आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,D,मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI

श्री संजय गर्ग, न्यायिक सदस्य **एवं**

श्री अश्वनी तनेजा, लेखा सदस्य**,** के समक्ष

Before Shri Sanjay Garg, Judicial Member, and
Shri Ashwani Taneja, Accountant Member

ITA NO.7471/Mum/2014
Assessment Year: 2010-11

Dinesh V. Bahirwani, Unit No.605, Business Suites 9 Ploot No.83, S.V. Rd, Santacruz(W) Mumbai-400054	**बनाम**/ Vs.	DCIT 20(2), Mumbai-
(Appellant)		(Revenue)
P.A. No. ABRPB3559K		

ITA NO.7497/Mum/2014
Assessment Year: 2010-11

ACIT 24(2) 612, Piramal Chambers, Lalbaug, Mumbai-400012	**बनाम**/ Vs.	Dinesh V. Bahirwani, Unit No.605, Business Suites 9 Ploot No.83, S.V. Rd, Santacruz(W) Mumbai-400054
(Revenue)		(Respondent)
P.A. No. ABRPB3559K		

Appellant by	Shri Vipul Shah (AR)
Revenue by	Shri B.S. Bist (Sr. DR)

सुनवाई की तारीख/**Date of Hearing :**	**18/10/2016**
आदेश की तारीख /**Date of Order:**	**18/10/2016**

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

These Cross Appeals are filed by the Revenue and assessee against separate orders of Ld. CIT(A) passed in each of the aforesaid assessment years.

2. During the course of hearing, arguments were made by Shri Vipul Shah, Authorised Representative (AR) on behalf of the Assessee and by Shri B.S. Bist, Departmental Representative (Sr. DR) on behalf of the Revenue.

We shall take up Revenue's appeal in ITA No. 7497/Mum/2014 for Assessment Year 2010-11

3. The revenue has filed an appeal against the order of Ld. CIT(A) dated 27.10.2014 passed against the assessment order u/s 143(3) of the Act, dated 28.03.2013 on following grounds:

> *"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 88,15,024/- on account of undervaluation of closing stock on the basis of additional evidences submitted during appeal proceedings without granting opportunity to the AO for verifying the same and thus violating the Rule 46A.*
> *2. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in granting relief of Rs. 8,93,558/- on account of disallowance of commission expenses only on the basis that TDS was deducted and the transactions were through bank whereas the assessee could not prove the genuineness of the commission transactions nor could he produce any contract for the same.*
> *3. The appellant prays that the order of the CIT (Appeals) on the above grounds be set aside and that of the AO be restored."*

4. Ground No.1: In this ground, the revenue has agitated the action of Ld. CIT(A) in deleting the addition of Rs.88,15,024/- made by the AO on account of undervaluation of closing stock. During the course of hearing, it was stated by the Ld. DR that since the assessee was not able to prove that correct method of accounting was followed, therefore, AO had applied average cost of valuation of stock and valuation of closing stock was done accordingly. He submitted that additional evidences were considered by the Ld. CIT(A). But, Ld. DR was not able to pin point exactly what additional evidences were considered by the Ld. CIT(A).

4.1. Per contra, Ld. Counsel of the assessee submitted that the assessee has been consistently following the FIFO method of accounting for valuation of stock in earlier years as well as subsequent years and the same has been accepted by the department and no addition has been ever made in this regard.

4.2. We have gone through the orders of the lower authorities and considered by both the sides. It is noted by us that Ld. CIT(A) analysed the facts of the case before deleting the addition with following observations:

> ***"****In appeal, it has been submitted that the appellant is a proprietor of two concerns by the name of M/s Trinity Trading and M/s Satya Tex, both of which are engaged in trading in fabric. It has been further submitted that the quantitative details of opening stock (with value), details of purchase during the year (with quantity and purchase cost) and quantitative details of closing stock (with value) were duly furnished during the scrutiny proceedings along with copies of purchase bills etc. It is also submitted that the appellant had clarified to the A.O.*

that it had been consistently following the FIFO method of valuation of stock for the past many years and that the said method of valuation had been accepted by the Department in preceding years. The appellant has argued that the overheads considered by the A.O. are applicable in the hands of a manufacturer whereas he is only a trader. It is pointed out that since he is following FIFO method, the average cost method is not applicable in his case. In light of these facts, it is stated that the addition of Rs. 88,15,024/- is unwarranted and should be deleted.

5.1.2 *I have carefully considered the facts related to this issue. One of the fundamental canons of taxation is that the method of accounting regularly followed by an assessee, cannot be disturbed unless it can be demonstrated that the profits for the year cannot be derived from the method adopted. In particular in a case where the method has been found acceptable in earlier years, the reason for rejection of the same should be clearly brought out. It is open to the assessee to choose the method but the same should be consistently adopted as held in CIT v. McMillan & Co. [19581 reported at 33 ITR 182 (SC). In the decision rendered in the case of CIT v. Advance Construction Co. (P.) Ltd. [2005] reported at 275 ITR 30 (Guj.)held as follows:*

"14.*....., it is necessary to note that under section 145 of the Act income chargeable under the head 'profits and gains of business or profession' shall be computed in accord method of accounting regularly employed by theassessee. The only exception is: where the method employed is such that in the opinion of the Assessing Officer income cannot be properly deduced therefrom the Assessing Officer shall then compute the income upon such basis and in such manner as he may determine. The provision, therefore, specifically provides that the choice of method of accounting lies with the assessee, the only caveat being that it has to show that the chosen method has been regularly followed. The section is couched in mandatory terms and the department is bound to accept the assessee's choice of method*

regularly employed, except for the situation, wherein the Assessing Officer is permitted to intervene, in case it is found that true income, profits and gains cannot be arrived at by the method employed by the assessee. The position of law is further well-settled that a regular method adopted by an assessee cannot be rejected merely because it gives benefit to an assessee in certain years."

5.1.3 *It has also been held that the A.O. must demonstrate that the method of accounting has resulted in under-estimation of profits as held by the Apex Court in the decision rendered in the case of CIT v. Realest Builders & Services Ltd. reported at 170 Taxman 218 (SC).*

"In cases where the Department wants to tax an assessee on the ground of the liability arising in a particular year, it should always ascertain the method of accounting followed by the assessee in the past and whether change in method of accounting was warranted on the ground that profit is being tinder estimated tinder the impugned method of accounting. If the AO comes to the conclusion that there is tinder-estimation of profits, he must give facts and figures in that regard and demonstrate to the Court that the impugned method of accounting adopted by the assessee results in underestimation of profits and is therefore rejected. Otherwise, the presumption would be that the entire exercise is revenue neutral."

5.1.4 *In the decision rendered in the case of CIT v. Margadarsi Chit Funds (P.) Ltd. [1985] 155 ITR 442 (AP), it was held that the A.O. must refer to the inherent defect in the system and record a clear finding that the system of accounting followed by the assessee is such that correct profits cannot be deduced from the books of account maintained by the assessee. It is not open to the ITO to intervene and substitute a different system of accounting from the one that is followed by the assessee, on the ground that the system which commends to the ITO, is better.*

5.1.5 It is seen that the appellant has consistently followed the FIFO method of stock valuation as is evident from the Audit Reports for MIs Trinity Trading and M/s Satya Tex for A.Y. 2009-10, 2010-11 and

2011-12 filed by the appellant during these proceedings. From the order passed u/s 143(3) for A.Y. 2009-10 passed in the case of the appellant himself, on 27/12/2011 it is seen that the A.O. has not made any addition on account of stock valuation. Similar is the position in the case of A.Y. 2011-12 wherein assessment in the case of the appellant is made vide order dated 27.02.2014 without taking exception to the method of valuation of stock. From the submissions made by the appellant during scrutiny proceedings, dated 04/03/2013, it is seen that the appellant had enclosed copies of bills etc. in support of the valuation. Accordingly, in view of the above facts and the settled position of law in this regard, the addition of Rs.88,15,024/- cannot be sustained and is deleted. Accordingly, Grounds No. 1 to 3 raised by the appellant are allowed.

4.3. We have carefully gone through the facts of the case and well reasoned findings recorded by the Ld. CIT(A). It is noted that the assessee has been following FIFO method for valuation of its stocks in all earlier and subsequent years and no addition has ever been made. The assessment order was passed u/s 143(3) for A.Y. 2009-10 accepting FIFO method of stock valuation. It is further noted that assessee had submitted copies of bills and other evidences to justify valuation based upon FIFO method. Further, nothing wrong could be pointed out by the Ld. DR in the detailed and well reasoned findings of Ld. CIT(A). Further, it is noted by us that closing stock of the impugned year had become opening stock of the next year. Thus, viewed from this angle also, overall tax effect taking both the years into account will be tax-neutral. Under these circumstances, we do not find any necessity to make interference in the order of Ld. CIT(A), therefore, this ground is rejected.

5. Ground No.2: In this ground, the revenue has challenged

the action of Ld. CIT(A) in deleting the commission expenses of Rs.8,93,558/-.

5.1. It was argued by the Ld. DR that the said disallowance has been deleted merely on the ground that payment was made by cheque and evidence of rendering of services has not been proved. It was further argued similar issue had arisen in A.Y. 2009-10 wherein the issue has been sent back to the file of the AO by the Tribunal.

5.2. Per contra, Ld. Counsel relied upon the order of the Ld. CIT(A).

5.3. We have gone through the facts of the case as well as order of the Tribunal of A.Y. 2009-10 dated 08.05.2015. It is noted that commission paid in identical facts and circumstances was disallowed by the AO in A.Y. 2009-10. The matter reached before the Tribunal and Tribunal has sent this issue back to the file of the AO with following observations:

> *"7. We have heard the parties, and perused the material on record.*
> *The case of both the parties before us was along with the same lines. We firstly observe that the primary reason of the A.O. in disallowing the expenditure, which he does in toto, is the non-furnishing of any evidence toward the rendering of the services for which commission on sales has been paid. In other words, the assessee's case was found deficient by him insofar as satisfactorily proving its claim was concerned. The A.O. nowhere doubted the genuineness of the expenditure, except, as it appears, in the case of Parul Bahirwani, a relative, whose place of residence; the assessee contending the payees to be out station parties, had not been specified. In fact, the doubt apparently arose in the mind of the A.O., as we infer from his calling for confirmations and supporting documents in all cases, as against from a selected few initially, on account of assessee furnishing xerox copies of the*

confirmations, and which are definitely not admissible. How could, then, the A.O. be said to have faulted in holding the assessee to have not satisfactorily proved its claim for the relevant year. The ld. CIT(A) reversed his findings without in any manner showing the same as infirm. It is not the question of the A.O. bringing contrary material on record, as stated by him. The law does not enjoin upon the assessing authority to, in order to disallow a claim for expenditure, disprove the same, but the assessee to prove the same; the payment through banking channel, which would only be proved by submission of bank statement/s (or the bank certificate, or the like), and which was not furnished despite being called for, would though a positive attribute, is not sacrosanct, nor is the fact of the same being subject to TDS. The primary charge of the A.O. as afore-stated, is toward non-evidencing the rendering of service, and which has not been rebutted in any manner. The assessee has no-where explained the modus operandi or even the manner in which the services were rendered, which is sine qua non for the claim of the commission, being only the service charges in relation thereto. Some of the classical cases in respect of expenditure in general (refer: Ram Bahadur Thakur Ltd. vs. CIT [2003] 261 ITR 390 (Ker); CIT vs. Navsari Cotton & Silk Mills [1982] 135 ITR 546 (Guj)), and commission expenditure in particular (refer: Lachminarayan Madan Lal vs. CIT [1972] 86 ITR 439 (SC); Lakshmiratan Cotton Mills Co. Ltd. vs. CIT [1969] 73 ITR 634 (SC)) are referred to draw home the point.

The findings by the ld. CIT(A) are based on bald claims, de hors any material on record. Merely making general statements, without basis in any material on record, which has moved the ld. CIT(A), would not prove a claim. His taking cognizance of the copies of the confirmations, i.e., which are inadmissible in evidence, cannot also to be regarded as valid. Even no finding qua commission to Parul Bahirwani, a relative, stands issued. We, accordingly, vacating his findings, restore the matter back to the file of the A.O. to allow the assessee an opportunity to present its case before him. The A.O. shall, on his part, proceed reasonably; that being the hallmark of any good assessment, sustainable in law. The backdrop under

which the expenditure stands incurred, is, as overly emphasized by the ld. CIT(A), nevertheless, relevant, and to be accorded due regard. Commercial expediency is an important ingredient, and which gets no doubt supported by the fact of regular expenditure, which we observe to vary over a wide range, and which may itself not be determinative, being rather in some circumstances a pointer to genuineness. Again, are the persons to whom the commission is paid the same from year to year, which would, where so, also establish them as regular commission agents, and toward which the A.O. had in fact called for their returns, etc. We leave it at that; the same being the purview of the assessing authority, only adding that his adjudication should satisfy the test of reasonableness and in accordance with the law in the facts and circumstances of the case, as validated by the material on record. We decide accordingly."

5.4. No distinction has been made on facts by the either party before us. Thus, we send the issue back to the file of the AO along with same directions as were given by the Tribunal in earlier years. The assessee shall bring on record requisite evidences to substantiate rendering of services by the agents. This ground may be treated as allowed for statistical purposes.

Now, we shall take assessee's appeal in ITA No.7471/Mum/2014

6. The assessee has filed on following grounds:

"1.On the facts and circumstances of the case and law the Ld. Commissioner of Income Tax; - Appeal (CIT-A) erred in disallowing commission of Rs. 7,00,000/-.
2. On the facts and circumstances of the case and law the id. CIT-A has not considered the fact and evidences submitted in relation to commission.
3. On the facts and circumstances of the case the Id. CIT-A erred in disallowing the above additions and thus upheld

penalty proceedings u/s 271(1) (c) of the Income Tax Act 1961.
The Appellant craves leave to add, amend, alter, modify, substitute or delete any or all the above ground(s) of appeal."

6.1. It is noted that the issue involved with regard to disallowance of commissions is identical to ground no.2 of Revenue's appeal. Since we have sent this issue back to the file of the AO, this ground is also sent back to the file of the AO with our directions as given above. The AO is directed to follow our order. These grounds may be treated as allowed for statistical purposes.

8. As a result, both appeals may be treated as partly allowed.

Order was pronounced in the open court at the conclusion of hearing.

Sd/-	Sd/-
(Sanjay Garg)	(Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य** / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 18/10/2016
*Patel, P.S.*नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**