

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

**BEFORE SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SH. NIKHIL CHOUDHARY, ACCOUNTANT MEMBER**

ITA No.90/Alld/2016
(A/w C.O. No.17/Alld/2016)
A.Y. 2011-12

Dy. Commissioner of Income Tax, Central Circle, Allahabad	vs.	M/s Kesarwani Zarda Bhandar, Sahson, Allahabad
		PAN: AADFK6279N
(Appellant)		(Respondent)

ITA No.481/Alld/2015
(A/w C.O. No.01/Alld/2016)
A.Y. 2012-13

Asstt. Commissioner of Income- tax, Central Circle, Allahabad	vs.	M/s Kesarwani Zarda Bhandar, Sahson, Allahabad
		PAN: AADFK6279N
(Appellant)		(Respondent)

Assessee by:	Sh. Praveen Godbole, C.A.
Revenue by:	Sh. Dr. Neel Jain, CIT DR
Date of hearing:	29.08.2024
Date of pronouncement:	22.11.2024

ORDER

PER NIKHIL CHOUDHARY, A.M.:

These two appeals have been filed by the Revenue against the decision of the Id. CIT(A), Lucknow-3, deleting the additions made on account of suppression of sales by the Id. AO under section 143(3) of the Income Tax Act, vide his separate orders for the A.Ys. 2011-12 and 2012-13. Cross Objections have been filed by the assessee supporting the orders of the Id. CIT(A). The issues being common, these

appeals and Cross Objections are taken up for disposal by way of a common order.
The grounds of appeal of appeal in these various cases are as under:-

ITA No.90/Alld/2016

- “1. That on the facts and in the circumstances of the case, Ld.CIT(A) has erred in deleting the addition of Rs. 2,75,42,070/- made by the AO on account of suppressed production.*
- 2. That the order of Ld. CIT (A) deserves to be set aside and the assessment order passed by the A.O. be restored.*
- 3. That the appellant craves to add, modify, revise or amend any one or more of the grounds of the appeal as stated above as and when need for doing so may arise.”*

C.O. No.17/Alld/2016

- 1- That in any view of the matter it is not correct to say that the Id. CIT(A) has erred in deleting the addition of Rs.2,75,42,070/- made by the Assessing Officer on account of Suppressed Production. The Id. CIT(A) perfectly justified in deleting the addition made arbitrarily by appreciating the correct facts and past records.*
- 2- That in any view of the matter the Id. CIT(A) was perfectly justified in deleting the addition so made on count of Suppressed Production by honouring the order and decision of the Higher Authority.*
- 3- That in any view of the matter since the issue of Suppressed Production has been finally settled and concluded hence there is no justification to make repetitive additions on account of Suppressed Production by ignoring the orders of the Higher Authorities.”*

ITA No.481/Alld/2015

- “1. That on the facts and in the circumstances of the case, Ld. CIT(A) has erred in deleting the addition of Rs. 5,77,89,675/- made by the AO on account of suppressed production.*
- 2. That while deleting the above addition of Rs. 5,77,89,675/-, Ld. CIT(A) has not appreciated the fact that with regard to A.Y. 2005-06 to A.Y.*

2009-10, Ld. CIT(A) had only reduced the amount of similar additions made by the AO. Thus Ld. CIT(A) has erred by taking different view on the issue of suppressed production in this year on similar facts.

3. That the order of Ld. CIT(A) deserves to be set aside and the assessment order passed by the A.O. be restored.

4. That the appellant craves to add, modify, revise or amend any one or more of the grounds of the appeal as stated above as and when need for doing so may arise.”

C.O. No.01/Alld/2016

1. That in any view of the matter it is not correct to say that the Commissioner of Income Tax (Appeals), Allahabad has erred in deleting the addition of Rs.5,77,89,675/- made by the assessing officer. The entire action/approach of the Ld. Commissioner of Income Tax (Appeals), Allahabad is correct and justified in deleting the addition.

2. That in any view of the matter in the light of principle of consistency the Ld. Commissioner of Income Tax (Appeals), Allahabad was perfectly justified in deleting the addition in the facts and circumstances of the case.

3. That in any view of the matter the assessee reserves his right to take any further grounds of appeal before hearing of the appeal.

4. That in any view of the matter in the facts and circumstances of the case the departmental appeal is liable to be dismissed.”

2. The facts of the case are that during the assessment year 2011-12, the ld. AO made an addition of Rs.2,75,42,070/- to the income of the assessee on account of alleged suppression of production. Similarly, in the assessment year 2012-13, the ld. AO made an addition of Rs.5,77,89,685/- on this issue. In the assessment for the assessment year 2011-12, the ld. AO observed that the assessee manufactured and sold 705559.20200 (Kgs) of different types of Zarda during the year under consideration. He observed that there was a shortfall of Rs.98,581.176 Kgs (which

was approximately 12% to 13%) between the raw materials consumed and the finished product i.e. Zarda. He accordingly asked the assessee to explain the shortfall. In response, the assessee submitted that there was some residual waste that resulted from the production process. It was further submitted that the process had been accepted by various departments such as the Central Excise Department and the Sales Tax Department and also that the appellate authorities of the Income Tax Department had accepted the claim of wastage in the production process that was filed by the assessee. However, the ld. AO noted that the assessee had not furnished any specific details / explanation and therefore, he estimated a yield of 95% of total production out of the raw material. Accordingly, he estimated the total production at Rs.7,63,933 Kg and accordingly treated the difference of 763933 – 705559.20 i.e. .58,374 Kg, as suppressed production of the assessee. Calculating the average rate per kg (of manufactured Tobacco) from the accounts of the assessee, he worked out the cost of suppressed production at Rs.2,75,42,070/- and added the same to the total income of the assessee in the assessment year 2011-12. Similarly, he worked out a suppression of 1,21,445.15 Kgs in the assessment year 2012-13, and applying the rate per kg (of manufactured tobacco shown in that year) worked out the cost of suppressed production at Rs.5,77,89,675/- and added the same back to the total income of the assessee.

3. Aggrieved with these additions, the assessee filed appeals before the ld. CIT(A)-3, Lucknow. In both years, it was submitted before the ld. CIT(A) that the assessee firm had submitted a detailed explanation of its manufacturing process stage wise along with photographs for the understanding of the ld. AO, but the ld. AO had failed to appreciate the same. It was further submitted that the final product of the assessee i.e. Zarda, was subjected to the Excise Act / Rules and Regulations. The assessee submitted that it had maintained all statutory records, as required under

the Excise Act / Rules made thereunder. These records had been periodically checked and verified by officials of the Central Excise Department. No defect had ever been pointed out regarding maintenance of excise records. It was further submitted, that details of yield during the manufacturing process could not be uniform, on account of the fact that raw materials which are purchased from agricultural or vegetable produce, were sometimes hygroscopic and sometimes volatile. Further consumption of silver leaves and other perfumery items varied on account of various manual processes and the nature of business, which had been explained to the Id. AO. It had been submitted to the Id. AO, that the ratio for consumption of raw materials depended upon the quality used, the quality of tobacco manufactured, levels of business competition and also losses in the process. But all these facts had been ignored, because the Id. AO was determined to make an addition. It was submitted, that right from the inception of the firm, the nature of the manufacturing process were the same and the fact of wastage had been accepted by the Department in the past. It was submitted, that the Id. AO had estimated the yield at 95% instead of yield shown at 85.57%. He had failed to appreciate that in manufacturing of chewing tobacco, there were production losses because it involved dust, wastage, evaporation and other processing losses. It was submitted that the Id. AO had come to a conclusion regarding suppressed production, without any finding of where the suppressed production had gone. There was no finding that the assessee had made sales outside its books of accounts and artificial difference of alleged excess production had been created, without explaining from which source this excess production had come, where this excess stock was kept and how the sales of this excess stock was effected away from the prying eyes of the Central Excise Department. It was also submitted that the Id. AO had accepted the assessee's opening stock, purchases, sales and closing stock of raw tobacco and other materials

including finished goods. It was again reiterated that the entire production/sale was subject to Excise Duty and till date, no case had ever been made out by the Excise Department or Sales Tax Department, that any suppression had been done in the purchase of raw tobacco, or in the production and sale of finished tobacco. It was submitted that the Id. AO had not considered the past records of the assessee. Without prejudice to the above, it was submitted that the Id. AO was taxing the assessee on the value of the production, when the law was settled that income tax was leviable on real income worked out on commercial basis, since production was the final outcome of various materials. Taxing the production value, amounted to also bringing to tax alleged expenditure made by the assessee, in purchase of raw materials. Thus, it was not the profit out of the same which was being subjected to tax but the gross figure, which was not as correct per the principle of accounting and taxation. Furthermore, in a situation where the Excise Department had never alleged that any Excise Duty had been suppressed, the Income Tax Department could not take a view that there had been suppression of production in its books and consequent sale of this excess production , outside of its books. It was submitted that therefore ,there was, no basis for making an addition of Rs.2,75,42,070/- (in the A.Y. 2011-12) or Rs.5,75,89,675/- (in the A.Y. 2012-13). Finally, the assessee posed a few questions by way of argument, in which it asked

- i. whether such a step could be taken without invoking the provisions of section 145(3) of the Act.
- ii. Whether the production and sales could be disbelieved on the whims of the surmises of the Id. AO when the assessee was in the business of excisable goods and clearance of finished goods from the factory, godowns took place under the supervision and control of Central Excise Department.

iii. Whether the wastage in the production process could be disbelieved on the basis of hypothetical grounds, surmises and excess production be created on the basis of calculations that did not consider the driage, evaporation and process loss?

iv. Whether the entire value of the alleged surplus production could be considered as the income of the assessee.

In view of these questions raised, the assessee prayed that there was no basis for the addition made on account of suppressed production. It accordingly prayed that the same may be deleted.

4. The Id. CIT(A), on consideration of the issue, held that the production and sales of the assessee were under the strict supervision of the Excise department; the appellant was bound to maintain statutory records, as required under the Excise Act and Rules. It was also required to maintain sales tax records and file regular returns in respect of U.P. Sales Tax (VAT). He faulted the process adopted by the Id. AO pointing out, that he had taken the consumption of whole leaf in calculating the yield, whereas the whole leaf is boiled to take out its ark, known as raw kimam and residual waste of the whole leaf was rendered useless and thrown away. The Id. AO had taken into accounts raw materials used in production such as chemicals, perfumes, Silver and Silver varks, masala, but had not taken into consideration the consumption of raw kimam. He had also ignored the actual evaporation / wastage of other materials used in production, whereas the same had been allowed year after year, being a normal feature in this nature of business. He observed that the assessee had maintained regular books of accounts, as per the Excise Act, which had been subjected to routine checks. No discrepancy had been reported by the Id. AO thereon and nothing adverse had been found by the Sales Tax Department. He quoted from the production figures of earlier year viz a viz., the year under

consideration, to show that the production figures of the present year were better than previous years which had been accepted by the Department. He further observed, that there was no finding of any sales outside the books of accounts or any finding of suppressed stock, by either the ld. AO or the Trade Tax Authorities or any finding of suppression of production by the Excise authorities. He observed that the ld. AO had not rejected the books of accounts, which meant that the books of accounts are correct and complete. He, therefore, held that the case of the assessee was squarely covered by the decision of the Hon'ble Allahabad High Court in the case of **CIT vs. Mascot (India) Tools and Forgings (P) Ltd.**, 320 ITR 110 wherein the Hon'ble Court had observed as under:-

"While deleting the addition made by the AO the Tribunal, inter alia, has observed as follows: "It is beyond comprehension that the charge of alleged suppression of sales has been confirmed by the CIT(A) without applying his mind on such elaborate written submission and comprehensive details submitted before him by the assessee. The AO has brought no material or evidence on records to prove the existence of any unaccounted local sales having been made by the assessee. The sales declared by the assessee are of excisable goods. The correctness of declared sales is supported by regular books of account which have duly been audited by the auditors as required by various provisions of the Companies Act and the IT Act. The auditors have given unqualified report. The Excise authorities have not doubted the correctness of the declared sales. The sales recorded in the books of account are supported by various Excise registers, which are periodically checked and verified by the Excise authorities. It is beyond comprehension that any addition on account of alleged suppressed sales can be made without any valid basis whatsoever on record. We are, therefore, of the considered opinion that the addition of Rs. 15,99,158 made by the AO and confirmed by the learned CIT(A) on account of alleged suppression of domestic sales is patently wrong. The same is, therefore, deleted." 8. The findings recorded by the Tribunal are based on appreciation of fact and material available on record. We do not find any illegality or infirmity in the order passed by the Tribunal on the aforesaid issue.

5. The Ld CIT(A) also observed that that similar additions on account of suppressed production were also made the case of the assessee for earlier

assessment years and that the Hon'ble ITAT, Allahabad had deleted additions made on account of suppressed production in case of the appellant in ITA Nos. 06 to 11/Alld/2014 for assessment year 2004-2005 to assessment year 2009-2010 dated 15.07.20, observing as under:-

“Therefore, going by same illogical calculations based on figures provided in the audit report, the AO should not have made huge additions against the assessee, which is also not approved by the CIT(A) Therefore, on mere comparison of cases without bringing adequate material on record, the Id. CIT(A) should not have sustained part addition without considering the principle of law that the entire sales would not be profit of the assessee. From every possible angle, we are of the view that the authorities below were not justified in making or confirming any addition against the assessee. We accordingly, set aside the orders of the authorities below and delete the entire addition in assessment year 2004-05. In the result, the appeal of the assessee is allowed and the departmental appeal is dismissed this issue.

15.1 This issue is arising in the remaining appeals for the assessment year 2005-06 to 2009-10 under appeals before us in which the assessee has declared percentage of yield at 84.69%,84.04%,85.08%,83.80% and 83 80%. The AO took the percentage of yield at 105.66% and the Id.CIT(A) restricted the addition by taking the percentage of yield at 90% as has been taken in assessment year 2004-05. The assessee as well as the revenue are in cross appeals on the identical issue. By following the order for the assessment year 2004-05 above, we set aside the orders of the authorities below and delete the entire additions. In the result, all the remaining appeals of the assessee are allowed and the departmental appeals are dismissed on this issue.”

6. In view of these facts, the Id. CIT(A) held that the addition made by the Id. AO on account of suppressed production without finding any discrepancy in the books of accounts or of sales outside the books of accounts was fit to be deleted. Accordingly, he deleted the additions of Rs.2,75,42,070/- made on this account in the A.Y. 2011-12 and the addition of Rs.5,77,89,675/- made on this account in the assessment year 2012-13.

7. The Revenue is aggrieved at this decision and has accordingly come before us in appeal. Arguing the matter, Shri. Neel Jain, CIT DR (hereinafter referred to as the 'ld. CIT DR') submitted that the ld. CIT(A) had failed to consider that the said orders of the ITAT, had since been overruled by the Hon'ble Allahabad High Court, vide its common order dated 6.09.2016 in ITA Nos. 268, 269 and 270 of 20014 and ITA Nos. 15, 16 and 17 of 2013. Shri. Neel Jain, ld. CIT DR invited our attention to paragraph number 13 of the order of the Hon'ble High Court which read, *"13. The judgment and order of Tribunal to this extent is hereby set aside and the additions made by the assessing authority which were deleted by the Tribunal, by taking otherwise view with respect to scope of section 153A are restored."* He submitted that in view of these orders of the Hon'ble Allahabad High Court, since all the additions deleted by the ITAT had been restored, the order of the ITAT was not a correct precedent to follow and the ld. CIT(A) had erred in allowing the relief to the assessee by following such order. He further submitted that the assessee had not been able to produce any details regarding how the raw material was consumed and therefore, the ld. AO was justified in estimating the production loss at 95% instead of the 85.57% that was displayed by the assessee.

