

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

Before Shri Sanjay Arora, AM & Shri Manomohan Das, JM

ITA No.184/Coch/2023: Asst.Year:2014-2015

Ojin Bakes & Restaurant 213761/F-5, G35 Happy Tower Vattakkinar, Post Arts College Meenchanda Calicut – 673 018. [PAN : AABFO8886D]	vs.	The Income Tax Officer Ward 1(1) Kozhikode.
(Appellant)		(Respondent)

Appellant by: Sri.R. Krishnan, CA
Respondent by: Smt.J.M.Jamuna Devi, Sr.AR

Date of Hearing : 14.07.2023	Date of Pronouncement: 28.08.2023
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ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee, directed against the Order by National Faceless Appeal Centre, Delhi (NFAC), the first appellate authority (faa) under the Income-tax Act, 1961 ('the Act' hereinafter) dated 10.01.2023, dismissing the assessee's appeal contesting its assessment under section 143(3) of the Act dated 24.3.2016 for assessment year (AY) 2014-2015.

2. The brief facts of the case are that the assessee, a partnership firm running a bakery and restaurant at Kozhikode, was subject to survey u/s.133A of the Act on 21.05.2014, along with other group concerns, at its business premises. Evidence in relation to suppression of turnover was found thereat. For the relevant year, its return disclosed a turnover of Rs.162.52 lacs as against an actual turnover of Rs.258.86 lacs, reflected in its accounts maintained on the computer system. This resulted in suppression of income by reporting a lower gross profit. In the assessment proceedings, the assessee explained that it, incurring losses, had entered into an arrangement whereby one, Sri.Shabeer Ahmed, working as a Manager,

would independently handle some operations. The unreported turnover of Rs.96.34 lakh pertained to such operations, income wherefrom was thus liable to be assessed in his hands. And toward which a confirmation letter dated 21.03.2016 (copy on record) was furnished by Sri. Ahmed. While accepting the turnover as disclosed, in the view of the Assessing Officer (AO), the gross profit rate reported thereon, being lower than that reflected in the assessee's accounts, could not therefore be accepted. He, accordingly, applied the gross profit rate as per the assessee's books, i.e., on the turnover of Rs.258.86 lakh, to the admitted turnover of Rs.162.52 lakh, resulting in an addition of Rs.4,89,122 (i.e., the proportionate gross profit of Rs.37,63,254 less the reported GP of Rs.32,74,132). The same finding confirmation in first appeal, the assessee is in second appeal before us.

3. We have heard the parties, and perused the material on record.

3.1 Before us, the assessee's case, as before the first appellate authority, was of the AO being in the wrong in not allowing deduction *qua* indirect expenses as per its books of account maintained on the computer. Having taken the turnover and the gross profit at the figures reflected in the accounting software, it was impermissible for him to ignore the indirect expenditure reflected therein. He does so, it alleged, as the accounting software reflected, on account of such expenditure, a net loss. Adopting the same would have worked to the Revenue's detriment. The Revenue, accordingly, adopts a bivalent approach, i.e., the figure of sales and direct expenditure as per the accounting software, while that of indirect expenditure as per the assessee's disclosed accounts, and which was lower than that reflected in the former, making its stand inconsistent and, thus, untenable.

3.2 The assessee's stand, appealing at first blush, is seriously wanting, both on facts and in law. The Revenue having detected suppression of turnover and, consequently, of gross income, adopted the same gross profit rate as reflected therein. *How, pray, could the same be faulted with?* In fact, the turnover is accepted

as disclosed, and the actual gross profit rate applied thereon. *Qua* indirect expenditure, allowed at the sum claimed, the same is not in dispute. In fact, there is nothing on record to show of the same being, as contended, at a sum higher, or the software disclosing a net loss. It would have been, we agree, a different matter where the accounting software reflected a lower gross profit vis-à-vis that returned, with the Revenue adopting the latter, even as the turnover adopted is as per the former. It is, rather, for the assessee, whose case is without reference to any material, to explain as to why, despite having incurred a higher indirect expenditure, does it claim a lower figure? Again, even so, what is the source of the capital to the extent of the difference inasmuch as the assessee's return is accompanied by (audited) final accounts, which are balanced? That is, even assuming the assessee to have incurred a higher expenditure than that claimed – which would though need to be proved with relevant material, not adduced at any stage, what, one may ask, is the source thereof? The same, liable to be added u/s. 69C, would stand to be explained only on the basis of books reflecting a higher turnover. As we see it, the assessee's entire case, besides being unsubstantiated, is misconceived. There is nothing to show that profit on a part of the business is to accrue to the manager (Sri. Ahmed). Why would, one may again ask, the assessee agree to such an arrangement, i.e., in which it has nothing to gain, and why would Sri. Ahmed agree to suffer a loss, i.e., assuming the combined result, as canvassed before us, is a loss. He, in fact, admittedly proposed to pay the assessee, May, 2013 onwards, Rs.1.85 lakh per month on being given an independent charge. *What further proof of the operations, stated to yield a loss, being profitable?* Again, which are the units; the product/product lines, whose turnover is being managed by him? No material as to division of revenue stream or expenditure has been found during survey. The assessee's claim of an unquantified higher indirect expenditure, or of a loss gets rebutted by the admission of income by Sh. Ahmed on the part of turnover ascribed

to him. The net income being a loss, it would, irrespective of the profit/turnover sharing arrangement, imply a loss for all.

3.3 We have, at this stage, two options. Construing the issue before us broadly, we may remit the matter back to the file of the AO, with the burden to prove its claims, being in the intimate know of its affairs, on the assessee. Sri. Krishnan, the ld. counsel for the assessee, would, upon the Bench so observing, object, stating that the issue before us is limited to the validity or otherwise of the Revenue's action in not allowing indirect expenditure. Tax proceedings are not in the nature of *lis* [*Gadgil (S.S.) v. Lal & Co.* [1964] 53 ITR 231 (SC)], and the true import of the tax assessment is the determination of correct income chargeable to tax and, resultantly, the correct tax liability. The findings by the lower authorities are not binding on the Tribunal and, further, it is the correct legal position that is relevant, and not the view that the parties may take of their rights in the matter (refer: *CIT v. C. Parakh & Co. (I) Ltd.* [1956] 29 ITR 661 (SC); *Kedarnath Jute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363 (SC)).

The second option is to restrict the scope of the instant proceedings to the maintainability or otherwise of the Revenue's action in assessing Rs.4,89,122 as the assessee's suppressed business income, without any credit for indirect expenditure. Even as we do not, for the reason/s stated, agree with the assessee's objection to the first option, we are not inclined to, in the facts and circumstances of the case, remit the matter back for fresh consideration. This is as the Revenue has not made any attempt to probe the matter, which is, as indicated above, full of inconsistencies and, besides, the assessee's case *sans* any material or merit. The Revenue could not, under the circumstances, be allowed a second inning; it failing abysmally in taking the findings of the survey to their logical end. *Qua* the second option, for the reasons stated, we find no infirmity in the estimation of the suppressed income.

We have, toward this, also considered the assessee's argument, advanced before the first appellate authority, of the evidence in the form of computer printout/s being inadmissible in view of sec.65(2) of the Evidence Act. The same is, as rightly

pointed out by it, misconceived. The turnover; the gross profit rate thereon; and division of income between the assessee and the manager, Sri Ahmed, is admitted. It is, on the contrary, the assessee who claims that the indirect expenditure as per the said printout, in preference to that claimed per it's return of income, be adopted. *The said provision of the Evidence Act would thus defeat the assessee's case.* That is, we, having, for the reasons stated, agreed to the scope of appeal being construed narrowly, as the assessee claims, non-consideration of the print-out, ousting it's case, would rather follow in consequence in view of the provisions of the *Evidence Act.*

4. We, for the reasons stated, decline interference. We decide accordingly.
5. In the result, the assessee's appeal is dismissed.

Order pronounced on August 28, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-

(Manomohan Das)
Judicial Member

Cochin; Dated: August 28, 2023
Devadas G*

Sd/-

(Sanjay Arora)
Accountant Member

Copy to:

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
4. The Sr. DR, ITAT, Cochin.
5. Guard File.

Assistant Registrar
ITAT, Cochin