

आयकर अपीलीय अधिकरण, राजकोट न्यायपीठ, राजकोट
**IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT**

(Conducted Through Virtual Court)

**BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
SMT. MADHUMITA ROY, JUDICIAL MEMBER**

**ITA No.143/RJT/2021
WITH
Cross Objection NO.01/RJT/2022
Assessment Year : 2019-20**

ACIT, Cent.Cir.2 Rajkot.	Vs.	Conor Granito P.Ltd. Sr.No.150, P1, Nr.Accord Plus Nichi Mandal Tal. Morbi 363 641. PAN: AAGCC 1554 J
-----------------------------	-----	---

अपीलार्थी/ (Appellant)		प्रत्यर्थी/(Respondent)
-------------------------------	--	--------------------------------

Assessee by :	Shri Mehul Ranpura, Id.AR
Revenue by :	Shri Shramdeep Sinha, Id.CIT-DR

सुनवाई की तारीख/**Date of Hearing** : **17/10/2023**
घोषणा की तारीख /**Date of Pronouncement**: **12/01/2024**

आदेश/O R D E R

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

Present appeal has been filed by the Revenue against order passed by the Id.Commissioner of Income Tax(Appeals)-11, Rajkot [hereinafter referred to as "Ld.CIT(A)under section 250(6) of the Income Tax Act, 1961 ("the Act" for short) dated 4.8.2021 pertaining to the Asst.Year2019-20. The assessee also filed its CO bearing no.01/RJT/2022 against the same order of the Id.CIT(A). Both are disposed of by this common order.

2. The Registry has noted that the CO filed by the assessee before the Tribunal is time barred by 15 days. Though the assessee has not filed any delay condonation application, the Ld.counsel for the

assessee submitted that due to some administrative reasons, the assessee could not file the CO in time. It was accordingly prayed that the delay being very small, the same may be condoned in the larger interest of justice, more so, when the assessee has a very good case on hand, for adjudicating the issue on merit.

3. Looking to the quantum of the delay being just 15 days, taking a lenient view in the interest of justice, we condone the delay in filing the CO, and proceed to adjudicate the same on merits.

4. At the outset itself it was stated that the solitary issue in the appeal of the Revenue relates to the deletion by the Id.CIT(A) of the addition made to the income of the assessee by the AO on account of undisclosed sales, restricting the addition to the net profit element in the same. While in the CO the assessee is challenging the restriction of addition by the Ld.CIT(A) seeking in turn deletion of the entire addition made by the AO of unaccounted sales.

5. Drawing our attention to the facts of the case, it was pointed out that during search at the residential premises of the director of the assessee-company, various incriminating material by way of WhatsApp message/images were discovered along with material from the mobile phone of the director of the assessee-company, Shri Dharendra Kavar and on analysis of the same, it was discovered that the assessee had made out of books sales which during the impugned year amounted to Rs.2,35,42,980/-. The AO added entire undisclosed sales to the income of the assessee. The Id.CIT(A), however, restricted the same to the profit element embedded therein estimated at the rate of 8% of the sales.

6. Aggrieved by the same the Revenue has filed appeal before us raising the following ground :

1. *On the facts and in the circumstances of the case and in law, learned Commissioner (Appeals) erred in restricting the addition to Rs.20,03,438/- out of total addition of Rs.2,50,42,980/- made on account of unaccounted sales.*
2. *On the facts and in the circumstances of the case and in law, learned Commissioner (Appeals) erred in considering the facts of the case and in ignoring that there were parallel books of accounts maintained by the assessee which was found and impounded during the course of Survey.*
3. *On the facts and in the circumstances of the case and in law, learned Commissioner (Appeals) erred in ignoring the facts that during the course of survey, accounting software was found having a record of whole transactions under the code name " Shivam" in software named "Busy" on which the AO has relied upon.*
4. *On the facts and in the circumstances of the case and in law, AO has duly investigated and applied his mind on the report of the DDIT, Investigation wing and after satisfying himself has made the assessment on the basis of cogent material and relevant evidence on record.*
5. *On the facts and in the circumstances of the case-and in law, learned Commissioner (Appeals) erred in ignoring the facts that the AO has made addition on the basis of Backup of Iphone data where unaccounted transaction were recorded and was also confirmed by the director of the company during the course of search proceedings.*
6. *The appellant prays that the order of the learned Commissioner (Appeals) on the above ground be set aside and the addition made in the Assessment order may kindly be restored."*
7. The assessee in its CO has raised the following ground:
 - “1. *The grounds of appeal mentioned hereunder are without prejudice to one another.*
 2. *The Id. Commissioner of Income Tax (Appeals)-11, Ahmedabad [hereinafter referred to as the "CIT(A)"] erred on facts as also in law in confirming addition of Rs.20,03,438/- out of total addition of Rs.2,50,42,980/- made on account of alleged unaccounted sale. The addition retained is totally unjustified on facts as also in law and may kindly be deleted."*

Since the issues raised in both the appeals before us arise from the addition of alleged unaccounted sales made by the assessee, both the appeals are being dealt with by us together.

8. During the course of hearing before us it was pointed out that the Id.CIT(A) had relied on various judicial decisions including that of the jurisdictional High Court while restricting the addition made on account unaccounted sales to the net profit element embedded therein. His finding in his regard at para 7.11 to 7.12 of the order is as under:

“7.11 From the discussion made hereinabove, no deviation in the quantum of unaccounted sales determined by the AO is being "made. However, entire sales cannot be treated as income as held by judiciaries in plethora of cases including jurisdictional high court. It held in all the case principally that entire unaccounted sales cannot be treated as an income, but only the profit element embedded in the unaccounted sales can partake the nature of taxable income. In the case of the appellant, it is seen that the AO himself in the assessment order has specifically mentioned that the unaccounted sales could not be taxed since probability of purchase cost and other direct and indirect expenses cannot be ruled out, however made the addition under the guise of disallowance of expenses particularly u/s 40A(3). Ironically, he also referred to the instances of unaccounted expenses like scheme discount, marketing expense, salary to staff, commission etc., all such expenses partakes the character of indirect expenses, which affect to Net Profit. Further, in the following cases, Hon'ble Gujarat High Court and other High Courts have held that in case of unaccounted sales, net profit is required to be taxed.

...

....

....

7.12 Therefore, when the AO himself in the assessment order illustrated various unaccounted direct and indirect expenses having incurred by the appellant against the unaccounted sales, it would not be proper to estimate the gross profit on the unaccounted sales particularly when the quantum of unaccounted sales is not fully corroborating with other materials. Therefore, looking to the various discrepancies and contradictions in seized documents, estimating GP would not be fair and reasonable, similarly estimating the average NP of last three years @ 3.59% would not be appropriate because profit on unaccounted sales made in cask-is always higher than the profits as per books. One important aspect raised by the appellant in the written submission that there are also instance of the sales of traded items, where margin of profit is lower as compared to the manufactured goods. Therefore, to determine the fair and reasonable real taxable income, if net profit @ 8% on unaccounted sales is estimated then it would meet the ends of the justice. Such Such estimated 8% rate of profit would take care all other discrepancies and contradictions in seized documents including the unaccounted expenses etc. The unaccounted sales worked out by the AO is Rs.73,99,262/-, on which profit at the rate of 8% would come to Rs.5,91,940/- and the addition to this extent is confirmed. Accordingly, addition on account of unaccounted income of the appellant is restricted to Rs. 5,91,940/- and remaining addition of Rs.68,07,322/- is directed to be deleted.”

9. The only argument of the ld.DR against the restriction of addition was in relation to the net profit rate applied by the ld.CIT(A). His contention was that he should have applied net profit at 12.5% and for this purpose purpose, he relied on the decision of Hon'ble Gujarat High Court in the case of CIT Vs. Simit P. Sheth, 38 taxmann.com 389.

10. The ld.counsel for the assessee, on the other hand, distinguished the case law relied upon by the ld.DR pointing out that, in the said case, purchases were also found to be bogus and therefore, the Hon'ble Court held that profit earned on account of evasion of sales tax was also to be added, and accordingly applied net profit @ 12.5% in the said case. The ld.counsel for the assessee contended that the fact in the present case was not so, and therefore, the decision relied upon by the ld.DR was of no assistance to the Revenue.

11. Vis-à-vis CO filed by the assessee, it was contended that the ld.CIT(A) had failed to give benefit of income surrendered by the assessee in its return of income while directing NP addition to be made in its case, on account of unaccounted sales. He drew our attention to the assessment order page no.13 wherein he pointed out that the AO had noted the fact of Rs.15 lakhs surrendered by the assessee to cover discrepancy in the return of income. He pleaded therefore that the addition confirmed by the ld.CIT(A) be adjusted and reduced accordingly by the income surrendered by the assessee.

The ld.DR fairly agreed with the same.

12. Having heard both the parties and having gone through the orders of the authorities below, we have noted that the solitary issue

for adjudication before us is vis-à-vis addition confirmed by the ld.CIT(A) on account of unaccounted sales revealed to the AO during search action conducted. The contention of the Revenue was that the ld.CIT(A) ought to have applied 12.5% net profit rate instead of 8%. However, the Revenue has not given any basis to justify applying higher rate of net profit at 12.5%. It is basic common sense that net profit to be applied is to be at justifiable rate depending upon nature of the business and other facts. It cannot be simply an *ad hoc* rate; there has to be a reasonable basis for applying a particular net profit rate in each case. The ld.DR has not supported his contention of applying 12.5% GP rate with any reasonable basis. The decision of Hon'ble Gujarat High Court has also not been pointed out to be rendered in the context identical to the activities carried out by the assessee so as to justify his stand of applying the rate held by the Hon'ble High Court to be a justifiable rate in that case. Therefore, we do not find any merit in the contentions of the ld.DR that the ld.CIT(A) ought to have been applied a net profit of 12.5% in the present case. The contention of the ld.DR is, therefore rejected, and the ground raised by the Revenue is accordingly rejected.

Thus, the appeal of the Revenue is dismissed.

13. As for CO filed by the assessee, both the parties have agreed that the ld.CIT(A) has failed to give benefit of the income surrendered by the assessee voluntarily against addition confirmed by him on account of unaccounted sales. This fact has been noted by the AO in his assessment order, which has been pointed out to us during the course of hearing.

In the light of the same, we direct the AO to grant assessee the benefit of the income surrendered of Rs.15 lakhs against the addition confirmed by the Id.CIT(A).

The CO is accordingly allowed.

14. In the result, the appeal of the Revenue is dismissed, while the CO of the assessee is allowed.

Order pronounced in the Court on 12th January, 2024 at Ahmedabad.

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Ahmedabad, dated 12/01/2024