

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

श्री वी. दुर्गा राव, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A.Nos.28-30 /Viz/2017

(निर्धारण वर्ष/ Assessment Years: 2008-09 to 2010-11 respectively)

M/s Nakshatra Hotels
Lakshmipuram
Main Road
Guntur
[PAN :AAGFN3148J]

Vs. Income Tax Officer
Ward-2(2)
Guntur

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से/ Respondent by

: Shri G.V.N.Hari, AR
: Smt. Suman Malik, DR

सुनवाई की तारीख / Date of Hearing

: 20.11.2018

घोषणा की तारीख/Date of Pronouncement

: 07.12.2018

आदेश /ORDER

PER D.S. SUNDER SINGH, Accountant Member:

These appeals are filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-1, Guntur vide ITA Nos.71-73/15-16/CIT(A-1)/GNT dated 31.01.2016 for the Assessment Years (A.Ys) 2008-09 to 2010-11. Since the grounds raised in these appeals are common, the

appeals are clubbed, heard together and a common order is being passed for the sake of convenience as under.

2. All the grounds in these appeals are related to the addition made by the Assessing Officer (AO) due to the discrepancies found during the course of survey in the premises of Mr.Medepally Rama Mohana Rao ("Mr.Rao" in short), partner of the assessee firm. The AO made the addition of Rs.19,82,362/- for the A.Y.2008-09, Rs.54,10,998/- for the A.Y.2009-10 and Rs.42,21,367/- for the A.Y.2010-11.

3. A survey u/s 133A was conducted in the case of Mr.Rao who is also having individual business. During the course of survey, certain incriminating material stated to have been found relating to the assessee firm, hence, the AO issued the notice u/s 148 on 28.03.2014 for which there was no response from the assessee. Therefore, a notice u/s 142(1) dated 07.07.2014 was served on the assessee and in response to the notice, the assessee filed a letter dated 17.07.2014 stating that the assessee had duly co-operated in the survey proceedings u/s 133A and paid the taxes due as directed by the department and as such the proceedings under the reference 2nd cited (notice u/s 148 dated 28.03.2014) above are not acceptable under law or fact. Subsequently, the AO issued show cause

notice on 24.12.2014 stating that a survey u/s 133A was conducted on 17.02.2011 in the case of Mr Rao and Nakshatra Hotels, Guntur and during the course of survey, certain papers were found according to which there was a difference in the turnover declared by the firm in the case of Nakshatra Hotels as per the details given below :

Sl.No.	Financial Year	Asst.Year	Turnover as per papers found	Turnover as admitted in the return	Difference
1.	2007-08	2008-09	1,18,82,077	32,64,226	86,17,851
2.	2008-09	2009-10	1,93,05,488	64,19,937	1,28,85,551
3.	2009-10	2010-11	2,24,55,442	98,89,160	1,26,66,282

The AO directed the assessee to explain the difference. In response to the notice issued, the assessee submitted that the turnover declared by the assessee in the return of income was correct and there was no difference as alleged. During the relevant years, the firm was managed by Sri Sukhavasi Srinivasa Rao and the return of income was filed by the said managing partner duly verifying books of accounts. The assessee did not accept contention of the AO that the material found in the premises of Mr Rao was related to the assessee firm and submitted that the turnover found in the premises of Mr.Rao does not belong to the firm. The AO did not accept the

explanation/contentions of the assessee stating that the material/papers impounded clearly indicates the name of the firm as Nakshatra hotels and thus, held that the material pertains to Nakshatra hotels only. Summons u/s 131 were issued to Mr Rao and a statement was recorded from him on 05.03.2015. During the course of recording the statement, the assessee stated that the said turnover was not related to the assessee firm and further submitted that in order to obtain the bank loan, the P&L a/c was prepared on estimation basis boosting the figures for getting the higher loans from the bank. For ready reference, we extract relevant part of the statement recorded from Mr.Rao, which reads as under :

"Q.2. statement recorded at the time of survey: During the course of survey proceedings you have answered to some of the questions that" I am not in a position to say anything at present and also stated that I don't know". However, the same questions are again put to you for your proper answers now.

However, once again the same questions are repeated as under:

"During the course of survey proceedings certain papers containing the statements showing funds flow / the daily collection / expenditure which are inventoried as bundle no.10 etc. were found. As per which the total sales for F Ys 2007-08, 2008-09 and 2009-10 are Rs. 1,18,82,077/-, Rs. 1,93,05,488/- and Rs. 2,24,55,442/-- respectively against which the sales shown in the ROI filed for the relevant F.Y. were its 32,64,226/-, Rs.64,19,937/- and Rs. 97,89,160/- respectively which has resulted in suppression of sales to the tune of Rs. 86,17,851/-, Rs.1,28,85,551/- and Rs.1,26,66,282/- respectively for the above F.Ys. What is your explanation?"

From the above, it is very clear that there is a much variation in the turnovers shown in the papers impounded and the returns filed, what do you say now.

A. *There is a managing partner Sri Sukhavasi Srinivasa Rao who is looking after the business transactions of the firm of M/s Nakshatra Hotel. In fact in order to obtain bank loan the P&L account etc have been prepared on estimated basis and particularly boosting the figures for getting higher loan from the Banks. It is a general practice in each and every business. In view of this, they cannot be relied upon,*

Q3. *At the time of survey you have answered that "I am not in a position to say anything. Now you are telling that those figures are estimated figures to get bank loan , You have not given this answer at the time of survey. Now what you are telling is nothing but an afterthought. Please explain.*

A. *At the time of survey I was in a confused state of mind, that's why I have answered so.*

Q.4. *You are informed that all the partners severally and individually are responsible for each and every transaction relating to the business activities of the firm. What do you say.*

A, *May be. As already mentioned, the managing partner is looking after the entire business transactions of the firm. Moreover, I have also replied that the figures in the papers impounded are estimated figures and they are not real transactions. It is also brought to the notice of the department that the firm has declared income on the turnovers found by the department during the course of survey mentioned above, At the time of survey, the department has suggested to offer the income on the suppressed turnover for the asst. year 2011-12 , Accordingly, Nakshatra Hotel estimated the net income at 3.23% on the entire suppressed turnover Rs.3,84 Cr. and offered additional Income of Rs.11,04,500/- for the asst. year 2011-12 alone to avoid further litigations. Hence the same maybe accepted.*

Q5. *Once you have accepted the turnovers found by the department, the assessments will be completed taking the suppressed turnovers for the respective years and not for one year as offered by you . What is your reply.*

A. *I have no objection. But the net income may be estimated at 3.23% for all the 3 years i.e. 2008-09 to 2010-11 and complete the assessments accordingly.*

Q6. *Please produce evidence by way of bills/vouchers in support of expenditure claimed for all the 3 years. In the absence of bills/vouchers, the book results cannot be relied upon. What do you say...*

A. *I request your good self that the rate of profit as admitted may be accepted. Why because the hotel business was started in the year 2007-08 only and much profit cannot be expected."*

4. The AO considered the explanation of the assessee and the reply submitted by the Managing partner, Mr Rao in the statement recorded u/s 131 dated 05.03.2015 reproduced above and found that the assessee's explanation that the turnover was not pertaining to M/s Nakshatra Hotels is unacceptable. Further the assessee's alternate contention to tax the net profit on turnover is also not accepted by the AO. The assessee also submitted before the AO that it had admitted the additional income of Rs.11,04,500/- for the for the A.Y 2011-12 covering the deficiencies of survey discrepancies was also rejected by the AO. According to the AO, the correct method to be applied in this case is to tax the gross profit on suppressed turnovers for the A.Ys 2008-09 to 2010-11 and accordingly estimated the gross profit as income for the respective A.Ys 2008-09 to 2010-11 as under and the resultant income was brought to tax.

A.Y.	Turnover as per papers found (Rs.)	Turnover as admitted in the return of income (Rs.)	Difference (Rs.)	Gross Profit Rate	Estimated Income (Rs.)
2008-09	1,18,82,077	32,64,226	86,17,851	23%	19,82,362
2009-10	1,93,05,488	64,19,937	1,28,85,551	42%	54,10,998
2010-11	2,24,55,442	98,89,160	1,26,66,282	33.32%	41,21,367

5. Aggrieved by the order of the AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) confirmed the addition made by the AO holding that the assessee had no explanation to offer anything with regard to the said difference in turnover and the silence of the assessee leads to presumption that the assessee has accepted the turnover which were reflected in the incriminating material found during the course of survey.

6. Against the order of CIT(A), the assessee filed appeal before this Tribunal. During the appeal hearing, the Ld.AR argued that the survey u/s 133A was conducted in the business premises of Mr Rao, one of the partners of the assessee firm on 17.02.2011. During the course of survey, certain incriminating material was found in the premises of Mr Rao which is said to be the turnover of the assessee, M/s Nakshtra Hotels. A statement u/s 133A was recorded from Mr Rao who has stated that he was not in a position to explain the contents of the incriminating material found at the time of survey. However, the assessee firm has admitted the additional income of Rs.11,04,500/-, net profit of the aggregate turnover of 3 years amounting to Rs.3.84 corres@3.25% on the suggestion of the survey team. The Ld.AR submitted that as evident from question No.4 of the statement recorded

during the course of survey, the admission was given as suggested by the department on suppressed turnover. During the course of statement recorded on 05.03.2015 also Mr.Rao has stated that the turnover does not pertain to the assessee firm. It was further submitted before the AO that during the above period from 2008-09 to 2010-11 Sri Sukhavasi Srinivasa Rao was the managing partner of the firm looking after the business transactions of the assessee. For the purpose of obtaining the bank loan, the profit & loss account etc. has been prepared on estimation basis particularly boosting the trading results for getting the higher loans from the banks. The Ld.AR submitted that the department has accepted the additional income offered by the assessee covering deficiencies of the 3 years for an amount of Rs.11,04,500/- and completed the assessment for the A.Y. 2011-12. The Ld.AR submitted that the survey was conducted in the premises of partner Mr Rao, but not in the premises of the assessee firm. Therefore, the Ld.AR argued that the AO simply relied on the material found during the course of survey in the premises of Mr. Rao and taxed the gross profit in the hands of the assessee which is unfair and unjustified. The Ld.AR further submitted that as per the statement in response to question No.2, Mr Rao stated that the profit and loss account was prepared boosting the figures for getting the higher loan and it is unjustified to

estimate the gross profit as income instead of net profit. Therefore, requested for estimation of net profit as income in the place of gross profit.

7. On the other hand, the Ld.DR supported the orders of the lower authorities.

8. We have heard both the parties and perused the material placed on record. The facts of this case are peculiar and distinct from other cases of survey. Mr. Rao is one of the partners of the assessee firm and carrying on the business independently. A survey u/s 133A was conducted in the case of Mr.Rao in connection with his business on 17.02.2011. During the course of survey, certain incriminating material was found stated to be relating to Nakshatra Hotels. As per the material found, the turnover of the was recorded at Rs.1,18,82,077/- for the A.Y.2008-09 , Rs.1,93,05,488/- for the A.Y. 2009-10 and Rs.2,24,55,442/- for the A.Y. 2010-11. The statement was recorded from Mr.Rao on the date of survey and he stated that he was not in a position to explain the details. Subsequently, on 05.03.2015, one more statement was recorded and in the said statement also, Mr. Rao has denied that the turnover was related to the assessee firm. However, he has admitted that they have prepared the Profit & Loss account by boosting the figures on estimation basis

for the purpose of bank loan. Further, Mr.Rao during the course of survey has admitted the additional income of Rs.11,04,500/- covering the deficiencies of survey. The said admission was relating to the net income estimated @3.23% on the entire suppressed turnover of Rs.3.84 crores covering the three years. The AO did not make any enquiry with the then Managing Partner, Sri Sukhavasi Srinivasa Rao to find out the fact regarding the suppressed turnover. The AO also did not make any enquiry or verification of books of accounts relating to the assessee firm to ascertain whether the turnover really belonged to the assessee firm or Mr.Rao, one of the partners of the firm who is also carrying on the business independently. It was also observed from the assessment order and the statements recorded that on the suggestion of the department, the assessee had admitted the additional income of Rs.11,04,500/- which was also taxed in the A.Y.2011-12. According to the statement recorded from the assessee on 05.03.2015, profit & loss account etc. have been prepared on estimation basis to boost the turnover figures for the purpose of bank loan. However, the AO did not discuss the contents of profit and loss account stated to be prepared by Mr.Rao for the purpose of bank loan but only taken the turnover for taxing the income. It is also not clear from the assessment order whether the details found were daily sales,

monthly turnover or annual turnover or in lump sum figures. Though Mr.Rao stated that the profit and loss account was prepared for the purpose of bank loan, there was no discussion with regard to the profit and loss account found during the course of survey. The Ld.DR or the Ld.AR during the appeal hearing did not make available the statements recorded from Mr.Rao either during the course of survey or subsequent to the date of survey and correlate the information with the additions made by the AO. It is settled issue that if the profit and loss account is found, the entire P&L a/c required to be taken in to consideration and tax the net profit but not the piecemeal information. The AO must consider the net profit as per the profit and loss account and to tax the net income but not the gross income. In the instant case, the AO estimated the gross profit instead of taking the profit and loss account and to tax the net profit as per the profit and loss account found during the course of survey. However, as discussed earlier there is no information made available by either Ld.DR or the Ld.AR with regard to exact information / incriminating material found at the time of survey. As per section 292C of the Act, the presumption is available to the department to hold that the material found during the course of survey was belonged to such person against whom the survey was conducted but not in the case of third party. In this case, such

person is Mr.Rao, the partner of the assessee firm who is carrying on his own independent business but not the assessee firm. Hence, there is no application of presumption in the case of the assessee. Merely because it was written on the face of it the Nakshatra Hotels it cannot be held that the turnover was pertaining to the Nakshatra Hotels unless such person confirms that the papers were related to the other person and other person also accepts the contents of the incriminating material. Otherwise it is to be presumed that the material belonged to the person who is surveyed. In this case, neither Mr.Rao nor the assessee has accepted that incriminating material was related to the assessee firm. In the absence of such enquiry and information, the papers cannot be held to be related to the assessee. Further, the assessee has admitted additional income of Rs.11,04,500/- covering the survey deficiencies for three years which was accepted by the department and completed the assessment for the A.Y.2011-12. For ready reference, we extract relevant part of the order of the assessment order of A.Y.2011-12 dated 30.03.2014 which reads as under :

“...basing on the impounded material and also the fact that one of the partners of M/s Nakshatra Constructions Sri Medepalli Rama Mohana Rao is also a partner in the assessee-firm. Thus, the assessee-firm in order to avoid tangible / intangible additions on account of Survey, has voluntarily offered additional income at Rs.11,04,500/- thereby returning income at Rs.13,64,620/- for A.Y.11-12....”

“...After examining the impounded material, books of accounts and the information / documents produced during the course of scrutiny proceedings, the income of the assessee, in view of the voluntary admission of additional income at Rs.11.05 lakhs, is accepted.”

9. In reply to the notice u/s 148 the assessee vide letter dated 17.07.2014 stated that it had duly cooperated in survey proceedings u/s 133A and also paid the taxes due as directed by the department and as such proceedings under reference are not acceptable under law. In the statement recorded on 05.03.2015 in response to question No.4 also Mr.Rao stated that the additional income was admitted as suggested by the department. Combined reading of the reply given by the assessee to the notice u/s 148, the statement recorded on 05.03.2015 in response to question No.4 and the assessment order for the A.Y. 2011-12 dated 30.03.2014 shows that the assessee had admitted the income of Rs.11,04,500/- on the suggestion of the department with an impression that the issue is put at rest. Having taxed Rs.11,04,500/- as an additional income for the A.Y. 2011-12 accepting the contention of the assessee to cover the deficiencies found during the course of survey, the AO would not have reopened the assessment by issue of notice u/s 148. From the facts of the case it is under stood that the assessee had admitted the additional income of Rs.11,04,500/- on the assurance of the department to

complete the survey proceedings. The very fact of accepting the returned income in the assessment order and the contents of discussion in the assessment fortifies the above impression. Having assured the department should not resort for reopening of earlier assessments. Though reopening is legal but not ethical and it damages the image of the department in the eye of public. In the instant case as stated in the statement recorded on 05.03.2015, the profit and loss account was prepared to boost the turnover figures for the purpose of bank loan. The AO instead of taking the net profit adopted the turnover figures and estimated the gross profit on the difference of the turnover. The details of turnover found during the course of survey the contents of the statements recorded were not made available at the time of appeal hearing. For a query from the Bench, the Ld.DR replied that there is no material available with regard to the details found at the time of survey. In the absence of any information from the revenue, we have no option except to believe that profit and loss account was found which was prepared for bank loan and net profit required to be brought to tax, but not the gross profit. Having admitted the additional income of Rs.11,04,500/- for an aggregate turnover of Rs.3.84 crores on the suppressed turnover at 3.23% which the AO has accepted, we find no reason to tax the gross profit once again. At the cost

of repetition we observe that the AO failed to establish that the turnover found was pertaining to the assessee and did not bring any material to support the contention, Therefore we hold that estimation of income on the suppressed turnover as per the net profit at 3.23% is reasonable and meets the ends of justice. The estimation of profit at 3.23% each year is in addition to the income already admitted by the assessee for the A.Y. 2011-12. Accordingly, we direct the AO to compute the income estimating the net profit @3.23% on the difference of turnover each year independently.

10. In the result, appeals of the assessee are partly allowed.

Order pronounced in the open court on 7th December, 2018.

Sd/-

(वी.दुर्गा राव)

(V. DURGA RAO)

न्यायिक सदस्य/**JUDICIAL MEMBER** लेखा सदस्य/**ACCOUNTANT MEMBER**

विशाखापटणम /Visakhapatnam

दिनांक /Dated : 07.12.2018

L.Rama, SPS

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S. SUNDER SINGH)

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती / The Assessee – M/s Nakshatra Hotels, Lakshmipuram, Main Road, Guntur
2. राजस्व / The Revenue– Income Tax Officer, Ward-2(2), Guntur
3. The Pr.Commissioner of Income Tax, Guntur
4. The Commissioner of Income Tax (Appeals)-1, Guntur
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम /DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

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आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, VISAKHAPATNAM