

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA**

[Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Godara, Judicial Member]

I.T.A. No. 1304/Kol/2017

Assessment Year: 2005-06

I.T.A. No. 1305/Kol/2017

Assessment Year: 2006-07

I.T.A. No. 1306/Kol/2017

Assessment Year: 2007-08

I.T.A. No. 1307/Kol/2017

Assessment Year: 2009-10

Dinanath Ornament Stores.....Appellant

C/o., D.J. Shah & Co

Kalyan Bhawan

2, Elgin Road

Kolkata - 700 020

[PAN : AABFD 9969 G]

Income Tax Officer, Ward-1, Haldia.....Respondent

(Now) Income Tax Officer, Ward-27(1), Haldia

Appearances by:

Shri Miraj D. Shah, A/R, appeared on behalf of the assessee.

Shri Sankar Halder, JCIT Sr. D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : March 20th, 2019

Date of pronouncing the order : April 23rd, 2019

O R D E R

Per J. Sudhakar Reddy, AM :-

All these appeals filed by the assessee are directed against the separate but identical orders of the Learned Commissioner of Income Tax (Appeals) - 7, Kolkata, (Id. CIT(A)) passed u/s. 250 of the Income Tax Act, 1961, (the 'Act'), dt. 21/03/2017 for the Assessment Years 2005-06, 2006-07, 2007-08 & 2009-10.

2. As the issues arising in all these appeals are common, for the sake of convenience, they are heard together and disposed off by way of this common order.

3. The assessee is a partnership firm and filed its return of income on 31/03/2006 declaring total income of Rs.72,973/- for the Assessment Year 2005-06, Rs. 87,925/- for the Assessment Year 2006-07 on 31/03/2007, Rs.1,04,340/-

for the Assessment Year 2007-08 on 31/03/2008 & Rs.2,05,900/- for the Assessment Year 2009-10 and on 14/10/2010 declaring total income of Rs.87,089/-. Later a survey operation u/s 133A of the Act was conducted on the business premises of the assessee company 23/04/2008 and the case was selected for scrutiny. The Assessing Officer completed the assessment u/s 143(3) of the Act. on 31/12/2010 for the Assessment Years 2005-06 & 2006-07, on 31/12/2009 for the Assessment Year 2007-08 and on 31/12/2011 for the Assessment Year 2008-09. Determining the income of the assessee as follows for the Assessment Years under consideration *inter alia* making additions:-

Assessment Year : 2005-06 – Rs.6,77,960/-
Assessment Year : 2006-07 - Rs. 32,01,140/-
Assessment Year : 2007-08 – Rs.20,74,370/-
Assessment Year : 2009-10 – Rs. 1,90,41,680/-

On appeal, the Id. First Appellate Authority granted part relief.

4. Further aggrieved the assessee is in appeal before us.
5. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-
6. The first issue that arises for our consideration is whether the Assessing Officer was right in adopting the gross profit of suppressed sales as the income of the assessee, instead of the net profit on such suppressed sales. The undisputed fact is that the assessee had suppressed sales. The Id. Counsel for the assessee relies on the judgment of the Bombay High Court in the case of *CIT vs. Shri Hariram Bhambhani in ITA No. 313 of 2013, judgment dt. 04/02/2015* reported in *2015 (2) TMI 907*, for the proposition that what can be brought to tax is the net profit of unaccounted sales. He further relied on the judgment of the Hon'ble Madhya

Pradesh High Court in the case of *CIT vs. Balchand Ajit Kumar* reported in [2003] 263 ITR 610 (MP), & *Man Mohan Sadani vs. CIT* reported in [2008] 304 ITR 52 (MP) for the same proposition.

6.1. The ld. D/R could not cite before this Bench any contrary judgment. Under these circumstances, we apply the proposition of law laid down in the judgments of the Hon'ble Bombay High Court and the Hon'ble Madhya Pradesh High Court, referred above, and direct the Assessing Officer to assess the income from undisclosed sales in question by applying the net profit rate in place of the "gross profit rate" as undisclosed sales. The net profit rate shall be that which the assessee had disclosed in its regular books of account for the said Assessment Year on recorded sales. In the result, this ground of the assessee is allowed in part.

