

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 6138/Del/2018
(Assessment Year: 2012-13)

VRB Foods Pvt. Ltd (through Dr Oetkar India Pvt Ltd , successor company) C/o. Kapil Goel, Adv. F26/124, Sector-7, New Delhi	Vs.	DCIT, Circle-26(2), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Kapil Goel, Adv
Revenue by:	Shri Mrtunjay Barnwal, Sr. DR
Date of Hearing	21/07/2020
Date of pronouncement	23/07/2020

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the VRB Foods Pvt. Ltd (through Dr. Oetker India Pvt. Ltd, Successor Company) [The Assessee or Appellant] against the order of The Commissioner of Income Tax (Appeals) -23 , New Delhi [The Ld CIT (A)] dated 25.07.2018 for Assessment Year 2012-13.

2. The assessee has raised the following seven grounds of appeal:-

"1. That on the facts and in the circumstances of the case and in law, the order passed by Ld. AO dated 13/02/2015 is void ab initio as same is passed in name of company which was not existing on date of order as Hon 'ble high court order approving amalgamation was passed on 12/05/2014 with effective appointed date from 01/04/2013 accordingly orders passed by Ld AO and Ld CIT-A becomes bad in law on basis of settled doctrine that no order can be passed in name of non existing person ;

Covered Matter: Addition made on basis of mere auditor comments having no bearing on income determination under the Act and wrongful invocation of section 145

2. That on the facts and in the circumstances of the case and in law, Ld. CIT-A erred in sustaining addition of Rs 146,76,345 made by Ld. AO on basis of perverse findings recorded in perfunctory manner without appreciating objectively the arguments and contentions of assessee taken before Ld. AO and Ld. CIT-A where it was highlighted with reference to case records that no case is made out for invocation of section 145 of the Act and merely on inchoate comments of statutory auditor and on incorrect deficiencies in valuation, impugned addition is made which stands already jettisoned in order of Hon'ble Delhi IT AT in similar facts in AY 2010-11 & AY 2011-12 (order of B bench in IT A 2291/ & 2292/Del/2015 order dated 29/12/2017) which squarely covers the present issue in favor of assessee;

Consistent stock valuation method: Duly accepted by revenue in initial and later years in same fact:-

3. *That on the facts and in the circumstances of the case and in law, Ld. CIT-A erred in sustaining addition of Rs 146,76,345 made by Ld. AO in highly inconsistent and non uniform manner where on similar and same facts where same comments were made by the auditor after considering the same no adverse inference is drawn in AY 2008-09, AY 2009-10 and AY 2013-14 onwards which fulminates the stand of lower authorities and reflects that addition is made without any application of mind;*
- 3.1 *That on the facts and in the circumstances of the case and in law, Ld. CIT-A erred in sustaining addition of Rs 146,76,345 made by Ld. AO as assessee has regularly followed recognized and acceptable principle of stock valuation in consistent manner which completely rules out any adverse scope of interference u/s 145 of the Act to arbitrarily reject trading results;*

Incoherent action u/s 145 and absurd /preposterous estimation of profits

4. *That on the facts and in the circumstances of the case and in law, Ld. CIT-A erred in sustaining addition of Rs 146,76,345 made by Ld. AO by wrongly holding that action of Ld AO u/s 145 is correct where as no where it is categorically established by Ld AO/CIT-A that it is impossible to compute taxable income from available books/records and even no trading outside the books in form of any surreptitious /clandestine transaction is detected which exposes the fallacy in action of Ld AO/Ld CIT-A and so addition made deserves to be deleted;*
5. *That on the facts and in the circumstances of the case and in law, Ld CIT-A erred in sustaining addition of Rs. 14676345 made by Ld AO by wrongly holding that best judgment assessment made on basis of net profit of AY 2010-2011 is correct, which is seriously repudiated being sans merits as firstly no trading outside the books is detected and secondly mere mechanical rejection of books u/s 145 cannot cloth the authorities to make hypothetical additions on basis of past history which itself stands overruled by IT AT in aforesaid order;*

Biased action of Ld AO and Ld CIT-A

6. *That on the facts and in the circumstances of the case and in law, Ld CIT-A erred in not deleting the addition made by Ld AO which was also unlawful and made in violation of principles of natural justice as additions are made and sustained in biased manner which is evident from the way and manner in which impugned proceedings before Ld AO and Ld CIT-A are conducted and no where valid show cause notice as mandated in law is issued to assessee.*

Consequential benefit u/s 80IC

7. *That on the facts and in the circumstances of the case and in law, Ld CIT-A erred in not allowing corresponding enhanced deduction u/s 80IC qua Unit 1 and finding in para 6.3 of Ld CIT-A order is plainly contradictory to CBDT circular no 37/2016 dated 2/11/2016.”*

3. Brief facts of the case shows that the assessee is a company engaged in the business of manufacturing and sale of processed foods like sauces, mayonnaise, spreads and dips, mustards, milk shake mixes, egg less cake mixes, peanut butter and culinary powders.

4. It filed its return of income for Assessment Year 2012-13 on 28.09.2012 at Rs. 3,58,00,490/-. The case of the assessee was selected for scrutiny. The Id AO found that the gross profit ratio of the assessee from Assessment Year 2010-11 was of 21.49% , it has gone down to 17.20% for this year, AO asked the assessee to show the reasons for decline. The assessee submitted that there is increase in raw material cost from 59.50% on turnover to 61.78% for this year, the Id AO was not satisfied with the explanation of the assessee, as the assessee did not produce books of account and vouchers before the Id AO. The Id AO further noted that the auditors of the assessee have also commented in audit report adversely regarding valuation of stock. He referred to the Audit report dated 03.09.2012 and noted that the audit report has stated that auditor is unable to comment on the accuracy of valuation on inventories of finished goods. Auditor has also stated that the company has not made available details regarding consumption of raw material and packing material used in manufacture of goods. Auditor was also not supplied consumption details as per bills of material. Thus, the auditor qualified audit report and stated that impact on the profitability cannot be ascertained. Therefore, the Id AO took up the same and noted that there is no suitable alternative source to obtain comparable quotations to check the value of purchase and sale with related parties with the fair market value of goods. The Id AO also noted that in the last assessment year also additions were made therefore, why it should not be repeated. Assessee furnished its reply. The main contention of the assessee was that the auditor is repeating its qualification mechanically year after year. It was further stated that for Assessment Year 2008-09 and 2009-10 despite identical audit observation, no additions have been made. It is also the claimed that assessee applies Accounting Standard-2 for Valuation of Inventories. It was further stated that additions were made Assessment Year 2010-11 on identical basis but that cannot be basis for the addition in this year. The assessee submits that Assessment Year 2010-11 and 2011-12 are in appeal.
5. The Id AO considered the explanation of the assessee and held that the assessee company has not produced books of accounts and vouchers during the assessment proceedings despite called for. He referred to the order sheet entry dated 11.02.2015. He further stated that though assessee in its letter dated 11/02/2015 stated that the books of accounts and vouchers are produced for verification. However, those were not produced. The Id AO further found that there are differences in the quantity of refined sugar of 14148 kgs, Acetic Acid of 116 kgs and Maida of 36 kgs. This difference was noted as per quantities details submitted along with audit report with the quantities details submitted by the assessee along with letter dated 11.02.2015. The Id AO further noted that assessee is not able to

justify the qualification of the auditor. Therefore, in view of discrepancy noticed in closing stock, non-production of books and the comments of the statutory auditor, Id AO held that he did not have any option but to invoke the provision of section 145(3) of the Act. To estimate the profit, he took the net profit ratio of 10.72% for Assessment Year 2010-11, which was adopted for making an addition in Assessment Year 2011-12 and made the differential addition Rs. 1,46,76,245/-. Consequently assessment u/s 143(3) of the Act was passed on 13.02.2015 determining total income at Rs. 5,04,76,835/- against the returned of income of Rs. 3,58,00,490/-.

6. The assessee aggrieved with the order of the Id AO preferred an appeal before the Id CIT (A). The Id CIT (A) considered arguments of the assessee as per para No. 4 of his order. He further upheld the order of the Id AO and confirmed the addition. As per para No. 5.8 at Sl No. 8 of the table the assessee submitted before him the order of the coordinate bench for AY 2010-11 and 2011-12 and claimed that it covers the issue in favour of the assessee. The Id CIT (A) held that only the law bind as a precedent value and its pure questions of fact, therefore, the issue decided by ITAT on the non satisfaction of the Id AO cannot bind the AO. Therefore, he rejected the reliance on the order of ITAT by the assessee. Consequently, the appeal was dismissed.
7. The assessee aggrieved with the order has preferred this appeal.
8. Ground No. 1 of the appeal challenges that the order passed by the Id AO stating it is bad in law, because as on the date of the passing of the order i.e. 13.02.2015, assessee company was amalgamated with another company i.e. Dr. Oetker India Pvt Ltd. It submitted that the assessee and M/s. Fun Foods Pvt Ltd merged with Dr. Oetker India Pvt Ltd as per the order u/s 394 of the Companies Act, 1956 of Hon'ble Delhi High Court w.e.f 01.04.2013. The order of the Hon'ble High Court approving above scheme of amalgamation was passed on 12.05.2014. The ground of the assessee is that on the date of passing of the order by the Id AO, VRB Pvt. Ltd (appellant) was not in existence and therefore, the order passed by the Id AO is invalid.
9. After details arguments of the Id AR citing several judicial precedents including the decision of Honorable supreme court in Pr. Commissioner of Income Tax, New Delhi Versus Maruti Suzuki India Limited in Civil Appeal No 5409 of 2019 (Arising out of SLP(C) No 4298 of 2019) dated 25/07/2019, the Id DR vehemently contested the arguments of the Id AR on various issues such as intimation to the Id AO, filing of appeal etc. Thereafter Id AR did not press this ground of appeal. Accordingly, ground No. 1 of the appeal is dismissed.

10. With respect to ground No. 2, the ld AR submitted that identical issue for Assessment Year 2010-11 and 2011-12 is decided by the coordinate bench in ITA No. 229 and 2292/Del/2015 wherein, the addition made by rejecting the books of account based on the auditor's report was deleted. He referred to para 6 of that order and submitted that issue is squarely covered in favour of the assessee. He submitted that the above order was also carried by the revenue before the Hon'ble Delhi High Court and as per order, dated 10.05.2019 in ITA No. 476 and 480/2019 the appeal of the revenue was dismissed holding that the orders of the coordinate bench deals essentially with factual aspects after perusing auditor report. He therefore, submitted that the issue is squarely covered in favour of the assessee. He further submitted that the ld CIT (A) despite the order of the ITAT has confirmed the addition.
11. The ld DR submitted that there are factual difference in the order passed by the coordinate bench in earlier years in case of the assessee on three counts:-
 - a. The assessee has not produced books of account and vouchers before the ld AO.
 - b. In para No. 2 and 2.1 the ld AO has pointed out the difference in quantitative details and
 - c. The certificate produced by the assessee on 20.02.2013 has mentioned para 2.2.2 of the order was itself qualified.
12. Therefore, there cannot be any infirmity in the order of the ld AO. He submitted that the ld CIT (A) has also held that the order of ITAT cannot apply, as it was a factual matter. However, he insisted that there are material difference in the facts of the case compared to the earlier years order of the coordinate bench therefore same cannot be applied as claimed by the ld Authorized Representative.
13. In rejoinder, the ld AR vehemently submitted that accounts of the assessee are audited and the assessee has produced the books of accounts before the ld AO that is mentioned in the letter and therefore, the issue is squarely covered in favour of the assessee. He even otherwise submitted that accounts are audited therefore non-production of books should not be an issue. He further stated that even the adoption of the profit ratio for Assessment Year 2010-11 is also improper, as the immediate assessment year preceding to this assessment year would be Assessment Year 2011-12. However, during the course of hearing, as Ld DR had read out various paragraphs of the orders of ld AO and ld CIT (A) regarding non production of the books of account and vouchers, the ld AR offered that though, it is stated in the letter that the assessee has produced the books of account before the ld AO, the assessee does not have any reservation in producing the books of

account and vouchers before the Id AO. Therefore, he offered that the assessee can produce the books of account before any authority.

14. We have carefully considered the rival contentions. The addition was made for precisely three reasons:-

- a. Non production of books of account and vouchers
- b. The difference in the quantitative details between the letter dated 24.02.2015 and tax audit report
- c. On the aspect of valuation as per report of auditor.

15. With respect to the valuation aspect the issue is squarely covered in favour of the assessee by the order of the coordinate bench in assessee's own case for Assessment Year 2010-11 and 2011-12, which has been further upheld by the Hon'ble High Court. The coordinate bench held as under :-

"4. The Id AR submitted that as per ground No. 2 and 3 the additions are challenged. The ground No. 4 is with respect to the deduction u/s 80IC on the addition sustained by the CIT (A). Therefore, his argument was that if ground no. 2 and 3 assessee succeeds the ground No. 4 becomes redundant and if assessee fails on those grounds then ground No. 4 is covered in favour of the assessee by the circular of CBDT. With respect to ground No. 2 and 3 he submitted that the assessee is engaged in the business of manufacturing of the foods products and valuation has been done of the finished products on the basis of unit costing of each of the product. He referred to page No. 95 to show that in valuation of the finished goods the quantum of raw material, packing, over heads are considered and even then, there is no difference in finished goods valuation. He further referred to his submission dated 15.07.2014 placed at page No. 103 to 125 of the paper book to support his contention. He further stated that complete valuation details are available with the Assessing Officer. He also referred to the tax audit report to show that complete quantitative details are maintained by the assessee and the auditor has certified that inventories are valued at lower of cost or net realizable value whichever is less and includes all the cost incurred to bring them to their present location. With respect to the manufactured goods he submitted that they are valued on the retail method wherein, from the selling price gross margin is reduced so that valuation of the inventory is determined. He further referred to the audit report and referred to the audit note and submitted that looking to the nature of the business of the assessee it is not possible to maintain product wise costing and certain overheads are required to be absorbed and therefore, assessee is using the retail method. He submitted that the above method is permitted by the

accounting standard 2 on valuation of inventory. He further submitted that valuation of semi finished stock is also made on the basis of technical evaluation. He submitted that this method is adopted by the assessee for last several years and also in subsequent years and accepted by the revenue. He further referred to the provisions of section 145(3) of the Act to state that there is no error in the accounts of the assessee to render it in correctness and its incompleteness. He further submitted that this method of valuation is regularly followed by the assessee and further it complied with the accounting standard. In view of this he submitted that provision of section 145(3) of the Act does not apply. He further stated that even otherwise the valuation of finished goods becomes the opening stock of the next year and the opening stock of the year is also required to be adjusted hence, it become tax neutral. He submitted that the Id CIT(A) has brushed aside all these arguments of the assessee. He submitted that the issue involved in the appeal is with respect to the addition to the gross profit based on the earlier years financial results. He stated that addition to the gross profit cannot be made if the AO is of the view that valuation of stock is not proper. Anyway he submitted that addition on account of gross profit cannot be made when complete quantitative details subject to verification by Excise Authorities and where there is no defects in the books of account.

5. The Id Departmental Representative vehemently referred to the orders of the lower authorities and supported them.

6. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The issue involved in this appeal is whether on the basis of qualification by the Auditor addition with respect to the gross profit can be made or not. It is necessary to go through the auditor's report issued u/s 227(4A) of the Companies Act as required under companies auditor's report order, 2003 to ascertain the correctness of accounts:-is required to be examined which is as under:-

“As explained in note 2(h) of the Schedule 15 of the financial statements, the company adopts the retail method for determining the value of its manufactured finished goods, whereby, the cost of the inventory is determined by reducing from the sale value of the inventory a percentage of gross margin considered appropriate by the management. As per Accounting Standard 2 valuation of inventory, retail method can be used as a valuation technique only when it approximates the actual cost of production for the goods manufactures by the company. However, in absence of adequate

product wise cost records having been made available to us, we are unable to comment on the appropriateness of the usage of the retail method for valuation of manufactured finished goods by the company. As a result, we are unable to comment on the accuracy of valuation of inventories of manufactured finished goods as at year end and at the end of the previous year, increase/ decrease in stock and its resultant impact on the profit for the year, reserves and surplus and the related disclosures forming part of the financial statement. Further, the company has not made available detailed records regarding consumption of raw material and packing materials, used in the manufacture of finished goods. We were also not made available the computation of consumption, which could have been arrived on the basis of bill of materials of the finished goods produced during the year. In absence of the above mentioned details/ records, we are unable to comment on the accuracy of the amount of consumption of raw material and packing materials as reported, as it's resultant impact on the profits for the year. vii. The company is valuing its inventory of semi-finished goods on the basis of technical evaluation of their costs. However, we have not been made available the computation of the value of such semi finished goods. In the absence of such computation we are unable to comment on the appropriateness of the valuation method followed, compliance with AS-2 (Valuation of inventory) and accuracy of value of these semi finished goods (work in progress) the impact of which is not quantifiable and.....”

7. On perusal of the auditor's report, it is apparent that the Company's inventory are valued at lower of cost or net reliable value and includes all cost incurred in bringing the goods to their present location and conditions. There is no dispute about the valuation of raw material and packing material. The issue is with respect to the valuation of manufactured goods which are valued on the basis of retail method wherein, the assessee reduced the gross margin from the selling price of the goods to derive at the cost of goods produced. The auditor has stated that such method can be used when the actual cost of production is approximate. As the assessee is in the business of manufacturing and selling of processed foods like sauces, mayonnaise, spreads, dips, mustards, milk shake mixes, egg-less cake mixes, peanut butter and culinary powders. Therefore, it is apparent that in

the nature of the business activities carried on by the assessee, it is not possible to keep the production cost of each and every finished products, therefore, in such type of industry certain cost are used on approximate basis and they are then spread over the goods produced. The another method which is called the retail method based on which from the selling price of the goods the gross margin of the product is reduced which is obviously the actual cost of the goods produced by the assessee. In case if there is a net loss then such finished goods are valued at selling price as the cost price is higher than the sale price. The auditor has also stated that such method can be used as a valuation technique when the actual cost of the product is not feasible to be ascertained. According to the para no. 21 of the Accounting Standard where the techniques for measurement of cost is mentioned that technique for the measurement of cost of the inventories such as the standard cost method or retail method may be used for convenience if the results approximates the cost. In para No. 22 it is stated that retail method is often used in retail industry where, large numbers of rapidly changing items with similar margins for which it is im-practicable to use other costing methods. In such circumstances the cost of the inventory is determined by reducing the sales value of the inventory by the appropriate percentage of the gross margin. An average percentage for each retail department is often used. Therefore, looking at the accounting standard for inventory valuation we do not find any infirmity in the method of techniques of measurement of cost as well as cost formula used by the assessee. The assessee in fact has followed the accounting standard only. In view of this, we find that provision of section 145(3) of the Act are incorrectly invoked by the 1d Assessing Officer and confirmed by the 1d CIT(A) because the valuation method is correct and therefore, it does not impact the correctness or completeness of the account of the assessee. In fact it makes the accounts of the assessee complete and correct. Furthermore, the 1d Assessing Officer has applied the past year's gross profit ratio in that year also the valuation of the inventory was on similar basis therefore, if opinion of the AO is accepted then it cannot be said that accounts of previous year were correct and complete. The method of valuation of inventory followed by the assessee is year to year same. Furthermore, the assessee has maintained complete quantitative details also. No defects have been pointed out by the AO in the books of account other than what is stated by the Auditor. To invoke provisions of section 145(3) of the Act it is necessary that accounts of the assessee suffers from latent, patent and glaring errors. In

the present case, we do not find any such finding by the Id AO. Further, the assessee has given detailed reason for the down fall in the gross profit also. Further, the details of valuation of closing stock of the manufactured goods as per retail method were also filed before the lower authorities and no infirmity was found in the same. In view of this, we do not find any reason to sustain the orders passed by the lower authorities with respect to the invocation of provisions of section 145(3) of the Act and consequently, making the addition of Rs. 15606861/- to the total income of assessee. In the result Ground No. 1 to 3 of the appeal are allowed.”

16. Thus, that order was with specific rider where there was no error in the accounts of the assessee with respect to its correctness and its incompleteness. This fact is recorded para no 4 at page No. 3 of the order of the coordinate bench. On this basis, the coordinate bench noted at page 5 that the assessee has maintained complete quantitative details and further no defects have been pointed out by the Id AO in the books of accounts then what is stated by the auditor. The coordinate bench further held that the Id AO must show some latent, patent and glaring error in the accounts of the assessee.
17. Now the important point that needs to be ascertained is that whether in the earlier years in which the order of the ITA T covers the issue in favour of the assessee, the assessee produced books of accounts before the assessing officer or it was not the grievance of the AO with respect to the books of accounts. The second issue needs to be ascertained as whether in those earlier years was there any other defect being pointed out by the AO for invoking the provisions of Section 145 (3) of the act. Before us, both the parties who are privy to this information i.e. the assessment orders for earlier years, did not produce the same. Therefore, in absence of verification of the assessment orders in those years with respect to the production of books of accounts as well as any other defect, it is impossible to decide whether the facts of the case in assessment year 2010 – 11 and 2011 – 12 are identical or not. Therefore, we proceeded to examine the record available with the ITA T with respect to those years.
18. The assessment year 2010 – 11 was assessed by the assessing officer on 11 March 2013. The addition of Rs. 1,56,06,861 was made on account of the qualification of the auditors. On page number three of the assessment order the learned assessing officer proceeded to make the assessment as Under:-

“on the basis of the above qualification by the statutory auditors of the assessee company, and further, there is a decline in the gross

profit to sales by 6.83% (28.33% - 21.50%) and net profit to sales ratio by 4.47 % (15.19% -10.72%), the basis of which has not been satisfactorily explained. The assessee submitted that company maintains Excise record and the views expressed are those of the auditor. I failed to understand that if the assessee is not able to satisfy the auditor with his explanation/data then how the assessee can satisfy the external agencies. Therefore, I am not satisfied about the correctness and completeness of the accounts of the assessee and as per the notes to the statutory auditor. Further, the accounting standard – 2 has not been followed while valuing the inventory. Hence, I have no option but to invoke Section 145. The next question which arises is what is the basis of the estimate. It is a well-established law that the estimate must be honest and fair. There must be a reasonable nexus between material and estimate. The material available before the undersigned has been discussed in detail above and estimate is made on the basis of earlier years profit accepted by the Department u/s 143 (3). Thus I assessee net profit at the same rate of last year viz. 15.19% resulting in addition of income of Rs 1,56,06,861 to the returned income.”

Thus for assessment year 2010 – 11, neither there is any defect in the quantitative details produced by the assessee and nor there is any observation about nonproduction of any detail by the assessee. The addition was made purely on the basis of decline in the gross profit and net profit ratio coupled with the observation of the auditor in the audit report. In fact the assessing officer at page number one has categorically mentioned that the assessee has furnished the details. Further, the combined order passed by the learned CIT – A for the two the assessment years i.e. AY 2010 – 11 and 2011 – 12 on 3 February 2015 categorically deals with the argument of the assessee in para number [5] that the appellant has argued that AO has not found any mistake in the books of accounts and has not disputed that correctness. This argument of the assessee has not at all been disputed by the revenue either in the assessment order or in the appellate order. Therefore, the facts for assessment year 2010 – 11 and the facts for assessment year 2012 – 13 are distinct for the reason that in the impugned assessment year i.e. assessment year 2012 – 13 the AO has pointed out defects in the quantitative details as well as assessee has not produced the books of account which has been categorically emphasized by the assessing officer as well as by the learned CIT – A.

19. Similarly for assessment year 2011 – 12, the assessment order was passed u/s 143 (3) of the income tax act on 31st of March 2014 wherein the learned assessing officer has made the addition of ₹ 20,227,358/- on identical facts and giving the identical reasons. The finding of the learned assessing officer is available at page number [7-8] of the assessment order. Therefore, for the similar reasons the facts in appeal before us are distinguishable with respect to the nonproduction of the books of accounts as well as defects pointed out by the learned assessing officer in quantitative details furnished by the assessee.
20. In the impugned order in this appeal, as the assessee did not produce the books of account and vouchers before the ld AO, which is specifically mentioned by the ld AO and the ld CIT(A). This issue is harped upon vehemently by the ld DR, but disputed by the assessee. Therefore,
- a. on the basis of the findings of the assessment orders for assessment year 2010 – 11 and 11 – 12, which did not make any reference to the production of the books of accounts by the assessee and further did not speak about any other defect in quantitative details,
 - b. the appellate order for both these years specifically not rejecting the argument of the assessee with respect to the correctness of the books of accounts,
 - c. Specific difference in the quantities of raw material and other material in the impugned assessment year, which is not the case in assessment year 2010 – 11 and 11 – 12.

according to us, the addition cannot be deleted based on the argument of the learned authorised representative that the issue in appeal is squarely covered in favour of the assessee by the order of the coordinate bench in assessee's own case in earlier years.

21. As there is serious dispute between the parties whether books of account were produced before the ld AO or not, both the parties readily agreed that if the books of account are produced before the ld AO, issue may be looked at from the point of view of the decision of the Hon'ble High Court in assessee's own case provided the other facts or any defects are not found in those accounts. Needless to say that the issue is squarely covered in favour of the assessee if the addition has only legs to stand is the qualification of the auditor. Furthermore, the quantitative difference harped upon by the learned assessing officer is also with respect to the letter submitted by the assessee and the tax audit report. Therefore, to find out the quantitative difference also with respect to Raw materials and other materials it is necessary to examine the books of accounts of the assessee. In the present case,

the whole addition is made by applying the provision of section 145(3) of the Act. The provisions of Section 145 (3) can only be applied if the assessing officer is not satisfied about the correctness or completeness of accounts of the assessee primarily. Therefore, even without examination of the books of accounts of the assessee which assessee has not produced despite called for by the assessing officer, application of the provisions of Section 145 (3) is premature. Therefore, as the learned authorised representative has agreed to produce the books of accounts before the assessing officer and the learned DR has also expressed his willingness on behalf of the learned assessing officer to examine it, therefore, in the interest of justice, we set aside the whole issue back to the file of the ld AO with a direction to the assessee to produce books of accounts and vouchers before him for examination. The ld AO is also directed to examine it and then decide the issue, following the order of the Hon'ble Delhi High Court as far as it relates to valuation, and decide the issue on merits with respect to the other grounds. The assessee is directed to produce the books of account before the ld AO within 120 days from the date of this order by taking prior appointment of the ld AO. The assessing officer is directed to pass the order in the name of Dr. Oetker India Pvt. Ltd. Accordingly, ground No. 2 to 7 of the appeal are set aside to the file of the ld AO.

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

Order pronounced in the open court on 23 /07/2020.

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 23 /07/2020
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	23.07.2020
Date on which the typed draft is placed before the dictating member	23.07.2020
Date on which the typed draft is placed before the other member	23.07.2020
Date on which the approved draft comes to the Sr. PS/ PS	23.07.2020
Date on which the fair order is placed before the dictating member for pronouncement	23.07.2020
Date on which the fair order comes back to the Sr. PS/ PS	23.07.2020
Date on which the final order is uploaded on the website of ITAT	23.07.2020
date on which the file goes to the Bench Clerk	23.07.2020
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	