

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "F" NEW DELHI**

**SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER  
AND  
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA No. 6773/Del/2015  
Assessment Year: 2008-09  
ITA No. 4356/Del/2015  
Assessment Year:2009-10  
ITA No. 4357/Del/2015  
Assessment Year 2010-11  
ITA No. 4358/Del/2015  
Assessment Year: 2011-12

Radico Khaitan Ltd., Plot, J-1/B-1, Mohan Co-op, Industrial Area, Mathura Road, Delhi	Vs.	DCIT, Central Circle-31, New Delhi	
TAN/PAN: AAACA2513K (Appellant)		(Respondent)	
Appellant by:	Sh. Ajay Vohra, Sr. Adv, Sh. Gaurav Jain, Adv & Ms. Manisha Sharma, Adv		
Respondent by:	Smt. Sulekha Verma, CIT DR		
Date of hearing:	20	08	2019
Date of pronouncement:	23	08	2019

**ORDER**

**PERSE PAVAN KUMAR GADALE, J.M.:**

The assessee has filed appeal against the order of CIT(A)-30, New Delhi passed under section 153(A) and 250 of the Income Tax Act for the Assessment Year 2008-09. Whereas the assessee also filed an appeal against common order of the the ld. CIT(A)-30 for the assessment year 2009-10, 2010-11

and 2011-12 perused under section 153A r.w.s. 143(3) and section 250 of the Income Tax Act.

2. Since all these appeals are filed by the assessee against the orders of CIT(A), where the issues are common and identical and hence for the sake of convenience they are clubbed and are heard together and common consolidated order is passed. Whereas the grounds of appeal in para 1 to 1.3 are for the Assessment year 2008-09 Assessment year 2009-10, Assessment year 2010-11 and whereas in Assessment year 2011-12 assessee has raised the grounds similar to earlier years para 1 to 1.3 and also other grounds of appeal 2 to 2.2. Therefore, for the sake of convenience, we shall take up the assessee appeal ITA No. 4356/Del/2015, for assessment year 2009-10 and facts Narrated. The assessee has raised the following grounds of appeal:-

- 1. That the Commissioner of Income-tax (A) erred on facts and in law in confirming the notional addition of Rs.36,29,637/- made by the Assessing Officer on account of alleged suppression of income from sale of wastage.*
- 1.1. That the Commissioner of Income-tax (A) erred on facts and in law in confirming the aforesaid addition, without appreciating that the assessing officer had failed to bring on record any evidence to prove that the appellant had received any amount in excess of the declared value of scrap.*
- 1.2. That the Commissioner of Income-tax (A) erred on facts and in law in not appreciating that the Assessing Officer enhanced the rate for sale of cattle fodder by Rs.0.09 per kg purely on basis of estimate, by relying on ex-parte enquiries conducted by the Assessing Officer, without sharing the result of the enquiry conducted with the appellant and without pointing out any defects in the books of account of the appellant.*
- 1.3. That the Commissioner of Income-tax (A) erred on facts and in law in not appreciating that the voluntary disclosure of additional income towards sale of wastage in the statement under section 132(4), without any incriminating material found in search was solely to avoid protracted litigation and could not lead to the conclusion that the appellant had suppressed the sale price or was making sales outside books, over and above the amount surrendered for tax in the return filed under section 153A of the Act.*

3. The Brief facts of the case is that the assessee is a public limited company engaged in the business of spirits, country liquor, alcohol and IMFL and also generating power by using bio gas for his captive consumption and filed the Return of income on 30.09.2009 with total income nil. A search and seizure operations under section 132 of the Income Tax Act was conducted on the Khaitan Group of cases including the assessee on 15.2.2011 and notice under section 153A was issued on 21.2.2012 for the assessment year 2009-10. In response the assessee filed Return of income declaring total income of Rs. Nil with the loss of Rs. 37,77,45,435/- and Notice under section 142(1) alongwith questionnaire issued. In compliance the ld. AR of the assessee appeared from time to time and filed the details. The Assessing Officer called for the clarifications on wastage sale being the cattle fodder by letter dated 8.5.2013 to explain method of accounting of waste generated in different plants and basis of arriving of generated waste sale with quantity and ledger account reflecting in the books of accounts. Whereas the assessee filed submissions on 14.5.2013 referred a para 3.2 of the assessment order. The assessee has submitted that assessee has disclosed a sum of Rs. 1,61,31,720/- in the present year towards the sale of the wastage whereas the Assessing Officer based on the submissions and the material on record observed that the assessee has sold the wastage generated in the form of organic manure 40329300 kg from 1.4.2008 to 31.3.2009 and disclosed in the books of accounts @ 0.73 per kg with the income of Rs. 2,92,62,271/-. Whereas the assessee in the return of income filed under section 153A of the Income Tax

Act has disclosed additional amount of Rs. 1,61,31,720/- towards wastage sale and the value mentioned at Rs. 1.13 per kg against earlier 0.73 per kg. The AO observed that there is a difference in rate as per the books and the rate conducted for computation of income and Filing of return of income under section 153A of the Act.

4. The AO further made observations on the search proceedings by the DDIT(Investigation) and found that the assessee was not disclosing the full and true sale of value of waste generated during the production of IMFL and was being sold outside the books of accounts. The AO on the information of few Distilleries of U.P. Region considered the market value of wastage and also the calculations made by the assessee @ 1.13 per kg whereas AO found other Distilleries rate is 1.22 per kg. Hence, the AO made an addition on the difference in sale value of wastages not credited in the Books of accounts Rs. 36,29,637/- and with other additions assessed the income of Rs. 37,22,74,271/- and passed the order under section 153A of the Act on 3.6.2013.

5. Aggrieved by the order the assessee filed an appeal with the CIT(A) where the CIT(A) considering the grounds of appeal and the submissions of the assessee referred in the order on the addition of sale of wastages has confirmed the AO's addition and partly allowed the appeal by granting relief in other additions. Aggrieved by the order CIT(A), the assessee has filed the appeal with the Tribunal.

6. At the time of hearing, the ld. AR submitted that the CIT(A) has erred in confirming the addition on account of wastages of sale products and where the AO has calculated the disallowance of Rs. 36,29,637/- without any basis. Further the AO has considered the rate @ 1.22 per kg without evidence and could not get any comparable case in this regard. The ld. AR substantiates his arguments with the material papers in support of the claim made in the Books of accounts. Further the ld. AR argued that no incriminating documents pertaining to the assessee were found and similarly made submissions for other Assessment years. The ld. AR contention that Basis for adoption of rate by the assessing authority is without any documentary evidence value and the ld. AR has restricted his arguments to the extent of the ground of appeal only and filed paper books to substantiate claim.

7. Contra the ld. DR relied on the order of the CIT(A) and submitted that The Assessing Officer has made enquiries in respect of adopting the rate of wastage sale of cattle field from the other Distilleries. The assessee though considered the rate at 0.73 per kg in the books of account but at the time of filing Return of income under section 153A of the Act has adopted rate of Rs. 1.13 per kg and there are no clarifications were filed for the Higher rate was adopted. Further assessee has been increasing the value of wastage sale of cattle fodder every year and supported the arguments with the written submissions and prayed for dismissal of assessee appeal.

8. We have heard the rival submissions and perused the material on record. Sole matrix of the disputed issue envisaged

by the ld. AR that the rate adopted by the Assessing Officer at 1.22 per kg is without any basis. The ld. AR referred to the paper book at pages 323, 324 where the generation of waste process has been explained. Whereas the AO treated the waste generated as cattle fodder and has adopted the static rate considering the prevailing rate of wastage generated in the organic manure on identical products in the relevant period and whereas the assessee's main production plant is situated at Rampur, U.P. and AO based on the enquiries adopted the rate of 1.22 per kg. The ld. AR further submitted that the assessee in order to buy piece with the department has increased the rate of wastage to 1.13 per kg and to avoid litigation whereas the AO has adopted 1.22 per kg without any evidence and there is no clarity in respect of the nature of the wastage produced. The ld. AR referred to the page 292 of paper book in respect of the value of wastage sale. The contention of the ld. AR that the cattle fodder is sold at the factory premises and the assessee is not incurring any other expenditure and supported with submissions.

9. We heard the rival submissions and perused the material on record. We find the submissions of the ld. AR are duly supported with facts and the rate adopted by the assessee for the said assessment year in filing the Return filed under section 153A was only to buy peace. We are of the considered opinion that the Assessing authority though adopted the rate at 1.22 per kg by general enquiries but there is no concrete proof in support of rate at 1.22 per kg. In the present case, the assessee has considered the rate of wastage sale generated @

0.73 per kg in the Books of accounts but whereas at the time of filing of Return of income under section 153A that assessee has adopted rate 1.13 per kg. The Ld. AR envisaged that to buy peace the assessee has enhanced the rate by 0.40 per kg and Disclosed in the Return of income. Whereas the Assessing authority without any supporting evidence except mentioning that the few Distilleries of U.P. Region also generates the wastage and they are selling at Rs.1.22 per kg. cannot be a benchmark of unorganized sector. The Assessing authority though made the specific observations but could not support with any logical and documentary evidence. Therefore, we considering the overall facts, material and the submissions of the assessee are of the substantive opinion that the addition of the Assessing Officer is without any cogent evidence and cannot be sustained. Therefore, we set aside the order of the ld. CIT(A) and Direct the Assessing Officer to delete the addition and allow the grounds of appeal of assessee for the assessment year 2009-10. Since the assessee has filed the appeal for assessment years 2008-09, 2010-11 and 2011-12 where similar grounds are raised except assessment year 2011-12 there are other grounds of appeal which are to be adjudicated. Accordingly, the ratio of decision of the assessment year 2009-10 ITA no. 4356/Del/2015 as discussed above shall apply to ITA No. 6773/Del/2015 Assessment Year: 2008-09 ITA No. 4357/Del/2015 Assessment Year 2010-11 where the grounds of appeal are same and identical and *Mutatis Mutandis* shall apply.

In the result the assessee's appeal in ITA Nos. 6773/Del/2015 AY 2008-09, ITA No. 4356/Del/2015 AY 2009-10 ITA No. 4357/Del/2015 AY 2010-11 are allowed.

10. Now we shall take up the appeal of the assessee ITA No. 4358/Del/2015 AY 2011-12. The assessee has raised grounds of appeal no. 1 to 1.3 which are similar and identical as discussed in the above paragraphs, the same decision shall apply and allow the grounds of appeal of the assessee as decided in paragraph no. 9. The assessee has raised other the grounds of appeal No. 2 to 2.2 which are as under:-

*2. That in facts and circumstances of the case, the Ld. CIT(A) grossly erred in upholding the addition of Rs.56,21,468/- made by the AO on account of alleged distribution of unaccounted surplus computed on the basis of shortage of stock of empty bottles of Radico brand found at the premises of the bottler namely M/s N.V. Distilleries & Breweries Ltd.*

*2.1 That the CIT(A) erred on facts and in law in holding that the bottles found short had been sold outside the books of accounts and the profit on the same have been shared between the bottling plant and the appellant, without bringing on record any evidence to support the same.*

*2.2 That the CIT(A) erred on facts and in law in observing that the appellant had entire control over the business of M/s N.V. Distilleries & Breweries Ltd., in terms of the Bottling agreement, and , therefore, proportionate amount of alleged unaccounted sales made by that party were to be added as income in the hands of the appellant.*

11. The Assessing Officer in the assessment proceedings found that there is a shortage of stock of empty bottles. There was survey operation u/s 133A on the bottling plant of M/s N.V. Distilleries & Breweries Ltd., on 15.2.2011 whereas investigation wing found 1,90,780 number of empty bottles of different brands i.e. 8 PM, Magic Moment, Contessa RUM of Radico Group were found short physically. It was submitted

that the products of the Radico Brand was manufactured and Bottled by M/s N.V. Distilleries & Breweries Ltd., in its bottling plant on behalf assessee-company as per the prevailing agreement between the assessee and the M/s N.V. Distilleries & Breweries Ltd. As the Bottles were related to Radico Khaitan Ltd. and a query was raised to the assessee in regard to the disputed issue of shortage of bottles. Since there was no satisfactory reply, the Assessing authority called for further clarifications and it was explained that the M/s N.V. Distilleries & Breweries Ltd. is one of the tie up unit for bottling the assessee's products and agreement was entered in this regard.

The contention of the assessee that net distributable surplus after deducting the expenses and bottling charges is actual profit and taxed as income in the Hands of the assessee. The AO referred to agreement dated 12.4.2004 for distributable surpluses. Whereas the AO has made a list of breakup of brands of assessee company and distributable surplus as under:-

<b>Items</b>	<b>No. of cases</b>	<b>Amount Distributable surplus (Rs.)</b>	<b>No. bottles</b>	<b>Distributable surplus per bottle (Rs.)</b>
<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
<i>8 P.M.</i>	<i>220353</i>	<i>15701124</i>	<i>2644236</i>	<i>6.00</i>
<i>Magic Moment Vodka</i>	<i>42445</i>	<i>19669611</i>	<i>509340</i>	<i>38.62</i>
<i>Contessa Rum</i>	<i>212389</i>	<i>78324559</i>	<i>5703444</i>	<i>16.85</i>

12. And finally made an addition based on the shortage as under:-

<i>Brand Items</i>	<i>Distributable surplus per bottle (Rs.)</i>	<i>Ratio of bottles calculated</i>	<i>No. Of bottles</i>	<i>Rate (Rs.) of distributable surplus per bottle</i>	<i>Amount (Rs.)</i>
<i>8P.M.</i>	<i>6.00</i>	<i>9.76% (6*100/61.47)</i>	<i>18640</i>	<i>6.00</i>	<i>1.11,840</i>
<i>Magic Moment Vodka</i>	<i>38.62</i>	<i>62.82%(38.62*100/61.47)</i>	<i>119847</i>	<i>38.62</i>	<i>46,28,491</i>
<i>Contessa Rum</i>	<i>16.85</i>	<i>27.41%(16.85*100/61.47)</i>	<i>52293</i>	<i>16.85</i>	<i>8,81,137</i>
<i>TOTAL</i>	<i>61.47</i>	<i>100</i>	<i>1,90,780</i>		<i>56,21,468</i>

13. On appeal the ld. CIT(A) has dismissed the assessee's claim in grounds of appeal in respect of shortage of stock. Aggrieved before the Tribunal the ld. AR submitted that the addition made by the Assessing Officer and confirmed by the CIT(A) is bad in law and referred to the observation of the ld. CIT(A) at page 19, 22 and filed paper book and at page 116 in particular reply to financial statements and supported judicial decisions. Contra the ld. DR supported the orders of the CIT(A) and relied on the observations of the CIT(A) and further emphasis that the shortage of bottles has to be explained by the assessee and the onus of claim should be established by the assessee company for shortages and also there is a contravention of provision of excise laws. The assessee could explain with reasons in regard of shortages. Before the appellate proceedings or the Hon'ble Tribunal and prayed for dismissing the grounds of appeal of the assessee.

14. We have heard the rival submissions and perused the material on record. The ld. AR has been emphasizing that the

shortage is not related to the assessee company and the assessee company is not related to M/s N.V. Distilleries & Breweries Ltd. But it has only entered into an agreement for manufacturing of assessee's brand Radico Brand in his bottling plant. The contention of the ld. AR that the issue of shortages, has to be explained by the M/s N.V. Distilleries & Breweries Ltd., with whom the assessee has tie up. Further there is no evidence to trace that the shortages has to be taxed in the hands of the assessee. We considering the facts and the findings of the ld. CIT(A) find the explanations of the assessee are not satisfactory though the ld. AR has referred and relied on obligations and warranties of the assessee and similarly of M/s N.V. Distilleries & Breweries Ltd. We find that without any relatable cause, the business of bottling cannot proceed. Further agreement was entered which is not disputed by the Revenue but the fact remained that the assessee could not explain the shortage of stock though referred to the permissions of bottling agreement. Whereas the Ld. AR contention that the difference has to be explained by the M/s N.V. Distilleries & Breweries Ltd., to the Revenue but the facts remain that the assessee has business tie up with this company various brands of products, manufactured and bottled by M/s N.V. Distilleries & Breweries Ltd., in the Bottling plant. The assessee has accepted that net distributable surplus after deducting the expenses and bottle charges as per agreement entered by with M/s N.V. Distilleries & Breweries Ltd., dated 12.04.2004 and the distributable surplus shall be appropriated. We find there are inter related transactions which the Revenue has rightly made observations and the

assessee could not overruled the finding of the Revenue with proper explanations or evidences. Accordingly considering the facts and circumstances and observations, we are of the substantive opinion that the ld. CIT(A) has considered the submissions, agreement and ratio of distributable surplus has passed a reasoned and logical order on this ground of appeal confirming the addition of the AO which we are not inclined to interfere and upheld the same and dismissed this ground of appeal of the assessee for the AY 2011-12

15. In the result, the assessee appeal for AYs 2008-09, 2009-10, 2010-11 are allowed and AY 2011-12 is partly allowed.

**Order pronounced in the open court on 23<sup>rd</sup> August, 2019.**

Sd/-  
**(N.K. BILLAIYA)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(P.K.GADALE)**  
**JUDICIAL MEMBER**

DATED: 23<sup>rd</sup> Aug, 2019  
SH

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

Assistant Registrar

		Date
1.	Draft dictated on	20.08.2019
2.	Draft placed before author	
3.	Draft proposed & placed before the second member	
4.	Draft discussed/approved by Second Member.	
5.	Approved Draft comes to the Sr.PS/PS	
6.	Kept for pronouncement on	
7.	File comes back to PS/Sr. PS	
8.	Uploaded on	23.08.2019
9.	File sent to the Bench Clerk	
10.	Date on which file goes to the AR	
11.	Date on which file goes to the Head Clerk.	
12.	Date of dispatch of Order.	