

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

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

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER

ITA No.28/Ind/2017
Assessment Year: 2012-13

Shri Virendra Singh Thakur 125/126, Patnipura, Indore M.P.	<u>बनाम/</u> Vs.	ACIT, 3(1) Indore (Revenue)
(Appellant)		
PAN:AGOPS3983Q		

ITA No.52/Ind/2017
Assessment Year: 2012-13

DCIT-3(1) Indore	<u>बनाम/</u> Vs.	Shri Virendra Singh Thakur 125/126, Patnipura, Indore M.P.
(Revenue)		(Respondent)
PAN:AGOPS3983Q		

ITA No. 29/Ind/2017
Assessment Year: 2012-13

Shri Virendra Singh Thakur 125/126, Patnipura, Indore M.P.	<u>बनाम/</u> Vs.	ACIT, 3(1) Indore (Revenue)
(Appellant)		
PAN:AGOPS3983Q		

ITA No.53/Ind/2017
Assessment Year: 2012-13

DCIT-3(1) Indore	<u>बनाम/</u> Vs.	Shri Virendra Singh Thakur 125/126, Patnipura, Indore M.P.
(Revenue)		(Respondent)
PAN:AGOPS3983Q		

ITA No.262/Ind/2017
Assessment Year: 2013-14

Shri Virendra Singh Thakur 125/126, Patnipura, Indore M.P.	<u>बनाम/</u> Vs.	ACIT, 3(1) Indore
(Appellant)		(Revenue)
PAN:AGOPS3983Q		

ITA No. 253/Ind/2017
Assessment Year: 2013-14

DCIT-3(1) Indore	<u>बनाम/</u> Vs.	Shri Virendra Singh Thakur 125/126, Patnipura, Indore M.P.
(Revenue)		(Respondent)
PAN:AGOPS3983Q		
Appellant by	Shri C.P. Rawka & Veenas Rawka, CAs	
Revenue by	Shri K.G. Goyal, Sr. DR	
Date of Hearing:	16.04.2019	
Date of Pronouncement:	08.05.2019	

आदेश / O R D E R

PER MANISH BORAD, A.M:

The above captioned cross appeals are directed against the order of Ld. Commissioner of Income Tax(Appeals)-I Indore, (in short 'CIT(A)'), dated 28.10.2016, 23.12.2016 & 28.10.2016 which is arising out of the order u/s 143(3) & 271(1)(c) of the Income Tax Act 1961 (hereinafter called as the 'Act') framed on 23.03.2015, 16.03.2015 & 28.09.2015 by ACIT, 3(1) Indore.

2. As the issues raised in these bunch of appeals relates to same assessee and are common in nature, therefore, these were heard together and are being disposed off by this common order for the sake of convenience and brevity.

3. Brief facts of the case are that the assessee is an individual and engaged in the business of liquor contractor. Regular return of income was filed for A.Ys. 2012-13 & 2013-14 which were selected for scrutiny assessment through CASS followed by serving of notices u/s u/s 143(2) & 142(1) of the Act. During the course of assessment proceeding Learned Assessing Officer (in short Ld. AO) observed that the assessee has not maintained proper quantitative as well as sales details. He accordingly rejected the books of accounts and after giving reference to other

businessmen carrying out same business activity estimated net profit @ 3.5% of the total turnover and made the addition for difference between the estimated net profit @ 3.5% and net profit declared by the assessee. Other additions were also made. Penalty also levied u/s 271(1)(c) of the for A.Y. 2012-13 which is under appeal before us.

4. We first take up cross appeal for A.Y. 2012-13 wherein following grounds of appeal have been raised by the assessee and Revenue:

ITANo.28/Ind/2017 by Assessee

1. That the Ld. CIT(A) erred and confirmed the action of assessing officer in rejecting the books of accounts without pointing out any material defect in the correctness and completeness of books of accounts.

2. That the Ld. CIT(A) erred and confirmed the addition of Rs.41,49,521/- out of the total addition made by the Ld. AO of Rs.1,02,07,172/- for low profit without appreciating full facts.

3. That the Ld. CIT(A) erred and confirmed the action of assessing officer in rejecting the claim of assessee under section 54B without considering the legal position.

ITANo.52/Ind/2017 by Revenue

i. Whether on the fact and in the circumstances of the case Ld. CIT(A) has erred in restricting the net profit rate at 2.16% as against net profit rate of 3.5% adopted by the AO.

ii. Whether on the facts and in the circumstances of the case Ld. CIT(A) has erred in applying ratio on the decision of Hon'ble Rajasthan High court in the case of Trilok Chand Girdharia & Party vs. ITO-Ward-1, SawaiMadhopur in ITANo.577/2009

dated 21.01.2014 in appropriate manner as in that case Hon'ble High court has held to adopt average net profit rate which has been upheld by the CIT(A) and I.T.A.T., while in present case the 3(three) rate were applied for net rate declared by the assessee himself which has not been upheld by either CIT(A) or I.T.A.T.

iii. Whether on the facts and in the circumstances of the case Ld. CIT(A) has erred in not considering the statement of the assessee recorded on 19.03.2015 during the course of assessment proceedings in which in the reply of question no.6,7, & 8 he has accepted net profit rate of 3.5% in view of defects in his books of accounts.

5. We have heard the rival contentions and perused the record placed before us. The first issue in challenge before us by both the parties relates to estimation of net profit wherein Ld. AO estimated net profit @ 3.5% against the net profit of 1.06% declared by the assessee. Ld. CIT(A) has restricted the addition applying net profit rate of 2.16% being the average of net profit rate of 5 years.

6. Ld. counsel for the assessee referring to the submission made before the lower authorities submitted that the books of accounts were regularly made and are being audited. Sale has increased due to which net profit rate decreased.

7. We find that during the course of appellate preceding the details of turnover of profit of the 3 years are shown in the following manner:

Sr. No.	Particulars	A.Y.2011-12	A.Y. 2012-13	A.Y. 2013-14
1.	<i>Sales:</i> <i>Foreign Liquor</i> <i>Country Liquor</i>	37834548 148333082	94456239 357607272	71435987 295898023
<i>Total</i>		186167630	452063511	367334010
2	<i>Net Profit</i> <i>Less: Commission Income</i>	5159409 (1039861)	5615050 (822969)	5646475 (1000366)
	<i>Net Profit before Commission income</i>	4119548	4792081	4646109
3	<i>Net profit Ratio(without commission)</i>	2.21	1.06	1.26
4	<i>Net Profit Ratio (with Commission)</i>	2.77	1.24	1.54
5	<i>Number of Shops:</i> <i>Foreign Liquor</i> <i>Country Liquor</i> <i>In Burhanpur</i> <i>In Jabalpur</i> <i>In Indore</i>	1 0 0 8	4 1 4 8	4 1 4 6
		8	13	11
	<i>Total Shops</i>	9	17	15

8. From the perusal of the above table it is noteworthy that net profit rate declined drastically in A.Y. 2012-13. During A.Y. 2011-12 Net profit including commission of Rs. 51,59,409/- has been shown on the gross turnover of Rs.18.62 crores but surprisingly during the A.Y. 2012-13 turnover has increased to Rs. 45.20 crores and profits to Rs.56,15,050/-. It shows that net profit of Rs. 4,55,641/- has only increased on the increased sales of Rs.26.59 corers. The number of shops has also increased 17 from 9. In the Tax audited report quantitative details are not shown. No regular sale bills are issued. No plausible

reasons have been given by the assessee for sharp decrease in the net profit rate.

9. In these given facts and in the light of Hon'ble Jurisdictional High Court in the case of ACIT vs. Gendalal Hazarilal and Co. 263 ITR 679 laying down a ratio that the doctrine of *res judicata* is not applicable but consistency has to be maintained unless there is a manifest distinguishable feature and on applying this principle on the instant case, we find that though facts of every year are separate and one just cannot apply results of preceding year on the current year but looking to the fact that type of business is the same and there is no future thrust to the assessee's business as the sales have increased drastically and no evidence have been placed on record to prove as to why there is a sharp decrease in the net profit even when other assessee's running similar type of business are showing better net profit rate.

10. We find that the Ld. CIT(A) has referred and relied on judgment of Hon'ble Rajasthan High Court in the case of Trilok Chand Girdharilal & Party vs. ITO in ITANo.577/2009 dated 21.01.2014 confirming the action of the assessing officer of rejecting the trading results and invoking the provisions of Section 145(3) of the Act, as no

proper sale vouchers were maintained and fairly estimated the net profit. Hon'ble Court confirmed the view taken by the Ld. AO adopting average gross profit rate which was upheld by Ld. CIT(A) and ITAT.

We therefore find merit in the finding of ld. CIT(A) calculating net profit rate 2.16% being average of net profit rate declared by assessee for 5 years at 2.77%, 1.33%, 1.54%, 1.77% and 3.5% thereby deleting the addition of Rs.60,57,651/-. We uphold the same and dismiss the assessee's ground nos.1 & 2 and also dismiss revenue's ground Nos. No.1,2 & 3 for A.Y. 2012-13.

11. Now we take up assessee's ground no.3 challenging the rejection of claim u/s 54B of the Act without considering legal position.

12. Brief facts relating to this ground are that the assessee sold land and received sale consideration of Rs.14,32,000/- thereon. Cost of acquisition of the land and transfer expenses were shown at Rs.8,14,555/-. The short term capital gain is arising at Rs.6,17,445/-. The assessee made a claim of exemption u/s 54B of the Act at Rs.6,17,445/- but no evidence placed in support thereof before both the lower authorities. Even during the course of hearing before the Tribunal assessee has not made any submissions with

regard to claim of deduction u/s 54B of the Act at Rs.6,17,445/-.

13. In these given facts and circumstances of the case there seems no reason to interfere in the finding of Ld. CIT(A) confirming the addition. Ground no.3 raised by the assessee deserves to be dismissed.

14. As a result, Cross appeal for A.Y. 2012-13 stands dismissed.

Now we take cross appeal for A.Y. 2013-14

15. We have heard the rival contentions and perused the record placed before us. The following grounds of appeal have been raised.

ITANo.253/Ind/2017Assessee's appeal for A.Y. 2013-14

i. Whether on the fact and in the circumstances of the case Ld. CIT(A) has erred in restricting the net profit rate at 2.16% as against net profit rate of 3.5% adopted by the AO.

ii. Whether on the facts and in the circumstances of the case Ld. CIT(A) has erred in applying ratio on the decision of Hon'ble Rajasthan High court in the case of Trilok Chand Girdharia & Party vs. ITO-Ward-1, SawaiMadhopur in ITANo.577/2009 dated 21.01.2014 in appropriate manner as in that case Hon'ble High court has held to adopt average net profit rate which has been upheld by the CIT(A) and I.T.A.T., while in present case the 3(three) rate were applied for net rate declared

by the assessee himself which has not been upheld by either CIT(A) or I.T.A.T.

iii. Whether on the facts and in the circumstances of the case Ld. CIT(A) has erred in not considering the statement of the assessee recorded on 19.03.2015 during the course of assessment proceedings in which in the reply of question no.6,7, & 8 he has accepted net profit rate of 3.5% in view of defects in his books of accounts.

iv. Whether on the facts and in the circumstances of the case Ld. CIT(A) has erred in deleting the addition made u/s 69 of the I.T. Act of Rs.60,19,920/- on the basis of additional evidence filed by the assessee and also in not following the provisions of Rule 46A of the I.T. Rules 1962.

ITANo.262/Ind/2017 Revenue's appeal for A.Y.

2013-14

1. That the Ld. CIT(A) erred and confirmed the action of assessing officer in rejecting the books of accounts without pointing out any material defect in the correctness and completeness of books of accounts.

The action of AO which is confirmed by the CIT(A) is totally wrong and illegal on the facts of the case in rejection of books of accounts.

2. That the Ld. CIT(A) erred and confirmed the addition of Rs.23,19,364/- out of the total addition made by the Ld. AO of Rs.72,10,215/- for low profit without appreciating full facts.

3. That the Ld. CIT(A) erred and confirmed the action of assessing officer in making addition on account of unexplained unsecured loan u/s 68 at Rs.47,77,000/- without appreciating full facts and reasoning and without affording proper opportunity.

16. First common issue relates to estimation of profits. The assessee had disclosed net profit rate @ 1.54% of Ld. AO estimated at 3.5%. Ld. CIT(A) restricted the addition to 2.16%.

17. These set of facts already stands adjudicated by us in the assessee's case for A.Y.2012-13 in the preceding paragraphs.

18. We, therefore, consistently taking same view confirm the finding of ld. CIT(A) taking average net profit rate being average net profit rate of 5 years at 2.16%. We accordingly find no reason to interfere in the finding of the Ld. CIT(A) and hold that the net profit in the case of assessee to be computed 2.16% of the total turnover. However, this finding as well as finding for A.Y. 2012-13 should not be taken as basis in the subsequent years and in case similar issue comes in future it should be decided on the basis of facts and figure for the year under appeal. In the result this common issue of estimation of net profit raised by both assessee and revenue stands dismissed.

19. Now we take ground No.3 of assessee's appeal for A.Y. 2013-14 for addition of unexplained unsecured loan u/s 68 of the Act at Rs.47,77,000/-.

20. We have heard the rival contentions and perused the record placed before us. During the course of assessment proceeding Ld. AO observed that a sum of Rs.47,77,000/- has been taken as unsecured loan from six different parties. Assessee was unable to furnish any evidence to establish the identity, creditworthiness and genuineness in respect of loan creditors. Addition was made u/s 68 of the Act by the Ld. AO. Thereafter before the ld. CIT(A) assessee could file confirmation of account but no other satisfactory evidence was filed due to which addition of Rs.47,77,000/- made u/s 68 of the Act was confirmed by Ld. CIT(A) observing as follows:

“Ground no.3:This ground of the appellant is directly against the addition u/s 68 of the Act of Rs.47,77,000/-. The detailed facts of the case as per the assessment order were reproduced at para No.2 above and the detailed submission of the appellant are reproduced at para no.3 above.

7.1 The amount of Rs.47,77,000/- was received by the appellant from six persons. During the course of assessment proceedings the appellant did not discharge the onus cast on it u/s 68 of the Act even though several opportunities were provided to the appellant as detailed in para 4.1 of the assessment order. During the appellate proceedings the appellant filed confirmations in respect of 4 persons as additional evidence under Rule 46A and requested for admission of the same on the ground that these could not be produced before the AO as the accountant passed away and the accounts were on a computer with him. The reasons given by the appellant are found to be without sound basis and it was pointed out to the appellant vide order sheet dated 19.12.2016

that the accountant had passed away in the preceding financial year. As appellant has failed to place on record reasonable cause for non furnishing of the evidences at the stage of assessment such evidence cannot be admitted as it does not satisfy the requirement of Rule 46A. The appellant has also not made any further submissions to explain the circumstances. In view of the above as the appellant has failed to discharge the onus u/s 68 of the Act and keeping in view the legal position as brought out by the AO in the assessment order the addition is confirmed in appeal. This ground of the appellant is therefore dismissed.”

21. During the course of hearing before the Tribunal no other evidences have been put forth by the Ld. counsel for the assessee in order to prove identity, creditworthiness and genuineness of the alleged unsecured loan of Rs.47,77,000/-. We, therefore, find no reason to interfere in the finding of the Ld. CIT(A) confirming the addition of Rs.47,77,000/-. Accordingly ground no.4 of the assessee,s appeal is dismissed.

22. As a result, assessee’s appeal for A.Y. 2013-14 is dismissed.

23. Now we take ground no.4 raised by the Revenue relating to deletion of addition of Rs. 60,19,920/- made by the AO u/s 69 of the Act.

24. We have heard the rival contentions and perused the record placed before us. Ld. AO observed that the assessee

has purchased a flat at Shehnai Residency of Rs.60,19,920/- and called for the copy of purchases documents but the query remain unexplained. Thereafter before the Ld. CIT(A) assessee filed the details along with proof of taking house loan of Rs.42,50,000/- for the purchase of flat. Ld. Departmental Representative (DR) failed to rebut the finding of the Ld. CIT(A).

25. We therefore, in the given facts and circumstances of the case, are of the view that the alleged purchase of flat of Rs.60,19,200/- cannot be categorized under the unexplained investments u/s 69 of the Act as the same have been recorded in the regular books of accounts along with housing loan taken for financing the purchase of the flat. No interference is therefore, called for in the finding of the Ld. CIT(A) deleting the addition of Rs.60,19,920/-. Accordingly, ground no.4 of Revenue's appeal stands dismissed.

26. Now we take up Assessee's appeal in ITANo.29/Ind/2017 & Revenue appeal in ITANo.53/Ind/2017 for A.Y. 2012-13. The following grounds of appeal have been raised by the assessee and Revenue:

ITANo.29/Ind/2017 by Assessee

“That the Ld. CIT(A) erred in law and facts of the case and confirmed the penalty levied under section 271(1)(c) of the Income Tax Act,1961 on Rs.6,17,445/-. The action of Ld. CIT(A) is totally wrong, arbitrary and illegal and on the facts of the case.”

ITANo.53/Ind/2017 by Revenue

“Whether on the facts and in the circumstances of the case Ld. CIT(A) has erred in deleting the penalty on the addition made by the assessing officer to his business income, which was based on assessee’s own statement and facts mentioned in the assessment order.”

27. Both assessee and revenue are in appeal against the levying of penalty u/s 271(1)(c) of the Act.

28. Brief facts relating to this cross appeals are that various additions were made by the Ld. AO in the assessment completed u/s 143(3) of the Act on 23.03.2015. Penalty proceedings were initiated. During the course of penalty proceeding necessary submissions were filed. Ld. AO levied penalty of Rs.33,50,000/- on the additions for estimated profits at Rs.1,02,07,172/- and incorrect claim of exemption u/s 54B at Rs.6,17,445/-.

29. The assessee took up the matter before the ld. CIT(A) and partly succeeded as the penalty levied on the estimated profits was deleted and penalty levied for furnishing of inaccurate particulars of income making wrong claim u/s 54B of the Act was confirmed.

30. Now both the assessee and revenue are in appeal against the order of Ld. CIT(A).

31. Ld. counsel for the assessee relying on the submissions made before the lower authorities contended that Ld. AO erred in levying the penalty on estimated profits without bringing any adverse material on record. As regards the penalty levied addition of Rs.6,17,445/- on account of rejection of claim u/s 54B of the Act, Ld. counsel for the assessee failed to demonstrate any *bonafide* reason for making the inaccurate claim.

32. Per contra Ld. DR vehemently argued supporting the order of Ld. Assessing Officer.

33. We have heard the rival contentions and perused the record placed before us. Both assessee and Revenue are in

appeal raising in the ground relating to levying of penalty u/s 271(1)(c) of the Act at Rs.33,50,000/-. Penalty u/s 271(1)(c) of the Act is leviable if the assessee conceal the particulars of income or furnishes inaccurate particulars of income.

34. In the instant appeal part of the penalty is levied on the estimated profits of Rs.1,08,24,617/- made by the AO by applying net profit rate of 3.5% on the sales disclosed by the assessee. From going through the assessment order it is discernable that Ld. AO rejected the books u/s 145(3) of the Act for not maintaining quantitative records and sales vouchers. No doubt has been raised for the purchase made by the assessee from the Excise Department. It is well established fact that the assessee engaged in the Liquor contractor business have to prepare regular quantitative details to be furnished to the Excise Authority.

35. The regular stock is taken. No anomaly has been found in the audited books of account. Addition has been made only by estimating profits. No adverse finding has been given for any instances which could prove that assessee

has concealed income or furnish inaccurate particulars of income.

36. In these given facts and circumstances levying penalty on the estimated profits was not justified and is uncalled for. Therefore, Ld. CIT(A) has rightly deleted the penalty levied u/s 271(1)(c) of the Act on the addition for estimated profits and no interference is therefore called for. Accordingly, ground No.1 of the Revenue's appeal stands dismissed.

37. As regards the penalty levied on incorrect claim u/s 54B of the Act At Rs.6,17,445/- it remains a undisputed fact that in the income tax return filed by the assessee inaccurate particulars of income were furnished in order to claim deduction/exemption 54B of the Act. Till the hearing before the Tribunal Ld. counsel for the assessee has been unable to prove with adequate material that claim made was a *bonafide* claim.

38. We, therefore, in the totality of facts hold that as the assessee furnished inaccurate particulars of income, making an incorrect claim u/s 54B of the Act, Ld. AO was

justified in levying penalty u/s 271(1)(c) of the Act and this action was rightly confirmed by the Ld. CIT(A). Ground no.1 of assessee's appeal stands dismissed.

39. In the result, all these cross appeals i.e. ITANo.29/Ind/2017 & ITANo.53/Ind/2017, ITANo.28/Ind/2017 & ITANo.52/Ind/2017 and ITANo.262/Ind/2017 & ITANo.253/Ind/2017 stands dismissed.

Order was pronounced in the open court on 08.05.2019.

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

Sd/-

(MANISH BORAD)
ACCOUNTANT MEMBER

Indore; दिनांक Dated : 08/05/2019

Patel, P.S./नि.स.

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order
Assistant Registrar