise Duty**
2003-04	7510.508	Variable	100441824	14596091
2004-05	6957.137	Variable	123957666	13980756
2005-06	4519.728	15836	71574407	11451905
2006-07	1566.271	17735	27777815	4444450
2007-08	699.625	16459	11515575	1842492
2008-09	2616.279	26566	69504066	9347103

Thus the Central Excise and customs Department, on the basis of evidences gathered during the proceedings for levy of central excise and various factors served a show cause cum demand notice bearing No.62/CEX/2008 dated 05.05.2008 for the financial years 2003-04, 2004-05, 2005-06, 2006-07, 2007-08 & 2008-09. Subsequently SCN cum Demand Notice No.70/CEX/Commr/2009 dated 20.05.2009 for the financial year 2008-09 was served on the assessee. In these demand notices, the fact of unrecorded production and surreptitious removal of goods without payment of duty was established as brought out in the table above."

4. Thereafter, the notices u/s.143(2) and 142(1) of the Act were issued and served upon the assessee and after the reply of the assessee an addition

of Rs.12,39,57,666/- was raised as suppressed production and added to the income of the assessee. The assessee also violated the provision u/s.40A(3) of the Act, therefore, an addition of Rs.19,50,580/- was also raised and total income of the assessee was assessed to the tune of Rs.12,77,72,996/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who partly allowed the claim of the assessee but declined the claim of the assessee on the grounds raised above, therefore, the assessee has filed the present appeal before us. However, the revenue has also filed an appeal against the deletion of the addition in sum of Rs.12,39,57,666/-.

ISSUE NO.1 & 2:-

5. The learned representative of the assessee did not press the issue no.1 and 2, therefore these issues are decided against the assessee being not pressed.

ISSUE NO.3:-

6. Under this issue the assessee has challenged the disallowance u/s.40A(3) of the Act of Rs.19,50,580/-. During the assessment proceeding the Assessing Officer noticed that the assessee made the payment in cash to transporters in excess of Rs. 20,000/- in violation of provisions of Sec. 40A(3) of the I.T. Act. There were two categories of such payments in which one category is in connection with the aggregate payment to a single party in a single day exceeded Rs.20,000/-. the list of such payments was to the tune of Rs.90,48,181/-. The other category is where the single payment

was made in excess of Rs.20,000/-. The payment was in sum of Rs.7,04,721/-. Regarding the first category of the payment in which the assessee paid the aggregate amount more than Rs.20,000/- paid to a single party in a single day was prospectively amended w.e.f.2009-10 in view of the amendment made in provision of section 40A(3) of the Act by Finance Act 2008, therefore, the addition raised by the Assessing Officer and confirmed by the CIT(A) is not liable to be sustainable because the present assessment year is A.Y.2005-06, hence, the addition raised in view of the above said provision is liable to be deleted. However, on the other hand the learned representative of the revenue has refuted the said contention and strongly relied upon the order passed by the CIT(A) in question. Copy of CBDT circular dated 03.06.2010 is on the file which is applicable w.e.f. 01.10.2009 i.e. from A.Y.2009-10 only. Accordingly, payment more than Rs.20,000/- in aggregate to a single party in a single day could not be declined prior to the A.Y.2009-10. It is not in dispute that the present case is in connection with the A.Y.2005-06, therefore, undoubtedly, the provision of aggregate payment to a single party in a single day would not applied in the present assessment year of the assessee i.e.2005-06. In support of the claim, the assessee placed reliance upon the decision of the Hon'ble High Court of Karnataka in case titled as **A.N.Swarna Prasad Vs/ Additional Commissioner of Income Tax Range – 2 [2015] 230 taxman 536/56 taxman.com 138 and decision of ITAT, Hyderabad 'A' Bench in**

case titled as Sonali Castings (P.) Ltd. Vs. Deputy Commissioner of Income tax [2017] 88 taxmann.com 869. Both the above mentioned authority speaks that the CBDT Circular No.5 of 2010 dated 03.06.2010 is not applicable retrospectively, however, the same would take effect prospectively w.e.f. A.Y.2009-10. Taking into above mentioned facts and circumstances, we are of the view that the addition raised by the Assessing Officer and confirmed by the CIT(A) on account aggregate payment to a single party in a single day is not liable to be sustainable in the eyes of law. Therefore, in the said circumstances, we also delete the addition in sum of Rs.90,48,181/-. Accordingly, this issue is decided in favour of the assessee against the revenue.

ISSUE NO.4:-

7. Under this issue, the assessee challenged the confirmation of the addition on account of payment made to transporter in excess of Rs.20,000/- u/s.40A(3) of the Act. The learned representative of the assessee has argued that the assessee has explained the payment and also furnished the particulars of parties to whom the payment was made and the parties are identifiable and the list of the parties are given at page 194 of the paper book, therefore, the payment of amount is well explained, hence, the claim of the assessee is liable to be allowable in accordance with law. It is not in dispute that the assessee made the payment in sum of Rs.7,04,721/- which is in excess of Rs.20,000/- in cash. On appraisal of the page 194 of

the paper book, we noticed that the assessee has given the PAN Nos. of some parties to whom the payment was made. With regard to some parties whose PAN Nos. have not given. Since the claim of the assessee has not been verified on the basis of evidence given by the assessee, therefore, we are of the view that the claim of the assessee is liable to be verified in the light of evidence adduced before us in accordance with law. Accordingly, we set aside the finding of the CIT(A) on this issue and direct the Assessing Officer to examine the claim of the assessee afresh after providing an opportunity of being heard to the assessee in accordance with law. Accordingly this issue is decided in favour of the assessee against the revenue.

In the result, appeal filed by the assessee is hereby partly allowed.

ITA NO. 2167/M/2016:-

8. The revenue has filed the present appeal against the order dated 28.01.2016 passed by the CIT(A)-14 relevant to the A.Y.2005-06. The revenue has raised the following grounds of appeal:-

1. *The Ld. CIT(A) has erred in holding that the Assessing Officer had determined the suppression of production on the basis of the power consumption as determined by the Commissioner of Central Excise and Customs, Aurangabad without appreciating the fact that the AO had arrived to the conclusion on the basis of the evidence on record.*
2. *The Ld. CIT(A) erred in its finding / conclusion that as the adjudication order passed by the Commissioner of Central Excise, Aurangabad has been cancelled by the CESTAT, Mumbai, by majority of opinion and hence the foundation of assessment is lost, is a perverse finding of fact and being contrary to the evidence available on records.*

3. *The Ld. CIT(A) has failed to properly appreciate the fact that the only issue before the Hon'ble Third Member of CESTAT was, "Whether in the absence of any other evidence of suppression of production, higher consumption of electricity alone can form the basis for determining the suppression of production? In the circumstance the said decision was squarely distinguishable on facts.*

9. The brief facts of the case has already been discussed while deciding the appeal of the assessee in ITA No.2061/Mum/2016, therefore, there is no need to repeat the same.

ISSUE NO.1 TO 3:-

10. Under this issue the revenue has challenged the deletion of the addition in sum of Rs.12,39,57,666/- as suppressed production. The facts leads to controversy is that an information was received from Commissioner of Central Excise and Customs Aurangabad on 29.03.2010 that the assessee indulged in suppression of production and clandestine removal of finished products without payment of excise duty during the A.Y.2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09 & 2009-10. The Central Excise and Customs Department had taken in to account of all important parameters on productivity like thermal efficiency, nature of mix of raw material, design of furnace, use of capacitors melting practice, heat balance as reported by the IIT, Kanpur in their Technical Opinion Report. On the basis of this report and per MT power consumption as reflected in various other technical studies, which form the benchmark for supervising

productivity in this trade, the highest power consumption i.e.1026 units of power, per MT production was adopted as the mean power consumption as against average consumption shown by the assessee, which is much higher than the established industrial norms of every MT of production. It also took into account the variations in consumption of electricity, spikes in electricity consumption vis-à-vis production, input-output ratios, consumption of raw material etc. Accordingly shortage in reporting of production and the duty payable thereon was worked out as per the table below:-

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2008-09	2616.279	26566	69504066	9347103

11. Thereafter, Central Excise and Customs Department sent information to the Income Tax Department and Income Tax Department raised the addition accordingly in the relevant assessment years. Against the action of the Assessing Officer, the assessee filed an appeal before the CIT(A) who deleted the addition and relevant finding has been given in para no.4 which is reproduced as under.: -

"The above reply of the assessee has been perused carefully and is found that, by and large, the assessee has reiterated the stand taken before the Commissioner of Central Excise, Aurangabad which is not on sound footings and it has been rejected by the Commissioner of Central Excise, Aurangabad with elaborate reasoning and lucid justification. The fact is the Commissioner of Customs and Central Excise, Aurangabad after having considered all the facts of this case, has given a specific finding that the assessee is indulged in suppression of its production and clandestine removal of stock. As mentioned in his order at page 4 para 6, a copy of the technical report of IIT, Kanpur was attached with the Show Cause Notice and was thus provided to the assessee. In view of the above, as also the detailed comparative analysis of data prepared from the assessee's books of accounts, peer analysis and details furnished, it is apparent that, the rate of units of electricity per metric tonne adopted by the Hon'ble Commissioner of Central Excise, Aurangabad are very much reasonable, fair and justified. I, therefore, conclude that the rates for calculation of suppressed production in assessee's case adopted by Commissioner of Central Excise, Aurangabad are absolutely reasonable. The same is adopted accordingly for the purpose of calculation of unaccounted production of finished goods.

On the lines of the above discussions, pattern of input, output, electricity consumption for per metric tonne of production, usage of raw material, comparison of assessee's production results with those of its peers and conclusions derived therefrom, I am of the conclusion and firm belief that the books of accounts of the assessee do not reflect the true and correct nature of manufacturing results of the assessee and therefore I have reason to believe that the manufacturing records of the assessee are incorrect. Therefore, the books of accounts of the assessee do not reflect a true and correct picture of the financial affairs of the assessee's business and do ought to be rejected u/s.145(1) of the I.T.Act.1961 and is therefore rejected. The income which can be taken is either the disallowances as mentioned above, or the value of output based on the lowest consumption as shown by the assessee or by the peers in the industry at Jalna or the suppression of production determined by the learned Commissioner of Central Excise and Customs, Aurangabad vide the adjudication order to show cause notice which is the basis for reopening this assessment. The value of suppressed production for 6957.137 MT at the average rate variable worked out in that order is Rs.12,39,57,666/-. This value is adopted as the quantum of suppressed production and is added in the income of the assessee treating the same as income from undisclosed sources. This results

in an addition of Rs.12,39,57,666/- in the income of the assessee. Penalty proceedings are initiated u/s.271(1)(c) of the I.T.Act, 1961 for concealment of Rs.12,39,57,666/- in the income of the assessee."

12. On appraisal of the above mentioned findings and facts on record, we noticed that the addition was raised on the basis of the information received from the Central Excise and Customs, Aurangabad dated 29.03.2010. The suppression of production was assessed on the basis of different criteria reported by the IIT, Kanpur in their Technical Opinion Report. The assessee challenged the addition before the Custom Excise and Service Tax Appellate Tribunal (CESTAT) who deleted the addition. The CIT(A) has also deleted the addition raised by the Assessing Officer on the basis of the decision of the Custom Excise and Service Tax Appellate Tribunal (CESTAT). We also find that this question has already came up before the Hon'ble ITAT which has been answered in favour of the assessee. The CIT(A) has been relied upon the decision of Hon'ble ITAT 'A' Bench in case of **SRJ Petty Steels Pvt. Ltd. vs. Addl. CIT Range – 1, Aurangabad ITA No.123&124/PN/2012 dated 16.01.2015 and Bhaghyalakshmi Steel Alloys Pvt. Ltd. Vs. The Addl. CIT Range – 1, Aurangabad in ITA No.234, 285, 286/PN/2012 dated 15.07.2015**.

13. The facts of the present case is quite similar to the facts of the case relied by the learned representative of the assessee. Taking into account of all the facts and circumstances and law relied upon by the learned

representative of the assessee, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage.

14. Accordingly, these issues are decided in favour of the assessee against the revenue.

ITA NO.2162/M/2016

15. Since the matter of controversy has been adjudicated while deciding the ITA bearing no.2061/Mum/2016, therefore, finding given by us above in the said case is quite applicable as mutatis mutandis. Accordingly, the said appeal is hereby decided partly in favour of the assessee against the revenue on similar lines.

ITA NOS. 2168/M/2016, 2169/M/2016 & 2170/M/2016:-

16. The matter of controversy in the above mentioned appeals has been adjudicated by us while deciding the ITA No.2167/M/2016, therefore the finding of the said appeal is quite applicable as mutatis mutandis and accordingly the appeal of the revenue is hereby ordered to be dismissed.

17. In the result, all the appeals of the Assessee are hereby partly allowed and all the appeals of the Revenue are Dismissed.

Order pronounced in the open court on this 30.01.2019.

Sd/-	**Sd/-**
(M. BALAGANESH)	**(AMARJIT SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai: Dated 30.01.2019
MP

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai