

आयकर अपीलिय अधिकरण, 'ए' न्यायपीठ, चेन्नई।  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**'A' BENCH: CHENNAI**

श्री वी. दुर्गा राव, माननीय न्यायिक सदस्य एवं  
श्री जी. मंजूनाथा, माननीय लेखा सदस्य के समक्ष  
**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND**  
**SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.117/Chny/2019  
निर्धारण वर्ष /Assessment Year: 2012-13

The Asst. Commissioner of-  
Income Tax,  
Circle-1(2),  
Chennai.

v. M/s.New Saravana Stores-  
Brahmandamai,  
No.128, 129 & 130,  
Usman Road, T.Nagar,  
Chennai-600 017.  
[PAN: ABSFS 1523 M]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

Department by : Mr. AR.V.Sreenivasan,  
Addl.CIT  
Assessee by : Mr.B. Ramakrishnan, FCA  
सुनवाई की तारीख/Date of Hearing : 23.02.2022  
घोषणा की तारीख /Date of Pronouncement : 09.03.2022

**आदेश / ORDER**

**PER G. MANJUNATHA, ACCOUNTANT MEMBER:**

This appeal filed by the Revenue is directed against the order of the Commissioner of Income Tax (Appeals)-18, Chennai, dated 01.10.2018 and pertains to assessment year 2012-13.

**2.** The Revenue has raised the following grounds of appeal:

1. *The order of the learned Commissioner of Income Tax (Appeals) is erroneous on facts of the case and in law.*

2.1 *The Id. CIT(A) erred in directing the Assessing Officer to delete the addition of Rs. Rs. 3,46,10,055/- made on account of mark-up price.*

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*2.2 The Id. CIT(A) erred in not appreciating the fact that there was no basis to show that the average mark-up is at 32% as against the average mark-up of 20-25% shown by the entire group.*

*3.1 The Id. CIT(A) erred in directing the Assessing Officer to delete the disallowance Rs. 2,00,520/- being employees contribution to Provident Fund.*

*3.2 The Id. CIT(A) erred in not appreciating the fact that the sum of employees contribution to PF were credited by the assessee to employee's account beyond the 'due date' as mentioned in explanation to section 36(l)(va) of the I.T. Act, 1961.*

*3.3 Reliance is placed on the decision of Hon'ble Madras High Court in the case of Unifac Management vs DCIT in W.P.5264 of 2018 dated 23.10.2018, wherein it is held that employees' contribution should be paid on or before the due date as prescribed under the relevant statute.*

*4. For these grounds and any other ground including amendment of grounds that may be raised during the course of the appeal proceedings, the order of learned CIT(Appeals) may be set aside and that of the Assessing Officer be restored.*

**RELIEF CLAIMED IN APPEAL**

*The order of the learned CIT(Appeals) may be set aside and that of the Assessing Officer be restored.*

**3.** The brief facts of the case are that the assessee is a partnership firm which is engaged in the business of retail trading of textiles. A search and seizure action u/s.132 of the Act, was conducted in the Saravana Group on 18.08.2011 and during the course of search, the business premises of the assessee was also covered. During the course of search, physical inventory of stock lying in the premises of the assessee was taken, which was at Rs.49.44 Crs. The statement of the principle partner Mr.Pondurai was recorded and asked him to correlate the physical stock available with relevant purchase invoices to ascertain the stock of the goods. The physical stock of inventory of textile was taken on tag price. Therefore, in order to arrive at cost of stock as on the date of search, the mark-up added by the assessee has been reduced by taking average gross profit rate declared by the assessee for the earlier years and accordingly, cost price of the physical

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stock has been worked out to Rs.42.81 Crs. by reducing average gross profit rate of 13.43% from the tag price. Further, after comparing the physical stock available with the assessee to the book stock as on 18.08.2011, excess stock of Rs.24.56 Crs. was determined and assessee has admitted the excess stock found during the course of search as undisclosed income.

**4.** During the course of assessment proceedings, the AO has examined the closing stock arrived at by adopting average mark-up of 13.43% and found that the closing stock worked out as on the date of search, is incorrect and thus, re-worked the closing stock by drafting trade account and has arrived at closing stock at Rs.4.28 Crs. Based on the above facts, the AO has compared closing stock available at the time of search to the book stock and determined excess stock of Rs.38.51 Crs. as against 24.55 Crs. determined by the search party. The assessee opposed the closing stock value arrived at by the AO by reducing average gross profit rate of 13.43% from tag price and argued that it has a mark-up of 32% to 47.5% on various products depending upon their type, size, etc. Therefore, reducing average gross profit declared by the assessee for the earlier years to arrive at cost price is not correct. Therefore, claimed that if you allow 32% average mark-up on tag price, then the correct physical stock figure would come, which tallies with stock difference arrived at during the course of search and thus, no further addition is called for. The AO did not agree with the arguments of the assessee and according to him, there is no basis

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for the assessee to show that average mark-up is at 32% as against the average mark-up of 25% claimed by other assessee in the group. Therefore, the claim of the mark-up has been restricted to 25% on the sales price and the closing stock is worked out after allowing mark-up of 25% and determined difference of Rs.3,46,10,055/- in the value of closing stock as on the date of search and made additions to total income.

**5.** Being aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has filed a detailed Written Submissions on this issue along with certain sample purchase bills and argued that it has mark-up of 32% to 47.5% on various products depending upon type of product and if you consider the average mark-up on all products, then it works out to 32%. Therefore, the AO is incorrect in allowing 25% of mark-up on tag price to arrive at closing stock as on the date of search. The Ld.CIT(A) after considering the relevant submissions of the assessee and also taken note of sample copies of purchase invoices, where MRP rate with selling rate was given, came to conclusion that the AO is incorrect in allowing 25% mark-up on tag price to arrive at cost price of closing stock held by the assessee as on the date of search as against 32% worked out by the assessee on the basis of average mark-up added on the goods. Therefore, directed the AO to work out the closing stock found at the time of search by allowing 32% mark-up on tag price. Aggrieved by the Ld.CIT(A), the Revenue is in appeal before us.

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**6.** The Ld.DR submitted that the Ld.CIT(A) erred in directing the AO to delete the addition made on account of mark-up price on closing stock reducing average mark-up at 32% as against the average mark-up of 25% allowed by the AO. The Ld.DR further submitted that the assessee has declared average gross profit of 13.43% for the earlier years and after considering gross profit declared by the assessee, the Department has allowed 25% of mark-up on tag price to arrive at cost price of closing stock held as on the date of search and thus, there is no reason for the assessee to claim 32% mark-up to arrive at closing stock.

**7.** The Ld.AR, on the other hand, supporting the order of the Ld.CIT(A) submitted that to arrive at cost price of closing stock held by the assessee, average gross profit declared for the earlier years, cannot be considered as good yardstick, because the assessee had mark-up of 32% to 42.5% depending upon the products and thus, it is incorrect on the part of the AO to reduce 25% of mark-up on tag price to arrive at cost of closing stock held as on the date of search. The Ld.AR for the assessee referring to sample invoice copies of purchases submitted that if you see the purchase invoices, it is noticed that the assessee having mark-up of 47.5% on some products and 32% mark-up on some products and if you average it, the mark-up, would works out to 32%. The Ld.AR further submitted that if you reduce mark-up of 32% on tag price, then the excess stock found during the course of search, works out to 20.47 Crs., which is lesser than the closing stock difference offered by the assessee to tax during the course of

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search. Therefore, argued that, the AO is incorrect in allowing 25% of mark-up to arrive at excess stock at Rs.27.55 Crs. to make additions towards difference in mark-up. The Ld.CIT(A) after considering the relevant facts has rightly deleted the additions made by the AO and his orders should be upheld.

**8.** We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. There is no dispute with regard to the fact that there is a difference in closing stock held by the assessee as on the date of search, when compare to book stock. The Department has taken physical inventory of stock, as per which, there was an excess stock of Rs.24.56 Crs. The Department has worked out the excess stock by reducing the average mark-up of 25% from the tag price of stock in trade held by the assessee and then compared with book stock. The AO has resorted into different method of working of closing stock, as per which, the AO has reduced average mark-up of 25% from the sales, and arrived at closing stock of Rs.4.28 Crs. as on the date of search. Further, the AO has re-computed physical stock found at the time of search by reducing average mark-up of 25% on tag price, which is based on average mark-up claimed in other group concern. As per the working of the AO, the closing stock found during the course of search should be at Rs.38.51 Crs. as against 24.55 Crs. determined by the search party. Therefore, he has worked out the difference in mark-up price of closing stock at Rs.3.46 Crs. by allowing 25% mark-up on tag price as against 32%

