

आयकर अपीलिय अधिकरण, पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

श्री डी. करुणाकरा राव , लेखा सदस्य
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

**BEFORE SHRI D.KARUNAKARA RAO, AM
AND SHRI VIKAS AWASTHY, JM**

**आयकर अपील सं. / ITA Nos. 1607 & 1608/PUN/2014
निर्धारण वर्ष / Assessment Years : 2005-06 & 2006-07**

Construction Portal Pvt. Ltd.,
M/s. MZSK & Associates,
Chartered Accountants,
Level 3, Riverside Business Bay,
Plot No.84, Wellesley Road,
Near RTO, Pune – 411 001
PAN : AAACG6703F

.... अपीलार्थी/Appellant

Vs.

ITO, Ward-1(1),
Pune

.... प्रत्यर्थी / Respondent

Assessee by : Shri Nilesh Khandelwal & Shri Rajiv Thakkar
Revenue by : Shri Ajay Modi, JCIT

सुनवाई की तारीख / Date of Hearing : 20.04.2018	घोषणा की तारीख / Date of Pronouncement: 06.06.2018
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आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

There are two appeals filed by the assessee under consideration for the A.Yrs. 2005-06 & 2006-07 against the common order of CIT(A)-I, Pune, dated 28-02-2014. Amended grounds for both the appeals are identical but for the figures. The facts are also common. Therefore, the facts relevant to A.Y. 2005-06 are taken as reference for adjudication of the issues.

We shall now take up the appeal of the assessee for the A.Y. 2005-06 first.

ITA No.1607/PUN/2014
A.Y. 2005-06

2. Assessee filed the grounds of appeal raising couple of issues (1) relating to claim of set off of brought forward losses against the additional income and (2) disallowance of provision for warranty. Subsequently, before us, assessee filed the amended grounds for both the appeals on 19-04-2018. The amended grounds for the A.Y. 2005-06 are extracted here as under :

“1. On facts and circumstances prevailing in the case and as per provisions & scheme of the Act it be held that, the Learned Assessing Officer as well as the first appellate authority erred in taxing the additional income of Rs.58,00,000/-, declared by the appellant in the course of survey u/s.133A of the Act and returned by it as business income, as deemed income u/s.69A of the Act. It further be held that all the consequential provisions available for business income should have been allowed to the Appellant. The Appellant be granted just and proper relief in this respect.

2. The Appellant prays to be allowed to add, amend, modify, rectify, delete, raise any grounds of appeal at the time of hearing.”

3. **Background facts on Additional income of M/s. CPPL & M/s. GDPL :** The facts include that the assessee is a company and is engaged in the development of properties. There was survey action u/s.133A of the Act on the assessee on 24-01-2007. The said action resulted in the discovery of incriminating information as well as the papers/documents relating to the assessee under consideration and the same were impounded for use in making of the assessments. These documents led to the discovery of unaccounted transactions of undisclosed receipts as well as the undisclosed expenditure outside the books of account. Based on these discrepancies as well as the disclosure of unaccounted income vide the sworn statement of the concerned persons of the assessee on 13-02-2007, an additional unaccounted income of Rs.2.06 crores and Rs.53 lakhs was admitted in the hands of GDPL and CPPL respectively for the A.Y. 2005-06. Further,

another sum of Rs.78 lakhs was admitted in the hands of **M/s. Construction Portals Pvt. Ltd. (in short 'CPPL')**, a sister concern of M/s. GDPL for the A.Y. 2006-07. The assessee revised returns and filed the return claiming set off of the brought forward losses against the said additional income of Rs.58 lakhs and 73 lakhs for the A.Y. 2005-06 and 2006-07 respectively. The claim of such set off against the 'deemed income' is the issue for adjudication in these appeals. Otherwise, there is no dispute about the additional income for both assessment years.

4. Briefly stated relevant facts of the case are that the assessee is a company and is engaged in the business of construction of properties. It belongs to Gera Group of cases. Assessee filed the return of income on 31-10-2005 for the A.Y. 2005-06 declaring Nil income by setting off of brought forward losses and claimed Rs.1,26,14,888/- to be carry forward to the next year. There was survey action u/s.133A of the Act on 24-01-2007. During the survey, as described above, certain incrimination papers indicating cash receipts and cash payments were found and impounded. Survey resulted in disclosing of additional income of Rs.58 lakhs for the A.Y. 2005-06 and also additional income of Rs.73 lakhs for the A.Y. 2006-07. Assessee offered the same in the return of income. However, in the computation, it is observed that the assessee had brought forward losses from earlier years and the same were set off against the said additional income in both the years invoking the provisions of section 70, 71 and 72 of the Income Tax Act. In the process, the assessee considered the said additional income as business income of the assessee and treated as eligible income for such set off. However, AO proposed to disallow such benefit of set off stating that the additional income offered by the assessee constitutes "deemed income" and not the "eligible business income" for such set off. After giving reasonable opportunity and also after considering the reply of the

assessee, the AO extracted the relevant questions and answers from the sworn statement of Mr. K.P. Gera, MD, disposed during the said survey action. As per the discussion given in Para Nos.2.1 to 2.3 of the assessment order, the AO held that the said additional income offered by the assessee over and above the regular income and was treated as unexplained money and the same was taxed as “income from other sources”. As per the AO, such deemed income is not available for set off of the brought forward losses as claimed by the assessee in the revised return of income. For the sake of completeness, Para No.2.2 is reproduced herein below :

“2.2 In the light of the above, the income, which the assessee has disclosed during the survey over and above the regular income, is treated as assessee’s unexplained money and is taxed under the head income from other sources without allowing the set off of brought forward business losses as claimed by the assessee in the revised return of income.”

Similarly, the AO made addition of Rs.78 lakhs which was disclosed by the assessee as additional income during survey action for the A.Y. 2006-07 as deemed income u/s.69C of the Act.

5. During the First Appellate proceedings, assessee raised this issue before him and questioned the AO’s decision of taxing the said additional income as income from other sources. The discussion given in Para Nos. 4.3.3. to 4.3.7 of the order of CIT(A) is relevant. CIT(A) held in Para No.4.3.7 that the income admitted during survey action for the A.Y. 2005-06 is assessable under “deemed income” u/s.69C of the Act and confirmed the AO’s decision in denying the benefit of set off of the brought forward business losses against such deemed income. In the process, CIT(A) directed the AO to withdraw the benefit of set off granted to the assessee subsequently u/s.154 of the Act to the extent of Rs.42,08,137/-, i.e. on account of unabsorbed depreciation and

discussed the reasons as to why such additional income is not available for such set off. CIT(A) invoked the provisions of section 69 to 69C of the Act and held that the “deemed income” was offered during survey action is not in the nature of income taxable under the head salary, house property and business, capital gains or others. Therefore, consequential deductions u/s.70, 71 and 72 of the Act are not available and relied on the following decisions in this regard (1) *Fakir Mohamed Haji Hasan Vs. CIT 247 ITR 290 (Guj.)*, (2) *Liberty Plywoods (P) Ltd. Vs. ACIT 29 taxmann.com 268 (ITAT Chd.)*, (3) *ITO Vs. Dulari Digital Photo Services (P) Ltd. 53 SOT 210 (ITAT Chd.) etc.*

5.1 Further, assessee also relied on various other decisions of Pune Bench and in the case of *Golani Bros Vs. ACIT 70 TTJ 887*. However, the CIT(A) distinguished the same by stating the following. Relevant paras of the order of CIT(A) are extracted here as under :

“4.3.5.

.....*In the case of Golani bros Vs. ACIT (70 TTJ 887) referred by the appellant, both the amounts of on money and unexplained expenditure were brought to tax by the Assessing Officer and in that context the ITAT, Pune held that if the unaccounted expenditure was incurred out of ‘on money’ received by the assessee, then question of making any addition under sec.69 does not arise because the source of expenditure is fully explained. In the case of the appellant, it is only either unexplained expenditure or undisclosed receipts which were brought to tax and not receipts as well as expenditure and therefore there is no double addition in respect of the same amount. Further, in this case, as discussed earlier, the expenditure far exceeded the receipts shown in the impounded documents. In such circumstances, the said decision of ITAT, Pune has no application to the facts of the present case.*

4.3.6 *The other contention of the appellant is that overall declaration was made by the MD of the company for the entire group and the declaration of such additional income has been considered & assessed as business income in the hands of GDPL while framing the assessment order. But, for the A.Y. 2005-06, as already mentioned, additional amount declared during the survey was brought to tax under sec.69C of the I.T. Act in the hands of GDPL. For the A.Y. 2006-07, the additional income was separately considered and added to the total income by the Assessing Officer in the final computation of total income. Further, it is also noticed that in case of GDPL, there was no brought forward business loss for set off against the income admitted during the survey and therefore the issue therein is only academic in nature. Therefore, it is not correct to say that the additional income was assessed as business*

income in the other case, i.e. GDPL and the same treatment should be given in the case of the appellant also ignoring the legal position as discussed above for set off of brought forward business loss against the 'deemed income' during the survey.

4.3.7 For the foregoing reasons, it is held that the income admitted during the survey for the A.Y. 2005-06 is assessable as 'deemed income' under sec.69C of the I.T. Act and the Assessing Officer is therefore justified in law in denying the set off of brought forward business loss against such 'deemed income'. Ground of appeal No.1.1, 1.2, 1.3 and 1.5 for A.Y. 2005-06 fail."

Similarly, the CIT(A) confirmed the addition made by the AO for the A.Y. 2006-07 giving same reasons.

6. Aggrieved with the said order of CIT(A) the assessee is in appeal before us with the amended grounds extracted above.

BEFORE THE TRIBUNAL

7. Before us, Ld. Counsel for the assessee submitted that the additional income offered by the assessee is part of the unexplained income (receipts/expenditure) of the assessee and, all of it, is directly related to the business activities of the assessee. Therefore, as per assessee, the additional income offered by the assessee in both assessment years constitutes the business income although the same is earned outside the books of account. Assessee offered the same for the years under consideration and therefore, the same is undisputedly business income. Further, on the issue of reversing the relief granted by the AO during the rectification proceedings, assessee filed the following written submissions.

"2.1. The fact that the Appellant had received on money over and above the agreement value of various units in different projects was not refuted either by the AO or the 1st Appellate authority.

2.2. Further on a perusal of the reply given by the Managing Director of the Appellant company, to question No. 26 in the statement recorded at the time of survey, it is clear that the income pertains to the business activity of the Appellant and as such the additional income offered by the Appellant ought to have been assessed under the "Income from business" and not under the head "Income from other sources".

2.3. Further, the Managing Director of the Appellant company had made an overall declaration for the entire group. As such, in the case of the sister company of the Appellant, the AO had accepted the declared income as business income. Thus, there is no reason that the closing stock declared by the Appellant for the assessment year under consideration should be assessed as deemed income u/s. 69A of the Act.

2.4. Once it has been established that the income declared by the Appellant is its business income, there would not be any reason for disallowing the set-off of unabsorbed depreciation pertaining to A.Y. 2000-01 and A. Y. 2001-02 against such income.

2.5. Without prejudice to the above, even if the income is held to be deemed income, section 32(2) of the Act was amended by Finance Act, 2001 w.e.f. 1st April, 2002, whereby the old position (as it stood until A.Y. 1996-97) that unabsorbed depreciation becomes the current depreciation under section 32(2) of the Act was restored.

2.6. Thus, w.e.f. 1st April, 2002, the unabsorbed depreciation is brought forward and treated as a part of the current year allowance for depreciation. That being so, in case where the business profits are lesser than the depreciation allowance, then the same is deducted from income under any other head.

2.7. Thus, the act of the CIT(A) in disallowing the unabsorbed depreciation is against the provisions of law.

2.8. For the above contention, reliance is placed on the following judicial pronouncements.

1. ITO Vs. Suraj Solvent & Vanaspati Industries Ltd. 16 DTR 492 (Asr Trib.)
2. Suresh Industries Pvt. Ltd. Vs. ACIT 27 taxmann.com 203 (Mum Trib.)
3. TMC Specialty Hospitals India Ltd. 49 taxmann.com 534 (Chennai Trib.)

8. Further, on the issue of allowing the benefits of the statutory deductions out of the said deemed income/additional income offered during any search and seizure action or survey action, Ld. Counsel filed the compendium of judgments and heavily relied on the judgment of Bombay High Court in the case of CIT Vs. Sheth Developers Pvt. Ltd. 25 taxmann.com 173 (Bom.). Ld. Counsel for the assessee demonstrated that the additional income offered during search and survey actions constitute business income. He also brought our attention to various decisions to demonstrate the said legal position. Further, referring to the allowability of certain deductions out of the business income offered

as additional income, Ld. Counsel relied on the judgment of Karnataka High Court in the case of CIT Vs. S.K. Srigiri & Bros. 171 taxman 264 (Karnataka). The cases, where claim of deduction u/s.80IB of the Act was allowed as well as claim of remuneration u/s.40(b) of the Act was allowed from the additional income, were also filed. Taking parallel from the same, Ld. Counsel for the assessee submitted that since the additional income offered is the business income, the statutory deductions are allowable against the said additional income, Ld. Counsel for the assessee submitted that set off of brought forward losses against the said additional income needs to be allowed in favour of the assessee. As per the Ld. Counsel, merely for reason of unaccounted transactions, the income earned from the business of the assessee, cannot be treated as ineligible income for such set off.

9. Per Contra, Ld. DR for the Revenue relied heavily on the orders of the AO/CIT(A) on one side and relied on the judgment of Punjab & Haryana High Court in the case of Kim Pharma Pvt. Ltd. Vs. CIT 35 taxmann.com 456 on the other.

10. We have heard both the sides on this limited issue of treating the additional income as deemed income of the assessee or if the said income is evidenced to have been earned out of business activities of the assessee and of course, outside the books of account. We also need to adjudicate whether the same can be considered as business income of the assessee and consequential deductions or set off as per the provisions of section 70, 71 and 72 of the I.T. Act can be allowed or not. As discussed in the preceding paragraphs of this order, Rs.58 lakhs and Rs.73 lakhs was offered as additional income of the assessee for the A.Yrs. 2005-06 and 2006-07 respectively. These amounts were offered on the basis of the impounded documents collected during the survey

action conducted on 24-01-2007 on the assessee. These documents clearly reflect the unexplained expenditure and unexplained receipts relates to sale of flats to the parties. Assessee is a Builder and his business is to construct the flats and sell the same to the customers. All these details clearly indicate the business nexus of the receipts/expenditure to the core business activities of the assessee. It is not the case that there was any cash impounded or seized in this case to deny such claim of set off as the source of the same becomes very vague issue. The entries available on the impounded material suggest the business nexus of the additional income. Therefore, we are of the firm view that the income in question is derived from the business activities of the assessee although they are outside the books of account of the assessee. Having held so, the taxability of the same under the head 'business' or 'income from other sources' is the next issue for adjudication. Considering the existence of business nexus, we are of the opinion that there is no reason why such income is taxed as 'income from other sources when the source for the same from the business activity, is already demonstrated by the assessee during the proceedings before the assessment/appellate authorities. Unaccounted receipts/expenditure constitutes business receipts/expenditure. As such, the judgment of jurisdictional High Court in the case of CIT Vs. Sheth Developers Pvt. Ltd. affirms that the income from business is required to be taxed as 'business income' and the following case laws also support the view of the assessee. For the sake of completeness, the conclusion of the said judgment is extracted as follows :

"Builders receiving undisclosed income in course of its business, is entitled to benefit of deduction under section 80IB."

The above decision is given on the context that such undisclosed income is eligible income for the claim of deduction u/s.80IB of the Act.

This was a case where there was search and seizure action on the assessee and the assessee disclosed additional income. The Hon'ble High Court treated the same as eligible income for grant of deduction u/s.80IB of the Act.

11. We have also examined the allowability of statutory deductions out of such additional income disclosed during search and seizure/survey actions. There are binding decisions (supra) to support the claim of deduction qua the deductions u/s.80IB, 40B of the Act etc. Therefore, in principle, granting statutory deductions out of such additional income arising out of business activities is sustainable.

11.1 Further, we examined the said decision in the case of Shri Radhesham Totaram Narayani Vs. ACIT in ITA No.1491/PUN/2015, dated 21-03-2018 for the A.Y. 2010-11 which is relevant for the proposition of allowing of set off of brought forward losses against such additional income offered u/s.133A of the Act and find barring the additional income by virtue of excess cash, other items relatable to the business activities of the assessee are found eligible for set off of the brought forward losses against the said business activities/additional income. For the sake of completeness, the operational paragraphs are extracted here as under :

“9. We heard both the parties on these 3 items. On going through the facts and considering the details available on record, we find the said items at Sl.Nos.1, 3, and 4 of the table being gross profits and the unrecorded purchases, we are of the opinion that the same should constitute business income and they should be available for set off of the losses in question. To that extent, the order of CIT(A) and the AO are required to be reversed and therefore, the AO is directed to grant set off of benefit accordingly.

10. Regarding the excess cash of Rs.4,93,290/- mentioned at Sl.No.2 of the table, it is the case of the assessee that the same was found at the business premises of the assessee, which was surveyed by the Revenue. The said cash was offered by the assessee during the survey action as the business income of the assessee. The same was shown in the return of income as additional income in the profit and loss account. However, the assessee could not demonstrate by explaining the sources and the

manner of earning of the same from the business activities of the assessee who deals with the ITC products. He merely stated that the said income constitutes business income and should be available for set off against the business losses of the assessee in the current year as well as in the earlier assessment years. Therefore, the AO denied the benefit of set off of losses against the excess cash found during the survey action.

11. After hearing both the parties, we find this is a case where survey action u/s.133A of the Act resulted in the discovery of the said excess cash and there is no dispute about it. Further, it is also undisputed that the assessee failed to explain the manner of earning of the said excess cash linked to the unaccounted sales of the ITC products. Assessee failed to explain the modus-operandi of earning of such excess cash from business sources of any kind. Therefore, we are of the opinion that it is reasonable to presume that assessee failed to discharge the onus on this aspect of establishing the business nature of the excess cash. This view is fortified by the legal proposition laid down by the Hon'ble Punjab & Haryana High Court in the case of Kim Pharma Pvt. Ltd. Vs. CIT 35 taxmann.com 456 (Punjab & Haryana). The said judgment is relevant for the following ratio :

*“where amount surrendered during survey was not reflected in the books of account and **no source from where it was derived was** declared by the assessee, it was assessable as deemed income of the assessee u/s.69A and not as business income”*

12. Further, we find the Agra Bench of the Tribunal in the case of Satish Kumar Goyal Vs. JCIT 70 taxmann.com 382 (Agra-Trib.) has also laid down similar legal proposition. The conclusion of the said Tribunal reads as under :

“Where assessee received certain amount in cash, since he failed to explain nature and source of said receipt, same was to be treated as income under section 68 assessable under head “income from other sources and as per provisions of section 71, business losses of assessee could be set-off against said income.”

This is also a case where assessee failed to explain the nature and source of the cash received by that assessee and the same was treated as income u/s.68 of the Act and taxed under the head “income from other sources”. The Tribunal did not allow the benefit of set off against the business losses of the assessee against the said income.

Considering the above legal propositions, we are of the opinion that the excess cash of Rs.4,93,290/- being deemed income is not to be treated as “business income” of the assessee.

Further, regarding the investment in the residential house, we find it is the case of appropriation of income earned by the assessee. Thus, the claim of the assessee is unsustainable. Therefore, these parts of the claim of the assessee are dismissed.

Thus, the only amount which is available for set off against the current year is brought forward loss amounts to Rs.4,81,252/-, i.e. sum of 3 items of income mentioned at Sl.Nos. 1, 3 and 4 of the table above. AO is directed to grant the benefit of set off of the balance of current year loss of Rs.2,65,457/- and the brought forward business losses to the extent of Rs.2,15,795/- (i.e. Rs.4,81,252 – Rs.2,65,457). **The balance of brought forward business loss is allowed to be carried forward to the**

subsequent assessment years for set off. Accordingly, the grounds raised by the assessee are partly allowed.”

11.2 On facts, it is evident that the additional income of Rs.58 lakhs and Rs.73 lakhs for the A.Y. 2005-06 and 2006-07 relates to the on-money received by the assessee over and above the agreed value of various residential units/projects of the assessee. Assessee offered the above income when the incriminating material containing the details of unaccounted cash receipts and unaccounted expenditure were placed before the Managing Director of the company. Therefore, on facts, the said additional income is intricately linked to the business activities of the assessee. Further, the judgment in the case of Kim Pharma Pvt. Ltd. (supra) is relevant to the proposition that the additional income surrendered during survey will not constitute business income in case where the same is not accounted in the books of account and the sources of the said income was not successfully linked to the business activities of the assessee. In our view, the AO has erred in taxing it as unexplained money when the same is actually explained qua the sources of income. The same infact constitutes unaccounted income of the assessee. In our view, the said judgment is distinguishable on facts qua the explanation about the sources of additional income. Assessee's claim of set off of brought forward losses against the additional income linked to the business income is valid when the source of such additional income is in the business income of the assessee. Mere taxing such income under the head 'income from other sources' as done by the AO in this case does not change the character business of source of such income. Hence, the said judgment has no application to the facts of the present case.

Therefore, where the assessee discharged the onus of linking the additional income to the business activities of the assessee, the fairness

demands that such additional income should be considered not as “deemed income” taxable under the head “income from other sources”.

To elaborate the same, the items of income that are chargeable to tax under the head ‘income from other sources’ as per the provisions of section 56 of the Act, are specified therein. The deemed income like the present case is certainly not specified in the said section. Further, it is not the case of the AO that the said unaccounted income of Rs.53 lakhs and Rs.78 lakhs cannot be classified to any other head of income. In fact, section 56(1) of the Act provides for bringing such items of income under the scope of section 56 of the Act. Therefore, the decision of the AO in treating the same as chargeable to tax under the head ‘income from other sources’ is not valid as the source for such additional income is clearly determinable as chargeable u/s.28 of the Act. Further, there is no law to automatically tax each and every ‘unaccounted income’ disclosed during search/survey actions as ‘income from other sources’.

In our view, such income needs to be treated as the ‘business income’ of the assessee and consequently, the benefit of set off/carry forward should be granted to the assessee against such additional business income of the assessee in both assessment years. Accordingly, the decision of CIT(A) stands reversed on this issue. Amended grounds raised by the assessee are allowed.

12. In the result, the appeal of the assessee is allowed.

ITA No.1608/PUN/2014
A.Y. 2006-07

13. Since the facts, issues, decision of the AO/CIT(A), arguments and counter arguments are same as that of appeal ITA No.1607/PUN/2014 for A.Y. 2005-06, the decision given in the said appeal applies to this

assessment year too. Therefore, with similar reasoning, we reverse the order of CIT(A) and accordingly allow the amended grounds raised by the assessee.

14. In the result, the appeal of the assessee is allowed.

15. To sum up, both the appeals of the assessee are allowed.

Order pronounced in the open court on this 06th day of June, 2018.

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(D. KARUNAKARA RAO)

लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 06th June, 2018
सतीश

आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT(A)-1, Pune
4. CIT-1, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "A Bench"
Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune