

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F' NEW DELHI**

**BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 2672/Del /2010
Assessment Year: 2006-07**

Perfect Agro Mills Pvt. Ltd., 245, Bharat Nagar, Near State Bank of Patiala, Ludhiana. (PAN: AAACP8891P)	vs	ITO, Circle-14(2), New Delhi.
(Appellant)		(Respondent)

Appellant by : Shri Pankaj Bhalla, CA
Respondent by: Shri Atiq Ahmad, Sr. DR

**Date of Hearing : 12.09.2017
Date of Pronouncement: 04.10.2017**

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.

This appeal has been preferred by the assessee against the order dated 23.04.2010 passed by the ld. CIT(A)-XVII, New Delhi for assessment year 2006-07 wherein the sole ground of dispute is against the action of the ld. CIT(A) upholding the disallowance of deduction of excise duty amounting to Rs. 50 lakh.

2. Brief facts of the case are that for the year under consideration, the assessee company filed the return of income declaring income of Rs.1,05,429/-. The AO noticed that the assessee had paid excise duty of Rs. 50,00,000/- during the year under consideration. He, therefore, asked to file details of excise duty paid amounting to Rs. 50,00,000/-, reasons for its payment and order of excise department if any. The assessee filed copy of the order No. A-558/CF/07/SC/(PB) dated 31.01.2007 of Settlement Commission, Customs & Excise, admitting the case which revealed that there was a search operation conducted by the Central Excise department on 27.2.2006. Excise Department found on physical verification of the stock in the factory of the assessee that goods valued at Rs. 27,26,365/- have not been accounted for in the statutory records and the same were seized from the factory of the assessee. A pen drive was also seized from the residence of Sh. Harbhajan Singh from which the relevant data with regard to unaccounted sales made during the period 1.4.2003 to the date of search i.e. 27.2.2006 were recorded. The Central

Excise department retrieved the data in the presence of Sh. Harbhajan Singh and issued a show cause notice to the assessee. On receipt of the show cause notice, the assessee filed a petition before the Settlement Commission Customs & Central Excise for settlement of the case. The Settlement Commission vide order dated 31.1.2007 admitted the application filed by the assessee company in which they were admitting the unaccounted sales at Rs. 5,60,83,996/- and excise duty payable was determined at Rs. 96,00,833/- after allowing benefit of duty value for the F.Y. 2003-04, 2004-05 and 2005-06. The AO obtained information from the Customs & Excise Department relating to the unaccounted sales and issued a show cause notice asking the details of the investment made in manufacturing the goods sold outside the books and also to provide year wise/month wise break-up of sales made during the period covered under the search made by Central Excise Department. The assessee filed letter dated 22.12.2008 and surrendered the sum of Rs. 35 lacs on account of investment and profit earned in respect of unaccounted sales for A.Y. 2003-04 to 2005-06 with the condition that the department will not reopen the case for 2004-05 and 2005-06 and no penal action will be initiated. The assessee also submitted

a chart of year wise sales made along with his letter dated 22.12.2008. The details of sales turnover and comparative profit and loss account fall in different assessment years. The AO did not accept the conditional surrender. The AO observed that under I.T. Act, income is to be taxed on yearly basis and not on consolidated basis as recorded by the assessee. The AO issued a show cause u/s 145(3) for rejection of the books of accounts. In response to the same, the assessee filed letter dated 30.12.2008 retreating the conditional surrender of Rs. 35 lacs. On the basis of information available on the record, the AO recasted the manufacturing account to arrive at the gross profit and accordingly, he computed unaccounted gross profit at Rs. 83,26,976/- for the year under consideration and unaccounted income of Rs. 70,86,138/-in respect of invoiced sales. Thus, total addition on this account was made at Rs. 1454,13,144/-. The AO also made addition of Rs. 27,26,365/- on account of unaccounted closing stock found by the excise department.

3. It was the contention of the assessee that the assessee may be allowed the benefit of Rs. 50 lakh paid towards excise duty but the Assessing Officer was of the opinion that since the amount paid was towards advance payment of excise duty and not

against any liability created by the Central Excise Department, the payment made as an advance would not fall under the provisions of section 43B of the IT Act. The Assessing Officer also noted that the benefit of proportionate excise duty paid amounting to Rs. 3792235/- has already been allowed by adjusting the same against unaccounted sale for the year under consideration. On appeal before the Ld. CIT(A), the Ld. CIT(A) dismissed the assessee's appeal on this issue and now, the assessee has approached the ITAT and has challenged the upholding of disallowance by the Assessing Officer.

4. At the outset, Ld. Authorised Representative submitted that the assessee's case was covered by the order of the ITAT in assessee's own case for Assessment Year 2010-11 in I.T.A. No. 5895/Del/2014 wherein the ITAT had set aside identical issue to the file of the Assessing Officer for the purpose of determining as to what portion of excise duty demand was penal in nature and what portion was compensatory in nature. Ld. Authorised Representative submitted that the case may be restored to the file of the Assessing Officer for similar purposes in this year also.

5. Ld. DR had no objection to the issue being restored to the file of the Assessing Officer.

6. We have heard the rival submissions and carefully perused the relevant material placed on record. We find that the ITAT Delhi Bench in I.T.A. No. 5895/Del/2014 for Assessment Year 2010-11 in assessee's own case vide order dated 30.12.2016 had considered an identical issue and had thereafter restored the issue to the file of the Assessing Officer. The relevant observations of the ITAT in the said order are contained in pages 7 to 12 and these are being reproduced hereunder for a ready reference:-

“4. Considering above submission, I find the relevant facts of the case on the issue in brief are that excise department had conducted of search on 25.2.2006 in the premises of the Assessee Company and unaccounted sales of Rs. 5,60,83,946/- was discovered for financial years 2003-04, 2004-05 and 2005-06. These sales were admitted by the assessee before the Income Tax Settlement Commission and Central Excise Settlement Commission. Excise duty demand of Rs. 96,00,833/- was raised by the excise duty department on unaccounted sales. On the basis of above information a demand of Rs. 41,80,520/- was also raised by the sales tax department which was deposited by the assessee company during the year under consideration and was claimed as deduction u/s 43B of the Act. The Assessing Officer disallowed the sales tax paid which was claimed u/s 37 read with section 43B of the Income Tax Act to the extent of Rs. 41,80,520/-. He also disallowed u/s 43B of the Act the bonus paid to the extent of Rs. 96,929/-. The same was questioned before the Ld. CIT (A) in the first appeal by the assessee but it could not succeed. The relevant provisions of section 37(1) and Explanation thereto of the Income Tax applicable in the present case are being reproduced hereunder:-

“(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 not being in the nature of capital expenditure of personal expenses of the assessee), laid out of expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head “profit and gains of business or profession.””

Explanation: for the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction of allowance shall be made in respect of such expenditure.”

4.1. The authorities below were of the view that a per section 37 of the Income Tax Act only the legitimate claim of any expenditure is allowable and non disclosing of actual sales cannot be said to be an acceptable practice of a person and therefore , sales tax on undisclosed sales cannot be allowed as deduction u/s 43B of the Act. The Ld. CIT (A) also remained of the view that a business loss incurred in the course of an unlawful business is admissible however the provisions of the Explanation to section 37(1) are clearly applied and barred any expenditure incurred on carrying out unlawful activities. The Hon’ble Supreme Court in the case of Prakash Cotton Mills Ltd. (supra) has been pleased to hold that whenever any statutory impost paid by an assessee by way of damages or penalty or interest is claimed as an allowable expenditure u/s 37(1), the Assessing Authority is required to examine the claim of the provisions of the relevant statute providing for payment of such impost notwithstanding the nomenclature of the impost as given by the statute, to find out whether it is compensatory or penal in nature. The authorities have to allow deduction u/s 37(1) of the Act whenever such examination reveals a concern impost to be purely compensatory in nature. Whenever such impost found to be of a compensatory in nature i.e. partly of compensatory nature and partly of penal nature, the authorities are obliged to bifurcate two components of the impost and give deduction to that component which is compensatory in nature and refuse to give deduction to that

component which is penal in nature. The contention of the assessee in the present case before us, remained that the entire amount except Rs. 1,87,126/- is compensatory in nature and only Rs. 1,87,126/- was penal in nature. The assessee has also tried to support its claim by referring the order of Income Tax Settlement Commission wherein offer of the assessee company has been accepted. Reference of CBDT's circular no. 772 dated 23.12.1998 also been given. Several decisions have also been cited by the Ld. AR to support its contention that payment of sales tax demanded on unaccounted sales was compensatory in nature and thus was an allowable deduction u/s 43B of the Act. Having gone through these decisions as well as the decisions of Hon'ble Supreme Court in the case of Prakash Cotton Mills Ltd. (supra), I am of the view that the claim of the assessee that out of the total demand of Rs. 41,80,520/- raised by the sales tax department and deposited by the assessee only Rs. 1,87,126/- was penal in nature and remaining amount was compensatory hence the assessee was eligible for the claimed deduction u/s 43B on the amount paid which was compensatory in nature needs fresh verification and consideration in view of the above cited decisions by the Ld. AR. The matter is thus set aside to the file of the Assessing Officer to decide the issue afresh as observed above, after affording opportunities of being heard to the assessee.

7. In result the appeal is allowed for statistical purposes.”

7. As the assessee has itself prayed for a set aside and the learned Departmental Representative also does not have any objection, we deem it fit to restore the issue to the file of the Assessing Officer for a fresh verification and consideration after giving proper opportunity of being heard to the assessee in light

of the observations of the order of the ITAT for assessment year 2010-11 as reproduced above.

8. In the result, the appeal of the assessee stands allowed for statistical purposes.

The order is pronounced in the open court on 4th October, 2017.

Sd/-
(G.D. AGRAWAL)
PRESIDENT

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 4th October, 2017

‘GS’

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

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By Order

ASSISTANT REGISTRAR