

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “SMC”, MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.3827/M/2023
Assessment Year: 2009-10**

M/s. Kings Drugs, 31, Feltham House, Graham Road, Ballard Estate, Mumbai – 400 038 PAN: AA AFK0990K	Vs.	ITO Ward 12(1)(1), Room No.641, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Manoj Mishra, A.R.
Revenue by : Shri S. Arunkumar, D.R.

Date of Hearing : 29 . 02 . 2024
Date of Pronouncement : 07 . 03 . 2024

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, M/s. Kings Drugs (hereinafter referred to as ‘the assessee’) by filing the present appeal, sought to set aside the impugned order dated 11.08.2023 passed by the National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter referred to as CIT(A)] qua the assessment year 2009-10 on the grounds inter-alia that :-

“Grounds 1 to 5: In connection with the Estimation of Gross Profit Rate at 8% instead of actual:

1. *The Learned AO has erred in law as well as on facts in estimating the gross profit at his own whims and fancies at 8% instead of the actual i.e., 5.76% and in enhancing the total income by Rs. 7,55,086/- without considering the nature of the business and without application of mind, which is wholly arbitrary and unjustified. The Learned CIT (A) has erred on facts and in law in confirming the said estimation of the gross profit rate by the Learned AO, which is made on the basis of surmises, conjectures and estimates. It is submitted that the gross profit rate has to be on the actual basis keeping in mind the expenses having been incurred for the business purpose, whereas the Learned AO has grossly erred in its Order by simply substituting the sale margin, devoid of any justifications or reason as to why the gross profit rate should be estimated at 8%.*

2. *The Learned AO has erred in law as well as on facts in estimating gross profit rate by ignoring the audited financials produced for the relevant assessment year and the Learned CIT (A) has erred on facts and in law in confirming the same. It is worth noting that the pre-condition for estimating business income, where the assessee maintains the books of account is that the books of the assessee should be unreliable or not realistically capable of demonstrating the income of the assessee. Thus, without proving the books of accounts maintained to be defective, the gross profit estimation by the Learned AO, which has been affirmed by the Learned CIT (A), is not permissible in the eyes of law. In support of this contention, the Appellant craves leave to rely upon a plethora of judgements wherein it has been held that if accounts are regularly maintained in course of business and duly audited, they should be taken as correct unless it is demonstrated otherwise that the books of accounts are incorrect/ incomplete or that the method of accounting adopted was such that true profits cannot be deduced from them. On this score, the Appellant submits that the Order by the Learned CIT (A) and the original Order by the Learned AO suffers from serious infirmity.*

3. *The Learned AO has erred in law as well as on facts in declaring suppression of sales, in the absence of any evidence which proves suppression of any manner. The Appellant submits that it has various customers who make*

small purchases from time to time and in light of the same, each party's account is not separately maintained by the Appellant. However, since the Learned AO called upon the Appellant to provide the details of the party wise sales, the Appellant volunteered to provide the party wise list of the entire sales made and had duly divulged the said details for the relevant A.Y. Thus, it is submitted that the Learned CIT (A) has grossly erred in affirming that there was suppression of sales, ignoring the fact that the entire information was duly furnished and disclosed by the Appellant.

4. The Learned AO has erred in law as well as on facts in indulging in estimation of gross profit at a whopping rate of 8% for the A.Y. 2009-2010, particularly when gross profits at lesser rates were declared for A.Y. 2007-08 and 2008 - 09 as 5.63% and 5.65% and the Learned CIT (A) has erred on facts and in law in confirming the same.

5. It is also of pertinence to note that the Learned AO vide the Show Cause Notice dated 13.12.2011 had called upon the Appellant to give reasons as to why Gross Profit not less than 10% should not be adopted. However, the Learned AO has itself estimated Gross Profit to be 8% which is itself contradictory in nature. Therefore, the Appellant submits that the Order by the Learned AO is on the basis of guess work and assumptions and the Learned CIT (A) has erred on facts and in law in confirming the same.

Grounds 6 to 7: In connection with the Disallowance of expenses of Rs. 2,15,970/-

6. The Learned AO has erred in law as well as on facts in disallowing certain expenses and adding Rs. 2,15,970/- to the total income and the Learned CIT (A) has erred on facts and in law in confirming the same. The Appellant submits that it is not open for the Learned AO to disallow expenses on its own estimation and discretion without verifying the genuineness, as held in various judgements. It is worth noting that the Hon'ble Apex Court has held that it is not open to the department to prescribe what an expenditure an assessee should incur and in what circumstances he should incur that expenditure.

7. The Learned AO has erred in law as well as on facts in disallowing the following expenses and the Learned CIT (A) has erred on facts and in law in confirming the same, as per reasons given by the Appellant which are elucidated hereinbelow:

(a) Disallowance of 50% Sales Promotion Expenses i.e., Rs.1,48,210/- The Learned AO has failed to appreciate the fact that the said expense has been used towards sales promotion purpose and has disallowed 50% of the expenses, on its own discretion and conjecture.

(b) Disallowance of 20% of General Expenses i.e., Rs.5,351/-

The Learned AO has failed to appreciate the fact that from the total general expense of Rs. 26,755/-, petty expenses in the nature of donation of Rs. 253/- and Rs. 651/- towards Onam Bakshis and contribution to temples for Ayyappa Pooja and the expense of Rs. 13,151/- towards maintenance of Godown including painting, repair work, etc. have been incurred, which being miscellaneous expenses are usually paid in cash. Thus, the Learned AO has erred in disallowing 20% of the expenses, on the ground that the said expenses are in cash.

(c) Disallowance of 20% of Office Expenses i.e., Rs.5,468/-

The Learned AO has failed to appreciate the fact that from the total office expense of Rs. 27,339/-, 93.52% expenses have been paid by cheque and only a meagre amount of Rs.1,772/- has been incurred towards correction of electrical faults, which being a petty expense has been paid in cash. Thus, the Learned AO has erred in disallowing 20% expenses i.e., Rs.5,468/- on the ground that expenses are in cash.

(d) Disallowance of 10% of Printing & Stationary Expenses i.e., Rs. 5,857/-

The Learned AO has failed to appreciate the fact that from the total printing & stationery expenses of Rs.58,578.70/-, petty expenses of Rs. 2,959/- have been incurred towards xerox charge, expense of Rs.9,455.70 towards reimbursement of stationery charges and Rs.11,508/- towards purchase of

stationery from local market, which are usually paid in cash in the normal course of business. Thus, the Learned AO has erred in disallowing 10% i.e., Rs.5,857/- on the ground that expenses are in cash.

(e) Disallowance of 50% Delivery & Collection Expenses i.e., Rs. 38,761/-

The Learned AO has failed to appreciate the nature of the business of the Appellant and the fact that the Appellant delivers the pharma products to the retailers, chemists & hospitals in Trichur District either by autos or in tempos as per the load factor or through canvassing agents who deliver stocks in emergency cases and whose charges are reimbursed by the Appellant. In view of the aforesaid, delivery and collection charges are incurred in cash and are also affected by the escalating fuel charges. Thus, the Learned AO has erred in disallowing 50% i.e., Rs. 38,761/- on the ground that expenses are in cash which is totally unjustifiable.

(f) Disallowance of 10% Telephone Expenses i.e., Rs. 8,750/-

The Learned AO has failed to appreciate the fact that the telephone was utilized entirely towards business purposes and for which expenses of Rs. 87,508/- has been incurred. However, the Learned AO has on the basis of conjecture and assumption, interestingly presumed that the staff of the Appellant must have made some personal calls and has disallowed 10% Telephone Expenses. Thus, the Learned AO has grossly erred in disallowing 10% Telephone Expenses i.e., Rs. 8,750/- on mere conjecture and estimation, without any justification.

(g) Disallowance of 10% Electricity Expenses i.e., Rs.3,573/-

The Learned AO has failed to appreciate the fact that the entire Electricity Expenses of Rs. 35,737.50/- have been paid by cheque. However, the Learned AO has wrongfully still made the observations that most entries are in cash and has disallowed 10% of the Electricity Expenses. Thus, the Learned AO has grossly erred in disallowing 10% of the

Electricity Expenses i.e., Rs. 3,573/- on the ground that most of the entries are made by cash.

8. The above grounds are without prejudice to and independent of one another.

9. The Appellant craves leave to add, alter, amend and/ or modify any grounds of appeal, as urged above, before or at the time of hearing of this appeal.

10. In view of the above and other grounds that may be urged at the time of hearing of the appeal, the Appellant prays that the appeal may be allowed in the interest of justice and equity.”

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee firm is a wholesaler of pharmaceutical products. The return of income filed by the assessee declaring total income at Rs.1,68,580/- was subjected to scrutiny. The Assessing Officer (AO) noticed that the assessee has suppressed the sales and during assessment proceedings he has not produced the details called for and thereby made adhoc addition @ 8% i.e. Rs.7,55,086.46 being the estimated gross profit on the total turnover of Rs.3,37,52,264.70. The AO has also made adhoc addition out of sale promotion, expenses, general expenses, office expenses, printing and stationary expenses, delivery and collection expenses and thereby framed the assessment under section 143(3) of the Income Tax Act, 1961 (for short ‘the Act’).

3. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the addition by dismissing the appeal. Feeling aggrieved with the impugned order passed by

the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing the present appeal.

4. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

5. At the very outset it is brought to the notice of the Bench by the Ld. A.R. for the assessee that during the assessment proceedings the assessee has failed to file the details called for by the AO viz. partywise details of sales, nor the assessee has filed partywise accounts to work out as to how he has been keeping track of recovery and sales. When the detail has not been filed by the assessee before the AO as well as the Ld. CIT(A) who has categorically mentioned that the assessee has failed to file the partywise details of the sales and other documents called for despite availing numerous opportunities and as such confirmed the adhoc addition by estimating the profit @ 8% of the gross turnover.

6. Now the assessee has brought on record the entire details called for by the AO by virtue of a paper book running from 48 to 106 pages.

7. We are of the considered view that no doubt the assessee has been provided with ample opportunities by the AO as well as the Ld. CIT(A) but to impart the justice and to decide the issue once for all one more opportunity is required to be given to the assessee in the interest of justice. So in view of the matter the impugned order

passed by the Ld. CIT(A) is hereby set aside and case is remitted back to the AO to decide afresh after examining the details to be filed by the assessee who shall be given adequate opportunity of being heard.

8. Resultantly, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 07.03.2024.

**Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 07.03.2024.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.