

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, 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 No.102/PUN/2015

निर्धारण वर्ष / Assessment Year : 2009-10

M/s. Hira Rollers & Flour Mills  
Private Limited.  
L-15, Additional MIDC,  
Satara-415 004.  
PAN : AABCH5584N

.....अपीलार्थी / Appellant

**बनाम / V/s.**

The Deputy Commissioner of Income Tax,  
Satara Circle, Satara.

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.103/PUN/2015

निर्धारण वर्ष / Assessment Year : 2009-10

M/s. Hira Enterprises,  
House No.111,  
Ravivar Peth,  
Satara-415 004.  
PAN :AAEFH7644H

.....अपीलार्थी / Appellant

**बनाम / V/s.**

The Deputy Commissioner of Income Tax,  
Satara Circle, Satara.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Pramod Shingte

Revenue by : Shri Mukesh Jha

सुनवाई की तारीख / Date of Hearing : 04.04.2018

घोषणा की तारीख / Date of Pronouncement : 29.06.2018

### **आदेश / ORDER**

#### **PER VIKAS AWASTHY, JM**

These two appeals by two different assesseees are directed against the order of Commissioner of Income Tax (Appeals)-III, Pune of even date i.e. 09.10.2014 in their respective cases for the assessment year 2009-10.

Since, the issues involved in both these appeals are similar and are arising from same set of facts, these appeals are taken up together for adjudication and are disposed of vide this common order.

2. The brief facts of the case as emanating from records are: Both the assesseees belong to the same group. The assessee in ITA No.102/PUN/2015 is a company and the assessee in ITA No.103/PUN/2015 is a partnership firm. A survey action u/s.133A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') was carried out on the business premises of the assesseees on 18.02.2009. During the course of survey, physical verification of cash and stock was undertaken. Excess cash and stock vis-a-vis cash/stock recorded in books of account was found in the case of both the assesseees. Statement of Shri Aslam H. Tamboli, Director/Partner of assesseees was recorded. He offered the difference in cash and stock as additional income in the hands of assessee company/firm. The Assessing Officer made addition of the excess cash and stock as deemed income u/s.69 of the Act. Apart from above, disallowance u/s.40(a)(ia) of the Act was made by the Assessing Officer in respect of both the assesseees.

3. Aggrieved by the assessment orders passed u/s.143 (3) of the Act, both the assessee filed appeal before the Commissioner of Income Tax (Appeals) in their respective cases. The Commissioner of Income Tax(Appeals) rejected the contention of the assessee and confirmed the assessment order in toto. Now, both the assessee are in second appeal before the Tribunal assailing the findings of Commissioner of Income Tax(Appeals).

**ITA No. 102/PUN/2015**  
**A.Y. 2009-10**

4. The assessee in ITA No.102/PUN/2015 has raised following grounds:

*“1.On the facts and in the circumstances of the case and in law the Learned Assessing Officer erred in treating the additional income of Rs.60,01,286/- declared during the survey action u/s.133A. as income from other sources by considering it as deemed income u/s.69 of the Income Tax Act, 1961 by disregarding the fact that on the basis of tentative trading and Profit & Loss account as well as partner's statement recorded on oath that the declaration belongs to same business, therefore appellants claim of treating this income as business income shall be accepted.*

*2. On the facts and in the circumstances of the case and in the law the Lower authorities have erred in not allowing set off of current year losses against declaration made u/s.133(A) of the Income Tax Act, 1961 a sum of Rs.60,01,266/-being declaration on account of excess stock/cash.*

*3. On the facts and in the circumstances of the case and in the law the Lower authorities have erred in making a disallowance of sum of Rs.6,87,882/- by invoking provisions of section 40(a)(ia) of the Income Tax Act, 1961 by disregarding appellants contention in this regards.*

*4. On the facts and in the circumstances of the case and in the law the Lower Authorities have erred in making an addition of Rs.21,624/- on account of interest received from MSEDCL.*

*The appellant craves for to leave, add, alter, modify, delete above ground of appeal before or at the time hearing, in the interest of natural justice.”*

5. Shri Pramod Shingte appearing on behalf of assessee submitted that the assessee is engaged in trading activity of wheat products like Atta, Maida, Rawa, Sooji, Bran etc. The assessee filed its return of income on 30.09.2009 declaring loss of Rs.54,73,477/-. In survey action u/s.133A of the Act conducted on 18.02.2009, excess cash of Rs.8,99,389/- and stock to the tune of Rs.51,01,877/- was found. Shri Aslam H. Tamboli, Director of assessee-

company offered excess cash and stock aggregating to Rs.60,01,266/- as additional income for the Financial Year 2008-09. The Director admitted that additional income is over and above the regular business income of the assessee company. However, the Authorities below have erred in holding that the excess cash and stock found during survey are not part of the business activities of the assessee and denied the set off of the additional income declared against loss in the statement of total income.

5.1 The ld. AR further submitted that during the course of scrutiny assessment proceedings, the Assessing Officer made disallowance of Rs.6,87,882/- u/s.40(a)(ia) of the Act in respect of payment of brokerage/contract labour charges without deduction of tax at source. The ld. AR submitted that the issue can be remitted to the file of Assessing Officer in view of the second proviso inserted by the Finance Act, 2012 for verification. The ld. AR further submitted that the assessee would furnish necessary details/ documents before the Assessing Officer to show that the recipients of the amount have offered to tax the brokerage in their respective return of income. As regards retrospective applicability of newly inserted proviso to section 40(a)(ia) of the Act, the ld. AR placed reliance on the decision of Hon'ble Delhi High Court in the case of CIT Vs. Ansal Land Mark Township (P) Ltd reported as 337 ITR 635.

5.2 In respect of ground No. 4, the ld. AR submitted that he is not pressing the same on account of smallness of the amount involved.

6. On the other hand, Shri Mukesh Jha representing the Department vehemently defended the order of Commissioner of Income Tax(Appeals) in confirming the additions made by the Assessing Officer. The ld. DR submitted that the assessee has not furnished any evidence to substantiate that the

excess cash and stock found during survey was part of regular business. The Id. DR prayed for dismissing the appeal of assessee and confirming the findings of Commissioner of Income Tax(Appeals).

7. We have heard the submissions made by representatives of rival sides and have perused the orders of Authorities below. The assessee in appeal has primarily assailed the findings of Commissioner of Income Tax (Appeals) on two counts viz.

(i) Treating the additional income Rs.60,01,286/- declared during survey as deemed income u/s. 69 of the Act.

(ii) Disallowance of Rs.6,87,882/-u/s.40(a)(ia) of the Act in respect of payment of brokerage and labour contract charges.

8. It is an undisputed fact that during the course of survey action u/s.133A of the Act cash inventory to the tune of Rs.51,01,877/- and stock of Rs.8,99,389/- was found excess as against cash/stock recorded in regular books of account of the assessee. The case of the assessee is that excess cash and stock is generated in the regular course of business activities carried out by the assessee. However, before the Authorities below, the assessee has not furnished any cogent evidence in support of his submissions. In the absence of any document indicating generation of excess cash and stock during regular business activity, the Assessing Officer made addition of the same u/s.69 of the Act as unexplained investment.

9. The Id. AR has prayed before us that if an opportunity is afforded to the assessee, the assessee would substantiate that excess cash and stock found during survey was part of business income of the assessee. Taking into consideration entire facts of the case and in view of the prayer made by the Id. A.R., without commenting on merits of addition, the issue is restored back to the file of Assessing Officer for re-adjudication after considering fresh

evidence, if any, filed by the assessee to substantiate generation of excess cash and stock in regular business activities of assessee. The Assessing Officer shall grant reasonable opportunity of hearing to the assessee before adjudicating the issue afresh, in accordance with law. Thus, **the ground No.1 raised in appeal by the assessee is allowed for statistical purpose.**

10. In ground No. 2 of the appeal, the assessee is seeking set off of current year losses against declaration made u/s.133A of the Act. The relief sought in ground No. 2 of the appeal is corollary to ground No.1. Since, we have remitted the issue raised in ground No.1 of appeal for examination of the additional income declared during survey, we deem it appropriate to remit the ground No.2 as well. If the assessee is successful in establishing that excess cash and stock is part of regular business income, the Assessing Officer is directed to allow the benefit of set off of current year losses to the assessee. **The ground No. 2 raised in appeal by the assessee is allowed for statistical purpose in the terms aforesaid.**

11. The ground No. 3 raised in appeal by the assessee is with respect to disallowance of Rs.6,87,882/- u/s. 40(a)(ia) of the Act. The assessee has made following payments without deduction of tax at source.

<i>Sr.</i>	<i>Name of the party</i>	<i>Nature of payment</i>	<i>Amount</i>
1.	<i>Dalal Adinath Canvassing</i>	<i>Brokerage</i>	4,904/-
2.	<i>Dalal Shreyas Broker</i>	<i>Brokerage</i>	85,006/-
3.	<i>Dalal Govindbhai</i>	<i>Brokerage</i>	5,000/-
4.	<i>Rajtulla Khan</i>	<i>Contract Labour</i>	5,92,972/-
		<i>Total Rs.</i>	6,87,882/-

The ld. AR has prayed that in view of second proviso to section 40(a)(ia) of the Act, the issue may be restored to the file of Assessing Officer for verification.

The Finance Act, 2012 has inserted following proviso to section 40(a)(ia) of the Act.

*“Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub section (1) of the section 201, then, for the purpose of this sub clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.”*

Though the proviso was inserted by the Finance Act, 2012 w.e.f. 01.04.2013, the Hon'ble Delhi High Court in the case of CIT Vs. Ansal Land Mark Township (P) Ltd (supra) has held the proviso to be declaratory and curative in nature. The proviso is held to be applicable retrospectively w.e.f. 1<sup>st</sup> April, 2005. In the facts of the present case, we deem it appropriate to remit this issue back to the file of Assessing Officer to consider documentary evidences furnished by assessee indicating that the recipients of the brokerage/ labour contract charges have offered the amount received from assessee to tax and has paid tax thereon. The Assessing Officer after examining relevant documents shall decide this issue, in accordance with law. Thus, **ground No.3 raised in appeal by the assessee is allowed for statistical purpose.**

12. The ld. AR for the assessee has stated at the Bar that he is not pressing ground No. 4 on account of smallness of the amount involved. Accordingly, **ground No. 4 raised in appeal by assessee is dismissed as not pressed.**

13. In the result, appeal of assessee in ITA No.102/PUN/2015 is partly allowed for statistical purpose.

**ITA No.103/PUN/2015**  
**A.Y. 2009-10**

14. The assessee in ITA No.103/PUN/2015 has raised following grounds:

*“1. On the facts and in the circumstances of the case and in law the Learned Assessing Officer erred in treating the additional income of Rs.6,91,664/- declared during the survey action u/s.133A. as income from other sources by considering it as deemed income u/s.69 of the Income Tax Act, 1961 by disregarding the fact that on the basis of tentative trading and Profit & Loss account as well as partner's statement recorded on oath that the declaration belongs to same business, therefore appellants claim of treating this income as business income shall be accepted.*

*2. On the facts and in the circumstances of the case and in the law the Lower authorities have erred in disallowing remuneration to partners a sum of Rs.1,30,262/- claimed on account of disclosure made during the course of survey of excess stock/cash.*

*3. On the facts and in the circumstances of the case and in the law the Lower authorities have erred in disallowing a sum of Rs.9,95,840/- being interest of debit balance of partners' capital account by disregarding appellants contention in this regards.*

*4. On the facts and in the circumstances of the case and in law the Lower authorities have erred in disallowing a sum of Rs.8,88,554/- by invoking the provisions of section 40(a)(ia) of the Income Tax Act, 1961 by disregarding appellant's contention in this regards.*

*5. On the facts and in the circumstances of the case and in law the Lower authorities have erred in making an addition of Rs.97,844/- being difference in balance of sundry creditors account by disregarding appellant's contention in this regards.*

*The appellant craves for to leave, add, alter, modify, delete above ground of appeal before or at the time hearing, in the interest of natural justice.”*

15. The ld. AR submitted that the issue involved in ground No. 1 and 2 of appeal is similar to the issue raised in ground No. 1 and 2 in ITA No. 102/PUN/2015. During survey action, excess cash of Rs.2,02,317/- and excess stock of Rs.4,89,357/- were found. Shri Aslam H. Tamboli, partner of assessee firm in his statement recorded during the course of survey action offered the amount Rs.6,91,674/- as additional income in the hands of firm.

The contention of assessee is that the additional income declared is part of undisclosed business income of assessee; whereas, the Assessing Officer and Commissioner of Income Tax (Appeals) have treated the same as unexplained investment u/s. 69 of the Act.

16. In respect of ground No.3 of the appeal, the ld. AR contended that Authorities below have erred in disallowing Rs.9,95,840/- being interest of debit balance of partner's capital account. The Authorities below have failed to take note of the fact that there are debit balances, as well as credit balance in the partner's capital account. The assessee is not charging any interest in respect of credit balances in the partner's capital account. To support his submissions, the ld. AR referred to the capital account balances reproduced by the Assessing Officer in Para 7 at page-5 of the assessment order.

17. In respect of ground No. 4 relating to disallowance u/s.40(a)(ia) of the Act, the ld. AR submitted that assessee has made payment of Rs.3,21,210/- on account of advertisement expenses and payment of Rs.5,67,344/- on account of interest on vehicle loan to M/s. Tata Capitals. The ld. AR prayed that in view of second proviso to section 40(a)(ia) of the Act inserted by Finance Act, 2012, the issue may be remitted back to the file of Assessing Officer for verification.

18. On the other hand, the ld. DR vehemently defended the findings of Commissioner of Income Tax (Appeals) and prayed for dismissing the appeal of assessee.

19. Both sides heard. The issue raised in ground No. 1 of the present appeal is identical to ground No. 1 raised in ITA No.102/PUN/2015. We have restored the issue back to the file of Assessing Officer for fresh adjudication.

Our findings while deciding ground No.1 raised in ITA No.102/PUN/2015 would mutatis-mutandis apply to ground No.1 raised in the present appeal. Thus, **ground No. 1 raised in the present appeal is allowed for statistical purpose.**

20. The ground No. 2 raised in the present appeal is interlinked to ground No.1. Since the ground No.1 is restored to the Assessing Officer for fresh adjudication, the issue raised in ground No. 2 of the present appeal is also remitted back to the file of Assessing Officer for re-adjudication along with ground No. 1 of the appeal. Hence, **ground No.2 raised in appeal by assessee is allowed for statistical purpose.**

21. In ground No. 3 of appeal, the assessee has assailed disallowance of Rs.9,95,840/- on account of interest on debit balance of partner's capital account. The ld. AR has pointed that there are credit balances as well and the assessee is not charging interest on the credit balances of the partners. We are of considered view that this issue requires verification. The issue is restored to Assessing Officer for verification. The Assessing Officer shall decide the issue afresh after re-verification. Thus, **the ground No. 3 of the appeal is allowed for statistical purpose.**

22. In ground No. 4, the assessee has assailed disallowances u/s. 40(a)(ia) of the Act in respect of following payments without deducting TDS.

<i>1. M/s. Concept Creator – Advertisement expenses</i>	<i>Rs.3,21,210/-</i>
<i>2. Interest on vehicle loan- M/s. Tata Capitals</i>	<i>Rs.5,67,344/-</i>
<i>Total</i>	<i>Rs.8,88,554/-”</i>

We have adjudicated similar issue in ground No.3 of ITA No. 102/PUN/2015 above. Our findings on the issue above would mutatis-

mutandis apply to ground No.4 of the present appeal. Accordingly, we direct the Assessing Officer to decide the issue afresh after considering relevant evidences furnished by assessee, in accordance with law. Thus, **ground No.4 raised in appeal by the assessee is allowed for statistical purpose.**

23. In ground No. 5 of the appeal, the assessee has assailed addition of Rs.97,844/- on account of difference in balance of sundry creditors. The ld. AR has failed to substantiate as to how the findings of the Commissioner of Income Tax (Appeals) are perverse. Since no material contrary to the findings of Commissioner of Income Tax (Appeals) has been brought before us, we uphold the addition. Accordingly, **ground No. 5 raised in appeal by the assessee is dismissed.**

24. In the result, appeal of the assessee in ITA No.103/PUN/2015 is partly allowed for statistical purpose.

25. To sum up, ITA No.102 & 103/PUN/2015 are partly allowed for statistical purpose.

Order pronounced on Friday, the 29<sup>th</sup> day of June, 2018.

Sd/-  
(**डी. करुणाकरा राव**/D. KARUNAKARA RAO)  
लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-  
(**विकास अवस्थी** /VIKAS AWASTHY)  
न्यायिक सदस्य/JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 29<sup>th</sup> June, 2018  
SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-III, Pune.
4. The CIT-III, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,  
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

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आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.