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mark-up claimed by the assessee. We find that the assessee has substantiated average mark-up of 32% with necessary evidences including sample purchase invoices, as per which, the average mark-up on various products ranges from 32% to 47.5%, whereas, the AO has taken average mark-up of 25% on the basis of mark-up allowed in other group concerns' case, but such rate is not supported with any evidences. Therefore, we are of the considered view that there is no reason for the AO to deviate from the method followed by the Investigation Wing to quantify excess stock held by the assessee as on the date of search by allowing mark-up on tag price of 32% when the assessee has justified mark-up of 32% on tag price of closing stock held as on the date of search. In our considered view, the estimations made by the AO on difference in mark-up price of closing stock is purely on suspicion and surmises basis, without any evidence to suggest that the assessee is having average mark-up of 25% on all goods. Therefore, we are of the considered view that the AO is erred in making additions towards difference in mark-up price of closing stock by allowing 25% average mark-up of closing stock on tag price to determine closing stock as on the date of search. The Ld.CIT(A) after considering relevant facts has rightly directed the AO to allow average mark-up of 32% to arrive at cost price of closing stock as on the date of search. Hence, we are inclined to uphold the findings of the Ld.CIT(A) and reject the ground taken by the Revenue.

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**9.** The next issue that came up for our consideration from Ground Nos.3.1 to 3.3 of the Revenue's appeal is deletion of additions made towards disallowance of employees' contribution to PF u/s.36(1)(va) of the Act r.w.s.43B of the Act. The AO has made additions towards employees' contribution to PF on the basis of Tax Audit Report by the Auditor, where the Tax Auditor has quantified the belated remittances of employees' contribution to PF beyond due date specified under the PF Act. The Ld.CIT(A) has deleted the additions made by the AO by following the decision of the Hon'ble Madras High Court in the case of CIT v. Industrial Security & Intelligence India Pvt. Ltd., by holding that employees' PF remitted beyond due date specified under the PF Act, but within due date specified u/s.139(1) of the Act for filing return of income is allowable u/s.43B of the Act.

**10.** Having heard both the sides and considered the materials on record, we find that the issue of belated remittances of employees' contribution to PF beyond the due date specified under respective Act, but within due date of filing of return of income u/s.139(1) of the Act, is not a **res integra**. The jurisdictional High Court, in the case of CIT v. Industrial Security & Intelligence India Pvt. Ltd., had considered the identical issue and held that employees' contribution to PF & ESI paid before the due date of filing of the return of income are allowable deduction, even though, the same was remitted beyond due date specified under the respective Act. The coordinate Bench of ITAT in the case of M/s.Adyar Anand Bhavan Sweets

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India Pvt. Ltd. v. ACIT in ITA Nos.402 & 403/Chny/2021 for the AYs 2018-19 & 2019-20 dated 08.12.2021 had considered an identical issue and the Tribunal after considering the amendments to Sec.36(1)(va) of the Act by the Finance Act, 2020 w.e.f. 01.04.2021, held that amendment inserted to Sec.36(1)(va) of the Act, is prospective in nature which is applicable from the AYs 2020-21 onwards. Therefore, considering the facts and circumstances of the case and also by following the decision of the coordinate Bench of the Tribunal in the case of M/s.Adyar Anand Bhavan Sweets India Pvt. Ltd. v. ACIT, we are of the considered view that there is no error in the findings given by the Ld.CIT(A) to delete the additions made towards disallowance of employees' contribution to PF u/s.36(1)(va) r.w.s.43B of the Act. Hence, we are inclined to uphold the findings of the Ld.CIT(A) and reject the ground taken by the Revenue.

**11.** In the result, the appeal filed by the Revenue is dismissed.

Order pronounced on the 09<sup>th</sup> day of March, 2022, in Chennai.

**Sd/-**  
(वी. दुर्गा राव)  
**(V. DURGA RAO)**

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 09<sup>th</sup> March, 2022.

**TLN**

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)

**Sd/-**  
(जी. मंजूनाथा)  
**(G. MANJUNATHA)**

लेखा सदस्य/**ACCOUNTANT MEMBER**

4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF