

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ, चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH BENCH, 'A', CHANDIGARH

**BEFORE SHRI A.D. JAIN, VICE PRESIDENT &
SHRI KRINWANT SAHAY, ACCOUNTANT MEMBER**

आयकर अपील सं./ ITA No. 17/CHD/2024

निर्धारण वर्ष / Assessment Year : 2014-15

The ACIT, CC-3, Opp. BVM School, Kitchlu Nagar,, Ludhiana	Vs. बनाम	Jain Amar Clothings Pvt. Ltd., 992/1, Pipal Building, Chawal Bazar, Ludhiana
स्थायी लेखा सं./PAN No: AABCJ8065G		
अपीलार्थी/ APPELLANT		प्रत्यर्थी/ REPSONENT

(PHYSICAL HERING)

निर्धारिती की ओर से/Assessee by : Shri Sudhir Sehgal, Advocate
राजस्व की ओर से/ Revenue by : Shri Rohit Sharma, CIT DR

सुनवाई की तारीख/Date of Hearing : 05.09.2024
उद्घोषणा की तारीख/Date of Pronouncement : 15.10.2024

आदेश/Order

Per Krinwant Sahay, A.M.:

The appeal in this case has been filed by the Revenue against the order dated 11.10.2023 of the Id. Commissioner of Income Tax (Appeals)-5, Ludhiana.

2. Grounds of appeal taken by the Revenue are as under: -

1. *Whether upon facts and circumstances of the case and in law, the Ld. CIT (A) was justified in holding that there is no incriminating material found during the course of search on account of suppression of sales as is apparent from the order of AO and from the remand report of the AO whereas no such submission has been made by AO in Assessment order and remand report AO. Hence, the order of Ld. CIT(A) is perverse.*
2. *Whether upon facts, and circumstances of the case and in law, the Ld. CIT (A) was justified in overlooking the fact that the AO both in the assessment order and in the remand report has proved that the incriminating data was retrieved from the hard disk, which the assessee had tried to delete during the course of search by remote access and the proof of unaccounted sales of Rs: 789016/- made during the AY 2014-15 was also recovered from it, leading to addition of Rs, 4,61,495/- of unaccounted profit made on this unaccounted sale?*
3. *Whether upon facts and circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 4,63,42,796/- by relying on the judgement of Hon'ble Supreme Court in the case of PCIT, Contral-3 vs. Abhisar Buildwell Pvt. Ltd. reported at 150 Taxman.com 257(SC)(2023) and holding that any addition made on the basis of document which is not incriminating cannot be sustained whereas the AO has made addition based on the incriminating data found during the search which was retrieved from the hard disk?*
4. *Whether upon facts and circumstances of the case and in law, the Ld. CIT(A) was justified in ignoring the decision of Hon'ble Supreme Court wherein in the*

case of M/s Keserwani Zarda Bhandar Sahson, Allahabad in Civil Appeal Nos. 7738-7739/2021, 7736-7737/2021, 7732-7735/2021 and 7740-7743/2021, Hon'ble Apex Court has upheld the order of Allahabad High Court and held that once during search undisclosed income is found on unearthing the incriminating material during the search, the AO would assume jurisdiction to assess or reassess the total income even in case of completed/unabated assessments?

5. *Whether upon facts and circumstances of the case find in law, the additions made on the basis of other material can be deleted, it in appellate proceedings, the additions made on the basis of incriminating material is wrongly deleted by appellate authority, as has been one by CIT(A) in the present case?*
6. *Whether upon facts and circumstances of the case and in law, the Ld. CIT (A) was justified in holding that books of accounts u/s 145(3) have not been rejected by the AO whereas the AD in the assessment order has stated that no books have been produced before the A.O. neither during the search / post-search proceedings nor during the assessment proceedings and the AO has in para 6 of Assessment Order at page 18 has held that books of accounts of the assessee are neither correct nor complete?*
7. *Whether in the facts and circumstances of the case and in law, Id. CIT (A) was justified in deleting the addition of Rs, 4,61,495/- on account of profit on unaccounted sales of Rs: 7,89,016/- by holding that the assessee is legally entitled to take its own decision as how to run its business and thereby justifying false entries made by assessee in books of account in contravention to the accounting principles?*

8. *The appellant craves leave to add, amend, modify, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.*

3. Brief facts, as per the written submissions filed by the Assessee, are as under:-

1. That the company is engaged in the manufacture of ladies garments and the total turnover of the assessee company during the year under consideration is Rs. 156,05,88,457/- and the company has branches all over the countries and besides that there are franchise outlets of the company, where the readymade garments of the assessee company are sold.
2. There was search and seizure operations on the company on 26.02.2016 and the search was carried out at different outlets of the company. In order to have check and control of the stock sent to different outlets, the representative of the company used to carry out the random stock audit of different branches and on account of such random stock audit of stocks at branches, certain nominal discrepancies in respect of shortage of some pieces of stock or some excess items of a very nominal value were found and, thereafter, wherever, there was shortage in stock of some items, the sales were recorded in the respective branch of the company and, thus, the income repercussion in respect of such nominal discrepancies were taken care off and

the profit element on account of such adjustments stood duly disclosed in the seized hard disks.

3. This contention was raised before the Assessing Officer and before CIT(A) also and the detailed working of such stock audit of each branch was given on account of such nominal discrepancy and the matter was remanded to the Assessing Officer, who did not dispute the above fact but only stated that for such shortage, no action have been taken against any employee for theft / damage or names of the person of stock audited have not been given and no insurance claim have been made.
4. The Assessing Officer in his order has calculated such discrepancy on account of shortage to the tune of Rs. 7,89,016/-, out of sales of Rs. 156,05,88,457/- and by applying the G.P. rate of 58.49% made an addition of Rs. 4,61,495/-.
5. Before, the CIT(A) on account of detailed submissions, about the profit element of such shortage in stock of nominal value have already been taken into consideration. In the regular books of accounts and in the remand proceedings, nothing adverse about the detailed working, as communicated to AO have been commented upon but only certain observation have been made as 'stated above'.
6. The Department has taken the ground with regard to sustaining of addition of Rs. 4,61,495/-, whereas, the CIT(A) in his order has deleted such addition since the

alleged discrepancy have already been taken care of while filling the return of income and there is no impact of the profit declared and the said addition has been deleted as per finding at pages 65 to 67 of the order of CIT(A).

7. Before, the CIT(A) on account of detailed submissions, about the profit element of such shortage in stock of nominal value have already been taken into consideration in the regular books of accounts and in the remand proceedings, nothing adverse about the detailed working, as communicated to AO have been commented upon but only certain observation have been made as 'stated above'.
8. The department has taken the ground with regard to sustaining of addition of Rs. 4,61,495/-, whereas, the CIT(A) in his order has deleted such addition since the alleged discrepancy have already been taken care off while filling the return of income and there is no impact of the profit declared and the said addition has been deleted as per finding at pages 65 to 67 of the order of CIT(A).
9. The Ld. CIT (DR), though relied upon the order of AO and also argued that since assessee had not taken any action against the staff of the branches for such theft / shortage and also no insurance claim has been made and urged for confirmation of addition of Rs. 4,61,495/-

10. It was argued by the ld. Counsel of the assessee that further detailed working during the course of appellate proceedings had been given. It was because not much time was allowed by the AO during the assessment proceedings. Such details were forwarded to the AO for comments and during remand proceedings, assessee's counsel appeared before AO and explained such working. The AO could not find any fault in the detailed working and both the copies of remand report and rejoinder of the assessee have been reproduced. Thus, it was argued that the CIT(A) has rightly deleted the addition.

4. The ld. CIT(A) in his order has given findings on the different issues raised in this appeal as under:-

“5.3.1 I have considered the facts of the case, the assessment order, the submissions of the appellant along with the documents filed by the AR, remand report submitted by the AO, the reply furnished by the assessee to the remand report of the AO as well as the legal position. It is a fact that during the course of search conducted on the appellant on 26.02.2016 certain excel sheets was found and which were confronted to the appellant and appellant explained before the AO during the course of assessment proceedings that the noting in the excel sheet were only on account of the random stock audit conducted by the it's representative at different branches in order to have

check & control over the stocks lying in different branches. It was further argued the noting in the excel sheet were only about the discrepancies found in some of the branches and these discrepancies were either of shortage in respect of some pieces of stock or some excess stock and which were of very nominal value.

5.3.2 During the remand proceedings also before the AO, the appellant submitted that all such adjustments whether in shortage of stock or excess stock as found in some of the branches were duly recorded in the books of accounts. It was therefore argued that the income repercussion in respect of such nominal discrepancies were taken care off and the profit element on account of such adjustments stood duly disclosed in the seized Hard Disk.

5.3.3 Although the AO during remand proceedings has accepted such modus operandi in principle, she has mentioned that the appellant has not done the following:

(i) It has not made an insurance claim.

(ii) No action has been taken against any person for theft of damage (iii) Name of persons conducting this stock audit has not been given.

(iv) It has not submitted any new documentary evidence and has relied upon the finding given in the assessment order.

AO further raised an apprehension that damage/loss/theft et.c would have been debited in its books of account resulting in reduction of profit.

5.3.4 Decision:

(a) During appellate proceeding, the appellant has explained this system of stock audit. The appellant has

*a large number of showrooms and franchises. To keep control over the pilferage, the appellant has been following a system of surprise stock audit of these branches/franchises, which was explained at length during appellate proceedings as well. The appellant has explained that in case of shortage in stock in branch, as a regular policy, the recovery has to be made from the branch in respect of such shortage in stock and it is treated as sale in its books of account at regular sale price (being MRP less discount). In case there is excess stock in the branch, it is entered in the books of accounts as sale return at zero value and thus become the part of the stock. In both the cases, there is no adverse impact on profit and all these transactions becomes part of regular books of account. The AO has examined these transactions and in para 7.1 and 7.2 of the remand report dated 18.09.2023 has given an example. Undersigned also examined these aspects during the appellate proceedings and found them to be in order. These transactions have been found to be the part of regular books of account and has no adverse impact of profit. **After examining the details filed , considering the remand report, as well as the facts, I find merit in the submission of the appellant that these transactions are part of regular books of account and have no adverse impact on profit.***

(b) The AO has raised suspicion in remand report that claim of shortage, would result in reduction of profit, as it would be claimed as expenditure. She further argued this difference may be covered by insurance and appellant would have got reimbursement for the insurance company. She also raised doubt about these accounting entries as sale.

These concerns of the AO would have been valid had the appellant claimed these amounts as a

loss. However, it has taken them as sale, and this has no adverse impact on profit.

(c) Another issue raised by the AO in remand report is that appellant has apparently taken no action against erring persons.

The matter was brought to the attention of the appellant. It explained that due huge volume of work and nature of work, as well as considering the percentage of these incidents (which are very small), it found it prudent not to escalate matter. Further most of the excess/shortage is on account of size of different cloth items.

After considering the facts, I find merit in the arguments of the appellant. This is a commercial decision, and it is a settled law the assessee has liberty to run its business as per its policies. Besides, during the current year, turnover is Rs. 156,05,88,457/-. Turnover on account of these shortages/excess has been worked at Rs. 7,89,016/-. This works out to 0.05% of declared sale. This a very low percentage. Therefore, the appellant is legally entitled to take his own decision as to how run its business.

(d) Therefore, the addition of Rs. 4,61,495/- mad* by the AO on account of GP on cash sale is deleted. Accordingly, these grounds of appeal are allowed.

5.4 Grounds of Appeal Nos. 5, 6 & 7:

(i) In these grounds, the AR has contested the addition of Rs. 4,58,81,301/- u/s 68 by applying GP rate of 58.49. During appellate proceedings, the AR has argued that no defect have been pointed out in the data as retrieved from the Hard Disk on account of the forensic audit and though the show cause notice was issued to

*the assessee for rejection of books of accounts u/s 145(3) yet while passing the order, the AO at page 28 & 29 of the order, has just mentioned that since in the assessment year 2015-16, the gross profit declared was 58.49% against the gross profit of 55.55% in the year under consideration, the addition on account of difference of 2.94% was applied on the declared turnover of Rs. 156,05,88,457/- resulting to an addition u/s 68 to the tune of Rs. 4,58,81,301/-. The first & foremost contention of the appellant is that this is an assessment framed by the AO u/s 153A r.w.s. 143(3) on account of the search conducted on 26.02.2016 and as per the decision of Hon'ble Supreme Court in the case of *Abhisar Buildwell Pvt. Ltd.* as reported in 149 *Taxmann.com* 399 (SC), it has been held that search assessment have to be framed on the basis of incriminating evidence found during the course of search. Since no such incriminating evidence have been found such addition of enhanced Gross Profit rate based on succeeding year cannot be made.*

(ii) It has further been argued that though the show cause notice was issued for rejection of books of accounts u/s 145(3), yet after the reply was submitted by the assessee, there is no specific finding with regard to the rejection books of accounts and hence it was pleaded by the AR that without rejecting the books of accounts u/s 145(3), no addition on account of gross profit was required to be made. The assessee has relied upon various case laws as submitted to the remand report of the AO.

(iii) It was further argued that variation of the gross profit rates can be on account of different reasons and there is no basis of making an addition of gross profit rate on account of higher gross profit disclosed in the later years. Further, vide its submissions dated 18.09.2018 at page 34 onwards, the appellant have

further stated that the AO while making the addition on account of unrecorded cash sales has mentioned that there can be more undisclosed sales in the retrieved Hard Disk. However, no such estimation of such sales has been made by the AO while making the addition of cash sales. The enhanced gross profit rate has been applied to the book turnover itself and thus it was pleaded that even no such material have been placed on record for making the addition on account of enhanced gross profit.

Decision

5.4.1 *I have considered the facts of the case, the assessment order, submissions of the appellant along with the documents filed by the AR, remand report submitted by the A.O., the reply furnished by the assessee to the remand report of the AO and legal position. It is relevant to mention here that there is no incriminating material found during the course of search on account of suppression of sales as it apparent from the order of the AO and from the remand report-of the AO. The material, which was initially considered as incriminating, found to be explained as result of enquiry.*

5.4.2 *Now this issue of scope of assessment u/s 153A of the Act has been decided by the **Hon'ble Supreme Court in the case of PCIT Central-3 vs. Abhisar Buildwell Pvt. Ltd. in Civil Appeal No. 6580 of 2021 dated 24.04.2023 (reported in 150 Taxmann.com 257 (SC) (2023).***

Unquote

5.4.3 *Therefore, Hon'ble Apex Court has clearly aid down the scope of assessment u/s. 153A and held the pre-condition of initiation of assessment proceeding u/s 153A for a particular year is the existence of seized*

material in that year. In case, there is no incriminating material, AO cannot assess or reassess the income. Further, the said judgment of the Hon'ble Apex Court has been followed in the case of King Buildcon Pvt. Ltd. in Civil Appeal No. 4326/2023 and latest judgment of the Hon'ble Apex Court in the case of PCIT vs. S. S. Con Built Ltd. reported in 445 ITR 506. Further, the AO though has issued a show cause notice for rejection of books of accounts u/s 145(3) but has not given any specific findings while making the addition of enhanced gross profit rate and hence even otherwise there was no basis of making the addition of enhanced gross profit rate on the book turnover of the assessee and that too without rejecting the books of accounts.

5.4.4 To summarize, the basic test of any document being qualified to be incriminating is that it must have some indication of undisclosed transaction/activity, which is not reflected in the books of account or return of income of the person. Therefore, any addition on the basis of this document, which is not incriminating, cannot be sustained in view of the law laid down by the Hon'ble Supreme Court in the case of PCIT, Central-3 vs. Abhisar Buildwell Pvt. Ltd. reported at 150 Taxmann.com 257 (SC) (2023).

5.4.5 Therefore, in view of the above stated legal position, facts discussed above and in view of the binding nature of the decision of Hon'ble Supreme Court in the case of Abhisar Buildwell Pvt. Ltd (supra), this addition -found sustainable and hence deleted.

5.4.6 Accordingly, addition of Rs. 4,58,81,301/- made by the AO by applying GP rate of succeeding year to the disclosed turnover of current year, in absence of corresponding incriminating material, is deleted. These grounds of appeal are allowed.”

5. The ld. DR relied mostly on the findings given by the Assessing Officer in the assessment order and he also vehemently argued that GP @ 58.49% for A.Y. 2015-16 was rightly calculated by the Assessing Officer as the A.O. found that in the year under consideration, the GP ratio declared by the Assessee was very low.

6. We have considered the submissions of ld. CIT DR and ld. Counsel of the Assessee and gone through the assessment order and order of the CIT(A) and find that the total turnover of the assessee company is 156,05,88,457/- and the AO/CIT(A) could not find any discrepancy, which have been explained by the assessee during the course of proceedings before the CIT(A) and the AO during remand proceedings, but still, the said discrepancy of Rs. 7,89,016/-, works out to only 0.05% on the declared sales, which is negligible and besides the same has been explained during the course of appellate proceedings and to the AO during remand proceedings and nothing fresh has been stated by the CIT (DR) and, hence considering the facts and circumstances of the case, this ground of appeal of the department is dismissed.

7. The other ground of appeal is with regard to deletion of Rs. 4,63,42,796/- on account of application of G.P. rate to the tune of 58.49% on recorded sales against the G.P. of 55.55%, which was

disclosed during the year under consideration. The facts, in brief, are that against the book sales of 156,05,88,457/-, the G.P. rate of 58.49% as declared in the Assessment in the Asstt. Year 2015-16 was applied for the year under consideration and the said addition was made by the AO without rejecting the books of accounts u/s 145(3), though, the show cause notice was issued by the AO for the same, but after the detailed reply was submitted, the books of account were not rejected but the addition of alleged low G.P. @ 2.94% (58.49% Minu* 55.55%) on recorded sales was applied, resulting into addition of Rs.4,58,81,401 /- .

8. The CIT(A) has deleted the addition as no incriminating evidence was found during the course of search and the ld. CIT(A) has relied upon the judgment of Hon'ble Supreme Court in the case of PCIT, Central-3 Vs Abhisar Buildwell Pvt. Ltd., 150 taxmann.com 257 and other case laws.

9. We have gone through arguments of the Ld. Counsel, who has vehemently argued that no incriminating evidence was found and seized during the course of search. As the books of accounts have not been rejected by Assessing Officer and, the action of addition on account of low G.P. ratio cannot be made as per the binding

judgment of Hon'ble Apex Court in the case of King Buildcon Pvt. Ltd., 445 ITR 506.

10. During the proceedings before us, the Revenue could not bring anything on record to rebut the findings given by the CIT(A) that no incriminating document was found during the search. The assessment framed by the A.O. was not based on any incriminating document. Despite supporting the additions made by the A.O., the Revenue could not rebut the findings given by the ld. CIT(A) on this issue.

11. After considering the submissions of ld. DR, ld. Counsel of the Assessee and after gone through the assessment order and order of the CIT(A) we find that in fact, no incriminating documents have been found during the search operation. Therefore, we find no infirmity in findings given by the ld. CIT(A) on this issue. Accordingly, the appeal filed by the Revenue is dismissed.

12. In the result, the appeal of the Revenue is dismissed.

Order pronounced on 15.10.2024.

Sd/-
(A. D. JAIN)
Vice President

Sd/-
(KRINWANT SAHAY)
Accountant Member

“आर.के.”

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT,
CHANDIGARH
5. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar