

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "A", JAIPUR

श्री रमेश सी शर्मा, लेखा सदस्य एवं श्री विजय पाल राव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH C SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ ITA No. 295/JP/2014
निर्धारण वर्ष / Assessment Year :2010-11

Shri Naveen Agarwal, Naveen Enterprises, F-174, IIIRD Phase, RIICO Industrial Area, Madanganj, Kishangarh.	बनाम Vs.	I.T.O., Kishangarh.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AASPA 0178 M		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ ITA No. 910/JP/2016
निर्धारण वर्ष / Assessment Year :2010-11

Shri Naveen Agarwal, Naveen Enterprises, F-174, IIIRD Phase, RIICO Industrial Area, Madanganj, Kishangarh.	बनाम Vs.	I.T.O., Kishangarh.
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निर्धारिती की ओर से / Assessee by : Shri Manish Agarwal (CA)
राजस्व की ओर से / Revenue by : Shri A.S. Nehra (JCIT)

सुनवाई की तारीख / Date of Hearing : 04/04/2019
उदघोषणा की तारीख / Date of Pronouncement : 08/04/2019

आदेश / ORDER

PER: R.C. SHARMA, A.M.

Firstly we take ITA No. 295/JP/2014

This is an appeal filed by the assessee against the order of Id. CIT(A), Ajmer dated 11/02/2014 for the A.Y. 2010-11 in the matter of order passed U/s 143(3) of the Income Tax Act, 1961 (in short, the Act).

2. In this appeal, the assessee is aggrieved for addition of Rs. 31,94,223/- made by the A.O. by applying G.P. rate @ 22.7% on unaccounted sales found during the course of survey at the premises of the third party.

3. Rival contentions have been heard and record perused. The facts in brief are that the assessee is a manufacturer of marble slabs and tiles. The AO noted that a survey was conducted at the business premises of Shri Vasudev Somani and his family members and Shri Prakash Chand Vijayvergiya and his family members by the investigation wing on 06.01.2010. The AO has noted regarding the survey as under:

"During the course of survey, incriminating documents, such as diaries, copies, loose papers etc. are found at the business premises of these family groups. During the course of survey, statement u/s 133A are recorded of Sh. Prakash Chand Vijayvergiya & his family members and Sh. Vasudev Somani & his family members by different survey teams. It is noticed that huge cash deposited in their bank accounts. In the statement recorded all these persons have stated that the cash deposited in their bank is not belonging to them. Many marble traders at Kishangarh are affecting sales of marble without recording the same in their books of accounts. This is being done either by selling the marble totally without bills or by under invoicing. The sales consideration for such sales are received in cash, which is not being recorded in their books of account. These traders have devised method of collecting cash through bank accounts of these persons. The cash has been deposited at different stations of India in the bank accounts of Sh. Vasudev Somani and Sh. Prakash Chand Vijayvergiya family members and their concerns. The same cash has withdrawn by these persons at Kishangarh and returned to the beneficiary traders. In the statement of Sh. Vasudev Somani stated that their bank accounts are used for collecting the cash from different stations by Naveen Enterprises, IIIrd Phase, RIICO Industrial Area, Madanganj Kishangarh.

Vijayvargiya family has also stated the same fact that their bank accounts are used for bringing the money at Kishangarh from different stations of India by Naveen Enterprises.”

The findings of the AO regarding the income on account of sales represented by the deposits in the bank accounts of Shri Vasudev Somani are as under:

“Shri Sachin Agarwal and Naveen Agarwal both are real brothers. Shri Sachin Agarwal is elder brother of the assessee. In their family one gangsaw unit is there in the name and style of Naveen Enterprises. All the manufacturing and trading of marble is being made in this concern Naveen Enterprises. Father Shri Ghanshyam Agarwal, both the son are living together and managing the manufacturing and trading of Naveen Enterprises. No proprietary concern is in the name of Shri Sachin Agarwal. All the sales either in books of account or outside the books of account in related to Naveen Enterprises. Survey u/s 133A was also carried at the business premises of Naveen Enterprises by the department in financial year 2010-11. Sachin was managing the affair such as purchases and sales there.

Shri Sachin has accepted in cross examination statement of Shri Vasudev Somani that he has received money through their bank accounts. Shri Sachin is elder son of Shri Ghanshyam Agarwal. Obviously, he will go for collecting the cash of unaccounted sales. From the statement of Shri Vasudev Somani, his cross examination by the Id. A/R of the assessee and acceptance of Shri Sachin Agarwal, it is clear that money of undisclosed sales of Rs. 1,40,71,468/- of Naveen Enterprises is received through bank account of Shri Vasudev Somani and his wife. This sale is not recorded in books of account for the year under consideration. Therefore, GP rate declared of 22.7% is applied on the undisclosed sales of Rs. 1,40,71,468/-. Addition of Rs. 31,94,223/- is being made to the total income of the assessee.”

By the impugned order, the Id. CIT(A) confirmed the action of the A.O. against which the assessee is in further appeal before the ITAT.

4. It was argued by the Id AR of the assessee that during the course of assessment proceedings, assessee filed an affidavit alongwith written submission wherein it was clearly stated that assessee has never made any transaction with Shri Vasudev Somani and Shri Prakash Chand Vijayvargiya and such affidavit remained uncontroverted (APB 6-8). Thereafter the Id. AO also issued summons to both the persons and provided opportunity for cross examination to the appellant, in presence of his A/R (APB 24-27). Attention of the Hon'ble Bench is invited to the fact that, in the entire statement recorded u/s 131, as well as during the process of cross examination, both these persons had accepted that they do not know the assessee and even failed to identify him. Further they were not having knowledge about the fact that assessee was proprietor of M/s Naveen Enterprises. Both have stated that one Shri Sachin Agarwal used to take the money so deposited in the bank account and they could identify Shri Sachin Agarwal only during the course of their statements recorded before Ld. AO during the course of assessment proceedings.

5. He further contended that "Naveen Enterprise ('NE')" is a proprietary concern of the appellant, and there is no connection between the transactions done by Shri Sachin Agarwal, brother of the appellant, and the trading activities of the concern. The appellant is in

no way concerned/ responsible for the acts done by Sh. Sachin Agarwal, who is an independent person and had accepted the fact that he is knowing both the persons.

6. In view of above, the Id AR has submitted that the entire addition made is without any evidences, made solely on assumptions and therefore requires to be deleted.

7. As an alternate, it was argued that the profit margin in the case of unrecorded sales is kept very low and therefore, the profit rate declared on the recorded sales cannot be considered in respect of unrecorded sales.

8. For this purpose, the Id AR has invited our attention to the order of the Hon'ble Rajasthan High Court in the case of Anita Choudhary in ITA No. 733/JP/2009 dated 14/10/2011 wherein addition made on account of unaccounted turnover was restricted to 10% to the profit on such undisclosed deposit in the bank account.

9. On the other hand, the Id DR has contended that as per the statement recorded during the course of survey and the subsequent enquiry made by the A.O. vis a vis subsequent survey at the business premises of the assessee, it is clear that the income on account of sales by depositing in the bank account of Shri Vasudeo Somani was

belonging to the assessee, accordingly, the A.O. was very reasonable in estimating the profit @ 22.7% on such alleged unrecorded sales. He supported the findings recorded by both the lower authorities.

10. We have considered the rival contentions and carefully gone through the orders of the authorities below. We had also deliberated on the judicial pronouncements referred by the lower authorities in their respective orders as well as cited by the Id. AR and Id. DR during the course of hearing before us in the context of factual matrix of the case.

11. From the record we found that the amount received through the bank account of Shri Vasudev Somani and his wife of Rs.1,40,71,468 has been added as unaccounted sales of Naveen Enterprises. Shri Naveen Agarwal is the proprietor of the Naveen Enterprises. As per the statement of Shri Vasudev Somani before the AO reproduced on Page No. 16, Question No. 2, the sale proceeds of Naveen Enterprises (for which code NE was used) were collected through Shri Sachin Agarwal who is elder brother of the assessee. Shri Sachin has accepted in the cross examination that he has received money from the bank accounts of Shri Vasudev Somani and his family members. Further, as per the survey u/s 131 carried out at the premises of Naveen Enterprises, it was noted that Shri Sachin Agarwal (brother of Shri Naveen Agarwal) was managing