7. The second and third issue that arises for our consideration is whether the disallowance u/s 40A(3) of the Act and Section 40(a)(ia) of the Act, can be made when profits have been estimated as a percentage of turnover, in the case of the assessee. The ld. Counsel for the assessee relied on the judgment of the Hon'ble Supreme Court in the case of *M/s. Pradeep Singh Wazir vs. CIT & Anr.* reported in 2017 (3) TMI 1268 (SC), wherein it has been held as follows:-

"In the process the High Court has failed to notice that even that aspect of not filing Form No. 15J is kept aside, in the present case, the income of the assessee on the total contract receipts of ₹74,81,106/- had been reached at by applying the net rate of profit after reduction and, thus, no further addition could be made under Section 40(a)(ia) of the Act. This is the reason which is rightly ascribed by the Commissioner of Income Tax (Appeals) to the order."

7.1. No contrary decisions is brought to our notice by the ld. D/R. Under such circumstances, we delete the disallowance made u/s 40A(3) and 40(a)(ia) of the Act as in this case, as the income has been estimated by the Assessing Officer. Hence, we allow this ground of the assessee.

8. The last ground that is agitated before us is the issue of taxation of excess stock found by the revenue during the course of survey. During the course of survey done u/s 131 of the Act, for the Assessment Year 2009-10, the survey team found difference between the physical stock and the book stock. The physical stock was more than the stock recorded in the books. The difference was assessed as income. The Id. Counsel for the assessee relied on the judgment of the Hon'ble Jurisdictional High Court in the case of *Principal Commissioner Of Income vs M/S. Subarna Rice Mill in ITAT 196 of 2015, GA 4047 of 2015, judgment dt. 20/06/2018* and argued that in such a situation, only the gross profit on such stock can be taxed. This judgment was followed by the ITAT Kolkata Bench in the case of *DCIT vs. Smt. Madhu Chhanda Sirkar reported in 2018 (9) TMI 1775 -ITAT Kolkat*, wherein this Bench of the Tribunal at para 15, 16 & 17 held as follows:-

"15. We have heard the representative of both the parties and perused the materials available on record. We find from the records that the entire amount has been added on the basis of the undisclosed stock of the business. The question arises as to whether the discrepancy in stock addition or the gross profit embedded therein is to be considered for addition. The issue has been settled by the following judgement relied upon by the representatives of the assessee passed by the jurisdictional High Court with the following observations :-

"The assessee's appeal before the Commissioner (Appeals) failed and by an order of August 25, 2014, the assessment order of March 28, 2013 was upheld. The Commissioner looked into the facts, the statements made by or on behalf of the assessee and the books of the assessee that had been looked into at the time of survey which the assessee subsequently claimed had been lost or destroyed and, in respect whereof, no complaint had been lodged by the assessee. On facts, the Commissioner (Appeals) found no grounds to interfere with the quantum of excess stocks discovered by the assessing officer in course of the survey. The Commissioner also agreed with the assessing officer as to the quantum of income which had escaped assessment."

There are two aspects to the order impugned dated June 30, 2015 passed by the Appellate Tribunal: the factual findings of the Commissioner (Appeals) as appear to have been interfered with by the Appellate Tribunal; and, the direction given for taking sales of rice and bran into account before arriving at the additional income which could be said to have escaped assessment.

Before the Commissioner (Appeals), the assessee had relied on a document signed by an official of the Food Corporation of India that evidenced the stock figures at the relevant

point of time. The Commissioner (Appeals) dealt with such aspect of the matter in great detail and by referring to the admitted statements of the representatives of the assessee, which were not sought to be controverted at any point of time on behalf of the assessee, concluded that it was the physical verification of the stocks undertaken by the Assessing Officer in course of the survey operation that was to be given primacy. Indeed, the Commissioner (Appeals) found that there was no evidence that the FCI official who had issued the certificate had undertaken any physical verification of the stock at the rice mill of the assessee and the document appeared to have been filled up by the assessee and merely signed by the FCI official. Such part of the order of the Commissioner (Appeals) was unexceptionable and could not have been interfered with by the Appellate Tribunal. Indeed, no reasons have been furnished by the Appellate Tribunal in disregarding the physical verification of the stocks carried out by the Assessing Officer. Further, the area of the godown as indicated in the FCI certificate was of no consequence since the Assessing Officer found stocks piled outside the godown at the time of the survey.

Accordingly, to the extent that the Appellate Tribunal accepted the quantum of additional stocks on the basis of the certificate issued by the concerned FCI official, such order is unacceptable and is set aside. The order of the Commissioner (Appeals) in such regard is restored. The additional quantum as discovered during the course of the survey operation will fasten to the assessee. However, the other aspect of the matter was dealt with by the Appellate Tribunal on a point of principle and such matter does not call for any interference.

According to the Appellate Tribunal the value of the entire quantity of additional stocks that were discovered in course of the survey operation could not be regarded as the additional income of the assessee and amenable to tax. There was a specific ground taken before the Appellate Tribunal which was a legal question, as to whether the undisclosed purchase could be taken as the additional income without reference to the possible sale of the paddy when converted.

The assessee refers to a judgment of the Gujarat High Court reported at 388 ITR

377. The principle enunciated in such judgment is that when undisclosed purchases of such nature are discovered, it is only the profit embedded in the transaction which can be added to the total income. The Gujarat High Court relied on some of its previous judgments to hold that "not the entire purchase price but only the profit element embedded in such purchases can be added to the income of the assessee."

In the circumstances and particularly since the factual findings rendered by the Commissioner (Appeals) as to the quantum of additional stocks have now been restored, the order impugned on the methodology for the ascertainment of the income which escaped assessment would pass muster. The Appellate Tribunal merely directed the gross profit that the additional purchase was capable of generating to be regarded as the additional income for tax to be assessed on such basis. Such view of the Appellate Tribunal does not call for any interference. Accordingly, ITAT NO.196 of 2015 and GA NO-4047 of 2015 are disposed of by modifying the judgment and order of the Appellate Tribunal dated June 30, 2015 as indicated.

There will be no order as to costs."

16. The coordinate Bench of this Tribunal held as follows :-

"5. Now comes the equally Important question as to whether the- entire discrepancy in stock addition or only the profit element embedded therein is to be considered for the impugned addition. We find this issue to be no more res integra as co-ordinate bench of this tribunal in [M/s.Subarna Rice Mill vs. ITO ITA No.1781/Ko1/2014](#) decided on 30.06.2015 holding only the profit element liability to be added in such circumstances; stand upheld by hon'ble jurisdictional high court's recent judgment dated 20.06.2018 in ITAT 196 of 2015 GA NoA047 of 2015. We therefore conclude that the impugned former addition of the entire discrepancy in stock deserves to be deleted. We accordingly accept assessee's former substantive ground challenging correctness thereof. Its latter substantive ground stands declined in view of our foregoing discussion. We confirm the gross profit addition of Rs.6,94,832/- in these peculiar facts and circumstances."

17. Respectfully relying upon these judgments we observe that only the gross profit can be added to the income of the assessee and not the entire undisclosed stock. We thus delete the addition made by the authorities below."

9. Consistent with the view taken therein, and as no contrary judgment is brought to our notice by the revenue, we direct the Assessing Officer to tax only the gross profit embedded in the excess stock found for the Assessment Year. The balance addition is hereby deleted. In the result this ground of the assessee is allowed in part.

10. In the result, all these appeals of the assessee are allowed in part.

Kolkata, the 23rd day of April, 2019.

Sd/-
[S.S. Godara]
 Judicial Member

Sd/-
[J. Sudhakar Reddy]
 Accountant Member

Dated : 23.04.2019
 {SC SPS}

Copy of the order forwarded to:

1. Dinanath Ornament Stores
C/o., D.J. Shah & Co
Kalyan Bhawan
2, Elgin Road
Kolkata - 700 020

2. Income Tax Officer, Ward-27(1), Haldia

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches