आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
" B " BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

1. आयकर अपील सं./ITA No.995/Ahd/2014

With **CO No.167/Ahd/2014** (in ITA No.1166/Ahd/2014)

(निर्धारण वर्ष/Assessment Year : 1995-96)

Shree Sanand Textiles Industries Ltd. 10-A, Sattar Taluka Society B/h. C.U. Shah College Navjivan Press Road Ahmedabad	**बनाम**/ Vs.	The Dy.CIT (OSD) Circle-8 Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAMC 8881 G		
(Appellant & Cross Objector)	..	(प्रत्यर्थी / **Respondent**)

And

2. आयकर अपील सं./ITA No.1166/Ahd/2014

(निर्धारण वर्ष/Assessment Year : 1995-96)

The DCIT Circle-8 Ahmedabad	**बनाम**/ Vs.	Shree Sanand Textile Industries Ltd., Ahmedabad
(अपीलार्थी/**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by :	Shri Anil R.Shah, Shri Tushar Hemani & Ms.Kinjal Shah, ARs
Revenue by :	Shri Vidhut Trivedi, Sr.DR

सुनवाई की तारीख/ **Date of Hearing**	19/11/2019
घोषणा की तारीख /**Date of Pronouncement**	06 /01/2020

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned cross-appeals appeals have been filed at the instance of the Assessee and Revenue against the common order of the Commissioner of Income Tax (Appeals)–XIV, Ahmedabad [CIT(A) in

short] vide appeal no.CIT(A)-XIV/DCIT/Cir.8/170/2009-10 dated 10/01/2014 arising in the assessment order passed under s. 143(3) r.w.s.254 of the Income Tax Act, 1961(hereinafter referred to as "the Act") dated 21/12/2009 relevant to Assessment Year (AY) 1995-96. The assessee has also filed Cross Objection No.167/Ahd/2014 for AY 1995-96.

The assessee in ITA No.995/Ahd/2014 has raised the following grounds of appeal:

I. On Reopening

1. The CIT(A) has erred both in Law and in fact in holding that your Appellant is barred from challenging the Reopening of Assessment u/s.148/147 of the Act.

It is submitted that in the present proceeding before the CIT(A) your Appellant had rightly and validity taken up the ground of Reopening of Assessment and that since the Reopening has been challenged which goes to the root of Assessment, the CIT(A) ought to have dealt with the ground and decided the question of Reopening on merits, keeping in mind the facts of the case and as per the provisions of Law.

II. On Quantification:

A.

1. The CIT(A) has erred in confirming addition u/s.68 of the Act of Rs.3,75,39,177/-.

It is further submitted that the CIT(A) has not given a specific Show Cause Notice to make enhancement and therefore the addition made by him of Rs.1,04,876/- is bad in Law and void and therefore entire Addition of Rs.3,76,44,053/- (3,75,39,177 + 1,04,876) be deleted.

2. Without prejudice, it is submitted by your Appellant that Sec.68 does not apply to the facts of the case and that the amount is not Deposit but Sale Realization and it does not pertain to the year under Appeal as it is related to A.Y. 1996-97.

3. With regard to addition u/s.68 it is submitted that the amounts so added in six different accounts consists of Opening Balance as well as Sale Proceeds which is not liable to be added u/s.68 of the Act as held by various Appellate Authorities and that the Assessing Officer worked out has not "Peak Credit" as per Law for making the Addition.

B.
1. Your Appellant in respect of addition of Rs.3,44,10,000/- as Alleged "Suppressed Sales" was wrongly made by the Assessing Officer and that since the Books of Accounts are Audited and subjected to Excise Duty and Sales Tax, it is submitted that there was no scope fo making any addition as "Alleged Suppressed Sales" and though the CIT(A) ought to have deleted entire addition of Rs.3,44,10,000/-.

2. Without prejudice to above it is submitted that the Ld.CIT(A) has rightly held that if at all any amount is liable to be added as Suppressed/Unaccounted Sale then it is only the Profit element thereof he has rightly restricted the addition to Rs.36,54,000/- in place of Rs.3,44,10,000/-.

III. <u>On Double Addition claim of Telescoping</u>

Without prejudice to above it is submitted by your Appellant that the Addition of Cash Credit and Unaccounted/Suppressed Sale results into double and multiple addition which is against equity & justice and therefore the principal of Telescoping to the Addition be applied as per Law.

It is therefore submitted that relief claimed above be allowed and the order of the Assessing Officer be modified accordingly.

Your Appellant reserves right to add, alter, amend to withdraw any or all Ground of Appeal.

The assessee has also raised additional ground which read as under:

1) *The Ld.CIT(A) has erred both in Law on facts in circumstances of the case and on Provision of Law in upholding Suppression of Sales of Rs.3,07,56,000/- out of amount added by Assessing Officer at Rs.3,44,10,000/-.*
2) *Your Respondent submits that it was to achieve Higher Annual Capacity of Production of Rs.1890mt (actually 86 mt.) after it got EOU status w.e.f. 31-7-1995 related to A.Y. 1996-97 and hence there was no question of any higher production and therefore Suppressed Sales in A.Y. 95-96 as alleged by AO and confirmed by Ld.CIT(A) is required to be wholly & fully deleted.*
3) *Alternatively and without prejudice on CIT(A) has erred in adopting/NP @ 0.84% and confirming addition at Rs.36,54,000/- for the year but on facts of the case he should have adopted 3 years average and it being a Loss No addition could not have been made.*

It is therefore submitted tghat reliefs claimed above be allowed and the order of the Ld.CIT(A) be modified accordingly. Your Appellant reserves right to add, alter, amend to withdraw any or all Ground of Appeal.

The Revenue in ITA No.1166/Ahd/2014 for AY 1995-96 has raised the following grounds of appeal:

1) *The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the addition of Rs.3,07,56,000/- out of total addition of Rs.3,44,10,000/- made on account of difference in rate of sales of PTY holding that only profit element on suppressed sales was liable to be taxed & ignore the fact that the AO had made addition on account of profit element only @ Rs.18,500/- per ton for 1860 tons of suppressed sales which has not been disputed by Assessee.*

2) *On the facts and in the circumstances of the case, the Ld.Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad ought to have upheld the order of the Assessing Officer.*
3) *It is therefore, prayed that the order of the Ld.Commissioner of Income-Tax(Appeals)-XIV, Ahmedabad may be set-a-side and that of the order of the Assessing Officer be restored.*

ITA No.995/Ahd/2014 – AY 1995-96

2. At the outset, the learned AR for the assessee before us submitted that he has been instructed by the assessee not to press the ground No. 1 challenging the reopening of the assessment under section 147 of the Act. Accordingly we dismiss the same as not pressed.

3. The interconnected issue raised by the assessee in remaining grounds including additional grounds is that the learned CIT (A) erred in confirming the order of the AO by treating the amount of Rs. 3,75,39,177/- being 33% of the sales as unexplained cash credit and further enhanced the unexplained cash credit by Rs. 1,04,876/- only. Thus the aggregate addition made by the learned CIT (A) is of Rs. 3,76,44,053/- only.

4. Similarly, the issue raised by the Revenue is that the ld. CIT-A erred in deleting the addition made by the AO for Rs. 3,07,56,000.00 out of the total addition of Rs. 3,44,10,000.00.

As the issues raised by the assessee and the Revenue are inter-connected, therefore we have clubbed them together for the purpose of adjudication and brevity.

4.1. It is 2nd round of litigation before us. Therefore, it is imperative to take a note on the brief history of the case. The facts are that the Assessee is a public limited company and engaged in business of manufacturing of textile products. The assessee for the year under consideration filed the return of loss at Rs. 26,92,682/- only. Subsequently, The case of the assessee was selected under scrutiny and assessment u/s 143(3) was completed on 26.02.1998 by determining total income at Rs. 27,74,100/- after making addition on account of unexplained cash credit and interest free loan and advances.

4.2. Thereafter, there was a search conducted at the premise of the assessee by the Central Excise Department dated 18 May 1998. As per the search report of the central excise department, it was revealed that the assessee along with some other persons/organizations indulged in diverting the excisable goods in the domestic market but claiming on papers to have cleared the goods to M/s SRIL on Inter unit transfer basis against the CT-3 forms in order to escape from the payment of the excise duty on the goods sold in the domestic market. But actually these goods were never reached to M/s SRIL. As such the assessee sold these finished

goods fraudulently after involving other parties in the domestic market in order to avoid the central excise duty.

4.3. On the basis of such information the assessment was re-opened u/s 147 of the Act. The assessee during the assessment proceedings was requested to produce the books of accounts but it expresses its inability to do so as the books of account were seized by the Excise Department.

4.4. However, the AO during the assessment proceedings to verify the genuineness of the sales shown by the assessee in the books of accounts conducted inquiries on 10 parties to whom the assessee has shown sales. But as per the enquiry, these 10 parties did not exist. Therefore, the AO disbelieved the amount of sales shown by the assessee in the absence of books of accounts and non-existent of the parties. Accordingly, the AO treated the sum of Rs. 3,75,39,177/- being 33% of the total sales shown at Rs. 11,37,55,083/- as unexplained cash credit under section 68 of the Act. Thus the amount of unexplained cash credit was added to the total income of the assessee vide order dated 26th March 2002 under section 143(3) read with section 147 of the Act.

4.5. Further, the AO based on central excise report observed that the assessee has shown sales of its Polyester Texturized Yarn (for short PTY) product at a price of Rs. 49.50/- kg as against fair price of Rs. 68/ per kg

only. The assessee during the year has sold 1859.96 tonnes of its PTY products. Accordingly the AO calculated suppressed sales of Rs. 3,44,10,000/- (Rs. 68 – 49.50 * quantity 1860 tonnes) which was not shown in the books of accounts and added to the total income of assessee.

4.6. The assessee carried the matter to the learned CIT (A) who deleted the addition made by the AO vide order dated 06-03-2006. But the Revenue preferred the appeal before the ITAT which set aside the order of the learned CIT (A) to the file of the AO for fresh adjudication in ITA No. 2719/AHD/2003 vide order dated 15-02-2008 by observing as under:

> *"5. We have carefully considered the submissions made by the learned DR. We find that in this case the additions have been made by the AO as the assessee could not be able to produce the books of account and copies of the seized material before the Assessing Officer, as according to the assessee, books of account were seized by the Central Excise authorities. The assessment has been reopened in this case on the basis of information received by the Revenue authorities due to the search taken place in the case of the assessee by the Central Excise authorities. We are of the view that verification of books of account by the AO is necessary and essential to decide both the issues taken by the Revenue in its grounds of appeal. We, therefore, in the interest of justice and fair play to Both the parties relied on the orders of the authorities below as favourable to them., set-aside the order of the CIT(A) on both the issues taken before us and restore both the issues to the file of the AO with a direction that the AO will re-adjudicate both the issues afresh after providing proper and reasonable opportunity to the assessee to produce the books of accounts as well as other materials on which the assessee may rely."*

4.7. In view of the above, the AO issued notice under section 143(2) of the Act dated 19 December 2008 directing the assessee to appear before him along with the books of accounts, documents or any other material on which it may rely. The assessee in response to such notice

vide letter dated 21st February 2009 again expressed its inability to produce the books of accounts as the same were seized by the Central Excise Department. The assessee further requested the AO to collect the necessary information/ books of accounts from the Central Excise Department. However, the AO in the absence of books of accounts again confirmed the addition of Rs. 7,46,23,277/- (Rs.3,75,39,177/- under section 68 of the Act and Rs. 3,44,10,000/- suppression of sales) to the total income of the assessee.

Aggrieved assessee preferred an appeal to the learned CIT (A).

5. The assessee before the learned CIT(A) submitted that it has written various letters to the central excise department requesting for the releasing of the books of accounts but its request remained unattended. Similarly, the assessee also requested the AO to collect the books of accounts directly from the excise department in order to verify the genuineness of the sales but the AO failed to do so despite there was the clear direction of Hon'ble ITAT to verify the books of account.

5.1. The assessee further submitted that the AO in his order dated 26th March 2003 has held that the sales shown by the assessee to the 10 parties were non-existent. As per the assessee the finding of the AO is not correct. As such there were no sales made by it to the 4 parties out of

the total 10 parties. Similarly the assessee has made sales to the remaining 6 parties in the assessment year 1996-97. In fact, there was no sale made to the remaining 6 parties during the year under consideration. The assessee further submitted that the sales to 6 parties were duly disclosed in the books of accounts and after making the payment of the excise duty in the AY 1996-97.

5.2. The assessee further claimed that the sales shown by it in the year under consideration has been accepted as genuine by the revenue without pointing out any fault therein including the element of profit embedded therein. Similarly, the amount of sale was realized through the banking channel and the same was accepted by the Department. As such there was nothing received by the assessee from the aforesaid parties over and above the sale price/value.

5.3. Similarly, there was no information brought on record by the AO suggesting that the particular amount received by the assessee from the party represents the unexplained cash credit under section 68 of the Act. As such the entire addition was based on the guesswork of the AO which is not permissible under the Act.

5.4. Therefore, there was no element of unexplained cash credit under section 68 of the Act in the amount of sales declared by the assessee.

5.5. The assessee regarding the addition of Rs.3,44,10,000/- representing the difference in the amount of sales shown by the assessee vis-a-vis observed from the central excise report as discussed above, claimed that the actual quantity of sale of its product namely PTY is 859.96 tonnes but the AO has wrongly taken the same at 1859.96 tonnes. Thus the AO on the wrong figure of production has worked out the rate of sale at Rs. 49.50 per kg whereas the actual amount of sale rate is of Rs. 107.08 per kg. Accordingly the assessee submitted that the AO has made the addition based on wrong assumption of facts.

5.6. The assessee also claimed that the installed capacity of the machines for its PTY products was expanded by introducing one more machine in the month of March 1995 with the capacity of 1100 to 1700 tonnes. Therefore, there was no possibility of even manufacturing its PTY products of 1860 tonnes during the year.

5.7. Further, the AO started the proceeding at fag end of the assessment and passed the order in hurry/haste without the application of mind. The assessee further claimed the addition u/s 68 on account of unexplained cash credit was made arbitrarily. There was no clarity about the parties from the AO order in whose respect the addition is made.

5.8. The ld CIT(A) after going through submission and order of the Hon'ble ITAT and the order of the AO observed that it is the set-aside proceedings and the issue is confined to the direction of the ITAT. Accordingly, the learned CIT (A) made certain observations as detailed under:

i. Regarding the addition of Rs. 3,75,39,171/- under section 68 of the Act

a. The books of accounts of the assessee pertaining to the year under consideration were not seized by the central excise department. But the assessee on the pretext of getting the books of accounts seized by the central excise department did not produce the same during the proceedings for the reasons best known to it.
b. There was proper enquiry conducted by the Joint CIT special range about the existence of the 10 parties as discussed above and it was submitted by him in his report that these parties do not exist.
c. The amount credited from the parties (6 out of 10 parties as discussed above) during the year under consideration stands at Rs. 3,76,44,053/-
d. The information received from the central excise department was credible piece of evidence, suggesting that the assessee was engaged in diverting its sales to the local markets fraudulently.

5.9. In view of the above, the learned CIT (A) held that the onus lies on the assessee to prove the credit worthiness, identity and the

genuineness of the transactions carried out with the parties but the assessee failed to establish the same. Accordingly the learned CIT (A) confirmed the order of the AO by enhancing the addition by Rs. 1,04,876/- only. Thus the aggregate addition of Rs. 3,76,44,053/- was added/confirmed.

Regarding the addition of Rs. 3,44,10,000- representing the suppression of sales

6. The learned CIT (A) deleted the addition in part as made by the AO by observing as under:

> *"… Now on the question/issue of suppression of sale, as pointed out earlier the various defects & deficiencies, I am invoking my power coterminous with A.O. and reject the books of accounts u/s.145(3) of the Act. After rejecting of books of accounts, the second step is estimation of profit. On the basis of finding of suppression of sale, in the appellant case for the previous year such suppression of sale can be made as follows:*
>
> *(a) As per the adjudication order of the CCE(Adj.) Mumbai dt. 17.01.07 in F.No.v/54/15-109/OA/2003, v/54/15-124/OA/2003-04 and v/54/15-122/OA/2003-04 para 5.1 of the order reflect that for 237 ton removal of PTY there was evasion of Central Excise of Rs.1.23 cr. (para 2.3), therefore the effective rate of such duty comes to Rs.51,823/- per ton (1.23 crore / 237 ton).*
> *(b) As per fourteenth Annual Report for 94-95 relevant to A.y. 95-96, the appellant produced 837 tonnes of PTY while 41 tonnes were got texturized from outside i.e. total 878 tonnes (837+41) texturized PTY produced. The Central Excise component at the rate of 51823 per ton on this comes to Rs.4,55,00,594/- (878 x 51823).*
> *(c) The appellant in the same Annual report reflect that net sale consideration i.e. excluding Central Excise is of Rs.11.26 cro9res for 860 tonnes sale. This gives av.sale price excluding Central Excise at Rs.1.31 lac per ton (11.26 crore/860).*
> *(d) On the basis of production shown by appellant at 878 tonnes, the total Central Excise of Rs.6.27 cr. Was paid. But, as per Rs.51,823/- per ton rate, such Central Excise duty comes to Rs.4.55 cr. (878 x 51823). Therefore the appellant though recorded central excise payment in excess of Rs.1.72 cr (6.27 – 4.55) but the corresponding production and*

sale is not shown by appellant. On the basis of Rs.51,823/- per ton duty such excess production/sale worked out at 331.89 tones of PTY (1.72 cr./51823).

(e) At the average rate of average sale price of Rs.1.31 lac/ton this excess production / sale of 332 tonnes come to Rs.4.35 crore (332 x 1.32).

It is therefore the suppression of sale comes to Rs.4.35 crore on the basis of estimation from the appellant's own records. It is important here to note that during previous year 93-94 relevant to A.Y. 94-95 the appellant on the total turnover of Rs.23.43 cr. Reflected Net profit of Rs.19.78 lac (0.84%) while during impunged previous year relevant to A.Y. 95-96 on the total turnover of Rs.11.38 cr. The appellant shown net loss of Rs.16.15 lacs. ((-) 1.41%) (As per working Results declared in director's report in fourteenth Annual Report). The reason for such decline in turn over from Rs.23.43 cr. To Rs.11.38 cr. Is stated to be mainly due to fall in production though as per capacity of production and total production, such reason is not correct.

Now the A.O. made entire addition of suppression of sale being rate difference but as held by me that such rate difference was related to previous year relevant to A.Y. 96-97 i.e. when appellant got the status of 100% export oriented unit. In the impugned previous year, as per settled legal proposition as well as accounting principle, I am inclined with appellant that on the suppressed sale, it is only the profit element which can be treated as income. In view of 0.84% of profit shown by appellant in immediately preceding previous year, the profit element on suppressed sale of Rs.4.35 cr. Comes to Rs.36,54,000/- (0.84% of 4.35 cr.). It is therefore, at the place of addition of Rs.3,44,10,000/-, addition to the extent of Rs.36,54,000/- are upheld and confirmed as income from suppression of sale. The A.O. is directed to delete the balance of Rs.3,07,56,000/- (3,44,10,000 – 36,54,000). The appellant gets part relief."

Being aggrieved by the order of the learned CIT (A), both the assessee and the Revenue are in appeal before us. The assessee is in appeal before us against the confirmation of the addition for Rs.3,76,44,053/- on account of unexplained cash credit under section 68 of the Act whereas the Revenue is in appeal against the deletion made by the learned CIT (A) in part for Rs. 3,44,10,000/-on account of suppressed sale.

7. The learned AR before us filed a paper book running from page 1 to 95 and reiterated the submissions made before the authorities below.

8. Both the learned AR and the DR before us vehemently supported the order of the authorities below to the extent favourable to them.

9. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion we note that, the AO has alleged that there were certain transactions showing cash credit in the books of the assessee which were not explained and therefore he invoked the provisions of section 68 of the Act by making the addition of Rs. 3,75,39,177/- to the total income of the assessee. The view taken by the AO was also adopted by the learned CIT(A).

9.1. Similarly, the AO also found that there was the suppression of sale to the tune of Rs. 3,44,10,000/- and accordingly he made the addition to the total income of the assessee. However, the learned CIT (A) deleted the addition made by the AO in part by observing that the element of profit embedded in the suppressed sale can only be brought to tax i.e. Rs. 36,54,000.00 only. Accordingly the learned CIT (A) deleted the addition for Rs. 3,07,56,000/-.

Now the first issue before us arises whether the amount received by the assessee for Rs. 3,76,44,053/- during the year represents the unexplained cash credit under section 68 of the Act. The assessee has claimed to have made sales to 6 parties amounting to Rs. 4,11,36,522/- which are reproduced as under:

(i)	*M.K. Textiles*	*Rs.29,04,991/-*
(ii)	*Hardik Textiles*	*Rs.1,98,91,748/-*
(iii)	*Lata Textiles*	*Rs.19,96,635/-*
(iv)	*Shaka Fabrics*	*Nil*
(v)	*Ravi Textiles*	*Rs.1,17,87,669/-*
(vi)	*Piyush Textiles*	*Nil*
(vii)	*Vijay Handloom*	*Rs.27,36,864/-*
(viii)	*Sangitha Textiles*	*Rs.18,18,615/-*
(ix)	*Sarvan Textiles*	*Nil*
(x)	*Royal Textiles*	*Nil*

9.2. The assessee against the impugned sales has received the amount from the parties in the year under consideration as detailed under:

Sr.No.	*Name of party*	*Amount of sale during previous year (Rs.)*	*Balance outstanding as on 31.03.95 (Rs.)*	*Amount credited in Books of account (Rs.)*
1	*M.K. Textiles*	*29,04,991*	*64,735*	*28,40,256*
2	*Hardik Textiles*	*1,98,91,748*	*98,644*	*1,97,93,104*
3	*Lata Textiles*	*19,96,635*	*69,196*	*19,27,439*
4	*Ravi Textiles*	*1,17,87,669*	*6,92,600*	*1,10,95,069*
5	*Vijay Handloom*	*27,36,864*	*25,00,000*	*2,36,864*
6	*Sangitha Textiles*	*18,18,615*	*67,294*	*17,51,321*
				3,76,44,053

9.3. Admittedly, the amount of sale as claimed by the assessee was offered to tax by reflecting the same in the trading and profit and loss account. This fact has not been doubted by the authorities below. However, the existence of the parties was not proved by the assessee based on the documentary evidence during the proceedings. Accordingly, the learned CIT (A) treated the amount received from such parties as unexplained cash credit under section 68 of the Act. In this connection we note that the impugned amount has been taxed twice firstly the same was treated as sales and secondly the same was treated as unexplained cash credit under section 68 of the Act. Even if we assume that the action of the learned CIT (A) is correct i.e. the impugned amount is representing the cash credit as provided under section 68 of the Act. Then, the learned CIT (A) was duty-bound to reduce the same from the amount of sales as the same does not represent the sale but unexplained cash credit. As such, the same amount cannot be held taxable twice as per the wish of the learned CIT (A). In our considered view the action of the learned CIT (A) is erroneous to the extent of treating the same as sale proceeds and the unexplained cash credit simultaneously.

9.4. However, we are also conscious to the fact that there is no allegation from the authorities below that the impugned amount represents the unexplained cash credit over and above the sale proceeds.

We also find important to refer the provisions of section 68 of the Act which reads as under:

> *"Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :*
>
> ***Provided** that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—*
>
> *(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and*
>
> *(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:*
>
> ***Provided further** that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB)of section 10.*

9.5 From the above, we note that the provisions of section 68 of the Act can be attracted where there is a credit found in the books of accounts and the assessee failed to offer any explanation or the offer made by the assessee is not satisfactory in the opinion of the assessing officer. The assessee has explained to the authorities below that the impugned amount represents the sale which has not been doubted by the authorities below. Thus in our considered view, the impugned amount cannot be treated as unexplained cash credit under section 68 of the Act merely on the ground that the assessee failed to furnish the details of the existence of the parties.

9.6. We also note that the provisions of section 68 cannot be applied in relation to the sales receipt shown by the assessee in its books of accounts. It is because the sales receipt has already been shown in the books of accounts as income at the time of sale only.

9.7. We are also aware of the fact that there is no iota of evidence having any adverse remark on the purchase shown by the assessee in the books of accounts. Once the purchases have been accepted, then the corresponding sales cannot be disturbed without giving any conclusive evidence/finding. In view of the above we are not convinced with the finding of the learned CIT(A) and accordingly we set aside the same with the direction to the AO to delete the addition made by him.

10. Now coming to the issue on the suppression of sales as alleged by the Revenue, in this regard we note that the learned CIT (A) has rejected the books of accounts under the provisions of section 145(3) of the Act. The rejection of the books of accounts of the assessee has not been challenged either by the assessee or the revenue. Thus the order of the learned CIT-A qua to the rejection of the books has reached to its finality. It is the settled law that once the books of accounts have been rejected the only option available to the revenue is to estimate the profit on scientific basis. In this regard we find support and guidance from the

judgment of Hon'ble Gujarat High Court in the case of **President Industries reported in 258 ITR 654** wherein it was held as under:

> *"The amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represent the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realisation of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that the investment by way of incurring cost in acquiring goods which have been sold has been made by the assessee and that has also not been disclosed, the question whether entire sum of undisclosed sales proceeds can be treated as income, answers by itself in the negative."*

10.1. There was no allegation by the authorities below that the assessee has made some investment in the sales which has been suppressed. Therefore, the learned CIT (A), in our understanding, has correctly estimated the profit. Accordingly, we do not find any reason to interfere in the finding of the learned CIT-A.

10.2. We also note that the entire basis of the additions as discussed above was on the basis of the information received from the central excise department. We in this regard note that the proceedings of the central excise department has been dropped as evident from the order of The Commissioner of Central Excise (Adj.) Mumbai vide order dated 17.01.2007 bearing F. No. V/54/15-109/OA/2003, V/54/15-124/OA/2003-04 and V/54/15-122/OA/2003-04. The relevant extract of the order is reproduced as under:

"DISCUSSION & FINDINGS

8. I have carefully gone through the three show cause notices, the replies of the notices & the facts of the case. The main question before me for consideration is whether the notices companies SSTIL & BTL were entitled to the benefits of duty-free procurement of raw materials (RM) by way of exemption notifications 1 / 95 - CE dt 4-1-95 in respect of RM indigenously & 13 / 81 - Cus dt 9-2-81 as amended by 53 / 97 - Cus dt 3-6-97 in respect of I ; procured by way of imports.

9. On going through the three notices, I observe that the main allegation was that the noticee companies, SSTIL & BTL were not eligible for the benefits of duty-free procurement of RMI vide the above mentioned exemption notifications since the final products, polyester ***texturized*** *yarn (PTY) manufactured & cleared by them were not exported out of India. In this connection, I wish to reproduce the relevant portions of the exemption notifications for ease of reference:*

9.1 Notification 1 / 95-Central Excise dt 4-1-95 states that:

"In exercise of the powers conferred by sub-section (1) of section 5 A of the Central Excises & Salt Act 1944 read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act 1957, the Central Government being satisfied that it is necessary in the public interest so…. hereby exempts excisable goods, specified in Annexure I to this notification (hereinafter referred to as the said goods), when brought in connection with —

(a) the manufacture and packaging of articles, or for production or packaging or job work for export of goods or services out of India into a hundred per cent export oriented undertaking (hereinafter referred to as user industry);
... ...

from the whole of

(i) *the duty of excise leviable thereon under section of the Central Excise Act 1944, and*

(ii) *the additional duty' of excise leviable thereon under sub-section (1) of section3 of the Additional Duties of Excise (Goods of Special Importance) Act 1957, subject to the following conditions, namely:-*
…….

5. Notwithstanding anything contained in this notification, the exemption contained herein shall also apply to the said goods used for the purposes of production, manufacture, processing or packaging of articles in a user industry and such articles (including rejects, waste, scrap and remnants arising out of such production,

manufacture, processing or packaging of articles) even if not exported out of India, are allowed to be cleared outside the user industry under and in accordance with the Export-Import Policy and subject to such other limitations and conditions as may be specified in this behalf by the said Board or the said Committee, as the case may be, on payment of appropriate duty of excise ... " (emphasis supplied)

9.2. Notification 13/81- Cus dt 9-2-81 states that:

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act 1962, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods specified in the Table below (hereinafter referred to as the goods), when imported into India for the purpose of manufacture of articles for export out of India, or for being used in connection with the production or packaging of goods for export out of India by hundred per cent Export Oriented Undertakings approved by the Board of Approvals for hundred per cent Export Oriented Undertakings, appointed by the notification of Government of India in the former Ministry of Industry & Civil Supplies, (Department of Industrial Development) No. SO 163 (E) /RLIU/10 (2) /76 dt.3-3-1976, from the whole of duty of customs leviable thereon under the …. Schedule to the Customs Tariff Act 1975 and the additional duty, if any, leviable thereon under section 3 of the second mentioned Act (Customs Tariff Act) subject to the following conditions, namely: - ...

(7) Notwithstanding anything contained in this notification, the exemption herewith shall also apply to goods which on importation into India 'are used for the purposes of manufacture of articles within hundred per cent Export Oriented Undertakings approved by the said Board of Approvals for 100 % Export Oriented Undertakings and such articles (including rejects, waste & scrap material arising in the course of manufacture of such articles) even if not exported out of India, are allowed to be sold in India, under & in accordance with the said Export & Import Policy, & in such quantity & subject to such other limitations and conditions as may be specified in this behalf by the Director General of Foreign Trade, on payment of duty of excise leviable thereon under section 3 of the Central .Excises & Salt Act 1944 ... " (emphasis supplied) :

9.3 Notification 53 / 97-Cus dt 3-6-97 states that:

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act 1962, the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts goods specified in the Table below (hereinafter referred to as the goods), when imported into India for the purpose of manufacture of articles for export out of India, or for being used in connection with the production or packaging or job work for export of goods or services out of India by hundred per

cent Export Oriented Units approved by the Board of Approvals for hundred per cent Export Oriented Units, appointed by the notification of Government of India in the Ministry of Industry, Department of Industrial Policy and Promotion or the Development Commissioner concerned as the case may be, for this purpose, (hereinafter referred to as the said Board), from the whole of duty of customs leviable thereon under the First Schedule to the Customs Tariff Act 1975 and the additional duty, if any, leviable thereon under section 3 of the said Customs Tariff Act subject to (he following conditions, namely: -...

… … …

(7) Notwithstanding anything contained in this notification the exemption herewith shall also apply to goods which on importation into India are used for the purpose of manufacture of articles within hundred per cent Export Oriented Unit and such articles (including rejects, waste & scrap material arising in the course of manufacture of such articles) even if not exported out of India, are allowed to be sold in India, in accordance with the Export & Import Policy, on payment of duty of excise leviable thereon under section 3 of the Central Excise Act 1944….." (emphasis supplied)

10. On going through the provisions of the aforesaid exemption notifications, it is clear that RM was allowed to be procured duty-free by an EOU if the final products manufactured out of such RM was exported out of India. However, I also observe that the exemptions from the whole of the duties of excise/customs granted by the said notifications shall also apply if the final products manufactured out of such duty-free RM, even if not exported out of India, are allowed to be sold in India on payment of the appropriate duties of excise leviable thereon under section 3 of the Central Excise Act 1944. In this connection, I observe that the demand of duties on the final products, PTY drawn out of RM, POY, were confirmed vide the following orders-in-original:

	SCN issued to Supplier EOU & receiving party as indicated below	*SCN #*	*dated*	*Duty involved (Rs)*	*Order-in-original No.*	*dated*
1	*SSTIL with GCUL*	*DGAE / DZU / 40 / 98*	*14-2-01*	*1,22,82,067/-*	*1 8 to 35 / Commr (AH) / 06*	*18-12-06*
2	*SST1L with SRIL*	*DGAE / DZU / 37 / 98*	*20-4-01*	*1,08, 11,515/-*	*168 /Commr (AH) /OS*	*27-10-05*
3	*BTL with GCUL*	*DGAE /DZU/ 40*	*1/3/01*	*7,05,08,62*	*1 8 to 35 / Commr*	*18-12-*

		/ 98		*5/-*	*(AH) / 06*	*06*
4	*BTL with SRIL*	*DGAE / DZU / 37 / 98*	*4-7-01*	*34,94,498/-*	*17 /Commr (AH)/ 06*	*19-10-06*

10.1 In view of dae fact that in the aforesaid orders-in-original, the demand of appropriate duties of excise on final products, as indicated above, has already been confirmed, I hold that the noticee companies are eligible for the exemptions on the RM provided in the aforesaid notifications. If Ae demand 01 duties on RM were to be confirmed at this stage, it would amount to double taxation on RM as well as final products which is against the principles of taxation in Central Excise law since it is well settled that under Central Excise law, the levy of duty is on the goods per SE & not ON the manufacturers of the goods. Furthermore, in view of the above facts, it is immaterial whether the goods suffer duty at the hands of supplier EOUs, SSTIL / BTL or user industries, GCUL / SRIL.

10.2 As regards the applicability of the condition 'allowed to be sold in India', it is seen that the final products cleared without payment of duty from the factory premises of SSTIL & BTL said to be destined to reach the factory premises of GCUL / SRIL were in fact diverted & sold in the local market viz., Domestic Tariff Area (DTA). Hence irrespective of whether the final products were 'allowed to be sold in India" or not, the indisputable fact was that the same were sold in India. In view of the above fact, the demand of duties on the final products were confirmed as per Sec 3 of the Central Excise Act 1944 as indicated in para 10 above.

10.3. In view of the discussion in paras 10 & 10.1 above, I conclude that SSTIL & BTL are eligible for the benefit of exemption notifications 1/95 – CE dt 4-1-95 in respect of RM procured indigenously & 13/81 – Cus dt 9-2-81 as amended by 55/97 – Cus dt 3-6-97 in respect of RM procured by way of imports."

11. The learned DR at the time of hearing has not brought anything contrary to the finding of the central excise department as reproduced above. Thus in the absence of any assistance from the learned DR we have no alternate except to place the reliance in the aforesaid order as

true and correct. Furthermore, we also assume that the impugned order of the central excise department pertains to the year under consideration.
In the result the appeal filed by the assessee is allowed and the appeal filed by the revenue is dismissed.

Coming to Assessee's CO No. 167/AHD/2014 for AY 1995-96

The Assessee in CO No.167/Ahd/2014 (in ITA No.1166/Ahd/2014 – AY 1995-96) for AY 1995-96 has raised the following grounds:-

> 1. *The CIT(A) in his Speaking Order have rightly deleted addition of Rs.3,07,56,000/- out of addition made to Rs.3,44,10,000/- from alleged Suppressed Sales and have correctly arrived at profit thereon of Rs.18,500/- following binding judgement of Hon.Gujarat High Court.*
>
> *In view of above the Departmental Appeal is infructuous and deserves to be dismissed.*

12. At the outset we note that, the CO filed by the assessee is supporting the order of the learned CIT-A. As such there is no grievance raised by the assessee in the CO filed by it. Accordingly we hold that no separate adjudication is required. Hence we dismiss the CO filed by the assessee as infructuous. Thus, the CO filed by the assessee dismissed.

13. In the result, the CO filed by the assessee dismissed.

14. In the combined result, the appeal of the assessee is allowed, the appeal of the revenue is dismissed and the CO of the assessee is dismissed.

This Order pronounced in Open Court on	**06/01/2020**

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated 06/01/2020

टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-XIV, Ahmedabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad