

। आयकर अपीलिय अधिकरण न्यायपीठ, कोलकाता ।

IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH, KOLKATA

BEFORE SHRI SANJAY GARG, HON'BLE JUDICIAL MEMBER

&

SHRI MANISH BORAD, HON'BLE ACCOUNTANT MEMBER

I.T.A. No. 2340/Kol/2019

Assessment Year: 2014-15

Shiv Biri Manufacturing Co. Pvt. Ltd. Collegepara, Aurangabad Murshidabad - 742201 [PAN : AAGCS2376E]	Vs	Asstt. Commissioner of Income Tax, Circle-42, Murshidabad
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri S.K. Tulsian, Advocate & Mita Rizvi
Revenue by :	Smt. Ranu Biswas, Addl. CIT D/R

सुनवाई की तारीख/Date of Hearing : 19/09/2022

घोषणा की तारीख/Date of Pronouncement : 21/11/2022

**आदेश/ORDER**

**PER MANISH BORAD, ACCOUNTANT MEMBER:**

The present appeal is directed at the instance of the assessee against the order of the learned Commissioner of Income Tax (Appeals)-12, Kolkata (hereinafter the "ld. CIT(A)") dt. 24/07/2019, passed u/s 250 of the Income Tax Act, 1961 ("the Act'), for Assessment Year 2014-15.

2. The assessee has raised the following grounds of appeal:-

"1. That on the facts and in the circumstances of the case, the Ld.CIT(A) erred in passing the order appealed against sustaining and confirming the additions made in the assessment order on account of 'undisclosed cash and stock amounted to Rs. 1,00,35,509/- without considering the facts of the case in proper perspective.

2. That on the facts and in the circumstances of the case, the Ld.CIT(A) erred in sustaining the addition of Rs.4,00,000/- on account of payment of Interest on Demand VAT

3. That on the facts and in the circumstances of the case, the Ld.CIT(A) erred in sustaining the additions of Rs.1,00,35,509/- under the head 'undisclosed cash and stock' and Rs.4,00,000/- Interest on demand VAT respectively.

4. That the appellant craves leave to urge such other ground or grounds before or at the time of hearing of appeal."

3. The assessee has raised the following additional grounds of appeal:-

*"1. That on the facts and circumstances of the case, the learned CIT(A) erred in confirming addition of an amount of Rs.1,00,35,509/- on account of undisclosed stock and cash, alleging the authorized personnel accepted the detection of excess and unaccounted physical cash/stock when clearly such baseless addition was not accepted by the assessee as shall be evident from the fact that the said sum was not offered in the return of income filed for the relevant assessment year.*

*2. That on the facts and circumstances of the case, the learned CIT(A) erred in not appreciating the fact that the alleged discrepancy in stock was never accepted by the assessee and the tax and penalty assessed by VATO (Enforcement), New Delhi was paid only to buy peace.*

*3. That on the facts and circumstances of the case, the learned CIT(A) erred in placing sole reliance upon the erroneous assessment documents raised by the Team of Enforcement, Branch -1, Department of Trade & Taxes, Government of NCT of Delhi, during survey under the DVAT Act, 2004, on which the Ld40 t00 placed complete reliance, when the assessee had already reconciled the difference in stock of biri as found in the godown and as obtained from stock statement maintained at the sales office.*

*4. That on the facts and circumstances of the case, the learned CIT(A) erred in sustaining the addition of alleged undisclosed stock and cash of Rs. 1,00,35,509/- without appreciating the fact that the difference in stock statement as obtained from godown and from sales office was due to certain quantity of stock of biri which was not stacked in the godown, pending verification by the team of internal stock verifiers.*

*5. That on the facts and circumstances of the case, even otherwise also, the difference in the stock as recorded by the survey party and as appearing in the godown as per the regular books of accounts being less, the entire difference can't be assessed and only GP@ 17. 20% amounting to Rs. 17,26, 108/- should have been assessed."*

4. Brief facts of the case are that the assessee is a private limited company engaged in manufacturing and selling of biri. Income of Rs.5,55,24,030/- declared in e-return filed on the 23/09/2014 pertaining to Assessment Year 2014-15. A survey was conducted under Delhi Value

Added Tax Act, 2004 (hereinafter "DVAT Act") on 13/11/2013 by a team of Enforcement Branch-I, of Department of Trade & Taxes, Government of NCT of Delhi and during the aforesaid survey variation in cash and physical stock was found. Unaccounted stock was detected by the survey team at Rs.1,00,35,509/-. Subsequently, the case of the assessee was selected for scrutiny through CASS followed by service of notice u/s 143(2) & (1) of the Act. During the course of assessment proceedings, the Id. Assessing Officer confronted the assessee with the survey report issued by Department of Trade & Taxes, Government of NCT of Delhi, for the survey conducted on 13/11/2013. Submissions of the assessee were not found acceptable by the Id. Assessing Officer and made various additions including addition of unaccounted stock at Rs.1,00,35,509/-.

5. Aggrieved the assessee preferred appeal before the Id. CIT(A) and submitted that there was no variation in the physical stock and 914 bags of the biri were stacked outside the warehouse for necessary verification and checking and the same were not considered by the survey team in the physical stock. It was also submitted that as per the stock register there were 2203 bags but in the godown only 1289 bags were found and the difference of 914 bags which were lying outside were not considered in the physical stock and the value of the same was considered as undisclosed cash/stock. However, the Id. CIT(A) was not satisfied with these submissions and held that the assessee had paid the penalty and has not challenged the action of the survey team under the VAT Laws and the issue cannot be decided merely on the basis of written submissions and since no documents or evidence have been produced to establish that the impugned stock was part of the regular books, there is no basis to interfere with the findings of the assessing officer.

6. Aggrieved, the assessee is in appeal before the Tribunal challenging the finding of the ld. CIT(A) confirming the addition for undisclosed/unaccounted stock amounting to ₹ 1,00,35,509/- and sustaining the addition of ₹ 4 lakhs on account of payment of interest on demand VAT. The assessee has also raised additional grounds taking an alternate plea that the alleged addition is towards the shortage of stock and, therefore, the addition could only be made to the extent of profit on such unaccounted stock.

7. The ld. Counsel for the assessee, made two fold contentions. Firstly it is submitted that there was no variation in the stock. The process followed by the assessee is that, when the stock is received from West Bengal to Delhi sales office, firstly the invoice-wise/date -wise entry are made in the stock register maintained both manually and in the computer systems. Thereafter the bags are unloaded in the open area nearest to the godown. After the verification of condition of the biris/counting of bags by their own internal stock verifiers and after satisfactory verification which generally takes 4 to 5 days, the bags are stacked in the godown. It was submitted that as per the stock register as on 13/11/2013, maintained at the sales office there were 2203 bags. Stock as per physical stock statement found in the godown by the survey team was 1289 bags. A shortage of 914 bags was noted. Along with other discrepancies, regarding the undisclosed cash and stock was calculated at ₹ 1,00,35,509/-and the survey team asked the assessee to pay VAT demand at ₹ 1,00,35,509/- of ₹ 20 lakhs and VAT penalty of ₹ 4 lakhs. The assessee paid the said sum under pressure and fear. Further the ld. Counsel for the assessee, submitted that actually there was no shortage of stock. Even after requesting the survey team they did not entertain the claim

that certain stock was lying outside for necessary checking and verification. Reference was also made to the invoice nos. 100, 101, 102 & 158, which were dt. 9/11/2013, 11/11/2013 & 12/11/2013 respectively; through which 914 bags were received and which remained to be considered by the survey team. Thus, it was submitted that no addition was called for in respect of the undisclosed stock at ₹ 1,00,35,509/-.

8. Alternative submission made by the Id. Counsel for the assessee, referring to additional ground is that in view of the settled judicial precedents only the gross profit element of such shortage of stock can be subject to tax and since the assessee has declared 17.20% gross profit in its regular books of account, the same should have been applied and addition should have been made only to the extent of ₹ 17,26,108/-. Reliance was placed on the following case-laws:-

*CIT vs. Samir Synthetics Mill [2010] 326 ITR 410 (Guj.)*

*CIT vs. Gurubachhan Singh J. Juneja [2008] 302 ITR 63 (Guj.)*

*CIT vs. Hariram Bhambani, Bombay High Court, ITA No. 313 of 2013*

9. Per contra the Id. D/R, vehemently argued supporting the orders of the lower authorities and also submitted that the details filed by the assessee in support of his contention that 914 bags were duly recorded in the stock register were never placed before the lower authorities and if these documents are entertained then, the issue may be restored to the lower authorities for necessary examination and verification.

10. We have heard the rival contentions and perused the record placed before us. The addition for unaccounted stock at ₹ 1,00,35,509/- and disallowance of interest/VAT penalty of ₹ 4 lakhs, is challenged before us.

11. As regards the addition for stock of ₹ 1,00,35,509/-, we find that there was a survey conducted on 13/11/2012 at the assessee's Delhi office by the

Department of Trade & Taxes, Government of NCT of Delhi. As per the stock register maintained at the sales office, there were 2203 bags in the stock. As per the physical stock statement prepared by the survey team 1289 bags were found. A shortage of 914 bags was detected and unaccounted stock was valued at ₹ 1,00,35,509/- was determined and the assessee paid the penalty/tax on the said sum. The ld. Assessing Officer, has confirmed this addition in the scrutiny proceedings and the same was confirmed by the ld. CIT(A) also.

12. In the first fold of contention, it is submitted by the ld. Counsel for the assessee that there was no difference in the stock and the alleged 914 bags were actually received during the period 09/11/2013 to 12/11/2013. They were duly entered in the stock record but they were stacked outside/nearby the godown for conducting necessary verification and counting of the bags before being stacked on the godown. Before both the lower authorities, the assessee failed to file any documentary evidence in support of the said 914 bags. The ld. CIT(A) confirmed the addition mainly on the ground that if the assessee had necessary evidence, he ought to have appealed the action of the survey team which the assessee failed to do and has paid the penalty stating that he did so solely to buy peace of mind. On examining the facts of the case, we find that there is actually shortage of stock because in the stock register, 2203 bags are appearing and as per the physical stock statement 1289 bags were found. So, there is actually shortage of stock of 914 bags and which was treated as unaccounted sales on which the Department of Trade & Taxes, Government of NCT of Delhi, has levied the tax/penalty. Now so far as the first contention of the assessee that there was no variation of stock and the total addition made by the Assessing Officer is liable to be deleted, the option left is to send the documents filed before us to the lower

authorities for necessary examination/verification. When this was proposed to the Id. Counsel for the assessee, he preferred to rely on his alternate plea raised in Additional Ground No. 5. Thus, Ground Nos. 1 to 4 and additional Ground Nos. 1 to 4 are dismissed.

12.1. Now, coming to the alternate plea made in additional ground no. 5, it is stated that only the gross profit element on such undisclosed sales should have been subjected to tax. We find force in this contention of the Id. Counsel for the assessee and considering the judicial precedents wherein it has been held that in case of undisclosed/unaccounted sales, addition could be made only in respect of the profit element. We find that the Hon'ble Bombay High Court in the case of *CIT vs. Hariram Bhambani (supra)* considering similar case, where survey was conducted u/s 133A of the Act and unaccounted sales were found and thereafter accepted in the statement recorded, the Hon'ble Court held as follows:-

*"We are unable to appreciate how Section 69C of the Act which speaks of unexplained expenditure is all at relevant for this appeal. We are not concerned with any unexplained expenditure in this case. In any view of the matter, the CIT(A) and Tribunal have come to the concurrent finding that the purchases have been recorded and only some of the sales are unaccounted. Thus, in the above view, both the authorities held that it is not the entire sales consideration which is to be brought to tax but only the profit attributable on the total unrecorded sales consideration which alone can be subject to income tax. The view taken by the authorities is a reasonable and a possible view. No substantial question of law arises. [emphasis supplied]"*

12.2. Similar view has been taken by the Hon'ble Gujarat High Court in the case of *CIT vs. Samir Synthetics Mill (supra)* & *CIT vs. Gurubachhan Singh J. Juneja (supra)*.

13. Considering these judicial precedents, we find that the same are squarely applicable in the facts of the instant case and the assessee having disclosed the gross profit rate of 17.20%, we are inclined to hold that the

addition should be sustained only to the extent of ₹17,26,108/-, which is 17.20% of the alleged sum. We, therefore, allow the additional ground no. 5 raised by the assessee and sustain the addition to ₹17,26,108/-. The assessee gets relief of ₹83,09,401/-.

14. As regards the disallowance of ₹ 4 lakhs on demand VAT, we find that the said sum is penal in nature and, therefore, not allowable u/s 37(1) of the Act as it is hit by Explanation to Section 37(1) of the Act. The ld. CIT(A) has rightly confirmed the said disallowance and thus, this Ground No. 2 of the assessee is dismissed.

15. In the result, appeal of the assessee is partly allowed.

**Order pronounced in the Court on 21<sup>st</sup> November, 2022 at Kolkata.**

*Sd/-*  
**(SANJAY GARG)**  
**JUDICIAL MEMBER**

*Sd/-*  
**(MANISH BORAD)**  
**ACCOUNTANT MEMBER**

Kolkata, Dated 21/11/2022

*SC SPB*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, **आयकर अपीलीय अधिकरण न्यायपीठ**, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ **BY ORDER,**  
**TRUE COPY**

**Assistant Registrar**  
आयकर अपीलीय अधिकरण  
**ITAT, Kolkata**