

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA**

[Before Sri N.V. Vasudevan, Judicial Member & Sri Waseem Ahmed, Accountant Member]

**I.T.A. No. 256/Kol/2012
Assessment Year: 2005-06**

M/s. Banarasi Niketan.....Appellant
128/10A, Bidhan Sarani
Kolkata - 700004
[PAN : AAEFB 7589 D]

I.T.O Ward - 41(2), Kolkata.....Respondent
18, Rabindra Sarani, Podder Court
4th Floor
Kolkata - 700001

Appearances by:

Shri Anikesh Banerjee, Advocate, appearing on behalf of the assessee.

Shri Amitava Bhattacharya, Additional CIT, Sr. DR, appearing on behalf of the Revenue.

Date of concluding the hearing : July 24, 2017

Date of pronouncing the order : August 30, 2017

ORDER

Per Waseem Ahmed :-

This appeal by the assessee is directed against the order of the Id. Commissioner of Income Tax (Appeals)-XXXII, Kolkata (hereinafter the 'Id. CIT(A)'), dt. 12/08/2011, passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), for the Assessment Year 2005-06, on the following grounds:-

"1. For that on the facts and circumstances and the law applicable to it, the CIT(Appeals) order dated 12.08.2011 is arbitrary, illegal and void ab-initio.

2. For that on the facts and circumstances of the case and the law applicable to it, the Ld. CIT(Appeals) was not justified in confirming the addition made by the Ld. I.T.O of Rs.5, 11,114/- on account of alleged unexplained investment in stock within the meaning of section 68 of the IT Act 1961 which is erroneous and illegal.

3. For that the Ld. CIT (Appeals) should not have confirmed the AO's erroneous addition of Rs.5,11,114/- to the total income treating and correcting the same as to have been made U/s.69 of the I.T. Act, 1961 by the Ld. A.O.

4. For that without prejudice to the above and not accept in g provisions of section 69 cannot be invoked in respect of unexplained stock-in-trade.

5. For that the observation of the Ld. CIT (Appeals) that the receipt of the "appellant's Goods returned worth Rs.337,228/- which formed part of the stock was not reliable" is not justified, the appellant having produced necessary bills and other evidences of goods returned before the Ld. A.O and copies of the same before the Ld. CIT(Appeals) and that no step was taken for verification of the genuineness of the same.

6. For that on the facts and circumstances, the addition of Rs.5,11,114/- to the total income is not tenable and is liable to be deleted.

7. That the appellant craves leave to reserve to himself the right to add, alter or amend the grounds of appeal at or before the time of hearing.

2. The only effective issue raised by the assessee in all the grounds of appeal is that the Id. CIT(A) erred in confirming the order of the Assessing Officer by sustaining the disallowance of Rs.5,11,114/-, on account of unexplained investment in stock.

3. Briefly stated facts are that the assessee is a partnership firm and engaged in the business of cloth merchandising. A survey operation was conducted u/s 133A of the Act, dated 12th October, 2004, at the premises of the assessee. During the course of survey operation, the physical stock available at the business premises of the assessee was verified and its value was determined at Rs. 48,67,936/-. The possession of the stock was duly admitted by Shri Ashok Kumar Saha, the father of the partner of Shri Sandeep Saha, in the statement furnished at the time of survey. However, the assessee revealed its closing stock as per its books of account for Rs.

18,58,635/-only. The closing stock as per the books of account was determined on the basis of trading account which was prepared as on 12thOctober 2004. As the assessee was not maintaining the stock register, therefore, a trading account as on the date of survey was prepared. Thus, a difference in stock between books of account and physical verification was computed at Rs.30,09,301/- only.

4. Subsequently, the assessee submitted the bills of purchases amounting to Rs. 24,98,187/-, which were made by the assessee prior to the date of survey. The assessee claimed to have made these purchases from 54 parties which were not recorded in the books of accounts. The necessary details of the purchases were duly submitted before the assessing officer at the time of assessment. Accordingly the assessing officer reduced the amount of purchases from the amount of difference as discussed above, however, still there was a discrepancy in stocks for Rs. 5,11,114/- [(Rs.30,09,301/-) – (- Rs.24,98,187/-)].

Besides the above, the assessee further submitted that the goods were received from certain parties prior to the date of survey but these goods were returned after the date of survey. The details of such goods are given below:-

Sl. No.	Name and address of the parties	Nature of documents	Amount	Date on which goods were returned
1	Shibu Chakraborty Madirpara, Birati, Kol-51	Cash Memo No. Nil Dated 7/10/04	Rs.56,250/-	14/10/2004
2	Sajahan Ali V.P. Hallyan, P.S. Bagnan	Bill No. 8 Dated 7/10/04	Rs.67,250/-	15/10/2004
3	Ashim Basak Agameswari Para, Nabadwip	Bill No. Nil dated 06/10/04	Rs.52,288/-	14/10/2004
4	Hadu Shaikh Madhya Har Lane, P.S. Bagnan	Bill No. Nil dated 06/10/2004	Rs.84,000/-	14/10/2004

5	Ram Ujjal Bhattacharya 11/A, B.P. Lane, Kolkata-3	C.Memo No. Nil dated 30/09/04	Rs.77,500/-	14/10/2004
---	------------------------------------------------------	-------------------------------------	-------------	------------

4.1. However, the assessing officer disregarded the contention of the assessee by observing that the story with regard to the goods returned is an afterthought. Moreover the details of goods returned have been furnished after a gap of 37 months. Accordingly, the assessing officer disbelieved the claim of the assessee for the purchases return and accordingly a sum of Rs. 5,11,114/-, was added to the total income of the assessee as unexplained investment, under section 68 of the Act.

5. Aggrieved, the assessee preferred an appeal before the Id. CIT(A). The assessee before the Id. CIT (A) made the submissions as detailed under:-

"1. The gross profit was taken by the revenue at the rate of 13% to determine the closing stock as per books of account as on the date of survey. The revenue has taken a wrong rate of gross profit. The actual rate of GP comes at the rate of 13.73% or say 14% of the total turnover. Accordingly, the assessee worked out its closing stock as detailed under:-

Applying this margin to the Trading Account figures taken by the Department, the Closing Stock as on the date of survey, is now calculated as hereunder –

Total sales from 01/04/2003 to 12/10/2004..... (Rs.) 99,05,564/-
Less: Gross profit as per modified percentage margin(Rs.) 14,00,000/-
Cost of Goods sold.....(Rs.) 85,05,564/-
Opening Stock as on 01/04/2003.....(Rs.) 21,58,262/-
Total Purchases from 01/04/03 to 12/10/04.....(Rs.)83,05,937/-
Total Stock.....(Rs.) 1,04,64,199/-
Less: Cost of Goods Sold.....(Rs.) 85,05,564/-
Closing Stock arrived at on approximation basis..... (Rs.) 19,58,635/-
Taking the above figure of Closing Stock, and including the subsequent figures for purchase of goods as produced before the Department and the Id. I.T.O. from time to time, the total Stock valuation as on the date of survey is worked out as hereunder:
Closing Stock as per calculations as above..... (Rs.) 19,58,635/-

Further purchase Bills produced on 24/10/2004(Rs.) 24,98, 187/-
 Purchase Bills for goods returned subsequently(Rs.) 3, 37, 288/-
 Total Stock at cost as on the date of survey.....(Rs.) 47,94,110/-
 Add: discount of 30% being the markup over (Rs.) 14,38,233/-
 Total Stock Valued at Sale Price.....(Rs.) 62,32,343/-

The difference in the sale price of the stock is taken by the Department and as arrived at by the assessee firm, of an amount of Rs. 62,113/-, on the higher side, being around 1.01% in percentage terms, being attributed to approximation is in the markup margin.

(iii) The Ld. ITO has made an addition of Rs.5,11,114/- as unexplained investment in stock, on the basis of the following method of valuation-

Stock of Ground Floor, valued at sale price(Rs) 18,19,353/-
 Less : Margin of 25% over cost (Rs) 3,63,870/-
 Cost price (A) (Rs) 14,55,483/-

Stock of mezzanine floor, valued at sale price (Rs) 43,50,877/-
 Less: Margin of 27.5% over cost (Rs) 9,38,424/-
 Cost price (B) Rs.34,12,459

Total stock at cost price on date of survey (A) + (B)..Rs.48,67,936/-

Less: Closing stock as computed on the basis
 Trading account prepared on the date
 Of survey (Rs)18,58,635/-

Less: Purchase Bills produced at the time of
 Deposition of Sandeep Saha, partner
 On 24/10/2004 (Rs) 24,98,187/-
 Unexplained investment in stock (Rs) 5,11,114/-

In the above addition, the Ld. ITO has chosen to ignore the amount relating to goods returned of Rs.3,37,288/-, and has also adduced the valuation of closing stock on the date of survey amounting to Rs.48,67,936/-, on the basis of an ad hoc margin of mark up assumed arbitrarily.

The assessing officer was supplied with all the details of the parties to whom the goods were returned. The assessing officer was empowered under the provisions of law for making the necessary enquiry before disregarding the contention of the assessee. There is no provision under the law to make new submissions at the time of assessment. The assessee has made the submission before the completion of assessment which was supposed to be accepted by the assessing officer.

5.1 The assessee also submitted that the provisions of section 68 of the, are not applicable to the instant case as there is no cash credit entry found in the books of account. However, the Id. CIT(A) disregarded the contention of the assessing officer by observing as under: –

“ As regards the mention of section 68 by the A.O. while making the impugned addition I agree with the A.R. that the said addition does not fall within the ambit of section 68. The A.O. has made the addition of Rs. 5,11,114/- on account of unexplained investment in the stock. Such an addition will fall within the ambit of section 69 and not of section 68 of the Act. In substance, the A.O. has made the addition on account of unexplained investment. Mere wrong mention of section will not vitiate the otherwise valid addition. As will be discussed in subsequent paras, the addition of Rs. 5,11,114/- is found to have been validly made by the A.O., therefore, the addition made by the A.O. is stated to have been made by invoking section 69 of the Act and not section 68.

As regards the merit of the addition, the A.R.'s contention is that the A.O. had worked out the value of the closing stock at Rs. 18,58,635/- as on the date of survey by applying profit margin of 13% whereas, as per the assessee, the gross profit margin should have been taken as 14%, applying which rate the value of closing stock as on the date of survey would be Rs. 19,58,635/-. In support of his contention that A.R. drew a trading account of the assessee for the period 01.04.2003 to 31.03.2005, i.e., for a period of 24 months. As per such trading account also the gross profit margin comes to 13.87%.

The A.R. has further contended that the assessee had also claimed at the time of assessment proceedings to have received certain goods worth Rs.3,37,288/- before the date of survey from different persons, which had been returned to the concerned parties after the date of survey and this claim of the assessee was not considered by the A.O. According to the A.R. this the gross profit rate of 14% is applied in the case and allowance of goods worth of Rs.3,37,288/-received by the assessee is allowed, then there would be no excess stock as on the date of survey, rather there would be a shortfall of Rs. 62,113/-on that account.

The contention of the A.R. regarding application of gross profit rate of 14% instead of 13% as applied by the AO is found not acceptable on the facts of the case. From the perusal of the audited

trading and profit and loss account filed by the assessee along with its return of income for the assessment year under appeal it is observed that the gross profit declared therein is Rs. 9,40,281/- on a total turnover of Rs. 73,36,530/-. The gross profit rate on which the basis of such trading account comes to 12.81%. Therefore, the A.O. had rightly applied the gross profit rate of 13% while computing the value of the assessee's stock on the date of survey and the A.R.'s claim of applying the gross profit rate of 14% is found to be incorrect on the facts of the case.

As regards the A.R.'s reliance upon the assessee's claim of receipt of goods worth Rs.3,37,288/-, it is observed from the assessment order that such claim was raised before the A.O. for the first time on 28/11/2007, that is more than 37 months from the date of survey and that too nearly at the fag-end of the time when the assessment proceedings were getting barred by limitation. I agree with the contention of the A.R. that there is nothing in law to prevent the production of evidence even at a later date during the assessment proceedings but the evidence shall be cogent and reliable.

The A.O. has recorded in the assessment order that the assessee had produced only photocopies of cash memos/bills regarding such goods but no transport bills/receipts were submitted to support its claim that those goods had been returned to the concerned parties, after the date of survey. He has also noted that the partner of the assessee-firm did not raise the claim of having received goods worth Rs.3,37,288/- even in his subsequent statement recorded after the date of survey when the claim of additional purchases worth Rs.24,98,187/- was raised stating that bills relating to those purchases had remained to be produced at the time of survey nor during the assessment proceedings till the time when the assessment proceedings were being completed. Therefore, the A.O. did not accept the assessee's claim of goods worth Rs.3,37,288/- to be part of stock as on the date of survey.

It is observed that the assessee had not produced any confirmations from the parties from whom he had claimed to have received goods worth Rs.3,37,288/-. Even during the appellate proceedings no evidence confirming that such goods were actually received by the assessee before the date of survey and that the same had been returned after the date of survey, had been filed. No bills/vouchers relating to such goods nor any other evidence indicating the receipt of such goods by the assessee were found by

the department during the survey. Those goods, neither in the form of purchases nor in any other manner were found recorded in the assessee's books of account at time of survey. Therefore, the assessee's claim that it had received goods worth Rs.3,37,288/- before the date of survey and that the same were part of physical stock inventorized at the time of survey is found to be non-reliable, consequently, not tenable.

In the light of the above discussion, the discrepancy of Rs.5,11,114/- on the date of survey in the actual physical stock and the stock as per assessee's books of account computed by the A.O. is found to be correct. Therefore, the addition of Rs.4,11,114/- made by the A.O. is confirmed."

Being aggrieved by the order of the Id. CIT(A), the assessee is in second appeal before us.

6. The Id. AR, before us submitted that the difference between the valuation of closing stock as on the date of survey is less than 10%, which is reasonable enough in the business of the assessee. The valuation of closing stock is always a debatable issue in the trading business. In the instant case, the assessee did not maintain stock register but all the purchases and sales are duly recorded in the books of account. In any case, the Department cannot allege that any purchase and sales has been made outside the books of account.

The Id. AR further submitted that the rate of gross profit determined by the Revenue @ of 13% is incorrect. The actual rate of profit is approximately 14% of the turnover. Accordingly, the difference of closing stock will reduce by Rs. 1 lakh/-. The goods were returned after the date of survey worth of Rs. 3,37,288/-, which has not been considered by the AO. In spite of this fact, all the necessary details with regard to the parties were available before the AO.

On the other hand, the Id. DR submitted that post survey, various statements were recorded by the Revenue but in none of the case, the assessee has mentioned about the goods returned subsequent to the date of survey. The actual amount of GP is 12.81%, therefore, the argument of the Id. AR that the actual GP rate is 14% is not based on any material. The Id. DR vehemently supported the orders of the authorities below.

7. We have heard the rival contentions of both the parties and perused the material available on record. The issue in the instant case revolves with regard to the determination of closing stock as on the date of survey. The revenue has determined the closing stock which is higher than the value declared by the assessee in its books of accounts by Rs. 511,114/-, therefore, the excess value of closing stock is treated as unexplained investment of the assessee. The view taken by the AO was subsequently confirmed by the Id. CIT (A).

From the foregoing discussion, we find that that the assessee has not maintained any stock register, therefore, the difference in the closing stock was arrived by applying the GP ratio as well as through physical verification. In the absences of stock register, the revenue had no option except to resort to determine the closing stock after applying the GP ratio. In the instant case, we find that the Id. CIT(A) has given the finding with regard to the GP ratio which comes to 12.81%, therefore, in our considered view, the closing stock, as determined by the AO at the rate of 13%, is correct and reasonable.

7.1 The plea taken by the assessee that the goods worth of Rs. 3,37,288/- , was received prior to the date of survey but in this regard, we find that no such entry was recorded in the books of accounts. Had this been a genuine

purchase, in our considered opinion, it must have entered in the accounting books of the assessee. Therefore, we are of the view that the claim of the assessee that the goods were purchased prior to the date of survey and these were subsequently returned back to these parties due to low quality material does not sound good. In view of the above discussion, we do not find any infirmity in the order of the lower authorities, hence this ground of appeal of the assessee is dismissed.

8. In the result, the appeal of the assessee stands dismissed.

Order pronounced in the open court 30/08/2017

Sd/-
[N.V. Vasudevan]
 Judicial Member

Sd/-
[Waseem Ahmed]
 Accountant Member

Dated :. 30.08.2017

{SC SPS}

Copy of the order forwarded to:

**1.M/s. Banarasi Niketan
 128/10A, Bidhan Sarani
 Kolkata - 700004**

**2.I.T.O Ward – 41(2), Kolkata
 18, Rabindra Sarani, Podder Court
 4th Floor
 Kolkata - 700001**

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

/True Copy/

By order

Senior Private Secretary
 Head of Office/ D.D.O. ITAT, Kolkata Benches