IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI N.R.S.GANESAN, JM and B.R.BASKARAN, AM

I.T.(SS)A. No.01/Coch/2012
Block period : 01-04-1996 to 18-04-2002

M/s. Giripai Jewellery, Rep. by L/Hr. Rajeswari S. Pai, "Sudheendra", ESI Hospital Road, Ernakulam, Kochi-682 018. [PAN: AACFG 4101C]	**Vs.**	The Commissioner of Income-tax-II, Kochi.
(Assessee -Appellant)		**(Revenue-Respondent)**

Assessee by	Shri R. Lokanathan, FCA
Revenue by	Smt. Susan Varghese George, Sr. DR and Shri M. Anil Kumar CIT(DR)

Date of hearing	28/02/2013
Date of pronouncement	05/04/2013

O R D E R

Per B.R.BASKARAN, Accountant Member:

The appeal filed by the assessee is directed against the order dated 27-09-2012 passed by the Ld. CIT, Kochi u/s. 263 of the Act and it relates to the block period from 01-04-1996 to 18-04-2002.

2. The assessee is challenging the validity of the revision order passed by the Ld. CIT.

3. The facts relating to issue are stated in brief. The assessee is a firm and is engaged in the business of trading in gold jewellery. The Department carried out search and seizure operations u/s. 132 of the Act in the hands of the assessee on 18-04-2002. During the course of search, the search officials noticed a stock deficit of

8529.945gms and it was considered by the revenue as sales made outside the books of accounts, i.e., unaccounted sales. In the block assessment, the Assessing Officer proposed to assess the Gross profit on the unaccounted sales and accordingly determined the undisclosed income at Rs.16,10,445/- by applying a G.P. rate of 36.66% on the unaccounted sales. The assessee challenged the order of the Assessing Officer by filing appeal before the Ld. CIT(A), but could not succeed. The assessee carried the matter in appeal before the ITAT and the Tribunal; vide its order dated 25-01-2011, remitting the matter back to the file of the Assessing Officer for the purpose of evaluation of correct profit rate to be applied on the unaccounted sales. In the order giving effect to the order passed by the Appellate Tribunal, the Assessing Officer determined the undisclosed income by deducting the cost price of gold from the unaccounted sales instead of applying any G.P. rate.

4. The Ld. CIT found it to be a mistake apparent from record. According to the Ld. CIT, the Tribunal has given a clear finding in para 4.2 of its order to the effect that the G.P. ratio of the financial year 2001-02 would be most appropriate for estimating profit. Accordingly, the Ld CIT initiated revision proceedings u/s 263 of the Act. Before Ld CIT, the assessee contended that the Tribunal has remitted the matter for the purpose of evaluation of correct profit rate to be applied and hence it was a open remand. Accordingly, it was contended before Ld CIT(A) that he Tribunal did not decide the rate of gross profit to be applied on the unaccounted sales. The said contentions were not acceptable to Ld. CIT. Accordingly, he directed the Assessing Officer to determine the undisclosed income by taking the G.P ratio of financial year 2001-02 as directed by the ITAT in para 4.2 of its order. The Ld. CIT also noticed that the AO has deducted the cost of 9028.64 gms. of ornaments from the sale price of 8529.945 gms, which was found to be incorrect. Aggrieved by the order of the Ld. CIT, the assessee has filed this appeal before us.

5. We have heard the parties. We notice that the dispute in the instant case is with regard to the interpretation of the direction by the ITAT. While the Ld CIT is placing reliance on paragraph 4.2 of the order of the Tribunal, the assessee is relying upon

paragraph 4.4 of the order of the Tribunal. For the sake of convenience, we extract below paragraphs 4.2 and 4.4 of the order passed by the Tribunal in the assessee's case on 25-01-2011.

> "4.2 The next question that arises is with regard to the value of the stock sold out of books. Toward this, we find that the Revenue has, considering the value addition of up to 10%, estimated a sale price of ₹515 per gm. The assessee has not seriously disputed the same nor led any evidence to rebut the same. The ld. AR also conceded to the said position before us. With regard to the gross profit rate, the assessee's claim for the adoption of the average rate of gross profit for the block period, i.e., at 23.63%, is itself in contradiction to its claim, which it prefers through a rectification application, that the cost of the stock of gold ornaments being on record, the same should have been adopted. The two can, therefore, only be considered as alternative claims. We shall deal with both, including *qua* the maintainability of the second claim per rectification proceedings. Without doubt, an eighteen day period (1/4 to 18/4/2002) is too short a period for determining the trading profit rate that could reasonably have been earned by the assessee on its undisclosed sales, particularly considering its vast variation with the average G.P. rate for the block period. In our view, the G.P. rate for the immediately preceding financial year, i.e., f.y. 2001-02, would be most appropriate for estimating the profit, evening out the highs and lows, both in the purchase and sale rates, that arise during the course of a year on account of a variety of incidental factors. And, at the same time is not too distant in time, i.e., with the time period (April'02) for which the profit is being estimated, to obviate a reasonable estimation. The assessee in fact itself admits to the stock deficit as arising during this period. This would also in a way answer the question raised by the assessee per the rectification petition. It says that the cost is available, citing the figure of 37,43,072 in this regard at para 6 (pg. 2) of the assessment order. The said figure, though perhaps not irrelevant, cannot be

taken at face value, i.e., without verification and, secondly, is admittedly only in respect of 9028.604 gms., while the stock deficit is for 8529.945 gms. only".

....

"4.4 To put the matter in sum, the cost under reference is only one reflected in the books of account, with reference to which the gross profit rate of 36.66% has been worked out, valuing the book stock with it at its cost, which the assessee admits as correct. How could, therefore, the said cost be challenged by it, passes our comprehension. The sole purpose of the exercise is to evaluate the profit that the assessee would have realized on the goods, though reflected in stock in books, stands actually sold out, as inferred on being not found on physical verification - an inference that the assessee does not dispute, or impliedly accepts per its application, and even conceded to before us by the ld. AR. *So however, as we are remitting the matter for the purpose of evaluation of the correct profit rate to be applied, the assessee would have another opportunity to exhibit any factual mistake that has crept in the working, which, if so, is definitely liable to be corrected, and toward which, if so, the AO shall issue definite findings of fact, stating the mistake as well as its financial impact, reconciling the profit estimated earlier and that being assessed by him, as the two are apparently based on the same set of books, reflecting the same costs. We decide accordingly"*.

6. There should not be any dispute that paragraph 4.4 of the order is the operative portion, wherein the tribunal has remitted the matter back to the file of the Assessing Officer for evaluating the correct profit rate to be applied, after giving opportunity to the assessee to exhibit any factual mistake that might have crept in the working. The discussion made in para 4.2 of the order is only to highlight the fact that the gross profit earned during 18 day period, namely, 01-04-2002 to 18-04-2002 cannot be considered as average G.P. ratio in view of the past fluctuations in the purchase and sale price of gold ornaments. In that context, the Tribunal has expressed the view that

the G.P. ratio of the immediately preceding financial year, i.e., financial year 2001-02, would even out the fluctuations both in the price of gold both at the time of purchases and sales of gold. Accordingly, it opined that the annual average rate would be most appropriate for estimating the profit.

7. However, as stated earlier, the Tribunal has remitted the matter back to the file of the Assessing Officer in para 4.4 of its order for determination of correct profit rate to be applied which means that the remand is open remand. Had the tribunal taken the view that the G.P. rate relating to the financial year 2001-02 should be applied on the unaccounted sales, it would have expressed the same in definite terms. Accordingly, in our view, the method adopted by the Assessing Officer for the determination of undisclosed income cannot be considered to be erroneous. Accordingly, we set aside his order on this issue. However, the Ld. CIT has pointed out the difference the error in the quantity of gold adopted for determining the undisclosed income. The assessee did not raise any objection to the same and hence, the said observation of Ld. CIT is sustained.

8. In the result, the appeal filed by the assessee is partly allowed.

Pronounced accordingly on 05-04-2013.

sd/-	sd/-
(N.R.S.GANESAN)	(B.R.BASKARAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place: Kochi
Dated: 5th April, 2013
GJ
Copy to:
1. M/s. Giripai Jewellery, Rep. by Legal Heir Rajeswari S. Pai, "Sudheendra", ESI Hospital Road, Ernakulam.
2. The Commissioner of Income-tax-II, Kochi.
3.The Commissioner of Income-tax, Kochi
4. D.R., I.T.A.T., Cochin Bench, Cochin.
5. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T, COCHIN