

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E': NEW DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER, AND
SHRI O.P. KANT, ACCOUNTANT MEMBER,

ITA No. 2606/Del /2012
Assessment Year: 2009-10

Nature Bio Foods Ltd
Unit No. 134, 1st Floor
Rectangle 1, Saket Dist Centre
New Delhi

Vs.

The A.C.I.T
Central Circle - 19
New Delhi

PAN : AACCN 2624 G

[Appellant]

[Respondent]

Date of Hearing : 01.03.2016
Date of Pronouncement: 27.05.2016

Assessee by : Shri Salil Kapoor, Adv
Shri Ananya Kapoor, Adv
Department by : Shri Rajesh Kumar Bhoot, Sr. DR

ORDER

PER CHANDRA MOHAN GARG, JUDICIAL MEMBER

This appeal filed by the assessee is directed against the order of the CIT(A)-XXXIII, New Delhi dated 29/03/2012 passed in first appeal No. 527/10-11/174 for A.Y 2009-10.

2. The assessee has raised as many as 9 grounds of appeal, out of which, Grounds Nos. 1 and 6 to 9 are general in nature and consequential and require no adjudication at our end. Remaining effective ground Nos 2 to 5 of the assessee read as under:

“2. That CIT(A) has failed to appreciate the fact that the alleged difference in stock is due the fact that stock was not weighed during search and it was only by way of estimate that the list of stock was prepared, hence the addition made on the basis of alleged GP rate by the AO is unjust, illegal and bad in law.

3. Without prejudice to the above ground, the estimated profit rate of 32.08% on the alleged sales outside the books is exorbitantly high and cannot be support by any material on record. In any case it should not be estimated more than the net profit rate.

4. That the CIT(A) has erred in law and on facts in upholding the disallowance the alleged expense of 2,00,000/- paid in cash on different dates in account for purchases made by the appellant from M/s Himanshu Trading Company.

5. That in view of the facts and circumstances of the case the CIT(A) has erred in law and on facts in upholding the addition of Rs. 19,600/- on account of unexplained expenses incurred outside the books of account.”

3. Briefly stated, the facts of the case are that search and seizure operation u/s 132 of the Income tax Act, 1961 [for short, 'the Act'] was carried out in Dawat Group of cases including the house company on 10.02.2009. The assessee company E filed the return of income for A.Y 2009-10 on 30.09.2009 declaring an income of Rs. 1,64,90,076/-. The AO, vide his order u/s 143(3) of the Act dated 30.12.2010 has made addition of Rs. 4,97,369/- on three counts and assessed the income at Rs. 1,69,87,445/- as against the said returned income. Aggrieved, the assessee filed appeal before the ld. CIT(A) but remained empty handed as the first appellate authority upheld the additions made by the AO by passing the impugned order. Now the assessee is aggrieved and has come in second appeal with the main effective grounds as reproduced hereinabove.

Ground Nos. 2 and 3

3. The ld. AR submitted that as per the assessment order, page 1, inventory of stock was physically prepared by the officials of the department but bags were not physically weighed and counted. Thus, stock was found lesser than the stock shown in the books of accounts of the assessee. The ld. AR further pointed out that all the purchases and sales were properly vouched in the books of accounts and no

discrepancies were found therein and even the AO could not bring out any allegation on record dismissing the returned income of the assessee. The ld. AR further pointed out that when the books of accounts and financial results of the assessee have not been rejected, rather they have been accepted by the AO, then the allegation of sale of rice outside the books of accounts cannot be held as sustainable and factually incorrect. The ld. AR further pressed an alternative plea that there was sale of Rs. 17.3 crore which was accepted by the AO and there was net profit of 9% of the turnover if any addition has to be made on the allegation of sale of rice outside the books of accounts, then also no addition can be made by estimating gross profit rate of 32.8% and addition can only be made @ 9% of which was declared by the assessee and accepted by the AO. The ld. AR also submitted a copy of the profit and loss account and drew out attention towards page 3 which supports the fact that the assessee made sales of Rs. 70.83 crores and declared profit before tax of Rs. 1,61,73,040/- which comes to 9% of the turnover.

4. Replying to the above, the ld. DR strongly supporting the action of the AO and the impugned order, drew our attention towards para 2.3 at page 3 of the impugned order and submitted that there was

shortage of stock of 10600 kgs as per physical verification done by the Revenue search party which was valued at Rs. 8,65,866/-. The ld. DR submitted that the assessee has been unable to satisfactorily explain the shortage of stock. Therefore, the AO was quite correct and justified in making addition in this regard and the ld. CIT(A) was also correct in upholding the same. The ld. AR also pointed out that the expenses against gross profit estimated by the AO cannot be allowed as all legitimate expenses were already debited in the profit and loss account. Therefore, estimation @ gross profit was correctly made by the AO which requires no interference.

5. On careful consideration of above rival submissions, at the very outset, from the assessment order as well as the first appellate order, we clearly observe that at the time of search and seizure operations on 10.2.2009, the stock was physically verified by officials of the department in the presence of assessee's employees and staff and the quantity of 10600 kgs of rice was found short which could not be properly explained by the assessee. In this situation, the allegation of the assessee cannot be held as sustainable that the bags were not physically weighted and counted. Therefore, there was shortage of stock and thus the stock was found lesser than the stock shown in the books of account of the assessee at the time of search and seizure

operation. Therefore, we are of the considered opinion that the authorities below were quite justified in concluding that the quantity of rice to the extent of 10600 kgs has to be treated as having been sold outside the books of accounts. At the same time, we are of the view that the AO and the Id. CIT(A) made and upheld the addition @ 32.08% on the average sale price of short stock of Rs. 8,65,866/- by holding that the assessee has already debited all legitimate expenses in the profit and loss account. But we are not in agreement with this approach of the authorities below. When, as per the audited books of account of the assessee which has been accepted by the assessee the net profit earned by the assessee for the year under consideration of 9% of the total turnover, then the addition cannot be made @ 32.08% on the basis of estimated gross profit. On the basis of the foregoing discussion, we uphold the conclusion of the authorities below that there was shortage of stock of rice which was valued at Rs. 8,65,866/- and the authorities below rightly treated the same as sale out of books and this part of conclusion is confirmed.

6. At the same time, we are of the considered opinion that the estimation of profit on the sale of rice out of stock has to be made @ 9% of turnover which was declared by the assessee and accepted by

the department. Therefore, the AO is directed to calculate the net profit accordingly. Finally, the main plea of the assessee is dismissed and alternative plea of the assessee is allowed and the AO is directed to estimate the net profit on the sale of rice outside the books @ 9%. Accordingly, Ground Nos. 2 and 3 of the assessee are partly allowed on alternative plea in the manner as indicated above.

Ground No. 4

7. Apropos Ground No. 4, the ld. Counsel for the assessee submitted that the AO at page 2 of the assessment order wrongly observed that the assessee has failed to advance any explanation regarding cash payment of Rs. 2 lakhs made to M/s Himanshu Trading Co. trading through Shri Aditya Arora Imrest account between 5.3.2009 and 25.3.2009 in ten installments of Rs. 20,000/- each. The ld. AR further drew our attention towards assessee's paper book pages 137 to 140 and submitted that the impugned payments have not been made by the assessee but these were made by Shri Aditya Arora Imprest Account in 10 installments of Rs. 20,000/- each on different dates and there was no payment of above Rs. 20,000/- in a day. Therefore, no addition can be made in this regard treating the same as undisclosed income of the assessee. The ld. AR also drew our attention towards

assessee's paper book page 31 and submitted that Shri Aditya Arora, employee of the assessee, confirmed the fact that he was given the responsibility of looking after the sales and purchase function of the company and M/s Himanshu Trading Co. is supplier of paddy to the assessee company which is procured by them directly from the farmers. The ld. AR further contended that Shri Aditya Arora has categorically stated in the confirmation that occasionally small quantity of paddy from M/s Himanshu Trading Co. from farmers for which farmers insist on cash payment. In these circumstances, he makes cash payments to M/s Himanshu Trading Co. on behalf of the assessee. The ld. AR also drew our attention to para 3.5 at page 7 of the impugned first appellate order and contended that the ld. CIT(A) wrongly observed that there is no evidence to show that these payments were made to M/s Himanshu Trading Co. in amounts less than Rs. 20,000/-. The ld. AR vehemently contended that the ld. CIT(A) was not correct in dismissing the confirmation of Shri Aditya Arora as not a credible document and cannot be relied upon to given any relief to the assessee. In the light of the entries made by the assessee in the ledger account of M/s Himanshu Trading Co. which was regularly kept in the course of business cannot be rejected at the threshold on bald allegations. The ld. AR also pointed out that the

assessee company was doing regular business with M/s Himanshu Trading Co. and there was opening and closing balance in the account of M/s Himanshu Trading Co. Therefore, the transactions with this firm cannot be doubted. The ld. AR pointed out that there were no payments above Rs. 20,000/- in a day and it was the duty of the AO and the ld. CIT(A) to verify the receipts of amount of M/s Himanshu Trading Co. by way of checking the records available with them as per the provisions of the Act, but without making any such exercise, they proceeded to make addition in this regard which is not a proper and justified approach for a quasi-judicial authority.

8. Reply to the above, the ld. DR strongly supported the action of the AO as well as the impugned order of the ld. CIT(A) and contended that there was no evidence to show that the payments actually reached M/s Himanshu Trading Co. Therefore, the addition was rightly made and confirmed by passing impugned order.

9. On careful consideration of the facts and circumstances of the case and rival submissions, we observe from the operative part of the impugned order that after making addition on this issue, the AO mentioned that penalty u/s 271AAA of the Act would attract

accordingly. On the facts, the AO made addition and the Id. CIT(A) upheld, in our humble understanding, the authorities below were intended to invoke the provisions of section 40A(3) of the Act for making the impugned addition but the premise of this addition is that the assessee could not submit any evidence to show that the payments actually reached M/s Himanshu Trading Co. which cannot be illegal basis for making any addition u/s 40A(3) of the Act. From the ledger account of M/s Himanshu Trading Co., and confirmation of the employee of the assessee Shri Aditya Arora, it is amply clear that the employee of the assessee company made payments between 5.3.2009 to 25.3.2009 in 10 equal installments of Rs. 20,000/- each and these payments have been made on various 10 dates and there were no payments of more than Rs. 20,000/- in a day. In this situation, we are inclined to hold that there was no violation of provisions of section 40A(3) of the Act by the assessee and no addition can be made under this provision on the allegation that the assessee could not submit or show evidence to show that the payments reached to M/s Himanshu Trading Co. Therefore, we are of the view that the addition made by the AO and upheld by the Id. CIT(A) is not sustainable on legal footing. Therefore, we demolish the same. Consequently, Ground No. 3 is allowed.

Ground No. 5

10. Apropos Ground No. 5, the ld. AR submitted that the ld. CIT(A) has erred on law and in facts by upholding the addition of Rs. 19,600/- on account of unexplained expenses incurred outside the books of accounts.

11. Per contra, the ld. DR supported the action of the AO and submitted that when kaccha and pucca bills were not found satisfactory, then in respect of kaccha bill the AO was not right treating the same as unexplained expenses outside the books and the same would constitute undisclosed income of Rs. 19,600/-.

12. We have heard the rival submissions and have perused the relevant material on record. On the facts and in the circumstances of the case, we observe that the assessee submitted reply dated 10.12.2010 to the AO during the assessment proceedings but there was no satisfactory reply to this issue of kaccha and pucca bills. In this situation, when the authorities below held that the assessee made sale of rice out of books, then certainly some expenses in this regard has to be made for effecting such sale out of books. In the present case, there was no satisfactory explanation by the assessee during the

assessment proceedings regarding impugned kaccha bill of Rs. 19,600/- which was not entered in the books of assessee, then the AO was right in treating the same as payments made outside the books of account and addition in this regard deserves to be confirmed and thus we uphold the conclusion of the authorities below in this regard. Accordingly, Ground No. 5 of the assessee is dismissed.

13. In the result, the appeal of the assessee is partly allowed as indicated above.

The order is pronounced in the open court on 27.05.2016.

**Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER**

**Sd/-
(C.M. GARG)
JUDICIAL MEMBER**

Dated: 27th May, 2016

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi