IN THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai

Before Shri R.K. Gupta, Judicial Member
and Shri B. Ramakotaiah, Accountant Member

ITA No. 3446/Mum/2008
(Assessment Year: 2004-05)

M/s. Ruskin Chemipharm 4/A, Bhangwadi Shopping Centre 1st Floor, Kalbadevi Road Mumbai 400002 PAN - AAAFR 8482 M	Vs.	Income Tax Officer 14(2)(2) Mumbai
Appellant		**Respondent**

Appellant by: Shri Vijay Mehta
Respondent by: Smt. Chandra Ramkrishnan

O R D E R

Per B. Ramakotaiah, A.M.

This appeal by the assessee is against the order of the CIT(A) is against the CIT(A) XIV, Mumbai dated 13.03.2008.

2. The assessee has raised the following grounds: -

"1. The learned CIT(A) has eared in law and in facts in passing the impugned order which is illegal and bad in law.

2. The learned CIT(A) has eared in law and in facts in passing the impugned order in violation of the principles of natural justice.

3. The learned CIT(A) has eared in law and in facts in holding that the Assessing Officer is justified in rejecting the books of account.

4. The learned CIT(A) has eared in law and in facts in holding that the appellant had under-valued the closing stock of Cipro Floaxacin to the tune of Rs.56,73,236/- and in making addition to that extent.

5. The learned CIT(A) has eared in law and in facts in sustaining the disallowance of Rs.3,28,117/- made by the Assessing Officer u/s. 37(1) of the Act.

6. The learned CIT(A) has eared in law and in facts in upholding the adhoc disallowance of Rs.5,789/- made by the Assessing Officer out of the total telephone expenses incurred by the appellant."

3. It was submitted that ground Nos. 1, 2 & 3 are general in nature and if ground No. 4 is concerned these are also considered. Ground No. 6 has

not been pressed and Ground No. 7 is general in nature. The effective grounds are ground No. 4 & 5.

4. The brief facts leading to the issue in ground No. 4 is that the assessee firm was engaged in the purchase and sale of pharmaceutical products and also acted as commission agent. During the year the assessee had shown total sales of Rs.14,13,45,835/- and declared GP of Rs.55,24,795/- resulting in GP at 3.9%. The A.O. has noticed various discrepancies and rejected the books of account and estimated the GP at 15% and made an addition of Rs.1.56,77,080/-. When it was contested before the CIT(A) the CIT(A) held that the A.O. was justified in rejecting the books of account. However, while dealing with the quantum of addition he has not agreed on the GP addition but made an addition to the closing stock of Rs.56,73,236/- by deciding as under: -

> *"7. ..... There was merit in AR's contention that the appellant's purchases/ sales expense were totally vouched; books of accounts were audited and the AO had not found out any instance of purchase/ sale outside the books of accounts. Thus, the adoption of GP rate on the basis of working of GP of certain items for a limited period of two months and that too with substantial errors was totally uncalled for. As discussed in preceding para, that since there was only one significant discrepancy with regard to the undervaluation of closing stock, the right course to determine the income should have been to make specific addition with regard to undervaluation of closing stock. The AR has pointed out certain mistakes with regard to the valuation of closing stock but has failed to corroborate them. On perusal of the working of closing stock as indicated in para 4.2, I find the closing stock of Cipro Floaxacin has been grossly under valued by an amount of Rs.53,98,850/- for which the assessee had no cogent explanation. Thus the income to the extent of under valuation of closing stock at Rs.56,73,236/- stood suppressed by the appellant. Considering all the facts and circumstances of the case, I am of the opinion that the only rightful addition which could be made in the instant case was on account of under valuation of closing stock by an amount of Rs.56,73,236/- and addition to that extent deserves to be confirmed. Reliance in this regard can be placed on the judgement in the case of CIT vs. Archrulal (1938) 6 ITR 155 (Nag.) wherein it was held the application of a flat rate is not always justified especially when the assessee's true income can be determined without much difficulty eg. By proper valuation of the closing stock, if under valued or some such similar thing. Respectfully relying on the above judgement, I hold that determination of income by the AO by applying a higher GP rate which itself was incorrectly worked out was not justified and income deserved to be determined by making addition on account of under valuation of closing stock by an amount of*

> *Rs.56,73,236/-. Thus the value of closing stock deserves to be adopted higher by Rs.56,73,236/-. Accordingly, the addition made at Rs.1,56,77,080/- is hereby reduced to an amount of Rs.56,73,236/-. The appellant gets a relief of Rs.1,00,03,844/-."*

Accordingly ground No. 4 is raised by the assessee.

5. The learned counsel drew our attention to the paper book filed in this regard and the contentions made before the A.O. He drew our attention to page 2 of the assessment order wherein in para 4, item No. 8 the value of Ciprofloxacin was taken at Rs.1067.70 while considering the GP addition and then page 3 wherein the quantity of closing stock was taken at 10356.70 kgs. It was his submission that during the course of survey the assessee's counsel has submitted a handwritten closing stock statement as on 31.03.2004 dated 14.08.2005 in which the closing stock was shown at the above figure but the actual stock was only 8000 kgs. In support of that the learned counsel placed on record the stock registers of that year and later year, which were stamped by the authorities during 133-A and gave the following statement in support of various purchases and sales: -

"Opening stock of Ciprofloxacin HCL as on 01.04.03	*Nil*
Purchase during the year 2003-04	*8250 Kgs.*
Sales during the year 2003-04	*250 kgs.*
Closings Stock	*8000 kgs.*
Purchases during the year 2004-05	*7437 kgs.*
Sales during the year 2004-05	*15437 kgs.*
Closing Stock on 31.03.2005	*Nil"*

6. The assessee has given 3 page statement of purchases and sales in the paper book, pages 3, 4 & 5 to submit that the closing stock as on 31.03.2004 was only 8000 kgs. and the entire stock on that date as well as the purchases in the later year were entirely sold in the financial year 2004-05 relevant for the next assessment year, accordingly adoption of the quantity of the stock available as on 31.03.2004 was a mistake which requires verification. While fairly conceding that there was under valuation of closing stock as considered by the CIT(A), it was his submission that the value to be sustained if 8000kgs. was accepted would come to Rs.28,40,040/- out of the addition made of Rs.56,73,236/- and the value of

the balance 2356.70 kgs. of Rs.25,58,811/- has to be deleted. However, it was his contention that since these figures were not examined by the CIT(A) and since the GP addition made by the A.O. was converted to closing stock addition the A.O. can be directed to verify the actual stock position and decide the issue. It was his submission that the matter should be remanded back to the A.O.

7. The learned D.R., however, objected to the paper book as well as the submissions stating that these were not filed before the A.O. and the additional evidences which changes the pattern of addition should not be admitted. She, however, supported the order of the CIT(A) wherein there is clear evidence that the assessee has not valued the closing stock correctly.

8. We have considered the issue. In our opinion the CIT(A) has rightly sustained the addition on account of undervaluation of closing stock. However, while determining the value of closing stock he was guided by the closing stock figures as available in the assessment order which itself was furnished by the assessee's counsel during the course of survey. It was the contention of the learned counsel that this closing stock figure in quantity is not correct even though the values are to be adopted at a higher level than what was adopted by the assessee in the books of account. We are accepting the contentions of the learned counsel to certain extent as we also notice that the stock registers furnished before us are singed by the A.O. in the course of survey and the statements furnished before us also more or less tallies with the stock shown in the stock registers. However, we are unable to verify the actual purchases and sales because those details are not available before us. The discrepancy noticed is that in page 2 of the assessment order in the table at row 8 Ciprofloxacin has been purchased at price per unit of Rs.900/- and the invoices were numbered 25/26/28. However, the sale price unit were shown at Rs.1067.70 and the date of bill was shown as 21.02.2004. As per the statement furnished before us there is no stock as on that date being opening stock Nil and the first purchase was made on 16.03.2004 only which was only the stock sold on the same day being 250 kgs. The balance stock of 8000 kgs. purchased vide invoice dated 25.03, 26.03, 28.03 and 30.03 of 2004 comes to 8000 kgs. and according to

the assessee, this was available in the closing stock which was sold in the later year for a value of Rs.94,51,541/-. Thus according to the assessee the price was not correctly taken even though the stocks were purchased at the end of the year and there was no sales incurred out of the stock purchased. There seems to be an attempt to reduce the profit and the A.O. made an addition by increasing the GP which was reduced by the CIT(A) by invoking the correct closing stock valuation. Since the assessee also admitted undervaluation to the extent of Rs.28,40,040/- the amount to that extent is to be confirmed. However, since the stock position require examination by the A.O. vis-a-vis the discrepancy in the dates shown in the assessment order and the exact purchases and sales from the statement filed, the matter is restored back to the A.O. to examine the stock position on the basis of the books of account and arrive at the correct stock as on 31.03.2004 and adopt the price for valuing the stock. For this the issue in ground No. 4 is restored to the file of the A.O. by setting aside the orders of the A.O. and the CIT(A) on this issue. The A.O. is directed to examine afresh and pass necessary orders in this regard.

9. Ground No. 5 pertains to the issue of disallowance of expenditure of Rs.3,28,117/- claimed under financial charges. It was assessee's submission that the price paid over and above the Drug Price Control Act was passed by way of financial charges. The A.O. considered that this is clear violation of Drug Price Control Act and being infraction of law the same cannot be allowed under section 37(1). The CIT(A) has confirmed the same. It was submitted before us that actually this amount was a discount granted and not an amount paid over and above the purchase price. There was some wrong appreciation of facts which require examination afresh. The learned counsel drew our attention to para 10 of the CIT(A)'s order to submit that the assessee has provided the list of expenses along with vouchers and these expenses are nothing but discount/reimbursement of expenses. It was pleaded that it is due to inadvertence of wrong statement made at the time of assessment with regard to the nature of expenses, these were disallowed. While accepting that the assessee had committed an error in furnishing wrong statement, the CIT(A) confirmed the disallowance on the basis of the

order of the A.O. It was the contention that this require examination by the A.O. again. The learned D.R., however, relied on the order of the A.O. and submitted that the expenditure claim cannot be allowed, which is in violation of the provisions of section 37(1).

10. We have considered the issue. As seen from the orders there was an explanation that some of the products are covered under FDA and since one cannot sale more than price fixed the sale amount above the price control rate debit/credit note passed by way of financial charges. Even though this statement was on record, we are unable to understand how this can be considered as amount paid over and above while purchasing the goods. The claim of expenditure comes only when there are purchases over and above purchase price but the explanation given is with reference to the sale of the goods. If they have sold goods for more than the printed price that would be an income but not an expenditure. Obviously the claim of expenditure do pertains to the discount granted. We are of the opinion that the assessee's explanation was wrongly considered by the A.O. without understanding the debit and credit notes passed in this regard. The same was explained before the CIT(A) which itself was extracted in para 10 of the order but, surprisingly while admitting that there was a wrong statement the CIT(A) did not either examine or direct the A.O. to examine. We are of the opinion that this requires examination afresh by the A.O. In view of this the issue in ground No. 5 is restored back to the file of the A.O. by setting aside the orders of the A.O. and the CIT(A) on this issue.

11. In the result, ground Nos. 4 & 5 are restored to the file of the A.O. to examine and pass necessary orders afresh. Needless to say, the assessee should be given adequate opportunity in the reassessment proceedings.

12. In the result, appeal is considered partly allowed.

Order pronounced in the open court on 19th March 2010.

Sd/-	Sd/-
(R.K. Gupta)	**(B. Ramakotaiah)**
Judicial Member	**Accountant Member**

Mumbai, Dated: 19th March 2010

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) – XIV, Mumbai*
4. *The CIT– XIV, Mumbai City*
5. *The DR, "D" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.