8. On the other hand, Shri. Praveen Godbole, C.A. (hereinafter referred to as the 'ld. AR') arguing the case on behalf of the assessee, submitted that the order of the Hon'ble Allahabad High Court had been misinterpreted and, in fact, the Hon'ble Allahabad High Court had declined to admit the issue of suppressed production, that had been raised by the Department in its application, as a question of law for adjudication. Accordingly, no relief had been granted to the Department on this account by the Hon'ble Allahabad High Court and the orders of the Hon'ble Allahabad High Court in ITA Nos. 358 & 374 to 378/Alld/2013 and ITA Nos. 6 to 11/Alld/2014 relating to A.Y. 2004-05 to 2009-10, still held the field. Hence, the ld.

CIT(A) was fully justified in following the legal precedent and it was incorrect to say that there was any mistake in his order on this account. It was further submitted that the entire process had been explained to the ld. AO and it had been pointed out that there would be divergences on account of variations in the quality of the raw material purchased and the quality of the tobacco produced. Therefore, a strait jacket formula could not be applied to estimate the wastage during production. It was further argued, that the assessee was dealing in an excisable commodity and its entire production process was subject to examination of the excise authorities to the extent that finished goods only left the factory godowns after clearance by excise authorities. It was submitted that the Excise had never pointed out any suppression of sales (and thereby evasion of Excise Duty) and therefore, the ld. AO could not assume suppression on the basis of surmises and conjectures. The ld. AR submitted that the ld. AO had not found any excess stock, had not found any evidence of sales outside the books of accounts and had not even been able to point out from which raw material this excess production was generated. He, therefore, submitted that his case was squarely covered by the decision of the Hon'ble Allahabad High Court in the case of *CIT vs. Mascot (India) Tools and Forgings (P) Ltd.* (supra) and considering the above, the ITAT had granted relief to the assessee in the assessment years 2004-05 to 2009-10, after considering the entire process and the submissions of the assessee. Therefore, the ld. AR argued that the ld. CIT(A) was correct in his decision and the deletions made by him, deserved to be upheld.

9. We have duly considered the facts and circumstances of the case. At the very outset, we must address the issue raised by ld. CIT DR regarding whether the orders of the Hon'ble ITAT in ITA Nos. 358 and 374 to 378/Alld/2014 and ITA Nos. 6 to 11/Alld/2014, relating to assessment years 2004-05 to 2009-2010, had been overruled by the orders of the Hon'ble Allahabad High Court, vide its order dated

6.09.2016 on the issue of suppressed production. It is observed that against the orders of the Hon'ble ITAT, the Department filed appeals before the Hon'ble Allahabad High Court. It is observed from the various petitions filed by the Department, that the issue of suppressed production was among the grounds that were raised by the Department before the Hon'ble Allahabad High Court. However, it is seen from the order dated 6.09.2016, that only two questions of law were admitted by the Hon'ble Allahabad High Court for adjudication as under;-

"(1) Whether the Hon'ble Income Tax Appellate Tribunal had erred in law and on facts in setting aside the assessment completed under Section 153A of the Income Tax Act, 1961 and not following the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. Raj Kumar in ITA No. 56 of 2011 wherein it is held that the Assessing Officer has the power to re-assess the returns of the assessee not only for the undisclosed income, which was found during the search operation but also with regard to the material that was available at the time of original assessment?"

"(2) Whether in view of the law laid down by this Hon'ble Court in the case of CIT Vs. Raj Kumar (supra), the Assessing Officer would be competent to re-open the assessment proceedings already made and determine the total income of the assessee; the Assessing Officer, while exercising the power under Section 153A of the Act, would make assessment and compute the total income of the assessee including the undisclosed income, notwithstanding the assessee had filed the return before the date of search which stood processed under Section 143(1)(a) of the Act?"

10. It is also seen that in paragraph 9 of its' order, the Hon'ble Allahabad High Court has clarified that, *"questions raised before us are confined to the scope of section 153A as to whether Id. AO has power to re-assess return of assessee not only for the undisclosed income found during search operation but also in regard to assessment order already finalized or stood processed under section 143(1) of the Act, 1961."*

Perusal of paragraph 13 shows that, in answering this question, the Hon'ble High

Court, by relying upon its earlier order in **CIT vs. Raj Kumar Arora**, (2014) 367 ITR 517 (Alld) allowed the appeal of the Revenue and set aside the judgment of the order of the Tribunal to this extent. It observed that “*the additions made by the assessing authority which were deleted by the Tribunal by taking otherwise view with respect to the scope of section 153A are restored*”. Thus, it is quite clear from a plain reading of the order of the Hon’ble Allahabad High Court, that the Hon’ble Allahabad High Court did not agree with the ITAT, that additions in the course of search assessment could only be made on the basis of incriminating materials unearthed during search and it restored the additions that were deleted by the Hon’ble ITAT, on this account. However, since the scope of the appeal was limited to the issue of the scope of section 153A, which was clarified by the Hon’ble High Court in para 9 of its order, it would not be correct to assume that additions made by assessing authority, on a ground other than the scope of an assessment under section 153A, were also restored by the Hon’ble Allahabad High Court. As the Hon’ble High Court has quite clearly stated, it was only setting aside the judgment and order of the Tribunal **to that extent**. Perusal of the orders of the ITA in ITA Nos. 358 & 374 to 378/Alld/2014 and ITA Nos. 6 to 11/Alld/2014, shows that while the ITAT has deleted all the additions made by the assessing authority on account of its interpretation of the scope of section 153A in paragraph nos.7.6 and 7.7 of their order, it had subsequently in para 8 of the order, also dealt with the addition on account of suppressed production on its merits and, after examining the issue in detail, it has deleted the said addition vide paragraph nos. 15 and 15.1 of its order, by relying on the judgment of the Hon’ble Allahabad High Court in the case of **CIT vs. Mascot (India) Tools and Forgings (P) Ltd.** (supra) and various other cases. Thus, we are unable to accept the contention of the Id. CIT DR that the said order of the ITAT has been overruled by the Hon’ble Allahabad High Court and therefore, the Id.

CIT(A) was not correct in following the judicial precedent set by the ITAT, in the assessee's own case for the previous assessment years.

11. We further observe that the ld. AO has not brought any material on record to show sale outside the books of accounts, or shown that the excise authorities had similarly noticed suppression of production on account of manipulation of wastage, or that wastage percentage in respect of any raw material was less than what was claimed by the assessee. We also observe that the ld. AO has not rejected the books under section 145(3) and not questioned the opening stock, purchases, sales or the closing stock of the assessee. In the circumstances, we are in complete agreement with the ld. CIT(A) and find no infirmity in his orders whatsoever. Accordingly, the decisions of the ld. CIT(A) to delete the additions made on account of alleged suppressed sale of Rs. 2,75,42,070/- in the assessment year 2011-12 and Rs.5,77,89,675/- in the assessment year 2012-13 are upheld. Consequently both the appeals of the Department are accordingly dismissed while the Cross Objections of the assessee, supporting the action of the ld. CIT(A) are accordingly allowed.

16. In the result, Department's appeal in ITA No.90/Alld/2016 and ITA No.481/Alld/2015 are dismissed while the assessee's Cross Objection Nos.1 and 17/Alld/2016 are allowed.

Orders pronounced on 22.11.2024 at Allahabad U.P.

Sd/-

**[SUDHANSHU SRIVASTAVA]
JUDICIAL MEMBER**

DATED: 22/11/2024

Sh

Sd/-

**[NIKHIL CHOUDHARY]
ACCOUNTANT MEMBER**

ITA No.481/Alld/2015
(A/w C.O. No.01/Alld/2016)
&
ITA No.90/Alld/2016
(A/w C.O. No.17/Alld/2016)

Copy forwarded to:

1. Appellant –
2. Respondent –
3. CIT DR , ITAT,
4. CIT,
5. The CIT(A)

By order
Sr. P.S.