

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

**BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM**

**आयकरअपीलसं./ITA No.271/SRT/2018**

**(निर्धारणवर्ष / Assessment Year: (2010-11)**

**(Virtual Court Hearing)**

Shanti Enterprises, Millenium Textile Market, Shop No.1013-14, Umarwada, Kamela Darwaja, Ring Road, Surat-395002.	<b>Vs.</b>	The DCIT (HQ)-1, Surat.
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AALFS5217L</b>		
<b>(Assessee)</b>		<b>(Respondent)</b>

Assessee by : Shri Hiren Vepari, CA

Respondent by : Shri Ritesh Mishra, CIT(DR)

**मुनवाईकीतारीख/ Date of Hearing : 17/03/2021**

**घोषणाकीतारीख/Date of Pronouncement: 03/05/2021**

**आदेश / O R D E R**

**PER DR. A. L. SAINI, ACCOUNTANT MEMBER:**

Captioned appeal filed by the assessee, pertaining to the Assessment Year (AY) 2010-11, is directed against the order passed by the learned Commissioner of Income Tax (Appeals)-3, Surat [in short “the ld. CIT(A)”] in Appeal No. CAS/3/trfd/200/2015-16 dated 13.02.2018, which in turn arises out of an order passed by Assessing Officer (in short “the AO”) under section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as the “Act”], dated 30.03.2013.

2. The grievances raised by the assessee are as follows:

*“(I) Treating additional income earned on sale of shops as income u/s.69A of the Act:*

*(1)The learned CIT(A) was not justified in treating the amount of Rs.7,20,00,000/- (declared specifically as net profit in respect of unaccounted income from sale of shops) as deemed income u/s 69A of the Act.*

*(2)The appellant submits that section 69A being related to money, bullion, jewellery or other valuable article not recorded in the books of accounts only, it*

*would not cover the amount earned from sale of shops as the appellant was not found owner of any money, bullion, jewellery or other valuable article.*

*(3)On the facts and circumstances of the case and as per law, the position taken by the CIT(A) that no deduction against this income of Rs.7,25,03,689/- is allowable to the assessee, is not tenable.*

*(II) Unabsorbed business loss/depreciation*

*The learned CIT(A) ought to have allowed adjusting the unabsorbed business loss/depreciation of the earlier years.*

*(III) Miscellaneous*

*The appellant craves leave to add Alter or vary any of the grounds of appeal.”*

3. Although, this appeal filed by the Assessee for Assessment Year 2010-11 contains multiple ground of appeals. However, at the time of hearing we have carefully perused all the grounds raised by the assessee and noted that solitary grievance of the assessee is that Id CIT(A) has treated unaccounted income from sale of shops of Rs.7,25,03,689/-, as deemed income u/s 69A of the Act instead of Business Income and denied set off of unabsorbed business loss/depreciation of the earlier years.

4. The relevant material facts, as culled out from the material on record, are as follows. The assessee firm is engaged in the business of Contractor/Developer. During the year under consideration, assessee has shown total turnover of Rs.27,19,08,689/- with a Net profit of Rs.6,48,93,444/- which works out at 23.86%. The survey under section 133(A) of the Act was carried out at the business premises of the assessee on 18.02.2010. Statement of Shri Vasantbhai Haribhai Gajera, partner of the firm was recorded under section 133(A) of the Act on 18.02.2010. In question No.8 of the said statement, the assessee was asked to explain regarding the excess cash found of Rs.5,03,689/-. In answer to the above said question the partner Shri Vasantbhai Gajera has stated that the excess cash found is unaccounted income of M/s. Shanti Enterprises earned during the F.Y.2009-10 and he disclosed this unaccounted income for taxation during the previous year relevant to A.Y.2010-11. As such in answer to question No.9, he stated that 7 small diaries found from the basement of the business premises and

impounded in Annexure BF-1 to BF-7 are related to the "On money receipts" received from the sale of shops and it includes transactions of unaccounted income of Rs.7,20,00,000/-. This amount of Rs.7,20,00,000/-, is disclosed unaccounted income of the said firm and the same is disclosed during the previous year relevant to assessment year 2010-11. In view of the above, the assessee has disclosed unaccounted income of Rs.7,25,03,689/- ( Rs.7,20,00,000 + Rs.5,03,689 Excess cash found).

5. The Assessing Officer has verified the Profit and Loss account of the assessee and it was noticed by him that assessee firm has shown the income from Sale of shops amounting to Rs. 19,94,05,000/-, undisclosed income amounting to Rs.7,25,03,689/- disclosed at the time of survey u/s 133A and other income of Rs.1,35,82,093/-. The assessing officer noted that in the course of survey conducted under section 133A of the Income Tax Act, unaccounted on money receipts worth Rs.7,25,03,689/- was detected. In the statement recorded in the course of survey proceedings, the assessee admitted these receipts as acquired from undisclosed income, therefore, relying on the decision of Hon'ble Gujrat High Court in the case of Fakir Mohmed Haji Hasan V/s. CIT reported in 247 ITR 290, the assessing officer made addition of Rs.7,25,03,689/- under section 69A of the I.T. Act and no set off of business loss/depreciation, against this income was allowed to the assessee.

6. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Ld. CIT(A), who has confirmed the addition made by the Assessing Officer. Aggrieved by the order of the Ld. CIT(A), the assessee is in appeal before us.

7. Shri Hiren Vepari, Learned Counsel for the assessee submits that a sum of Rs.7,20,00,000/- is business income of the assessee, which was admitted during the survey proceedings and which relates to M/s Shanti Enterprises (vide answer to question No.9, paper book page 14). The excess cash found to the tune of Rs.5,03,689/- during the survey proceedings, is also an undisclosed income which

is belonged to M/s Shanti Enterprises, (vide answer to question No.8, paper book page 13). The assessee is a developer of Shops for textile market and has admitted during the survey proceedings that a sum of Rs.7,20,00,000/- has been earned as an unaccounted money, through sale of shops during the Financial Year 2009-10 relevant to assessment year 2010-11. Since, these undisclosed money relates to business receipts, therefore it should be assessed under the head of business income and the assessee should be allowed set off of business loss and depreciation. Learned Counsel for the assessee took us through paper book page no.14 wherein answer to question no.9 clearly states that during the survey proceedings, the assessee has admitted stating that the amount of Rs.7,20,00,000/- was net unaccounted income of the firm, M/s. Shanti Enterprises. The said net income of Rs.7,25,03,689/- ( Rs. 7,20,00,000 by sale of shops and Rs.5,03,689 excess cash found during survey) is a net income and no any expense to be claimed), that is, the said income is over and above the income which had already been disclosed by the assessee in his firm, M/s. Shanti Enterprises. During the survey proceedings, the assessee has agreed to pay tax on net undisclosed income of Rs.7,25,03,689/-, which should be treated business income of the assessee and therefore, the assessee should be allowed set off of business loss and depreciation also.

8. On the other hand, Shri Ritesh Mishra, Ld. CIT-DR for the Revenue submits that assessee has misrepresented the facts before the Tribunal. He took us through paper book page No.28 where the assessee's Profit and Loss account for the year ended March 31, 2010 is located. He argued that income side the assessee has included Rs.7,25,03,689/- as part of undisclosed income along with income from sale of shops to the tune of Rs.19,94,05,000/- and other income to the tune of Rs.1,35,82,093/-. Total of these three incomes come to Rs.28,54,90,782/-. Against these three incomes, the assessee has claimed the combined expenditure viz: cost of construction Rs.21,88,50,070/-, Administrative and other expenses Rs.15,72,114/-, Selling and distribution expenses Rs.1,50,000/- and Financial charges Rs.25,154/-. Total of these expenses come to Rs.22,05,97,338/-. Therefore, ld DR pointed out that assessee has claimed the

proportionate expenses against the undisclosed income of Rs. 7,25,03,689/-, hence assessee has distorted the facts and presented a false profit and loss account therefore, assessee's claim that said undisclosed income should be allowed for set off of business loss/depreciation, may be rejected. As per the statement of assessee during the survey proceedings, the said net income of Rs.7,25,03,689/- (Rs.7,20,00,000 by sale of shops and Rs.5,03,689 excess cash found during survey) is a net income and no any expense to be claimed, that is, the said income is over and above the income which had already been disclosed by the assessee in his firm, M/s. Shanti Enterprises, therefore, now the assessee should not claim expenses against the undisclosed income of Rs.7,25,03,689/- by taking the same in the income side and claiming expenditure, such as, cost of construction Rs.21,88,50,070/-, Administrative and other expenses Rs.15,72,114/-, Selling and distribution expenses Rs.1,50,000/- and Financial charges Rs.25,154/-. The Id DR also contended that undisclosed income of Rs.7,25,03,689/- should be assessed under the head "Income from other sources" and set off benefit from business loss/depreciation may be denied. Apart from this, Id DR has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

9. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the Id. CIT(A) and other material brought on record. We note that in statement on oath taken by the Department of Shri Vasant Haribhai Gajera *vide* paper book page nos.13 and 14 wherein he stated in response to questions nos.8 and 9 that income of Rs.7,25,03,689/- ( Rs.7,20,00,000 by sale of shops and Rs.5,03,689 excess cash found during survey) is a net income from undisclosed business sources and no any expense to be claimed, that is, the said income is over and above the income which had already been disclosed by the assessee in his firm, M/s. Shanti Enterprises, therefore, now the assessee should not claim expenses against the undisclosed income of Rs.7,25,03,689/-. However, we find that assessee has claimed the expenses against the undisclosed income of

Rs.7,25,03,689/- in the audited profit and loss account which is placed at paper book page No.28 and the same is reproduced below for ready reference:

**“PROFIT AND LOSS ACCOUNT FOR THE YEAR ENDED 31ST MARCH, 2010.**

	<b>Sch</b>	<b>Rs.</b>
<i>Income</i>		199,405,000
<i>Sale of Shops</i>		72,503,689
<i>Undisclosed Income</i>	7	13,582,093
<i>Other income</i>		
<b>TOTAL..</b>		<b><u>285,490,782</u></b>
 <b>Expenditure</b>		
<i>Cost of Construction</i>	8	218,850,070
<i>Administrative and other expenses</i>	9	1,572,114
<i>Selling and distribution expenses</i>	10	150,000
<i>Financial charges</i>		<u>25,154</u>
<b>TOTAL..</b>		<b><u>220,597,338</u></b>
 <b>Net Profit for the year before Deferred taxation</b>		<b><u>64,893,444</u></b>
<i>Add / (Less): Deferred tax Asset/(liability)</i>		<u>(12,366)</u>
<b>Net Profit for the year after Deferred taxation</b>		<b>64,881,078</b>
<b>NET PROFIT for the year transferred to Partners' Capital Account</b>		
 1) Anilbhai B. Virani		12,976,216
2) Ashokbhai Haribhai Gajera		12,976,216
3) Chunibhai Haribhai Gajera		6,483,108
4) Keval Kishorbhai Virani'		3,244,054
5) Kishorbhai Bhikhabhai Virani		12,976,215
6) Nirav Anilbhai Virani		3,244,054
7) Vasantbhai Haribhai Gajera		<u>12,976,216</u>
		64,881,073

**Notes: forming part of the accounts. 11”**

Having gone through the above audited profit and loss account, we find merit in the propositions canvassed by Id DR for the Revenue. The Id DR for the Revenue has rightly pointed out that “income side the assessee has included Rs.7,25,03,689/- as part of undisclosed income along with income from sale of shops to the tune of Rs.19,94,05,000/- and other income to the tune of Rs.1,35,82,093/-. Total of these three incomes come to Rs.28,54,90,782/-. Against these three incomes, the assessee has claimed the combined expenditure viz: cost of construction Rs.21,88,50,070/-, Administrative and other expenses

Rs.15,72,114/-, Selling and distribution expenses Rs.1,50,000/- and Financial charges Rs.25,154/-. Total of these expenses come to Rs.22,05,97,338/-. Therefore, assessee has claimed the proportionate expenses against the undisclosed income of Rs. 7,25,03,689/-, hence assessee has distorted the facts and presented a false profit and loss account.”

Hence, it is abundantly clear that assessee has claimed proportionate expenses against the undisclosed income of Rs. 7,25,03,689/- and thus deviated from his statement taken during survey.

10. The Leaned Counsel, contended that during the assessment stage, the assessee submitted before the assessing officer a statement showing pre-survey and post -survey profit and loss account (vide paper book page 49). However, we note that there is no any reference in the assessment order about pre-survey and post -survey profit and loss account. There is no acknowledgment by the assessing officer on the letter dated 18.03.2013 ( vide paper book page 49), therefore it is not certain whether the pre-survey and post -survey profit and loss account was submitted before the assessing officer. We also note that in the order of Id CIT(A) there is no any discussion about pre-survey and post -survey profit and loss account. Hence, taking into account these facts we are of the view that assessee has claimed proportionate expenses against the undisclosed income of Rs. 7,25,03,689/-.

11. Now the question before us is that whether undisclosed income of Rs. 7,25,03,689/- is “business income” or “income from other sources”. From the statement on oath taken by the Department of Shri Vasant Haribhai Gajera vide paper book page nos.13 and 14 wherein he stated in response to questions nos.8 and 9 that income of Rs.7,25,03,689/- ( Rs. 7,20,00,000 by sale of shops and Rs.5,03,689 excess cash found during survey) is a net income from undisclosed business sources and it belong to firm, M/s Shanti Enterprises. The Ld Counsel has submitted before us that assessee does not deal into any other business except of development of market to sell textile shops. We believe on the submission of

ld Counsel, as assessee himself also during survey statement affirmed this fact, that said undisclosed income belongs to business. Therefore, we treat amount of Rs.7,25,03,689/- as undisclosed income of business.

12. However, as noted by us above that assessee has claimed proportionate expenses against the undisclosed income of Rs. 7,25,03,689/- which is against the statement of the assessee, which is reproduced below:

*“Question no. 9*

*During the survey operations today in your basement premises seven small diaries which is annexure BF-1 to BF-7 and is impounded as shown to you. In this account, receivables Rs.7,20,00,000 is written Give explanation of the above.*

*Ans.*

*The amount of earned unaccounted income by Shanti Enterprises through sale of shops FY 2009-10 (AY 2010-11) is written in this diary which is total Rs.7,20,00,000 We disclose this net profit in our firm Shanti Enterprise as income during the FY 2009-10 and offer it for income tax. This is our net income and no expenditure has remained to be claimed. This income of Rs.7,20,00,000 is over and above regular business income of our firm for F Y 2009-10 and tax thereon as per rules will be paid before 15<sup>th</sup> March 2010.....”*

From the above statement, it is clear that the partner has admitted to Rs.7,20,00,000 as net income which is over and above regular business income of the firm FY 2009-10, relevant to assessment year 2010-11 . In view of the above admission, the amount of Rs.7,20,00,000/- must have been offered separately in the computation of income under the head business income without claiming proportionate expenses. As per assessee the said undisclosed income of Rs.7,25,03,689/- ( Rs. 7,20,00,000 by sale of shops and Rs.5,03,689 excess cash found during survey) is net of expenses, therefore the said income would be assessable under the head business income without deducting any expenses from it, however, as noted by us above, that assessee has claimed proportionate expenses, which is not acceptable. Therefore, we remit this issue back to the file of the assessing officer to exclude the proportionate expenses from the said undisclosed income of Rs.7,25,03,689/- and allow the assessee the benefit of set off of business loss/depreciation in accordance with law. The assessee is directed



to file the detail of proportionate expenses claimed by him in profit and loss account in relation to undisclosed income of Rs. 7,25,03,689/-.

13. In the result, the appeal filed by the assessee is allowed for statistical purposes

Order is pronounced on 03/05/2021 by placing result on Notice Board.

Sd/-  
(PAWAN SINGH)  
JUDICIAL MEMBER

Sd/-  
(Dr. A.L. SAINI)  
ACCOUNTANT MEMBER

सूरत /Surat

दिनांक/ Date: 03/05/2021

SAMANTA,PS

**Copy of the Order forwarded to**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

// TRUE COPY //

By Order

Assistant Registrar/Sr. PS/PS  
ITAT, Surat