

**IN THE INCOME TAX APPELLATE TRIBUNAL
JABALPUR BENCH 'DB', JABALPUR**

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Yogesh Kumar US, Judicial Member

ITA No. 76/JAB/2019 : Asstt. Year: 2016-17

ITO, Ward-1(2), Jabalpur, MP	Vs	Deepak Jaiswal, 117, Takiya Mohalla, Garha Bazar, Jabalpur, MP
(APPELLANT)		(RESPONDENT)
PAN No. AGRPJ 9376 P		

**CO No. 17/JAB/2019 : Asstt. Year: 2016-17
(Arising out of ITA 76/JAB/2019)**

Deepak Jaiswal, 117, Takiya Mohalla, Garha Bazar, Jabalpur, MP	Vs	ITO, Ward-1(2), Jabalpur, MP
(APPELLANT)		(RESPONDENT)
PAN No. AGRPJ 9376 P		

Assessee by : Sh. Dhiraj Ghai, FCA

Revenue by : Smt. Garima Chaudhary, CIT-DR

Date of Hearing: 22.11.2023	Date of Pronouncement: 23.11.2023
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by Revenue and cross objection filed by the assessee against the orders of Id. CIT(A)-1, Jabalpur dated 18.07.2019.

2. The Revenue has raised the following grounds of appeal are as under:-

1. *Whether on the facts and in the circumstances of the case, the Ld. Rs.1,41,11,945/-CIT(A) erred in deleting the addition made on account of Business Income of Rs.1,21,48,371/-?*

2. *Whether on the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs.2,69,43,790/- made on*

account of unexplained credit under section 68 by accepting the additional evidences which was never confronted to AO for cross examination?

3. *Any other ground as may be adduced at the time of hearing.*

3. The assessee has raised the following grounds of cross objection are as under:-

1. *On the facts and in the circumstances of the case the learned CIT (A) grossly erred in law as well as on facts in not accepting the book results shown by the appellant.*

2. *On the facts and in the circumstances of the case the learned CIT(A) was fully justified in not accepting the sales being three times of the license fees that too (the license fees) calculated wrongly and accepting the sales as per the books of accounts.*

3. *On the facts and in the circumstances of the case the leaned CIT(A) was not justified in law in estimating the net profit @ 1.5% on the sales disclosed by the appellant thereby determining the net income from liquor business at Rs.73,08,307/- as against the net profit net profit shown by the appellant at Rs.8,17,387/- thereby confirming the addition of Rs. 64,90,920/- (Rs.73,08,307 - Rs.8,17,380/- The addition sustained by the learned CIT (A) is totally highly arbitrary and unwarranted, and hence deserves to be reduced suitably.*

4. *On the facts and in the circumstances of the case, the learned CIT(A) having adopted a net profit rate in estimating the business income of the appellant, there is no justification in law for making a further addition of Rs.1,88,053/- on account of penalty paid by the appellant.*

5. *On the facts and in the circumstances of the case, the learned CIT(A) was not legally Justified in confirming the addition of Rs.7,00,000/- on account of credits in the name of Late Shri Abhishek Tiwari and Rs.28,97,042/- in the name of Smt Kiran Jaiswal without properly appreciating the facts of the case.*

Determination of profits of liquor business:-

4. The pertinent facts are as under:-

- The assessee was engaged in the business of purchase and sale of IMFL.
- The basic licence fee and the duty claimed by the assessee and as obtained from the District Excise Officer, Jabalpur and Seoni are as under:-

S.No.	Details	Basic license fee(Rs.)	Duty(Rs.)	Total (Rs.)
1	As per assessee	21,46,93,473	13,70,70,595	35,17,64,068
2	As per the Excise Authority	20,39,99,997	12,02,77,372	32,42,77,969
3	Difference	1,06,93,476	1,67,93,223	2,74,86,699

- Purchases as per TCS of Rs. 11,29,242/- were to the tune of Rs. 11,29,24,200/- whereas the trading account of the assessee has declared purchases to the tune of Rs. 9,22,63,920/-
- The Assessing Officer has gone through the audit report and noticed that the auditor has observed that proper books of accounts, to enable reporting in form 3CD, have not been maintained by the assessee/ proper documents and data required of audit were not made available for audit. Before the Assessing Officer the books of accounts were not produced, hence the Assessing Officer held that book results shown by the assessee is not reliable and not acceptable.
- Keeping in view the remarks auditor, payment of basic license fee to excise authorities and relying on the judgments quoted below the Assessing Officer determined total sale equal to twice of the license fee paid. Since the license fee paid by the assessee as per the Excise

Authorities was Rs. 32,42,77,969/-, the Assessing Officer determined the total sale to Rs. 64,85,55,938/- against the total sale declared by the assessee of Rs. 48,72,20,476/- and computed net profit @3% of the total sale of Rs. 64,85,55,938/- which amounts to Rs. 1,94,56,678/-.

Aggrieved with the addition the assessee appeal before the Id. CIT(A). The Id. CIT(A) held that the net profit @1.5% was reasonable, instead of 3% as determined by the Assessing Officer.

5. Aggrieved with the order of the Id.CIT(A), the Revenue as well as the assessee filed appeal before us.

6. Before us the Id. DR argued that since the books of accounts of the assessee are not reliable the only way to determine the correct profits is by a logical estimation and taking into consideration the precedencies. There has been difference even in the excise fees paid and claimed by the assessee and hence the books results cannot be accepted. The Id. DR argued that even the purchases shown by the assessee do not tally with the purchases as per the TCS. On the other hand, Id. AR argued that the excise payments are continuous payments and hence a tentative figure was given during the audit. The sales of Rs. 48,72,20,476 have been have been duly shown in the accounts and determination of purported sale based on the payment of license fee cannot be accepted. The Id.AR further argued that the market fluctuations have to be considered while determining the sale as well as profits. The

profits of 1.5% or 3% cannot be considered sacrosanct and the assessee cannot be accepted to earn the same profits from year to year.

7. Heard the arguments of both the parties and perused the material available on record.

8. The case laws referred by the Revenue are as under:-

1. In the case of ACIT, 1(2), Bhopal Vs M/s Avinash Chalana & Co. G-2/119, Gulmohar Colony, Trilanga, Bhopal for the A. Y 2008-09 by ITAT. Indore Bench vide I.T.A No. 570/Ind/2012 Dated: 17/05/2013 has held as under:-

" A liquor contractor is to determine the sale price of the liquor at his own free will. The Assessing Officer concluded that since cash memos were not issued for the liquor sale, the rate charged by the assessee from its customers cannot be verified with the rated accounted for by it in its books of account maintained. Thus. the sales or liquor are not verifiable and therefore, provisions of section 145(3) are clearly attracted in this case. Accordingly, the Assessing Officer rejected the books of account of the assessee and estimated the sale of liquor at two times of license fee of Rs. 22.18,81.367/-, working out to Rs. 44.37.62,734/- as against sale of Rs. 34.18,37.223/ shown by the assessee in its books of account. He applied net profit rate at 3% on the estimated sales of Rs. 44,37,62,734/- working out net profit to Rs. 1,33.12.882/- and accordingly, assessed the income of the assessee at Rs. 1.33.12,882/.."

1. "In the case of M/s Shivhare Associates, 44, Sindh Bihar, Nadi Gate, Gwalior Vs. JCIT, Range-1, Gwalior vide ITA No. 47 and 48/Agr/2015 Dated: 16/05/2018 and in the case of ACIT. Circle-1, Gwalior Vs. M/s Shivhare Associates, Jinsi Nala No. 1. Chhapparwala Gwalior vide ITA No. 71 and 72/Agr/2015 Dated: 16/05/2018 the Hon'ble ITAT has given its decision that "Following the Hon 'ble Jurisdiction MP High Court and considering our observation in the case of Shri Laxmi Narain Shivhare (Supra) of ITAT. Agra Bench. on parity of facts, in case of retail trade of liquor, as such, we hold that it would be just fair and ITA No. 47 and 48/Agr/2015 ITA No. 71 and 72/Agr/2015 reasonable to apply a net profit rate of 2.7% on the sales price as estimated by the AO. Accordingly, the AO is directed to apply 2.7% NP rate on the estimated sales after deducting interest and salary to partners as per law; subject to the minimum returned income.

9. We find that in the case of M/s. Avinash Chalana the ITAT has determined net profit @2% as against 3% mentioned by the Assessing Officer.

10. We have also perused the judgments relied upon by the Id. AR which are as under:-

In the case of CIT v Balchand Ajit Kumar(2003) 263 ITR 0610 the hon'ble MP High Court has held that the enhanced sale can't be added to the income but only the net profit on such enhanced sale can be added to the income. The para 6 of the order is reproduced hereinafter:-

"6. We are in respectful agreement with the aforesaid opinion inasmuch as the total sale cannot be regarded as the profit of the assessee. The net profit rate has to be adopted and once a net profit rate is adopted, it cannot be said that there is perversity of approach. Whether the rate is low or high, it would depend upon the facts of each case. In the present case net profit rate of five per cent, has been applied. We do not think it appropriate that the same requires to be enhanced. We are also inclined to think that it is high. In any case, it cannot be said that there has been perversity of approach."

In the case of Man Mohan Sadani v CIT (2008) 304 ITR 52 the hon'ble MP High Court has again held that the entire enhanced sale cannot be treated as income. The relevant portion from head note is reproduced hereinafter:-

"Income-Addition—Undisclosed sales-Entire sale proceeds of the assessee cannot be added to his income Net profit rate has to be applied—CIT vs. Balchand Ajit Kumar (2004) 186 CTR (MP) 419 : (2003) 263 ITR 610 (MP) followed "

In the case of M/s Ramesh Chand Ravindra Kumar Rai v ITO, (2010)14 ITJ 34 the Hon'ble ITAT Jabalpur bench has held that if the books of accounts of an assessee having dealing in liquor is rejected then the estimation of the net profit @1.5% is reasonable. The relevant portion from the order of Hon'ble ITAT Jabalpur Bench is reproduced herein after:-

"15. Now coming to the net profit rate of 2% as applied by the Ld CIT (Appeals) and the gross profit rate of 5% as applied by the AO as against 0.81% show by the assessee, we observed that AO has considered the case of Singh & Associate, Gwalior. However, the assessee has stated the facts that the case of Singh & Associate, Gwalior is different as compared to the case of the assessee and, therefore, the net profit rate of Singh & Associate, Gwalior could not be the basis for considering the net profit rate of the assessee. The Ld. DR in his submission has not disputed the facts as submitted by

the Ld. AR before under section and also before the Ld. CIT (Appeals). Be that as it may, we are of the considered view that it will be reasonable, in the facts and circumstances of the case, to adopt the net profit rate of 1.5% as against 2% estimated by the Ld. CIT(Appeals) on the sales of Rs. 12.50 crore as estimated by the Ld. CIT (Appeals). Hence, we reject grounds No. 1 to 4 of the appeal of the department and allow ground No. 2 of the revised ground of appeal of the assessee in part. Further, ground No. 1 of revised ground of appeal of the assessee is rejected."

The N.P. @ 1.5% considered reasonable in liquor trade by hon'ble ITAT Jabalpur bench Jabalpur in the case of M/s Ramesh Chand Ravindra Kumar Rai v ITO (2010) 14 ITJ 34 and hon'ble ITAT Agra bench in the case of ITO v Sh. Satendra Singh Parmar (I.T.A No. 127/Agra/2017).

The ITAT Jabalpur Bench Jabalpur in the case of Yadav Brother Construction Co. v ACIT (I.T.A. No. 109 & 110/JAB/2012) has held that if the net profit rate of a year is better than other years than in such case even if books of accounts are rejected for that year than also the net profit as returned by the assessee is to be accepted. The relevant portion from para 6 of the ITAT order is reproduced hereinafter:-

"6. This important factor that during the A. Ys. The assessee has shown better result, has been totally ignored by the authorities below to justify their action for adopting a different Net Profit rate for estimation of the profit. We thus, while setting aside the orders of the Authorities below, direct the A.O. to accept the profit shown by the assessee."

11. Hence keeping in view the entire facts of the case, judgments of various authorities, order of the coordinate bench of the Tribunal, we hold that the Id. CIT(A) has rightly determined the profit @1.5%. The order of the Id. CIT(A) is hereby affirmed.

12. In the result, the appeal of the Revenue as well as that of the assessee on this ground are being dismissed.

Un-secured loans:-

12. The assessee has taken unsecured loans as per schedule 2 of Rs. 3,05,40,382/-. The details are reproduced herewith as under:

Schedule 2:

Particulars	Opening Balance	Amount received	Amount paid	Closing balance
Abhishek Jaiswal		6,50,000	1,50,000	
Abhishek Tiwari		7,00,000		
Anshu Jaiswal		37,98,340	13,49,170	
Arun Kumar Rai		8,00,000		
Deepak Jaiswal		77,50,000	77,50,000	
Kiran Jaiswal		28,97,042	28,97,042	
M.D. Associte (Ashok Dubey)		40,45,000	29,65,000	10,80,000
Mahendra Tiwari		16,50,000		16,50,000
Nandkishore Sharma		9,00,000		9,00,000
Neeti Namdev		40,00,000		40,00,000
Rajni Jaiswal		5,50,000		5,50,000
Rakesh Namdev		10,00,000		10,00,000
Rama Tiwari		10,00,000		10,00,000
Vijay Dubey		5,00,000		5,00,000
Vinita Tiwari		3,00,000		3,00,000
Total		3,05,40,382	1,51,11,212	1,54,29,170

13. The Assessing Officer asked the assessee to produce the documents related to creditworthiness of the creditors. The Assessing Officer held that the assessee has failed to establish creditworthiness of the creditors with documentary evidences.

14. The Assessing Officer held that the assessee has even failed to produce creditors for examination, who have given him unsecured loan of Rs. 3,05,40,382/-. The Assessing Officer held

that The assessee has obtained most of the loans from his family members and friends and the family members of the assessee are not being traced out at the present address disclosed to the department. The AO alleged that the assessee has shifted himself and family to any other place, which has not disclosed to the department. Therefore, the amount credited in books of accounts of the assessee is treated as unexplained credit within the meaning of section 68 of the Income Tax Act, 1961 and added to the total income of the assessee of Rs. 3,05,40,382.

15. Aggrieved, the assessee filed the appeal before Id. CIT(A).

16. The Id. CIT(A) after examination of the material on record deleted the addition made on account of the following members except Abhishek Tiwari of Rs. 7,00,000/- and Kiran Jaiswal of Rs.28,97,042/-.

Particulars	Opening Balance	Amount received	Amount paid	Closing balance
Abhishek Jaiswal		6,50,000	1,50,000	
Abhishek Tiwari		7,00,000		
Anshu Jaiswal		37,98,340	13,49,170	
Arun Kumar Rai		8,00,000		
Deepak Jaiswal		77,50,000	77,50,000	
Kiran Jaiswal		28,97,042	28,97,042	
M.D. Associte (Ashok Dubey)		40,45,000	29,65,000	10,80,000
Mahendra Tiwari		16,50,000		16,50,000
Nandkishore Sharma		9,00,000		9,00,000
Neeti Namdev		40,00,000		40,00,000
Rajni Jaiswal		5,50,000		5,50,000

Rakesh Namdev		10,00,000		10,00,000
Rama Tiwari		10,00,000		10,00,000
Vijay Dubey		5,00,000		5,00,000
Vinita Tiwari		3,00,000		3,00,000
Total		3,05,40,382	1,51,11,212	1,54,29,170

17. The Id. CIT(A) categorically held that the assessee has filed confirmation letter from the above parties and hence the observations of the Assessing Officer were held to be untenable.

18. Aggrieved, the Revenue and the assessee filed appeals before the Tribunal.

19. Heard the arguments of both the parties and perused the material available on record.

20. We find that the Id. CIT(A) has held that the assessee furnished the correct addresses of the loan parties. It is obligatory on the part of the AO to force the attendance of the witnesses. The AO has all power to force the attendance of the loan parties. In this case, we find that AO is not called for personal production of the of the loan parties as against the observation quoted in the Assessment Order. The loan parties furnished the loan confirmation. The Id. CIT(A) held that by filing the above documents the appellant is able to establish the –

- i. Identity of the creditors - all the creditors except Abhishek Tiwari and Kiran Jaiswal filed the loan confirmations. All the creditors furnished the PAN numbers.

ii. Genuineness of the transaction- the appellant has taken the loan through banking channel. The appellant is in the receipt of loan by cheque.

iii. Creditworthiness of the creditors - The persons not only given the loan to the appellant but to other parties also.

21. From the above it is clear that the appellant has satisfied all the three conditions required for genuineness of the transaction. In spite of the confirmation filed and which are on record the AO wrongly held that the assessee has not furnished any details. Hence, we decline to interfere with the order of the Id CIT(A) on the issue of deletion on account of un-secured loans. With regard to the loan received from Kiran Jaiswal, we find that the amounts have been already repaid within the same year hence no addition is called for. With regard to loan received from Abhishek Tiwari of Rs. 7,00,000/- even before us no details have been given and hence the same is hereby confirmed.

22. In the result, appeal of the assessee on this ground is partly allowed and that of the Revenue is dismissed.

22. In the result, the appeal of the Revenue is dismissed and appeal of the assessee is partly allowed.

Order Pronounced in the Open Court on 23/11/2023.

Sd/-
(Yogesh Kumar U.S)
Judicial Member

Sd/-
(Dr. B. R. R. Kumar)
Accountant Member

Jabalpur Dated: 23/11/2023

NV, Sr. PS

ITA No. 76/JAB/2019
CO No. 17/JAB/2019
Deepak Jaiswal

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR
ITAT JABALPUR**