

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH "C" KOLKATA**

Before **Shri N.V. Vasudevan, Judicial Member** and  
**Shri Waseem Ahmed, Accountant Member**

**ITA No.959/Kol/2009**  
Assessment Year :2000-01

ACIT, Circle-42, 18, Rabindra Sarani, Poddar Court, 4 <sup>th</sup> Floor, Kolkata-700001	<b>V/s.</b>	M/s M.M. Exports 22, Madan Mohon Tola Street, Kolkata 700 005 <b>[PAN No. AAFM 4426 M]</b>
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Uday Kumar Sarkar, JCIT-SR-DR
प्रत्यर्थी की ओर से/By Respondent	Shri S.M. Surana, Advocate
सुनवाई की तारीख/Date of Hearing	01-12-2015
घोषणा की तारीख/Date of Pronouncement	20-01-2016

**आदेश /ORDER**

**PER Waseem Ahmed, Accountant Member:-**

This appeal by assessee is against the order of Commissioner of Income Tax (Appeals)-XII, Kolkata in appeal No.323/XII/Cir-42/07-08 dated 26.03.2009. Assessment was framed by ACIT, Circle-42, Kolkata u/s 143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 28.12.2006 for assessment year 2000-01. Assessee has raised following ground:-

*"1. Under the facts and circumstances, the Ld. CIT(A) Ld. CIT(A)-XII, Kolkata has erred in deleting the addition of Rs.12,87,94,000/- on account of inflated purchases from M/s Madho Prasad Mahabir Prasad, on the ground that the AO failed to bring on record any corroborative material evidence to indicate the over invoicing of purchase prices of the glass beads and chatons.*

2. Under the facts and circumstances, the Ld. CIT(A) has erred in deletion of the addition of Rs.20,000/- on account of bogus purchase of M/s Monoharlal Mahabir Prasad on the ground that the AO has not conducted any enquiries either during the assessment proceedings or at the remand report stage.

3. Under the facts and circumstances, Ld. CIT(A) was not correct in deleting the addition of Rs.3,51,117/- on account of inflated purchase from M/s Atul Enterprises on the ground that AO failed to conduct enquiries and bring on record any material records contrary to the claim of the assessee and merely on the basis of assessee's arguments.

4. under the facts and circumstances, the Ld. CIT(A) has erred in deleting the addition of Rs.37,27,578/- on account of inflated purchase from M/s Unisilk on the ground that AO should have verified this aspect from different sources including Custom authorities and other Govt. agencies to ascertain the real value of the goods reported if comparative market rate was not available.

5. Under the facts and circumstances, the Ld. CIT(A) has erred in allowing the assessee's appeal regarding the addition on account of Cessation of liability of Rs.1,21,553/- w.r.t. M/s A.B.N. Laminators merely relying on assessee's arguments whereas the assessee could neither prove it during the assessment stage, nor during the remand report stage and nor during the appellate stage.

6. under the facts and circumstances, the Ld. CIT(A) was not right in deleting the disallowance of freight expenses to the tune of Rs.23,250/- paid to Natwar Parikih and other freight expenses of Rs.38,235/- which were made in absence of any plausible evidence. Hence, the Ld. CIT(A) was not justified in allowing the same.

7. under the facts and circumstances of the case, the Ld. CIT(A) was not correct in allowing 90% of the sale proceeds of the DEPB license as allowable deduction u/s. 80HHC(3) as the conditions laid u/s 80HHC were not fulfilled for the claim. ”

2. First ground raised by Revenue is that Ld. CIT(A) erred in deleting the addition of Rs. 12,84,94,000/- made by Assessing Officer on account of inflated purchased.

3. The facts of the case are that assessee is a partnership firm engaged in manufacturing and exports business. During the year, assessee purchased goods from M/s Madho Prasad Mahabir Prasad glass beads and glass chatons. The necessary details of purchases are given as under :

<u>S.No.</u>	<u>Goods description</u>	<u>Quantity</u>	<u>Rate</u>	<u>Amount(Rs.)</u>
1.	Glass beads	19,266 Kgs.	6750/-	Rs. 13,00,45,500/-
2.	Glass chatons	25,000 dozens	30/-	Rs. <u>7,50,000/-</u>
			Total 'A'	Rs. <u>13,07,95,500/-</u>

The AO during the assessment proceedings observed that all the purchases were made within the period of two months i.e. April 1999 to May 1999. The assessee failed to produce the evidence of transportation and delivery of the goods. The assessee has submitted the photocopies of the bills in support of his purchase of the above goods from the party. On the request of the AO the assessee produced the owner of M/s Madho Prasad Mahabir Prasad for the verification of the transactions. However the party expressed his inability to get the transactions verified in the absence of the books of accounts. Accordingly he requested the AO for 10 days time but thereafter he never appeared. The notice sent to the party was returned unserved. Besides the above the AO also found there was also some report from the custom department that the assessee and three other exporters have exported 58 consignments of finished goods of glass beads at a highly declared export price of Rs. 7000.00 per kg. in order to avail the DEPB credit to the tune of Rs. 4.80 crores. Whereas the sale price of the same from the reputed manufacturer of glass beads ranges from Rs. 70 to 100 per kg.

3.1 In view of the above the AO held that the purchases are bogus and worked out the genuine purchase as under :

<u>S.No.</u>	<u>Description of goods</u>	<u>Quantity</u>	<u>Rate</u>	<u>Amount (Rs.)</u>
1.	Glass beads	9266 Kgs.	1000/-	Rs. 19,26,600/-
2.	Glass Chatons	25000 dozens	3/-	Rs. <u>75,000/-</u>
			Total 'B'	Rs. <u>20,01,600/-</u>
	Difference (A-B)			Rs. <u>12,87,93,900/-</u> Say Rs.12,87,94,000/-

The AO has disallowed the above purchase by treating it bogus purchase and added to the total income of the assessee.

3.2 Aggrieved, assessee preferred appeal before Ld. CIT(A) who deleted the addition made by the AO by observing as under:-

*"iv. I have perused and examined the above documents furnished before me and also perused the assessment records wherein almost all the above said documents are available. I have also gone through the relevant facts of the appellant connected to enquiry made by the Customs Department. Some of the documents are available in the assessment records and some documents were furnished during appellate proceedings.*

*It is noticed from the Custom's records that investigations are initiated against some exporters of Calcutta including the appellant and M/s Ramapati Exports and others on the basis of information about over valuation of exported goods of various exporters. Accordingly action was initiated both by the Customs Department and also the Special Investigation Branch (SIB) of the Customs Department during the relevant period of time. Show cause notices were issued to some exporters including the appellant alleging over valuation of the exported goods. In the case of M/s. Ramapati Exports who also purchased glass beads from M/s Madho Prasad Mahabir Prasad, the show cause notice issued was adjudicated upon by the Commissioner of Customs wherein he dropped the proceedings against all the notices. On appeal the Kolkata Customs Tribunal held that the allegation of over valuation of glass beads exported was not sustainable in the absence of any positive and tangible evidences and that samples taken from respondent's consignment not tested but having been misplaced and that value of glass beads proposed in show cause notice not acceptable in absence of any co-relation made by Revenue. In that ordered the Hon'ble Tribunal also mentioned that Mr. Nirmal Kr. Sarswat filed before the Commissioner certified copies of sale/purchase agreement, challans, invoices, payment instructions and money receipts issued to the respondent (M/s M.M. Exports is also one such party). The Hon'ble Tribunal also quoted that the Commissioner of Customs, Kolkata on appraisal of the evidence on the statement of various persons recorded by SIB concluded that the statements may create an element of doubt of suspicion with regard to the valuation of impugned glass beads and no tangible evidence has been obtained to substantiate the evidence collected through the statements. I have also noticed from the copy of the order of Hon'ble Supreme Court of India that the Apex court has dismissed the appeal made by the Commissioner of Customs, Kolkata in the case of M/s Ramapati Exports. Thus as argued by the Ld. AER the matter of over valuation in the case of M/s Ramapati Exports reached a finality. The facts of this case and subsequent dismissal of appeal of 'over valuation' assumes significance as during the relevant point of time i.e. F.Y 99-00 relevant to the AY 2000-01, M/s Madho Prasad Mahabir Prasad supplied glass beads both to the appellant and also to M/s Ramapati Exports. I agree with the views expressed by the Ld. AR that the case of M/s.Ramapati Exports is identical and connected to the appellant's case and therefore the ruling given in that case would apply to the app's case also. It is relevant to reproduce a portion of the extract of appellant's submission dt. 26.03.09 as under:-*

'From the above it s crystal clear that Your Appellant Exported goods being Glass Beads & the same is not disputed, the price at which

exports have taken place has been accepted by the Customs Department itself during the assessment of all the shipping Bills. In the case cited ii 8 above Export Price of US \$162 i.e. the same price at which we had made exports was approved & no over-invoicing could be proved by the department. The basis of downward revision of purchase price by the Assessing Officer was the report of customs which itself stands rejected after the order of the CESTAT & value taken for exports i.e. US 162 or Rs.7000/- per KG was found to be genuine. As the case of action of the Assessing Officer for treating Reducing the Purchase price of Glass Beads from Rs.6750- per KG to Rs.100/- per KG was not tenable in law the action of Assessing Officer is also not tenable in law, unjustified & illegal & the same should be set aside.

Further taking a value of 100 Per KG against a Sale Value of Rs.7000/- per KG results in a Gross Profit of around 98% which is unrealistic, unreal & imaginary. In the circumstances of our case, Judgement on similar facts the Order of the Assessing Officer as regards taking the purchase price to be Rs.100/- per KG needs to be set aside.'

*The above argument of the appellant is also supported by another evidence by way of letter dt. 21.09.99 of Commissioner of Customs (Port), Kolkata addressed to Member (Customs) wherein it was commented that there was no over invoicing in the case of decorative finished glass beads. It was further mentioned in that letter that the decorative glass beads price ranged from Rs.6,000/- to Rs.6,500/- per kg. during the relevant point of time.*

*The above facts as revealed from the customs records clearly shows that there is no element of over invoicing of glass beads in the case of M/s. Ramapati Exports connected to M/s Madho Prasad Mahabir Prasad who also supplied glass beads to M/s M.M. Exports at the relevant point of time. As such, based on such information and report received from Asst. Commissioner, Customs the AO blindly adopted the value without making any marketing enquiries with regard to the comparative price of glass beads and chatons existing at that relevant point of time as the Customs Authorities pointed out there was a huge variance in quality and price of the glass beads. As such without verifying the quality and price from the market sources and without bringing in any corroborative material evidence on record to indicate the over invoicing of purchases, the Assessing Officer's action of adopting the value of Rs.100/- per kg. for glass beads and Rs.3/- per dozens for chatons is not logical as there was no basis for such valuation. Moreover the AO has also not made any enquiries with regard to payments made by the appellant through banking channels. It is also to be mentioned here that Mr. Nrmal Kr. Sarswat, the proprietor of M/s Madho Prasad Mahabir Prasad furnished an affidavit before Chief Metropolitan Magistrate, Kolkata dt. 14.02.2000 wherein he confirmed that he sold and delivered the glass beads to M/s M.M. Exports and M/s Ramapati Exports. A copy of the above said affidavit is also been furnished. The relevant portion appearing at point 5 of page 2 of the affidavit is reproduced as under:-*

'I say that the said glass beads were received by me in small lots on diverse dates and I sold delivered the same to the said M/s M.M. exports, Calcutta and M/s. Ramapati Exports at their respective offices at Calcutta through my said peon.'

*The said Mr. Sarswat has also furnished a reply dt 26.02.03 to the Commissioner of Customs (Port), Kolkata wherein he confirmed that he sold the glass beads to M/s. M.M. Exports at Rs.6,750/- per kg. The relevant extract appearing at point 4 & of page 1 & 2 of the above said reply is reproduced here as under:-*

'4. I came into contract with Shri L.K. Todi of M/s M.M. Export, who wanted to buy Glass Beads from me. I entered into an agreement with him to sell Glass Beds at local level & Rs.6,750- per kg. The Glass beads were hand cut and hand polished.

5. Between April, 1999 and May 1999, I sold and delivered 19260 Kg and 25000 Dozen of hand cut Glass Beads and decorated and Glass Chatons. Time to time I raised Bills upon M/s M.M. Export which were paid by M/s M.M. Export to me or my nominees. On few occasion I caused to deliver the goods through M/s Arawali Gems when the goods were required on urgent basis.

*The only deficiency pointed out by the AO is that Mr. Nirmal Kr. Sarswat did not appear on a subsequent day and that no transport evidence was produced corresponding to the purchase in question. In my opinion, this is not a conclusive test to arrive at the bogus/inflated nature of the purchasers without verifying the payments made by the banking channels. Moreover, the AO despite assessment details furnished could not cross verify from the assessment records available. Also the AO could not prove that the corresponding export sales were bogus and non-existing. The appellant has sufficiently produced the necessary documentary evidences in respect of the purchases in question.*

*v. Decision:*

*In view of the foregone discussion and circumstances and facts of the case especially in the light of the findings noticed from the Customs recourses, I am of the view that the AO failed to bring on record any corroborative material evidence on record to indicate the over invoicing of purchase prices of the glass beads and chatons. Accordingly, I held that the addition made on account of alleged over invoicing of purchases is without any basis. Accordingly I direct the AO to delete this addition of Rs.12,87,94,000/- made on account of inflation of purchases.*

Being aggrieved by this order of Ld. CIT(A) Revenue came in appeal before us.

Mr.S.M. Surana, Ld. Authorized Representative appearing on behalf of assessee and Mr. Uday Kumar Sarkar, Ld. Departmental Representative appearing on behalf of Revenue.

4. We have heard rival contentions and perused the materials available on record. Ld. DR vehemently relied on the order of Assessing Officer whereas Ld. AR supported the order of Ld. CIT(A). Ld. AR submitted the paper book which is running pages 1 to 178. Before us the Ld. AR submitted that the AO has taken the purchase price at just Rs. 100/- per kg. without investigating the market price. The AO has acted on the information gathered from the custom department. The assessee during the year has exported the goods and received the sales consideration in foreign exchange after purchasing the goods from M/s Madho Prasad Mahavir Prasad. However the AO has not challenged the sale claimed by the assessee. The Ld. AR produced the copy of the purchase bills from the above said party which are placed on **pages 144 to 161 of the paper book**. There was also an agreement between the assessee and the party for the sale purchase of glass beads and fire polished glass chatons which is placed at **page 162 of the paper book**. The assessee has made the payment of all the purchase bills through account payee cheque. Our attention was also drawn on page 30 to 33 of the custom report to demonstrate that no over valuation of the exports was made to earn extra DEPB and the name of the assessee was not there in the list those who claimed the extra DEPB. . Finally the AR prayed for allowance of the purchase expenses.

4.1 From the aforesaid discussion we find that the assessee has made total purchase of the goods for an amount of Rs. 13,07,95,500.00 from M/s Madho Prasad Mahavir Prasad. Out of the total purchase the AO has disallowed the purchase expenses worth of Rs. 12,84,94,000.00 on the information gathered from the custom department that the assessee has overpriced the value of the export goods. However the CIT(A) has allowed the same by treating the

transaction at the fair market value. We find that the AO in the instant case has disallowed the substantive purchase without making the substantive enquiry about the prevailing market price of the product in question. The AO also not considered the payment to the party which was made through the banking channel. The goods were exported after the custom clearance and the payment was realized in terms of convertible of foreign exchange. We also find from the report of the custom department that no over invoicing for the export of the goods was made. The Id. AR also drew our attention on pages 85 to 90 of the paper where the affidavit given by Mr. Nirmal Kumar Sarswat- a partner of M/s Madho Prasad Mahavir Prasad before the Ld. CHIEF METROPOLITAN MAGISTRATE regarding the sale of the goods to the assessee is placed. Therefore considering the totality of the case and submission we find no reason to interfere in the order of the Id. CIT(A), hence the ground raised by the Revenue is dismissed.

5. Second issue raised by Revenue is that Ld. CIT(A) erred in deleting the addition made by AO for ₹20,000/- on account of bogus purchase from M/s Monoharlal Mahabir Prasad.

6. During the year assessee claimed to have purchased goods worth of ₹ 20,000/- from M/s Monoharlal Mahabir Prasad. The AO found that the party operates from the same address as that of assessee. On enquiry from the party for the sale of goods, it was found that no sale was made to the assessee. Therefore, the same was disallowed and added to the total income of assessee.

7. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who has deleted the addition made by AO by observing as under:-

*"i. The AO made the addition as the appellant failed to produce purchase bill and the party (supplier of goods) also not confirmed the sale made to the appellant. In the remand report the AO reproduced the same argument*

*ii) The Ld. AR however argued that copy of invoice dated 25.06.99 having purchased 'ties' and copy of Form No. 42A obtained from Sales Tax*

*Authorities indicating the purchase made from outside West Bengal were furnished before the AO at assessment proceedings stage ad also at remand report stage. As regards the non-conformation from the party it is submitted that the appellant produced all necessary evidences in respect of the purchase made including ledger extract of the party appearing in the app's books of account.*

*iii) I have perused the documents which were produced before the AO including Form No. 42A given by the Sales Tax Authorities. I find there is a force in the argument of the Ld. AR that the appellant filed all the relevant details including the address of M/s Manohar Lal Mahabir Prasad. The AO as not conducted any enquiries either during the assessment proceedings or at the remand report stage. In fact M/s Manoharlal Mahabir Prasad is the sister concern of the appellant firm. The AO should have cross verified the return of income filed by this party.*

*iv).As the AO failed to produce any cogent and corroborative evidence to establish the bogus nature of the above purchase, I direct the A.O to delete this addition of Rs.20,000/-”*

8. We have heard both the parties and perused the materials available on record. Before us the Id. AR submitted that the goods were purchased from the said party vide invoice no. MMP/NT/176 dated 25.6.1999 for Rs. 20,000/-. This transaction of purchase was interstate purchase so the form 42A was duly submitted to the Sales Tax Department.

9. We find from the aforesaid discussion that the AO has disallowed the purchase expenses due to non availability of the purchase bills. However the same has been allowed by the Id. CIT(A) after due verification of the necessary supporting evidence. Before us the Id. DR has not brought anything on record to controvert the finding of the Id. CIT(A), therefore we are confirming the order of the Id. CIT(A) and dismissed this ground of the Revenue.

10. Ground No.3 raised by Revenue is that Ld. CIT(A) has erred in deleting the addition made by AO for an amount of ₹3,51,117/- on account of inflating purchase from M/s Atul Enterprise.

11. During the year assessee claimed to have made purchase for an amount of ₹3,51,117/- from M/s Atul Enterprise. But the assessee failed to produce the purchase bills from the party. The AO made enquiry from the party concern u/s. 133(6) of the Act, but the notice was returned by the Postal Department as 'unserved'. The assessee also failed to provide the present address of the party. Therefore, AO could not make necessary enquiry for the purpose of verification of purchase bill. Hence, the purchase amount of ₹3,51,117/- was disallowed and added it to the income of assessee.

12. Aggrieve, assessee preferred appeal before Ld. CIT(A) who has deleted the addition by observing as under:-

*"i. The AO made the addition in the absence of purchase bills and the present postal address of the party.*

*ii. The AR furnished the present postal address of Mr Arun Kumar Todi of M/s Atul Enterprises along with ledge copy, invoice copies, payment details by account payee bank drafts and other relevant details before the AO during the remand report stage. The AO has not caused any enquiries except acknowledging the fact that some copies of invoices were submitted. My earlier predecessor called for a remand report from the AO way back on 25.6.07 enclosing copy of the submissions made before the CIT(A). Again a reminder was sent on 20.8.07 for early report on the points raised by the appellant. Finally the AO has sent the report without causing any enquiries. When a direction given by the CIT(A) to sent a report on certain points/submissions made by the appellant including the points/evidences not raised/produced before the AO during assessment proceedings, the AO bound to act and given his comments after due verification of the matter. The AO should have made proper enquiries to ascertain the genuineness of transactions as the present postal address and payment details available.*

*iv. In my view, the appellant which failed to produce the relevant details during assessment proceedings, furnished the required details at the remand report stage, thus discharging its onus of responsibility. It is for the department to prove the genuineness or otherwise of the transactions when once the basic facts are available. However the AO failed to get enquiries done and bring on record any material evidence contrary to the claim of the appellant. In these circumstances, the addition made on account of unproven genuineness of transactions is not reasonable and deserves to be deleted. Accordingly, I direct the AO to delete the addition of Rs.3,15,117/- made towards purchase."*

Being aggrieved by this order of Ld. CIT(A) Revenue is in appeal before us :

13. Before us the Id. AR submitted that all the payments for purchases were made through account payee cheque. The Id. AR produced the copy of the ledger of the party which is placed at page 178 of the paper book. The Id. AR also submitted that all the requisite details were submitted such as copies of invoice, ledger copy, payment details etc. before the AO during the time of the remand report.

14. We find from the aforesaid discussion that the AO disallowed the purchase due to non-production of the bill from the party, notice sent was unserved and non-availability of the present address of the party. But we find from the order of the Id. CIT(A), all the necessary details were furnished at the time of the remand report to the AO. The Id. DR. has also not brought anything on record to controvert the finding of the Id. CIT(A). In view of above we find no reason to interfere in the order of the Id. CIT(A). Hence this ground of Revenue appeal is dismissed.

15. Ground No.4 raised by Revenue in this appeal is that Ld. CIT(A) erred in deleting the addition for an amount of ₹37,27,578/- on account of inflated purchase from M/s Unisilk.

16. During the year, assessee claimed to have purchased goods worth of Rs.37,27,578/- from M/s Unisilk Ltd. having address at 1615/16/F 1, Star House, 3, Salis Buri Road, Kowloon, Hong Kong. Several opportunities were given to assessee to produce necessary evidence in respect of the above stated purchases. But the assessee failed to provide the documentary evidence. Therefore, AO held that such purchase cannot be treated as genuine, therefore disallowed and added to the income of assessee.

17. Aggrieved, assessee preferred second appeal before Ld. CIT(A) who deleted the addition made by AO by observing as under:-

*“i. As seen from the assessment order the AO made the addition as the appellant failed to produce any supporting evidence. During the remand report stage, the AO observed that the assessee failed to produce justification of the cost of purchase of raw silk.*

*ii. The appellant on the other hand submitted that it produced all relevant information proving the imports and genuineness of transaction by way of invoices and bill of entry.*

*iii. In my view, the appellant produced sufficient material evidence to prove the import transaction to meet the requirement of the AO as pointed out in his assessment order. However according to AO the appellant failed to produce any evidence justifying the cost of silk. The appellant submitted that the item being unique, the price comparability is not available. May be the appellant is right. Firstly as the same kind of quality silk would not be available in India. Hence the appellant might have imported the goods. Secondly the cost of that particular kind of silk might be comparatively less which made the appellant to import the goods. On the other hand the AO should have verified these aspects from different sources including Customs Authorities and other government agencies (Commerce Ministry etc.) to ascertain the real value of the goods import if comparative market rate was not available. He should have examined the aspect of the utility of the goods and subsequent sale to ascertain its consumption and price. The Assessing Officer has not made any efforts either to prove the imports are wrong or to bring any cogent material evidence to show that the appellant resorted to over invoicing imported purchases. In view of the matter I am of the opinion that the addition made on account of cost deserved to be deleted. Therefore, I direct the AO to delete this addition of Rs.37,27,578/- made towards purchase of silk.”*

18. Before us the Id. AR submitted that this is an import transaction and all the relevant documents such as all the 4 invoices of the party, Bill of entry of each import (4 Nos.), Bank certificate for the remittance of payment before the AO at the time of remand report. However the AO asked for the comparison of the import price of Silk with Indian price which the assessee failed to furnish being the unique item of purchase.

18.1 From the aforesaid discussion we find that the AO has disallowed the purchase of imported silk worth of Rs. 37,27,578.00 due to non production of the necessary supporting documents. But we find from the order of Id. CIT(A) that all the requisite details were furnished to the AO at the time of remand report. The Id. DR has not brought anything on record to controvert the findings of the Id. CIT(A). In view of above we find no reason to interfere in the order of the Id. CIT(A). Hence this ground of Revenue appeal is dismissed.

19. Ground No.5 raised by Revenue in this appeal is that Ld. CIT(A) erred in treating the addition for an amount of ₹1,21,553/- on account of cessation of liability with respect to w.r.t. M/s A.B.N. Lamenators.

20. During the course of assessment proceedings AO found that the creditors worth of ₹1,21,553/- was appearing at the end of year in the name of M/s A.B.N. Lamenators. The AO observed that the creditor was outstanding for the last several years and assessee was not having the current address of the said party. Therefore, AO opined that such liability is not payable and cannot be enforced for payment. Hence, AO found that liability is ceased to exist. Therefore, same added to the income of assessee.

21. Aggrieved, assessee preferred appeal before Ld. CIT(A) who deleted the addition made by AO by observing as under:-

*“i. The A.O made additions in the case of ABN Laminators P. Ltd., Kolkata and RGS Apparels, Tripur, Tamil Nadu with respect to sundry creditors’ on the ground that the liability was ceased. Moreover the notices sent u/s 133(6) returned unreserved. In the remand report the AO observed that the appellant furnished only the residential address of one of the directors of ABN Laminators P. Ltd. and in the case of RGS Apparels no present address was produced.*

*ii. On the other hand, the Ld. AR submitted that in the case of ABN Laminators P. Ltd.’s current postal address as appearing in the records of the register of the companies was furnished along with the residential address of the director of a company. It is further submitted that the company is a duly registered company and copy of I.T*

*acknowledgement of the party was also produced. The notice u/s. 133(6) was issued after a gap of more than seven years as such there would have been a change in the address. In respect of M/s RGS Apparels it has been submitted that since the notice was given after a gap of seven years there would have been a change in the address and that the amount in question was subsequently paid by way of account payee cheque during the F.Y 2003-04. To this extent the copies of the ledger accounts were furnished.*

*iii. In the case of M/s. ABN Laminators P. Ltd., the appellant furnished the current postal addresses of the company and residential addresses of a director of the company along with income tax details of the company. However the AO has not conducted any enquiries based on the information given by the appellant. He should have enquired into the matter as the present whereabouts of the company has brought to the knowledge of the AO. The cessation or remission of liability depends on the factual position. Either the appellant company suo motu write off in its books or based on the confirmation given by the sundry creditors the cessation of the liability comes into picture. In this case there is neither remission nor cessation of liability. In the absence of any material evidence brought on record by the AO even at the remand report stage I decline to agree with the addition made on account of cessation of liability in the case of M/s ABN Laminators P. Ltd."*

Being aggrieved by this order of Ld. CIT(A) Revenue came in appeal before us.

22. Before us the Id. AR submitted that the liability towards the creditor is very much appearing in the books of the assessee and it has not ceased to exist. For the non-service of notice the assessee submitted that liability in the books of the assessee has been appearing for more than 7 Years so apprehended for the change of address of the company. However we find from the submissions and records that the liability towards sundry creditors has not ceased to exist in the books of the assessee. Therefore it cannot be treated as income of the assessee. The Id. DR has not brought anything on record to controvert the findings of the Id. CIT(A). In view of above we find no reason to interfere in the order of the Id. CIT(A). Hence this ground of Revenue appeal is dismissed.

23. Ground No.6 raised by Revenue in this appeal is that Ld. CIT(A) erred in deleting the addition made by AO on account of freight expenses of ₹23,250/- to Natwar Parikh Industries and other freight expenses of ₹38,235/- on account of non-production of supporting evidence.

24. During the year, assessee has incurred an expense of ₹ 52,046/- towards freight charges to Natwar Parikh Industries and other freight charges of ₹ 38,235/- but assessee failed to produce supporting evidence. Therefore, same was added to the income of assessee by AO.

25. Aggrieved, assessee preferred appeal before Ld. CIT(A) where the assessee submitted only part of the bills related to Natwar Parikh Industries for an amount of Rs. 23,250/- but no supporting document was submitted for other freight expenses. Accordingly the Id. CIT(A) deleted the addition of Rs. 23,250.00 only by observing as under:-

*"i. The AO added Rs.52,046/- in the case of M/s Natwar Parikh Industries and Rs.38,235/- towards miscellaneous expenses in the absence of bills and supporting evidences. Even in the remand report the AO observed that no supporting evidences were furnished.*

*ii. The appellant contended that M/s Natwar Parikh Industries was a duly registered company and that apart from producing 10 copies of invoices amounting to Rs.22,250/- money receipt also enclosed and the AO has not caused any enquiries in this regard. As regards miscellaneous freight bills the appellant furnished only freight account without any supporting evidences.*

*iii. It is not correct on the part of the appellant to say that the AO has not conducted any enquiries. It is the responsibility and onus trusted on the appellant to produce the necessary evidences. It only produced evidence to the extent of Rs.23,500/- by way of producing 1 copies of invoices. As such for the remaining amount of Rs.28,796/- no documentary evidence whatsoever produced by the appellant. Accordingly I direct the AO to restrict the addition to Rs.28,796/- out of total disallowance of Rs.52,046/-. As regards miscellaneous freight bills the appellant failed to produce any supporting evidence to justify the expenditure of Rs.38,235/-. However taking into consideration the turnover of the company and circumstances, I direct the AO to disallow 20% of Rs.38,235/- which in my opinion is reasonable enough to take*

*care of any inflation in freight bills. This is because the Ld. AR brought to my notice that all these miscellaneous freight bills belong to local transport by way of cartage, hamail charges etc.”*

Being aggrieved by this order of Ld. CIT(A) Revenue is in appeal before us.

26. Before us the Id. AR demonstrated that the copies of the bills for an amount of Rs. 23,250.00 of M/s Natwar Parikh Industries towards freight charges were submitted before the AO at the time of remand report. The AO could have made enquiry under section 133(6) of the Act for establishing the genuineness of the expenses. Regarding the other freight expenses, the Id. AR submitted that the necessary details in support of the expenses were furnished before the AO at the time of remand report.

From the aforesaid discussion we find that the above said expenses were disallowed by the AO due to non availability of the supporting documents. However some details were submitted before the AO at the time of the remand report. Accordingly the Id. CIT(A) granted the relief to the assessee. However the argument of the Id. AR that the freight charges to Natwar Parikh Industries could have been verified by issuing the notice under section 133(6) is not tenable as it is the duty of the assessee to provide the information as desired by the AO in connection with the assessment proceedings. We also find that the assessee could not produce the necessary supporting evidence before the lower authorities in connection with other freight charges. Considering the facts in totality and turnover of the assessee, we do not want to interfere in the order of the Id. CIT(A). Hence this ground of Revenue appeal is dismissed.

27. Ground No.7 raised by Revenue in this appeal is that Ld. CIT(A) erred in allowing 90% of the sale proceeds of the DEPB license as allowable deduction u/s 80HHC(3) of the Act.

28. During the year assessee has made a sale of DEPB license and earned an amount of Rs. 2,15,29,749/-. The turnover of assessee for the relevant year was more than Rs.10 crores. The AO found that in view of the insertion of clause (a) & (b) under the 3<sup>rd</sup> proviso of sub section (3) in Sec. 80HHC with retrospective effect from 1<sup>st</sup> April, 1998 the assessee was not allowed to claim the deduction of the profit on sale of DEPB license u/s 80HHC of the Act. Therefore, the claim of assessee u/s 80HHC was disallowed and added to the total income of assessee.

29. Aggrieved, assessee preferred appeal before Id. CIT(A) where the assessee submitted that the conditions mentioned in the 3<sup>rd</sup> proviso to section 80HHC are very much fulfilled. Accordingly the Id.CIT(A) after considering the assessee submission and remand report of the AO concluded that the deduction is available to the assessee by observing as under :-

*"i. I have perused the provisions of Section 80HHC of I.T Act and also Export & Import Policy (1997-2002) and the contentions raised by the appellant as against the disallowance of claim on account of profit on sale of DEPB License u/s. 80HHC(3) of proviso (a) & (b).*

*ii. The two conditions laid down u/s. 80HHC(3) with regard to the claim of 90% of sale proceeds of DEPB License are:*

- i) The assessee should have an export turnover exceeding Rs.10 crores during the previous year.*
- ii) The assessee should have necessary and sufficient evidence to prove that:*

*(a) He had an option to choose either the duty draw back or DEPB scheme ; and*

*(b) The rate of draw back credit attributable to the Customs duty was higher than the rate of credit allowable under DEPB scheme.*

*"As contended by the appellant the two main conditions prescribed u/s. 80HHC(3) have been fulfilled by the appellant and accordingly the appellant is eligible to claim the deduction of 90% of the sale proceeds of the DEPB License in computing deduction u/s. 80HHC of the Act.*

*iii. As regards the objection of the AO that para 7.14 pertains to import of gold/silver, I have perused the entire text of the Export and Import policy and it is very clear from the report that the AO misread the para 7.14 of the Handbook of procedures instead of para 7.14 of the Foreign Trade Policy. As contended, if the appellant's business activities are not eligible as per Export & Import policy the appellant would not have granted DEPPB License at all.*

*In view of the matter I am to hold that the appellant has correctly claimed the deduction u/s. 80HHC(3) on account of sale of DEPB License. Accordingly, I direct the AO to allow the benefit of 90% sale proceeds of DEPB license while computing the benefits u/s. 80HHC."*

Being aggrieved by this order of Ld. CIT(A) Revenue came in appeal before us.

30. Before us the Id. DR vehemently supported the view of the AO. On the other hand the Id. AR while strongly relying on the order of Id. CIT(A) submitted that the assessee was having the option of availing either duty drawback or the DEPB in terms of the section 5 of the Foreign Trade (Development & Regulations) Act. For the condition specified under clause (b) of 3<sup>rd</sup> proviso to section 80HHC(3), the Id. AR submitted that the custom duty leviable on the goods was 35% and DEPB entitlement was only 20%. Hence the Id. AR pleaded that since both the conditions specified in clause (a) & (c) to the 3<sup>rd</sup> proviso to section 80 HHC (3) have been fulfilled, so the deduction under section 80HHC for the profit on sale of DEPB license.

31. We have heard rival parties and perused the materials available on record. From the facts of the case we find that the AO has disallowed the deduction claimed by the assessee under section 80HHC of the Act on the ground that the assessee has not fulfilled the condition specified under clause (a) & (b) to the proviso of section 80HHC(3) of the Act. However the Id. CIT(A) allowed the same on the ground that all the aforesaid conditions have been fulfilled by the assessee. Now let us examine the relevant provisions of clause

(a) & (b) to 3<sup>rd</sup> proviso to **sub section 3 of section 80HHC** of the Act which reads as under :

*“Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiid) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that,-*

- (a) He had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and*
- (b) The rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme:”*

Now to avail the benefit under section 80HHC for the profit arising from the sale of the DEBT license the above said twin conditions needs to be satisfied. We accordingly find from the submission of the assessee that both the conditions have been fulfilled as provided in (a) and (b) of third proviso to section 80HHC of the Act. The relevant Policy of the DEPB in terms of paragraph 7.14 of the Foreign Trade Policy notified u/s 5 of the Foreign Trade (Development & Regulation) Act is set out herein below:

*“For exporters not desirous of going through the licensing route, an optional facility is given under DEPB. The objective of Duty entitlement pass book scheme is to neutralize the incidence of customs duty on the import content of the export product. The neutralization shall be provided by way of grant of duty credit against the export product.*

*Under the Duty Entitlement passbook scheme (DEPB) an exporter may apply for credit, as a specified percentage of FOB value of exports, made in freely convertible currency. The credit shall be available against such export products and at such rates as may be specified by the Director general of foreign trade by way of a public notice issued in*

*this behalf, for import of raw materials, intermediates, components, parts, packaging materials, etc.*

*The holder of Duty Entitlement passbook scheme (DEPB) shall have the option to pay additional customs duty, if any, in cash as well.”*

For the condition specified in clause (b) the assessee submitted that the Drawback credit attributable to custom duty was 35% in terms of Custom Tariff Heading 7018 and where as the DEPB entitlement was only 20%. We also find that the Id. DR has not brought anything contrary to the findings of the Id. CIT(A). In view of above we find no reason to interfere in the order of the Id. CIT(A). Therefore we dismiss the ground of Revenue.

**32. In the result, Revenue's appeal is dismissed.**

Order pronounced in the open court 20/01/2016

Sd/-  
(N.V.Vasudevan)  
(Judicial Member)  
Kolkata,

Sd/-  
(Waseem Ahmed)  
(Accountant Member)

\*Dkp

दिनांक:- 20/01/2016 कोलकाता ।

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. अपीलार्थी/Appellant-ACIT, Cir-42, 18, Rabindra Sarani, Poddar Court, 4<sup>th</sup> Fl, Kol-01
2. प्रत्यर्थी/Respondent-M/s M.M. Exports 22, Madan Mohon Tola Street, Kolkata-05
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,  
/True Copy/  
उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
कोलकाता ।