

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "C": NEW DELHI  
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No.1491/Del/2014  
(Assessment Year: 2009-10)

Hemla Embroidery Mills Pvt. Ltd., 14/6, Mathura Road, Faridabad PAN:AAACH4302B DCIT,	Vs.	DCIT, Circle-I, Faridabad
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by :	Sh.MP. Rastogi, Adv Sh. P. N. Shastry, CA
Respondent by:	Sh. Shravan Gotra, Sr. DR
Date of Hearing	29/02/2016
Date of pronouncement	05/04/2016

**ORDER**

**PER PRASHANT MAHARISHI, A. M.**

1. This appeal is filed by the assessee against the order dated 10.01.2014 of Id CIT (A), Faridabad for the Assessment Year 2009-10. The following grounds of appeal are taken by the assessee before us:-

"1. That the learned CIT (A) has erred in not deleting the whole of Rs12,05,150/- added by AO on account of reduction in GP by 6% during the period from 24-2-09 to 31-3-09 ignoring the explanations given regarding as well as the fact that fabric sale without and value addition cannot result in the same GP as for garments.

2. *That the learned CIT (A) has erred in confirming the disallowance of depreciation of Rs.3,50,000/- on Rs.70,00,000/- voluntarily admitted as income on account of additions made to building during the year during Survey operations.*
3. *That the learned CIT (A) has erred in confirming the disallowance out of Repairs & renovation of Rs.40,00,000 which was voluntarily admitted as income on account of Repairs & renovation of showroom made during the year during Survey operations.*
4. *That the learned CIT (A) has erred in confirming the non -allowance of Depreciation on account of Repairs & renovation of Rs.40,00,000 on account of Repairs & renovation of showroom made during the year, which were held to be Capital in nature."*

2. The ground No.1 is against the confirmation of addition of Rs.3,01,352/- by the Id CIT(A) on account of reduction in gross profit of 6% during the period from 24.02.2009 to 31.03.2009.
3. Brief fact of the case of this ground is that a survey operation was carried out at the premises of the appellant on 24.02.2009. During the course of survey unaccounted stock of Rs.3,80,50,000/-, unexplained excess cash of Rs.9,50,000/-, unexplained repairs expenditure of Rs.40 lacs and unaccounted building expenses of Rs.70 lacs was found. Based on this the assessee surrendered an amount of Rs. 5 crores during the survey as his accounted income. Assessee credited miscellaneous income in the profit and loss account and debited profit and loss account by Unaccounted stock purchase of Rs 38050000/-, unexplained repairs expenditure of Rs 40 lakhs, debited

building account with Rs and claimed depreciation thereon and also debited cash on hand by RS.9,50,000/-. Therefore on the disclosure of Rs 5 crores assessee has debited the expenses of Rs.3805000 on account of purchases, Rs 40 lakhs on account of Repairs expenditure. Assessee claimed depreciation on the building account capitalized of Rs 70 lakhs. During the course of assessment proceedings the AO asked the assessee to provide details of post survey and pre survey trading results of the assessee. Based on this information the AO noted that there is fall of 6% in the gross profit ratio from 30.29% to 24.29% from pre to post survey period. Before the AO the assessee explained that fall in gross profit is because of recession in the market and therefore there is distress sale of plain cloth. The AO rejected the explanation of the assessee as according to him the distress sale of plain cloth to the holding company is just the book entries and not the actual sale and is done to reduce the effect of surrendered amount during the survey. Therefore he made an addition of 6% of sales of post survey period. The total addition made was Rs.12,05,150/-. The assessee preferred the appeal before the Id CIT(A) who in turn deleted the addition to whole of the turnover to restrict it to sales made to sister concern of Rs.5022546/- and applied ratio 6% confirming the addition of Rs.301352/- . Against this the assessee is in appeal before us.

4. The Id AR reiterated the submission made before the lower authorities and the Id DR supported the orders of the AO and Id CIT(A).

5. We have carefully considered the rival contentions. The Id CIT(A) has dealt with this issue at Para 3.2 to 3.4 of his appellant order as under:-

*3.2 I have considered the facts of the case and gone through the submissions of the appellant. The Issue to be decided relates to the fall in profitability, more precisely, the drop In, GP rate from 30.29% in the pre-survey period to 24.29% during the post survey period. When the post survey transactions are analyzed in detail, it is found that the fall in GP is primarily on account of the fact that the appellant hardly earned any gross profit in the sale of plain cloth made to its sister concern amounting to Rs.50,00,000/- in the post survey period. If this transaction is excluded, the GP rate in the pre and post survey period comes to almost the same, i.e., 30%. When asked to explain the reasons behind fall in profitability, the appellant submitted that the entire transaction with its sister concern should be viewed in totality rather than being confined to the sale of plain cloth amounting to Rs.50 lacs during the post survey period. Elaborating this, the appellant stated that it had taken an interest free loan of Rs. 6 crores from its sister concern on which it had not been paying any interest. If interest @ 12% had been charged by its sister concern from the appellant on this transaction, it would have to pay paid an amount of Rs.12 lacs on account of interest. This amount is much more than what the appellant would have received from its sister concern, even if it had sold plain cloth at such a price to its sister concern which would have yielded a gross profit rate of 30% in that transaction. More precisely, the appellant that sold plain cloth to the tune of Rs.50 lacs to its sister concern in the post survey period. Applying a GP rate of 30% on this transaction, the appellant would have earned Rs.15,00,000/- on this transaction. Thus, while it would have lost Rs.72 lacs on account of interest, the gain would have been only Rs. 15 lacs on account of the fact that the plain cloth was sold at such a price which ensured a GP rate of 30% to the appellant. In the ultimate analysis, the appellant's*

*profitability would have lower by Rs.57,00,0007- had it applied commercial expediency with regard to each 3rd every transaction with its sister concern.*

*Thus the arrangement made by the appellant with its sister concern resulted in a higher gross and hence, net profit for the appellant.*

*3.3. If this reasoning is accepted, the next question which arises is whether there is any difference in profitability (GP Rate) between pre and post survey period in appellant's, transactions with its sister concern. Though the appellant did not sell plain cloth to its sister concern during the pre survey period, a comparison of prices at which the same product was sold to the sister concern and other unrelated parties during the pre survey period will throw some light on whether the preferential treatment to its sister concern was there during pre survey period as well. On a perusal of relevant bills/vouchers for the pre survey period, it was revealed that the price at which a certain variety of cloth was sold to sister concern was 20% to 30% lower than the prices at which the same cloth was sold to un-related parties. Thus, this clearly shows that even in pre survey period there is a 20% to 30% price differential between sister concern and un-related parties. Even after substantiating this point, the appellant has not ruled out a slightly higher price differential in the post survey period between sister concerns and unrelated parties by submitting that 4% higher price differential can be considered on the sale of plain cloth in the post survey period amounting to Rs.2,00,000/-.*

*3.4 Thus, by way of these arguments, backed up statistics/supports, the appellant has been able to substantiate the price differential between pre and post survey period, as regards sale of cloth to its sister concern. However, since the appellant has not been able to explain the entire price differential, and did not rule out the possibility of the price differential being higher in post survey period, I hold that if during the post survey period the appellant had continued getting the same GP from its sister concern as it was getting pre survey period, the gross profit in its transaction with this*

*sister concern in the post survey period should have been 7% instead of 1% shown by the appellant. The difference i.e. 6% is applied to the total sale of plain cloth in the post survey period to the sister concern amounting to Rs.50,22,546/-, which gives an addition of Rs.3,01,352/-. The addition made by the AO is confirmed to this extent. The ground of appeal is thus partly allowed.”*

6. We find no infirmity in the order of Id CIT(A) in confirming the addition to the extent of Rs.3,01,352/- on sale made to sister concern as the assessee could not explain the fall in gross profit on distress sale made by assessee to its sister concern. The plea of safeguarding itself from the clutches of slow down and of wastages is not supported by evidence. Merely disclosure of sales figures and sales tax return does not prove or disprove the gross profit declared by the assessee. The rates charged by the assessee on sale of goods to sister concern at no profit no loss but the sale them at cost is stated the commercial expediency of the assessee. However no commercial expediency was demonstrated before the lower authorizes. Further assessee has debited the whole of the unaccounted purchases to the profit and loss account of Rs 3,80,50,000/- and claimed it as deduction and AO has allowed it for the reasons best known to him. This fact is apparent from the details of purchases furnished by assessee at paper book page no 13. Therefore the main reason for lower gross profit is also the reasons of the debit of unaccounted purchases by the assessee to the profit and loss account. In the result we confirm the order of Id CIT (A) in confirming the addition of Rs.3,01,352/- on account of lower gross profit in post survey period on sale

made to sister concern. Therefore ground No.1 is dismissed.

7. Ground No.2 of the appeal is against the confirmation of disallowance of depreciation of Rs. 350,000/- on Rs.70 lacs voluntary admitted as income on account of addition made to the building account based on statement recorded of the Director of the company where in disclosure of Rs.5 crores as stated above has been made. Out of the above disclosure of Rs. 70 lacs has been disclosed on account of addition to building at 16/4, Mathura Road, Faridabad. On this addition assessee claimed depreciation @5%. However same was disallowed by the 1d AO applying provision of section 69C of the Act stating that any unexplained expenses which are deemed to be the income of the assessee shall not be allowed as deduction under any head of income. On appeal before the 1d CIT(A) he also confirmed the decision of 1d. AO holding that provision of section 69C are clear and relying upon the decision of the Hon. Gujarat High Court in case of Fakir Mohmed Haji Hsasan Vs. CIT (2001) 247 ITR 290 (Gujarat). Against this the assessee is in appeal before us.
8. The 1d AR of the appellant claimed that provision of section 69C have wrongly been applied to the facts of the case and decision of Hon'ble Gujarat High Court is also not applicable for the reasons that that it is a case of survey and assessee has owned income during the course of survey proceedings. Therefore there is no applicability section 69C of the Act. Further the addition on account of unaccounted building shall be on account of section

69B and not section 69C of the act. Against this 1d DR relied on the orders of lower authorities.

9. We have considered the rival contentions. The fact is that during the course of survey the assessee has disclosed Rs.5 crores out of which the addition to the building was stated to be of Rs.70 lacs. The moment the disclosure of Rs.5 crores is accepted then the investment in the building is also required to be accepted. The principle is that the statement of any person should be accepted or rejected in toto. In this statement the assessee has offered income of Rs.5 crore which has been taxed by the AO. Further the application of this income has not been accepted. Because of the reason that provision of section 69B does not contain identical provision as contained in section 69C of the act. For the purposes of allowance of depreciation AO has not stated that any conditions mentioned in section 32 of the Act has not been met with. Neither AO has put any question to the assessee about the ownership of the assets, user of those assets and consequent allowance of depreciation thereon. In absence of this disallowance of depreciation cannot be made. According to us the 1d CIT (A) and AO both erred in applying the provisions of section 69C on the issue of unaccounted investment in construction of building. The addition made is not on account of unexplained expenditure but it is an addition of amount of investment which is not fully disclosed in the books of account. The relevant addition has not been made u/s 69C but u/s 69B of the Act. In view of this the disallowance of depreciation of Rs. 350000 cannot be upheld. In the result we reverse the finding of the 1d CIT(A)

in disallowing the depreciation, hence ground No.2 of the appeal is allowed.

10. Ground No.3 & 4 of the appeal is against the confirmation of disallowance of Rs.40 lacs out of repairs and renovation expenditure which was voluntarily admitted by the assessee pertaining to expenses incurred on showroom during the year. This expenditure was disallowed by the AO holding that the provision of section 69C prohibits that. On appeal the 1d CIT(A) has also confirmed the disallowance on account of repair and renovation upholding the applicability of section 69C and relying on the decision of Hon'ble Gujarat High Court in the case of Fakir Mohmed Haji Hsasan Vs. CIT (supra)
11. Before us the 1d AR submitted the explanation was offered before the 1d CIT(A) which is at Page 12 of his order. He submitted that both the lower authorities have erred in understanding the provision of law and also applying the decision of Hon'ble Gujarat High Court. The 1d DR relied on the orders of lower authorities and submitted that the disclosure has been made by the assessee on account of repair and maintenance explained u/s 69C of the Act and therefore deduction cannot be allowed.
12. We have carefully considered the disclosure made by the assessee. In fact assessee has offered income of Rs. 5 crore by crediting this sum as other income and showed in schedule 12 of the profit and loss account. Simultaneously the assessee has debited Rs. 40 lacs in the profit and loss account under the head repair and maintenance expenditure at schedule 16. According to this assessee has agreed the income to credit of profit and loss account

and simultaneously debited the expenditure to the profit and loss account and thus nullifying the amount of disclosure made by the assessee. Obviously the disclosure made by the assessee is on account of repairs of show room amounting to Rs. 40 lacs. That means the assessee has incurred an expenditure however it did not offer any explanation about the source of such expenditure then same is required to be added under the provision of section 69C of the act. As the amount is covered by provision of section 69C obviously proviso mentioned therein is applicable which prohibits the allowance of any expenditure as deduction under any head of income which has been taxed u/s 69C of the Act. In view of this we confirm the action of the lower authorities in confirming the disallowance of Rs. 40 lacs as unexplained expenditure. In this result ground no. 3 & 4 of the appeal are dismissed.

13. In the result appeal of the assessee is partly allowed.

**Order pronounced in the open court on 05/04/2016.**

**-sd/-**

**(H.S.SIDHU )  
JUDICIAL MEMBER**

**-Sd/-**

**(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER**

Dated:05/04/2016

*A K Keot*

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi