

आयकर अपीलीय अधिकरण, रायपुर न्यायपीठ, रायपुर
IN THE INCOME TAX APPELLATE TRIBUNAL RAIPUR BENCH, RAIPUR
श्री रविश सूद, न्यायिक सदस्य एवं श्री अरुण खोड़पिया, लेखा सदस्य के समक्ष ।
BEFORE SHRI RAVISH SOOD, JM & SHRI ARUN KHODPIA, AM
आयकर अपील सं./ITA No.90 & 91/RPR/2019
(निर्धारण वर्ष / Assessment Year :2011-2012 & 2012-2013)

M/s Fashion House, Malviya Road, Raipur	Vs	ITO-4(3), Raipur
PAN No. : AACFF 3323 M		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by	:	Shri R.B.Doshi, CA
राजस्व की ओर से /Revenue by	:	Shri G.N. Singh, Sr. DR
सुनवाई की तारीख / Date of Hearing	:	27/07/2022
घोषणा की तारीख/ Date of Pronouncement	:	21/09/2022

आदेश / O R D E R

Per Arun Khodpia, AM:

These two appeals are filed by the assessee against the order passed by the CIT(A)-II, Raipur, both dated 16.11.2018, for the assessment years 2011-2012 & 2012-2013.

2. First we shall decide ITA No.90/RPR/2019 for assessment year 2011-2012, wherein the assessee has raised the following grounds:-

1. *In the facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming the addition of Rs.2,93647/- out of total addition of Rs.9,65,262/-made by AO on account of difference in balance in the account of 5 sundry creditors. The addition made by AO and sustained by CIT (A) is arbitrary, baseless, without observing principles of natural justice and not justified.*
2. *Without prejudice to ground no. 1 above, Ld. CIT(A) erred in confirming above addition without even adjudicating the ground of appeal raised w.r.t. non-observance of principles of natural justice. The addition made by AO and sustained by CIT(A) is illegal and unlawful inasmuch as same has been made and sustained without affording due and proper opportunity of hearing and in violation of principles of natural justice.*

3. At the outset, Id. AR of the assessee did not press ground No.2, therefore, ground No.2 is dismissed as not pressed.
4. The only sole ground remained in appeal of the assessee for A.Y.2011-2012 is with regard to confirming the addition partly by the CIT(A) made by the AO on account of difference in balance in the account of 5 sundry creditors.
5. Facts in brief are that a search operation was conducted u/s.132 of the act at the residence of partners of the assessee firm on 21.03.2012. A survey u/s.133A of the Act was also carried out simultaneous in the premises of assessee. In consequence thereof, the assessee was issued notice u/s.153C of the Act. Thereafter the assessee filed return of income declaring total income of Rs.6,26,720/-, Accordingly, the AO completed the assessment assessing total income at Rs.15,91,982/- making an addition of Rs.9,65,262/-.
6. Against the above addition made by the AO, the assessee preferred appeal before the CIT(A) and the CIT(A) partly allowed the appeal of the assessee.
7. Being aggrieved with the order of CIT(A), the assessee is in further appeal before the Tribunal.
8. Ld AR of the assessee has submitted that the evidences information produced by the assessee were not duly appreciated by the Ld CIT(A) during the appellate proceedings. Discounts accounted for by the assessee on the purchases but not allowed by the seller / creditor was the main reason for difference in the balances confirmed by creditors and

the assessee firm. In support the assessee has produced confirmed copy of ledger account of the creditors in its books of accounts and ledger account of the assessee in the books of the creditors, reconciliation statement showing the difference on account of discount considered by the assessee but not allowed and accounted for by the creditors are also placed on records. Ld AR had contended that the difference in account of sundry creditors cannot be a reason for addition since the same may be due to various reasons which do not lead to a opinion to consider the same as income of the assessee without assigning any valid reason to it.

9. Ld DR on the contrary vehemently supported the orders of the revenue authorities and prayed to sustain the same.

10. We have head the rival submissions, perused the material available on records and after going through the documents placed in the paper book by the assessee, have find that the contentions of the assessee are correct that the addition made on account of difference in balances confirmed by the creditors and balances as per books of the assessee cannot be baldly added to the income of the assessee without knowing the actual reason of the impugned differences. In the present case since it is verifiable that the differences were on account of discount considered by the assessee but not allowed by the sellers/creditors. By such differences the amount of purchases in the books of assessee would have reduced and thereby the taxable profit / income of the assessee would be indirectly taken at a higher figure. Thus, no addition on this account is permissible.

11. In view of the aforesaid observations the addition made by the AO and partly sustained CIT(A) without scrutinising the facts of the transactions and fate of differences are subject to dismissal, in terms of our observations, as above. We therefore, set aside the orders of both the revenue authorities on this ground and direct to delete the addition made.

12. Thus, appeal of the assessee for under ITA No. 90/RPR/2019 for assessment year 2011-2012 is allowed.

13. Now we shall take the next appeal in the case of same assessee's for the AY 2012-13 vide ITA 91/RPR/2019. Grounds of appeal raised by the assessee under this appeal are as under:-

1. *In the facts and circumstances of the case and in law, Ld. CIT(A) erred in ignoring and not adjudicating the ground of appeal raised with reference to rejection of books of accounts u/s 145. The action of AO rejecting books of accounts u/s 145 is arbitrary, 'unlawful and not justified.*
2. *In the facts and circumstances of the case and in law, Ld. CIT(A) erred in upholding the conclusion of AO that difference in value of stock found short during survey u/s 133A (i.e. Rs. 1,40,98,755/-) represents unaccounted sales of the appellant. The conclusion drawn by AO and upheld by CIT(A) is not justified.*
3. *Ld. CIT(A) erred in confirming the addition of Rs. 5,29,823/- made by AO by adopting NP rate of 0.56% in place of declared NP rate of 0.11% ignoring the submissions of appellant in toto in violation of principles of natural justice. The addition made by AO and sustained by CIT(A) through nonspeaking order is arbitrary, baseless, unlawful and not justified.*
4. *In the facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming the disallowance of Rs. 66,287/- out of total disallowance of Rs. 1,32,573/- made by AO on account of car and scooter expenses, telephone and mobile expenses and depreciation on car. The disallowance made by AO and sustained by CIT(A) is not justified.*

14. Ld. AR has filed his brief written synopsis with respect to ITA 91/RPR/2019 for AY 2012-13, which reads as under :-

1. *For rejecting books u/s 145(3), the books should not be correct or complete or the AO should give finding that the Accounting Standards are not followed or prescribed method of accounting is not followed regularly. No finding given by the AO in respect of any such issue.*
2. *Whatsoever discrepancy was found during survey, they have been considered by the AO for the purpose of making addition. For the same reason, books could not have been rejected.*
3. *Discrepancy in stock could have resulted into estimation of sales and not estimation of NP rate.*
4. *Since cash balance was found short, which was explained to be available at the residence of the partners, no adverse view could have been taken.*
5. *Difference in the closing cash balance of 20.03.2012 and the opening balance of 21.03.2012 does not have any effect on the income because even if the reduced cash balance is taken, much less cash found during the survey.*
6. *The AO rejected books but at the same time accepted the figure of sales disclosed in the regular books.*
7. *Defects in books can entail rejection. Defects mean either receipts are suppressed or expenses are inflated. On account of suppression of sales proper explanation was submitted and the AO drew adversity of such defect.*
8. *Shortage in stock could have been claimed as loss in absence of any corroborative material found during survey like excess cash, unrecorded debtors, details of unrecorded sales etc.*

Ground no. 2

Submission of assessee

1. *No corroborative evidence in support of unrecorded sales like excess cash, entries of unrecorded sales, unrecorded debtors, unrecorded recovery etc. was found during survey.*
2. *Discrepancy in stock explained. PN 3 & 4 of PB.*

Ground no. 3

AO: AO adopted NP rate of 0.56% (of last year) in place of declared NP rate of 0.11%.

CIT(A): Confirmed the addition.

Submission of assessee

- 1. Since shortage in stock was considered to be sales of the current year, NP rate of 0.11% of the current year could only have been considered.*
- 2. Alternatively, even if NP rate of last year to be adopted, it was not 0.56% but 0.31%. Working at PN 8 of PB. Correct working of NP rate comes to 0.31%. Calculation mistake in the tax audit report.*

Ground no. 4

AO : Page no. 8. Para no. 10

For car & scooter expenses, complete details are not available. There can be personal user of vehicles and telephones. One-fifth of the expenses disallowed.

CIT(A): Reduced it to half of disallowance.

15. Further, Ld AR submitted and prayed that the disallowances partly sustained by the LD CIT(A) are not justified and thus needs to be vacated. Submissions of the Ld AR on each ground raised under this appeal are as under:-

16. Ground no 1 regarding rejection of the books of accounts of the assessee u/s 145 by the Ld AO was not pressed by the assessee, thus dismissed as withdrawn.

17. On Ground No. 2 regarding difference in value of stock resulting in shortage of stock of Rs. 1,40,98,755/- during the serve proceedings u/s 133A represents unaccounted sales of the assessee

appellant, concluded by the AO and upheld by the Ld CIT(A), the AR of the assessee has submitted as under :-

1. No corroborative evidence in support of unrecorded sales like excess cash, entries of unrecorded sales, unrecorded debtors, unrecorded recovery etc. was found during survey.
2. Discrepancy in stock explained. Following explanations were given by the appellant to before the revenue authorities below, the same are reiterated as under:

(i) During survey u/s 133A, none of the partners of the assessee firm were present in the business premises and the stock verification was done in the presence of one Shri Gaurishankar Agrawal. Neither of the partners were ever required to explain the difference during survey.

(ii) When asked about the difference, Shri Gaurishankar Agrawal stated that he was presently not in a position to explain the difference in stock.

(iii) The stock of the assessee firm was found in two premises situated at Malviya Road opposite to each other. The old shop comprises of 4 floors while the new showroom comprises of 4 floors. The inventory of stock prepared during survey was prepared within a short time of about 4 hours. It was humanly impossible that such huge stock lying in different floors of the two premises can be physically verified even roughly, not to speak of precisely, within a short time span of about 4 hours.

(iv) The stock verification carried out by the survey team was not taken properly and correctly. Each item in the stock was not verified. The inventory was prepared roughly and on estimate basis. For example, the items of readymade garments were not counted on piece to piece basis.

The stock of cloth was not measured in meters. The entire stock taking was completed roughly and on estimate basis.

(v) For the above reasons only, Shri Gaurishankar Agrawal had stated in his statement that he was not in a position to explain the difference.

(vi) In view of above explanation, you would kindly appreciate that the quantity of physical stock mentioned in the inventory is not correct but is only an approximate quantity taken on estimate basis. Such quantity and the value thereof is not reliable and no conclusion can be drawn on this basis. The figure of physical stock worked out by the survey team is

unauthentic and unreliable and therefore, no inference can be drawn therefrom.

(vii) During survey, no evidence/material of the assessee being involved in effecting the unrecorded sales was found, neither from the business premises nor in the search at the premises of partners. No excess cash/debtors were found. No unaccounted assets have also been found. In view of this, the allegation of difference being unrecorded sales is arbitrary and not justified. Assuming without admitting that there was any such difference, though there was no such difference, the so called difference could also be attributed to any loss/theft.

(viii) In view of above explanation, it is requested that no adverse inference may kindly can be drawn on this account.

The AO has not controverted any of the explanation of the appellant with a valid reason and has drawn adversity only on presumption. When such serious allegations were leveled by the appellant, it was incumbent upon the AO to have conducted some enquiry. Without making any enquiry, explanation of appellant could not have been rejected on presumption.

In view of above explanation, the value of alleged shortage could not have been considered as unrecorded sales.

18. Above submission of the assessee along with the finding of the AO were duly recorder and considered by the Ld CIT(A) and thereafter has concluded with following observations:-

3.3 *As seen in the appellant's submission, the appellant has taken objection regarding stock taking during the survey. It was stated that none of the partners of the assessee was present and the assessee's person Shri Gourishankar Agarwal was not able to explain the difference. The inventory was completed within a short time of four hours and stock verification was not taken properly. During survey no evidence was found as the assessee was involved in making unrecorded sales. On going through the assessee's submission from the assessment records it is seen that it was duty of the partners of the appellant firm to be present during the survey operation and assists the survey team in carrying out the operation. Shri Gourishankar Agarwal was authorized and deputed on behalf of the firm. Therefore with the assistance he has provided as whatever clarification he has given or was not able to give the onus was on behalf of the assessee firm. At a later stage the assessee's contention that no partner was present or Shri Gourishankar Agarwal did not explain the difference or any other objection in this regard cannot be accepted. Further the appellant*

has also claimed that the difference in stock was due to loss or theft. No evidence of such loss have been furnished. No FIR appears to have been made. Therefore such excuses are mere after thought and the same are rejected.

The addition made by the AO on profit element on the stock shortage has been taken as unaccounted sale is hereby sustained.

19. We have heard the contentions of the parties and perused the material available on record. We do not subscribe to and find that the explanations given by the appellant are satisfactory, as much as, the assessee's contentions that the entire stock on 4 floors of the shop of the assessee was physically verified roughly within a short period of 4 hours and the same was not substantiated with any corroborative evidence, nor apparent from the records. Whereas the AO in its observations have mentioned that the stock taking process was completed in not less than 1 day and 1 night. Thus, this contention of the assessee is not acceptable. Further, assessee has not accepted the difference alleging that the same was based on rough estimates; however as per observations of the Ld AO, no such objection was recorded during the valuation process or at the time of finalisation of appraisal report. Assessee's alternative contention that the shortage should not be regarded as unrecorded sales, since this might be on account of any loss/ theft, however no evidence for such loss or theft could be brought on the records, as observed by the Ld CIT(A), neither any FIR appears to be made in this respect. Thus, we concur with the observations of the Ld CIT(A) on this issue and do find any reason to interfere with the same. This ground of the assessee is therefore disallowed in terms of above observations.

20. **Ground no. 3 :- Addition of Rs. 5,29,823/- on account of rate of NP at 0.56% in place of 0.11%**

21. Regarding this addition the Ld AR of the assessee has submitted that, since, the shortage in stock was considered to be sales of the current year, NP rate of 0.11% of the current year could only have been considered. AR also submitted that, alternatively, even if NP rate of last year to be adopted, it was not 0.56% but 0.31%. Working of the calculation of Net Profit % over the Turnover for the preceding AY 2011-12 was demonstrated on Page No 8 of Paper Book of the assessee (Net Profit/Turnover = $314285/99005009 = 0.31\%$), thus the correct working of NP rate comes to 0.31% and not 0.56%, the same is apparent from records.

22. In this context, after carefully considering the factual matrix of the case, it is clearly emanated that the rate of NP for the AY 2012-13 was 0.11% and rate of NP for the AY 11-12 was 0.31%. Since the ground regarding rejection of books u/s 145 was not contested by the appellant, thus estimation of profit by the Ld AO, which was on wrong premise of the facts that the rate of profit for the preceding year in assessee's own case was 0.56%, which actually was 0.31%. It is settled principle of law that if the profit of the assessee has to be estimated the best basis will be assessee's own case.

23. No contrary submissions were made by the revenue on this aspect, apart from relying on the orders of the authorities below.

24. Therefore, we are of the considered view, the contention of the assessee is acceptable and consequently the rate of estimation of profit shall be adopted at 0.31%. Resultantly, this ground of appeal is partly allowed for statistical purposes in terms of our aforesaid observations.

25. Next Ground, part confirmation of disallowance of Rs.66,287/- by the CIT(A) on account of element of personal uses in certain expenses.

26. Submission of the Ld AR in this issue are as under:-

As regards ground no. 4

In para no. 10 of the assessment order, the AO observed that the appellant incurred car and scooter expenses of Rs. 1,61,211/-, telephone and mobile expenses of Rs. 1,02,455/- and depreciation on car of Rs. 3,99,201/-, aggregating to Rs. 6,62,867/-. He observed that in respect of car and scooter expenses, complete bills are not available and personal user of vehicles and mobiles cannot be ruled out. He therefore, disallowed 20% of the above expenses and made addition of Rs. 1,32,573/-. It is submitted that: -

i) At the outset, it is submitted that on one hand the AO has rejected book results and on the other

hand, the AO has relied upon the same books and has made specific disallowance out of the above heads. The AO has thus adopted contradictory stand. Without prejudice to this argument, further arguments are submitted below.

ii) The AO has observed that complete bills are not available. However, the AO has not given any specific instance of unsupported expenditure. No disallowance is permissible without pointing out specific instance/defect/discrepancy.

iii) Although the AO has mentioned that personal user cannot be ruled out, no specific instance of alleged personal user has been pointed out by the AO. The observations made and the disallowance is thus arbitrary.

iv) The books of accounts of appellant have been audited and the auditors have not expressed any qualification. It is settled law that in scrutiny assessment, no disallowance can be made on presumption and estimate and that for making disallowance, there has to be some material on record. This has been laid down in the following cases: -

Dhakeswari Cotton Mills Ltd. vs CIT (1954) 26 ITR 775 (SC)

In this case, it was held that the AO cannot make an assessment on pure guess work, without reference to any material or evidence.

ITO vs Adhunik Khanan Vs Parivahan Theka Sahkari Samiti Ltd. (2014) 41 CCH 86(Jodh) (Trib.)

*In this case, it was found that disallowance was made by AO in general and routine **manner** without any specific instance of bogus claim. It was held that such disallowance **cannot be** sustained. It was also found in this case that the GP rate was progressive and the AO **bad not** pointed out any specific case of non business or of bogus/in-genuine expenditure. **Addition** held to be not justified,*

27. Ld SR DR on the other hand has relied on the orders of the revenue authorities,

28. We have heard the rival contentions, perused the orders of Ld AR and the Ld CIT(A). This issue was dealt with both the Ld revenue authorities on the basis of presumption that the possibility of personal use in the incurrence of certain expenses cannot be ruled out. Ld AO had disallowed the expenses to the extent of 20%, whereas Ld CIT(A) had reduced the quantum of disallowance by 10% and sustained the disallowance to 10%. After considering these facts of the case, since the books of assessee were rejected and the profit was also directed to be estimated @ 0.31 in terms of our observations on one of the preceding grounds in this appeal, no further estimated addition on account of expenses is permissible. Accordingly the addition made under this ground by the Ld AO, partly sustained by the Ld CIT(A) is hereby deleted. In the result this ground of appeal of the assessee is hereby allowed.

29. In the result, appeal of the assessee in ITA No.90/RPR/2019 is allowed and ITA No.91/RPR/2019 is partly allowed.

Order pronounced in pursuance to Rule 34(4) of ITAT Rules, 1963
21/09/2022.

Sd/-
(RAVISH SOOD)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(ARUN KHODPIA)

लेखा सदस्य / ACCOUNTANT MEMBER

रायपुर/Raipur; दिनांक Dated 21/09/2022

Prakash Kumar Mishra, Sr.P.S.

आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर/ DR, ITAT,
Raipur
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Assistant Registrar)

आयकर अपीलीय अधिकरण, रायपुर/ITAT, Raipur