

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

**BEFORE SH. BHAVNESH SAINI, JUDICIAL MEMBER  
AND  
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No. 3266/Del/2012  
Assessment Year: 2004-05

Income Tax Officer, Ward - 13(1), Room No. 219, C.R. Building, New Delhi	<b>Vs.</b>	M/s. Nathu Sweets Pvt. Ltd., 2-Sunder Nagar Market, New Delhi
<b>PAN : AAACN9419R</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

**And**

**C.O. No. 307/Del/2012**  
[In ITA No. 3266/Del/2012]  
Assessment Year: 2004-05

M/s. Nathu Sweets Pvt. Ltd., 2-Sunder Nagar Market, New Delhi	<b>Vs.</b>	Income Tax Officer, Ward - 13(1), Room No. 219, C.R. Building, New Delhi
<b>PAN : AAACN9419R</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Department by	Ms. Sweta Nakra Datta, Sr.DR
Assessee by	S/sh. K. Sampath & Raj Kumar, Advocates

Date of hearing	28.08.2017
Date of pronouncement	13.10.2017

**ORDER**

**PER O.P. KANT, A.M.:**

Both, the appeals by the Revenue and the cross objections of the assessee, are directed against order dated 24/01/2012 of the

Commissioner of Income-tax (Appeals)-XVI, New Delhi [in short ~~the~~ CIT-(A)] for assessment year 2004-05. Both the appeals and cross objection being connected to the same assessment year, were heard together and disposed off by way of this consolidated order for convenience. The grounds of appeal raised by the Revenue are as under:

*“1. Whether on the facts & in the circumstances of the case, the Ld. CIT(A) has erred in ignoring the facts and circumstances of the case and merely followed the line of consistency and simply relied on the comparable cases cited by the assessee in which there was no survey operation to substantiate the wrong done by the assessee and their G.P. etc. were on the basis of their regular books of account.*

*2 Whether on the facts & in the circumstances of the case, the Ld. CIT(A) has erred in ignoring the incriminating evidences gathered against the assessee during the survey operation and which authenticity has not been questioned by the assessee either during the assessment proceedings or appellate proceedings.*

*3. Whether on the facts & in the circumstances of the case, the Ld. CIT(A) has erred in appreciating the fact that the assessee itself has accepted the total sales suppression of sales of Rs.44.64.425/- from 1.4.2003 to 4.9.2003 and agreed to pay the tax in three installments.*

*4. Whether on the facts and circumstances of the case, the Ld. CIT(A) erred in ignoring the observation of the ITAT and defeated the very purpose of the restoring the matter back to the A.O. while holding again that the GP rate for the profit should be taken as 22% despite the fact that the A.O. worked out the enhancement of sales on the basis of the evidence gathered and applying very scientific method of ratio of raw material consumption to sales.*

*5. The appellant craves to be allowed to add any fresh grounds of appeal and/or delete or amend any of the grounds of appeal.*

2. The ground raised by the assessee in the cross objection is as under:

*“That on the facts and in the circumstances of the case and in law the learned CIT(Appeals) erred in sustaining the rejecting of the books of accounts and the additions to the profits without any cause. The same being superfluous and unnecessary must be quashed.+*

3. Briefly stated facts of the case are that the assessee is engaged in the business of manufacturing and sale of ‘sweets’ and ~~namkeens~~ and retail trading of various confectionery items. A survey operations under section 133A of the Income Tax Act, 1961 (in short ~~the Act~~) was conducted at the shop of the assessee located at Sunder Nagar market, New Delhi on 04/09/2003. During the survey operation, a discrepancy in the sales figure for the month of August, 2003 was found by the survey team in the computer system installed at the first floor of the shop and the computer system installed on the ground floor of the shop. The sale depicted in the computer system installed at the shop was of Rs.26,02,765/-, i.e., primary records, whereas the sales recorded in the computer system at first floor (i.e. account section) was of Rs.16,52,854/- resulting into a difference of Rs.9,67,911/-. During survey operation, Sh. Anand Gupta, i.e., the director of the company was confronted with the above discrepancy. He expressed his inability to explain the discrepancy. In the statement recorded, he accepted the quantum of sales suppressed of Rs.44,64,425/- from beginning of the financial year concerned i.e. 01/04/2003 till the date of survey i.e. 04/09/2003 worked out by the survey team on *pro rata* basis and agreed to pay taxes of Rs.16,01,612/-thereon in three instalments. Subsequently, on 19/09/2003, Sh Anand Gupta retracted his statement partly by stating that suppression of sales found during the course of survey was confined only to the month of August, 2003 and same should not be extended to the earlier period. He also stated that on the profit margin on the

suppressed sales should be brought to tax in the hands of the assessee company and not the entire sale proceeds remaining unaccounted for.

3.1 Subsequently, the assessee filed return of income for the year under consideration on 30/09/2004, declaring total income of Rs.6,89,600/-. The case was selected for scrutiny. In scrutiny proceedings, the Assessing Officer observed that in the return of income filed, the monthly sales for the month of August, 2003 was shown by the assessee at a figure of Rs.16,52,854/- and thus, the admitted sale suppression detected during the course of survey for the month of August, 2003 and for the period from April, 2003 to June, 2003 remain to be disclosed. The Assessing Officer noticed from the submission made on behalf of the assessee that all the expenses incurred by the assessee during the course of business including raw material etc. had already been claimed and nothing had remained unrecorded in the regular books of accounts. According to the Assessing Officer, the consumption of raw material is found recorded in the books of assessee for the month of August, 2003 and the actual sales made by the assessee in the said month as found during the course of survey in the computer at ground floor, i.e., primary records, thus represented correct figures and taking the said figures amounting to Rs.11,24,396/- and Rs.26,20,765/- respectively, he worked out the ratio of material consumption to sales at 42.9%. Applying the said ratio to the total value of raw material ( i.e. Rs.1,62,74,157/-) consumed by the assessee company during the year under consideration/-, the total sales for the year under consideration of the assessee were worked out by him at Rs.3,79,35,098/- as against the total sales disclosed by the assessee in its books of accounts of Rs.2,33,09,880/-. In the course of assessment proceeding, after considering the submission of the assessee, he took the ratio of raw

material consumption to sales at 50% and worked out the sales of the company at Rs.3,25,48,2014 as against the sales of Rs.2,33,09,880/- as recorded in the books of accounts of the assessee and the difference of Rs.92,38,434/-was added to the total income of the assessee on account of suppression of sales.

3.2 On further appeal, the Ld. CIT-(A) did not accept the basis of computing sale suppression by the Assessing Officer on the basis of ratio of raw material consumed to the sales of the month of August, 2003. According to the Ld. CIT-(A), the suppressed sale for the month of August, 2003 and the corresponding consumption of raw material was recorded by the assessee in the month of September 2003. The learned CIT-(A) rejected the entire working made by the Assessing Officer to arrive at the suppressed sales and proceeded to make his own working. On the basis of comparable cases cited by the assessee, he found the gross profit rate of 22% in the line of the business of the assessee as fair and reasonable. Accordingly, he applied the said rate to the total sales declared by the assessee and worked out total income at Rs.11,93,305/- as against Rs.6,89,600/- declared by the assessee in the return of income.

3.3 On further appeal by the Revenue and cross objection by the assessee, the Tribunal in ITA No. 2981/Del/2007 and C.O. No. 141/Del/2008, rejected the working of Ld. CIT-(A) and restored the matter to the file of Assessing Officer for deciding afresh. The relevant finding of the Tribunal is reproduced as under:

*“9. We have considered the rival submissions and also perused the relevant material on record. It is observed that the factum of suppressed sales as found during the course of survey was accepted even by the assessee. The quantum of such suppressed sales for the year under consideration was worked out by the AO by*

*applying the ratio of raw material consumption to sales as adopted by him at 50% to the raw- material consumption as shown by the assessee company in its regular books of accounts. Accordingly, the actual sales of the assessee company for the year under consideration were determined by the AO and the difference between the said figure and the figure of sales as shown by the assessee company in its books of accounts was treated by him as the quantum of sales suppressed by the assessee company. This basis adopted by the AO to work out the quantum of sales suppressed by the assessee company was held to be unacceptable by the learned CIT(A) mainly relying on the submissions made on behalf of the assessee company during the course of appellate proceedings before him. First of all, he held that the ratio adopted by the AO of raw material consumption to sales was without any basis. He, however, appears to have overlooked the fact that the ratio of raw material consumption to sales initially adopted by the AO at 42.9% was taken on the basis of raw material consumption actually recorded by the assessee company in its books of accounts for the month of August, 2003 and the quantum of actual sales made in that month as found during the course of survey and accepted on behalf of the assessee company. It thus cannot be said that there was no basis for the ratio of raw material consumption to sales adopted by the AO. The Id. CIT(A) also held that the raw material consumption in respect of trading items in the case of the assessee company was on the higher side giving low W.P. rate and this aspect according to him was not taken into account by The AO. The working "given by" the AO as contained in the assessment order however clearly shows that the initial ratio of raw material consumption to sales adopted by him at 42.9% was increased by the AO to 50% for the purpose of final working in order to take care of the fact that the sales of the assessee company were comprising of trading items also wherein the gross profit was on the lower side than the manufacturing items. The learned CIT(A) also held that the consumption of packing material was entirely ignored by the AO while working out the quantum of suppressed sales. In this regard, it is observed that the entire working of the AO was based on the ratio of raw material consumption to sales and therefore the question of taking into account the consumption of packing material did not arise at all. In our opinion, all these objections raised on behalf of the assessee company regarding the working made by the AO to ascertain the quantum of suppressed sales were not sufficient to hold that the entire itself was wrong as done by the learned CIT(A). There might*

*be some adjustments required to be made in the working of the AO on the basis of the said objections depending on the verification of relevant facts of the case.*

*10. It is observed that the learned CIT(A) however held that the entire working made by the AO to determine the quantum of suppressed sales was without any basis and proceeded to make his own working which in our opinion was totally unjustified in the facts of the case as discussed above. In his own working independently made the learned CIT(A) determined the quantum of addition liable to be made on this issue by applying a Gross Profit rate of 22% on the sales declared by the assessee company in its books of accounts. For adopting the said rate, he relied on the comparable cases cited on behalf of the assessee company for the first time before him without giving any opportunity to the AO of verifying the same. He also relied on the details of raw material consumption in case of specific sweets furnished by the assessee company for the first time before him without giving any opportunity to the AO to verify the same. He also held that the entire amount of suppressed sales could not be added in the hands of the assessee company and only the gross profit of such unaccounted sales could be added. He however ignored that nothing was found during the course of search to show that any consumption of raw material or other expenditure had remained unaccounted for by the assessee company. A perusal of the assessment order also shows that it was not even the case of the assessee company before the AO that any expenditure in relation to the suppressed sales was incurred outside the books of accounts. If at all such a case was sought to be made out by the assessee company before the learned CIT(A), the onus was on it to support and substantiate the same on evidence and the AO in that case should have been afforded an opportunity to verify the said evidence. As such considering all the facts of the case, we are of the view that it would be fair-and proper and in the interest of justice to set aside the impugned order of the learned CIT(A) on this issue and restored the matter to the file of the AO for deciding the same afresh on the basis of fresh working to be made after taking into consideration all the objections of the assessee company. We do so and allow this appeal of the Revenue as well C.O. of the assessee for statistical purposes.”*

3.4 In compliance to the direction of the Tribunal, the assessment proceedings were re-initiated and after detailed discussion on the various issues raised during the set aside assessment proceedings, the Assessing Officer finally made addition of Rs.44,64,425/- as amount of sales suppressed by the assessee for the period from 01/04/2003 to 04/09/2003. The Assessing Officer held that during the course of survey no evidence indicating expenses incurred out of books of accounts was found which established that all the expenses corresponding to the suppressed sales were already claimed in the regular books of accounts.

3.5 On further appeal, the learned CIT-(A), upheld the rejection of books of accounts and restricted the amount of sales suppressed to Rs.9,67,911/-, i.e., the amount of sales suppressed for the month of August, 2003 only. The Ld. CIT-(A) agreed with the contention of the Ld. AR that entire suppressed sales cannot be income of the assessee and expenditure has to be reduced from the same. Accordingly, he directed the Assessing Officer to enhance the sale declared by the assessee in its books of account by Rs.9,67,911/- and, thereafter, compute the gross profit by applying the gross profit rate of 22%.

3.6 Aggrieved with the above finding of the learned CIT-(A), both the Revenue and the assessee are before the Tribunal by way of appeal and cross objections respectively.

4. First we take up the cross objection of the assessee challenging the rejection of books of account, which goes the root of the addition.

4.1 The Ld. counsel of the assessee reiterated the grounds raised in the cross objection and submitted that there was no reason for rejection of books of accounts and estimation of the gross profit.

4.2 On the other hand, learned Sr. DR submitted that assessee itself has admitted before the Assessing Officer that due to peculiar nature of



the trade no records of consumption of material were maintained. Further, the assessee submitted that it was not possible to keep the record of the cooked food of such a small quantities. During assessment proceeding, it was also stated on behalf of the assessee that fact of non-maintenance of stock register was mentioned in the tax audit report. The Ld. Sr. DR further submitted that the fact of suppression of the sales for the month of August, 2003 amounting to Rs.9,67,911/- has been found in the computer records of the assessee and which has not even retracted by the assessee. According to the Ld. Sr. DR, these factual evidences were sufficient enough to reject the books of accounts of the assessee.

4.3 We have heard the rival submissions and perused the relevant material on record. We find that the Ld. CIT-(A) rejected the book result on the ground that the assessee was not able to give suitable explanation for difference in sales as the two computers found in its establishment. We also agree with the argument of the Ld. Sr. DR that in absence of day-to-day consumption register or stock register, the book results cannot be said reliable and same are liable to be rejected.

4.4 In our opinion, the finding of the learned CIT-(A) as far as the rejection of books of accounts is concerned, is well reasoned and we do not find any infirmity in the same and we uphold the same. The grounds of cross objection of the assessee, is accordingly dismissed.

5. Now, we take up the grounds of Revenue wherein mainly the two issues are involved. The first issue is what should be the amount of sales suppressed in the case of the assessee. The second issue is whether the entire suppressed sale is profit in the hand of the assessee or profit of the suppressed sale should be computed applying the net or gross profit rate.

6. The learned Sr. DR vehemently argued that the director of the assessee company himself admitted during the survey proceeding that the discrepancy in the figures of sales for the month of August 2003 recorded in computer was a matter of fact only and he could not explain the discrepancy. The director of the company himself accepted to workout tax on the sales suppressed from 01/04/2003 till the date of survey. The Ld. Sr. DR further submitted that subsequent to the letter of retraction of his statement dated 19/09/2003, in subsequent letters filed dated 10/12/2003, wherein the assessee accepted the submission of sales of Rs.44,64,425/-, however, requested for applying net profit rate on said suppression of sales for computing the undisclosed profit of the assessee. Further, the Ld. Sr. DR submitted that during the course of survey no documentary evidence was found which could establish that any expenditure was incurred by the assessee out of books of accounts towards suppressed sales and therefore no expenses could be allowed against the suppressed sales. Thus, the Assessing Officer has correctly added the entire amount of suppressed sales as the undisclosed profit of the assessee.

7. The Ld. counsel of the assessee, on the other hand, on the issue in dispute relied on the submission made before the learned CIT-(A) and submitted that only basis for making addition for suppressed sales other than the month of August, 2003 was statement of the director only, which has already been retracted by him within a period of 15 days and, therefore, the statement cannot be considered as evidence for holding the *pro-rata* sales for the period from April to July, 2003 as suppressed sales. Without prejudice to this submission, he pleaded that entire suppressed sales cannot be considered as profit of the assessee and expenditure has to be reduced out of the same.

8. We have considered the rival submission of the parties on the issue in dispute and perused the relevant material on record. There is no dispute as far as discrepancy of sales of Rs.9,67,911/- for the month of August, 2003. This discrepancy is evident in view of the figure of sales recorded in computer maintained at the shop and sales entered in books of accounts maintained in computer at first floor. The sale depicted in computer at shop was Rs.26,02,765/- whereas the sales recorded in books of accounts was of Rs.16,52,854/-. On the basis of this discrepancy, the survey party determined that 58.5% of the sales recorded in books of accounts represented suppressed sales. This ratio was applied on the sale of April to July, 2003 and on that basis suppressed sale of Rs.44,64,425/- was worked out for the entire period from 01/04/2003 to the date of survey. Thus, the dispute in respect of the suppressed sale is in respect of the amount of Rs.(44,64,425 - 9,67,911) = Rs.34,96,514/-. The assessee has contended that no discrepancy was found in sales for the month of April to July, 2003 nor any evidence was found with regard to any unrecorded sales for the months and the, director of the assessee company has already retracted his statement dated 04/09/2003 on 19/9/2003.

9. In the facts of the case, we find that the computer maintained at the shop was for issuing invoices, which was primary record of the sales of the assessee. It was admitted by the parties during hearing before us that in this computer, only sales for the month of August, 2003 was found. The Ld. Sr. DR contended before us that the sales figure of earlier month were already deleted and on admission of the director of the company that the company had suppressed sales from the beginning of the financial year to the date of survey, no further efforts were made to retrieve deleted records on the computer. She said that the survey

proceedings were closed on the admission of the director to accept the suppressed sales and to pay the taxes thereon in three installments. Further, we find that subsequent to the retraction statement dated 19/09/2003, in the letter dated 10/12/2003, the assessee disputed only for allowing cost of goods sold out of the sales of Rs.44,64,425/- calculated by the survey team. In the present case, the suppression of the sales for the month of August, 2003 has been established from the records of the computer. The director of the assessee company during the survey admitted of suppressing sales from the month of April 2003 to the date of survey. Now, question before us is whether the assessee suppressed sales in the month of April to July, 2003. The first observation in this regard is the statement of the director of the company during survey proceedings. The assessee has not established that it was under any coercion or pressure. The statements during survey proceedings are recorded in presence of witness and the assessee has not produced any witness supporting retraction of his statement. Second observation is that not finding of the records of the sales other than the sales for the month of August 2003, in the computer maintained at shop, also raises question as why the primary record of those sales have not been found. In the facts and circumstances, there seems to be no reason as why the assessee had not suppressed sales in the month of April to July, 2003. It is logical to presume that the habit of suppression of sales must have been continued from April 2003 i.e.beginning of financial year.

10. Regarding the presumption of existence of anything or state for backward period, the third member in the decision of the Tribunal in the case of Overseas Chinese Cuisine Vs. Assistant Commissioner of Income-tax, reported in (1996) 56 ITD 67 (Mum.), held as under:

*“66. The assessee's Restaurant started in 1984 and assessment year 1986-87 is the first assessment year. Originally sales billing was made manually. Later in the middle of the accounting year, relevant to assessment year 1990-91, the computer billing was introduced. Even after computer billing was introduced side by side manual sale bills also were issued. Shri Nelson Wang was the Managing Director of the assessee company. From the beginning he had introduced systematic service of food articles to the customers as well as systematic billing system. It was never the case of the assessee that this system of either billing or receiving cash at the counter as per bills was ever changed during any of the accounting years relevant to these three assessment years under consideration. When the same system is being practised in all the three accounting years, the modus operandi adopted while manipulating bills even though found out while investigating the case for assessment year 1990-91 applies to back assessment years also since the nature of the business as well as the nature of establishment and the method of billing followed by them remain the same in all these accounting years.*

*67. Under section 114(d) of the Indian Evidence Act, there is a presumption that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually ceases to exist, is still in existence.*

*68. Now the question in this case is whether the presumption which arises u/s 114(d) runs retrospectively, i. e., a particular state of things found obtaining in the accounting year relevant to assessment year 1990-91 can be presumed to exist in back years also or retrospectively also is the question. In Woodroffe and Amirali's Law of Evidence, 14th Edition, 1980 in the commentary u/s 114(d) held the following :*

*"In some cases, it has been said that there is no presumption to operate retrospectively. The rule of evidence is in favour of presuming the continuity of things shown to exist at a prior date. There is no rule of evidence by which one can presume backwards and, this section does not enable the Court to presume that the present state of things existed in the past without proof; in other words, the presumption is prospective rather than retrospective in operation. But the Supreme Court has held that if a thing or state of thing is shown to exist, an*

*inference of its continuity within a reasonably proximate time goes forwards and backwards and may sometimes be drawn. [See Ambika Prasad v. Ram Ekbal Rai [1962] 1 SCR 758 equivalent to AIR 1966 SC 605]. When a person was tenant in 1957 and his name was also found entered in 1961, the presumption is that he continued to be the tenant in the period between 1957 and 1961. The statement that there is no rule of evidence by which one can presume the continuity of things backwards, it has been said, cannot be supported. The presumption of continuity weakens with the passage of time. How far the presumption may be drawn both backward and forward depends, it has been held, upon the nature of things and the surrounding circumstances. Wigmore considers it a fallacy to say that 'Presumptions do not run backward.'..... Presumption can be made both backwards and forwards within a reasonably proximate time." (p. 2620)*

*69. Thus a particular habit or bad habit of manipulating sale bills was found to be existing or was found to be practised by the assessee in assessment year 1990-91, the same state of things can be found to be existing even in the earlier accounting years. That means the habit of manipulation of sale bills can be presumed to be existing even in assessment year 1988-89. Therefore, coupled with the fact that none of the sale bills were produced and none of the sales registers were also produced for assessment year 1988-89, a presumption can be drawn that the habit of manipulation of sale bills can be presumed to be existing even in assessment year 1988-89, can be stated to be a legitimate presumption which can be drawn under law."*

11. In the instant case, suppression of the sales for the month of August 2003 has been established on the basis of discrepancy in the sales recorded in books of accounts and sales recorded in the computer at shop, which is used for billing i.e. primary record of sales. Thus, in view of suppression of the sales found in the month of August, 2003 on the basis of the primary records and not finding of the primary records of the sales for the period from April, 2003 to July, 2003 in the computer at shop, relying on decision of third Member in the case Overseas Chinese

Cuisine Vs. ACIT (supra), the habit of suppressing the sales can be presumed to be existing in the period from April, 2003 to July, 2003 and which is a legitimate presumption drawn under the law.

12. In view of these facts and circumstances, we are of the opinion that that the assessee company was engaged in suppression of the sales during the period from April, 2003 to July, 2003 also. The suppression of sales amounting to Rs.34,96,514/- for the month of April, 2003 to July, 2003 has been worked out on the *pro rata* basis (58.50 %) of the sales entered in the books of accounts for this period. We do not find any error in the principle employed for working out the amount of suppressed sales for the period from April, 2003 to July, 2003.

13. As regard the second issue of working out of profit on suppressed sales, in principle we are agreed that cost of goods should be reduced out of the sales while working out the profit. But in the instant case, during the course of survey proceedings no evidence was found that assessee incurred expenses on raw material etc. which were not entered in the books of accounts. Thus, it is evident that all the expenses towards the cost of goods, whose sales has not been recorded in the books of account, are already entered in the regular books of accounts. Once the expenses towards the suppressed sales are already entered in the regular books of accounts, such expenses are not required to be reduced out of the suppressed sales. If it is found that both the sales as well as cost of goods sold are not recorded in the books of accounts, then only, while computing the undisclosed profit, the cost of goods should be reduced out of the suppressed sales. But in present case, no such evidence of any cost of goods sold incurred out of books of accounts was found during survey. In the circumstances, we are of the opinion that entire suppressed sales for the period from April, 2003 to the

date of survey amounting to Rs.44,64,425/- is the amount liable to be taxed as undisclosed profit.

14. Accordingly, we set aside the order of the Id. CIT-(A) on the issue in dispute and uphold the order of the Assessing Officer. The grounds of the appeal raised by the Revenue are accordingly allowed.

15. In the result, appeal of the Revenue is allowed whereas the cross objection of the assessee is dismissed.

The decision is pronounced in the open court on 13<sup>th</sup> Oct., 2017.

Sd/-  
**(BHAVNESH SAINI)**  
**JUDICIAL MEMBER**

Dated: 13<sup>th</sup> October, 2017.

RK/-(D.T.D)

Copy forwarded to:

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

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

Asst. Registrar, ITAT, New Delhi