the affairs such as purchase and sales of above enterprise. Accordingly, the amount so deposited in the bank amounting to Rs. 1,40,71,468/- was unaccounted sales of the assessee. Thus we are inclined to agree with the Id. DR that the A.O. has correctly treated the amount deposited in the bank account of Vasudev Somani, as unaccounted sales of assessee. Accordingly, we uphold the findings of the lower authorities to this extent. On such sales, the A.O. has estimated G.P. @ 22.7%. The issue with regard to addition to be made with respect to such unaccounted sales has been considered by the Coordinate Bench vide its order dated 07/5/2010 in the case of Anita Choudhary and this order of the Tribunal was confirmed by the Hon'ble Rajasthan High Court vide order dated 14/10/2011 wherein addition to the extent of estimating the profit @ 10% on such unaccounted sales was upheld. We had carefully gone through the order of the Hon'ble Rajasthan High Court in the case of Anita Choudhary and found that in that case the assessee was engaged in the business of trading of marble and granite, whereas in the present case, the assessee was engaged in manufacturing of marble slabs and tiles. The profit rate of manufacturing is always high as compared to the traders, therefore, considering the totality of facts and circumstances of the case, we direct the A.O. to make addition by

estimating profit @ 15% of the amount so deposited in the bank account with respect to unaccounted sales. We direct accordingly.

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

13. **Now we take ITA No. 910/JP/2016**

This is an appeal filed by the assessee against the order of Id. CIT(A), Ajmer dated 23/08/2016 for the A.Y. 2010-11 in the matter of imposition of penalty U/s 271(1)(c) of the Act.

14. We have considered the rival contentions and carefully gone through the orders of the authorities below and found that with respect to the estimated addition made by the A.O. by applying G.P. rate @ 22.7% on the alleged deposit in the bank account, the A.O. has also imposed penalty U/s 271(1)(c) of the Act. BY the impugned order, the Id. CIT(A) confirmed the penalty order so passed by the A.O., against which the assessee is in further appeal before us.

15. The Id AR of the assessee has alleged that the penalty imposed u/s 271(1)(c) of the Act, have been levied arbitrarily without issuing a valid notice u/s 274 r.w.s. 271 of the Act as in the notice the limb for which the penalty proceedings were initiated was not specified. He has further contended that while initiating penalty u/s 271(1)(c) of the Act

Id. AO in the assessment order at page 18 has recorded satisfaction and initiated the penalty proceedings for 'concealment of income', whereas in the penalty order the same has been levied for 'furnishing inaccurate particulars of income'. Reliance was placed on the recent decision of the Hon'ble ITAT Amritsar bench, in the case of HPCL Mittal Energy Ltd. Vs. ACIT in ITA No. 554 & 555/ Asr/2014 dated 03.05.2018 wherein it has been held that where satisfaction of the AO while initiating penalty proceedings u/s 271(1)(c) of the Act is with regard to alleged 'concealment of income', penalty is imposed for 'furnishing inaccurate particulars of income', the penalty order cannot legally stand.

16. With regard to the merit of the penalty, the Id AR has relied on the decision of the Hon'ble Jurisdictional High Court in the case of Shiv Lal Tak Vs CIT 251 ITR 373 (Raj) and CIT Vs. Krishi Tyre Retreading & Rubber Industries 360 ITR 580 (Raj) wherein it was held that no penalty is imposable where addition is made on estimated basis.

17. On the other hand, the Id DR has relied on the orders of the authorities below and submitted that there was concealment of income therefore, the penalty so levied for the addition made with regard to profit estimated on unaccounted sales should be upheld.

18. We have considered the rival contentions and carefully gone through the orders of the authorities below. From the record we found that the A.O. made addition by estimating the profit @ 22.7% on the alleged unrecorded sales. After considering the entire facts and circumstances while disposing the quantum appeal hereinabove we have directed the A.O. to estimate the profit @ 15% and upheld the addition only to that extent. It is clear that the addition to the income is based on estimate of profit rate when the A.O. passed order vis a vis when we dispose the quantum appeal. In such estimated addition, no penalty is to be levied in view of the decision of the Hon'ble Jurisdictional High court as referred by the Id AR during the course of hearing before us. Considering the totality of facts and circumstances of the case we direct the A.O. to delete the penalty so imposed on the estimated addition so made.

18. In the result appeal of the assessee is allowed.

Order pronounced in the open court on 08th April, 2019.

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

Sd/-
(रमेश सी शर्मा)
(RAMESH C SHARMA)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 08th April, 2019

***Ranjan**

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

1. अपीलार्थी / The Appellant- Shri Naveen Agarwal, Kishangarh.
2. प्रत्यर्थी / The Respondent- The I.T.O., Kishangarh.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 295/JP/2014 & 910/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar