

**IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH “H”, MUMBAI**  
**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND**  
**SHRI PAWAN SINGH, JUDICIAL MEMBER**  
**ITA No.4939/Mum/2015 (Assessment Year- 2011-12)**

Shri Prakash Fatandas Jassuja, M/s Fatandas Mangumal, Mahatma Phule Market, Nr. Old Municipal Office, Bhaji Market, Thane(W)-400601 <b>PAN: AEVPJ3440E</b>	<b>Vs.</b>	ITO, Ward-3(2), Room No. 3, B Wing, Ashar IT Park, Road No. 16Z, Wagle Estate, Thane.
(Appellant)		(Respondent)

Assessee by : Shri Devendra Jain (AR)  
Revenue by : Shri T.A. Khan (DR)  
Date of hearing : 21.09.2017  
Date of Pronouncement : 27.09.2017

**Order Under Section 254(1) of Income Tax Act**

**PER PAWAN SINGH, JUDICIAL MEMBER:**

1. This appeal by assessee under section 253 of the Income-tax Act (the Act) is directed against the order of Commissioner of Income –tax (Appeals)-2 [ld. CIT(A)-2], Thane dated 17.08.2015 for the Assessment Year (AY) 2011-12.

The assessee has raised the following grounds of appeal.

1. On the facts and in the circumstances of case and in law, the Ld. AO has erred in exceeding powers u/s 133A of the Act in terms of examining the appellant on oath and using the statement so recorded as evidence.
2. On the facts and in the circumstances of case and in law, the Ld. AO has erred in invoking section 131 of the Act despite full co-operation by appellant during the survey proceedings.
3. Without prejudice to ground no. 1, 2 and 3, on the facts and in the circumstances of the case and in law, the ld. AO has erred in adding Rs. 14,38,282/- being 100% of gross profit.

4. Without prejudice to ground no. 1, 2, 3 and 4, on the facts and in the circumstances of the case and in law, the addition should be restricted to gross profit margin in respect of onions only.
  5. On the facts and in the circumstances of case and in law, the Ld. AO has erred in denying set off of brought forward short term capital loss of Rs. 6,37,542/- against short term capital gain of Rs. 8,69,087/-
  6. Without prejudice to ground no. 5, on the facts and in the circumstances of case and in law, the ld. AO has erred in taxing the short term capital gain of Rs. 8,69,087/- at slab rates instead of 15%.
2. Brief facts of the case are that the assessee is a trader of Onion and Potato, filed his return of income for relevant AY on 22.09.2011 declaring income of Rs. 8,60,000/-. The return of income was processed under section 143(1) of the Act. Subsequently, a survey action under section 133A was carried out at the business premises of assessee on 07.01.2011. During the course of survey, various bills/receipt/loose papers related to unaccounted sales and purchase were found and impounded. The statement of assessee was also recorded. In the statement, the assessee admitted that he has also carried out sales and purchase of Onion, Potato and Garlic in cash in earlier years, which is not recorded in the regular books maintained. On the basis of statement of assessee the assessing officer made addition Rs. 14,38,282/- in the income of assessee. The addition was made @ 100% of Gross Profit. The assessee also claimed the set off of brought forward losses. The Assessing Officer noticed that in the previous years, the assessee has not shown any loss nor allowed any carried forward loss. Thus, the set off of loss for Rs. 6,37,452/- against the Short term Capital Gain was disallowed. On appeal before the ld. CIT(A), both the addition and disallowance was

sustained. Thus, further aggrieved by the order of Id. CIT(A), the assessee has filed the present appeal before us.

3. We have heard the Id. Authorized Representative (AR) for the assessee and Id. Departmental Representative (DR) for the Revenue and perused the material available on record. Ground No. 1 to 4 relates to addition of Rs.14,38,282/- being 100% Gross Profit. The Id. AR of the assessee argued that Ground No. 1 to 4 of the appeal raised by assessee is covered in favour of assessee by the decision of Tribunal in assessee's own case for AY 2005-06 to AY 2010-11 in ITA No. 4933 to 4938/Mum/2015. It was argued that on the basis of same survey, the assessment for Ay 2005- 06 to 2010-11 was re-opened and addition on account of unrecorded sale was made @ 50% of Gross Profit. However, on appeal before the Tribunal, the Gross Profit was reduced to 20% vide order dated 20.01.2016 in ITA No. 4933 to 4938/Mum/2015. On the other hand, the Id. DR for the Revenue not disputed the decision of Tribunal relied by Id. AR of the assessee.
4. We have considered the rival submission of the parties and have gone through the order of Tribunal in ITA No. 4933 to 4938/Mum/2015 for AY 2005-06 to AY 2010-11 dated 20.01.2016. We have seen that the assessment for AY 2005-06 to AY 2010-11 was re-opened on the basis of the same survey action under section 133A at the business premises of the assessee. In all Assessment Years, the assessing officer while framing assessment order made addition @ 50% of Gross Profit. On appeal before the Tribunal,

the addition was reduced to 20% of the Gross Profit. Considering the decision of Tribunal in assessee's own case for AY 2005-06 to AY 2010-11 in ITA No. 4933 to 4938/Mum/2015 for AY 2005-06 to AY 2010-11 dated 20.01.2016, wherein the addition was made on the basis of the same survey action carried on 07.01.2011 at the premises. The assessment order under consideration was also passed on the basis of same survey action. Thus, respectfully following the decision of Tribunal in assessee's own case, we direct the Assessing Officer to restrict the Gross Profit @ 20% of the Gross Profit (Rs. 14,38,282/-). Hence, Ground No. 1 to 4 of the appeal is allowed.

5. Ground No. 5 relates to disallowance of Short Term Capital Loss against the Short term Capital Gain. The ld. AR of the assessee argued that assessee has filed an application for admission of additional evidence. The assessee could not file such evidences during the assessment proceedings as well as during the First Appellate Stage. It was prayed that this ground of appeal may be restored to the file of AO for verification of fact and considering the issue afresh. The ld. DR for the Revenue has not objection if, the additional evidence furnished by assessee is restored to the file of AO for its verification and taking the action afresh.
6. We have considered the submission of the parties. In the application of admission of addition evidence, the ld. AR of the assessee has pleaded that the assessee is mainly relying upon the records of earlier year's return of income, which were in power and possession of the department. The AO

disallowed the set off of loss holding that the assessee has not shown loss in earlier assessment years. We have further noticed that the assessing officer has not verified the fact from the record of earlier years during the assessment. The assessee has now claimed to have obtained the copy of return of income under the Right to Information Act. Considering the contention of the assessee, we admit the additional evidence furnished by assessee and restored these grounds of appeal to the file of AO to verify the fact and pass the order afresh in accordance with law. Needless to say that the Assessing Officer shall grant adequate and sufficient opportunity before passing the order afresh after giving the opportunity to the assessee. Hence, the Ground No. 5 of Appeal is allowed for statistical purpose.

7. Next Ground of Appeal related to taxing of Short Term Capital Gain. Considering the fact that we have already restored the Grounds of Appeal related the disallowance of set off of brought forward Short Term Capital Loss to the file of AO. Hence, this Ground of Appeal is also restored to the file of AO to pass the order in accordance with law.
8. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 27<sup>th</sup> day of September 2017.

Sd/-

**(SHAMIM YAHYA)**

**ACCOUNTANT MEMBER**

Mumbai; Dated 27/09/2017

S.K.PS

Sd/-

**(PAWAN SINGH)**

**JUDICIAL MEMBER**

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,  
(Asstt.Registrar)  
**ITAT, Mumbai**