

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D" MUMBAI**

**BEFORE SHRI D.T. GARASIA (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 3208/MUM/2017
Assessment Year: 2010-11**

&

**ITA No. 3209/MUM/2017
Assessment Year: 2011-12**

M/s Dimpy Enterprises
501, Ashirwad Building
Ahmedabad Street,
Mumbai-400009

Vs.

ITO-17(1)(4)
Mumbai

**PAN No. AAAFD4836B
Appellant**

Respondent

Assessee by : Shri Bhupendra Shah, AR
Revenue by : Shri Purushottam Kumar, DR

Date of Hearing : 13/09/2017
Date of pronouncement : 31/10/2017

ORDER

PER N.K. PRADHAN, A.M.

The captioned appeals filed by the assessee are directed against the order of the Commissioner of Income Tax (Appeals)-28, Mumbai and arise out of the assessment completed for AY 2010-11 & AY 2011-12 u/s 143(3) r.w.s. 147 of the Income Tax Act 1961 (the 'Act'). As common issues are involved, we are proceeding to dispose them off through a consolidated order for the sake of convenience.

2. The grounds of appeal filed by the assessee read as under:

- 1) In the facts and the circumstances of the case and in law, the learned A.O. erred in passing the order u/s 143(3) r.w.s 147 and therefore rendering the whole reassessment bad in law on the basis of borrowed satisfaction, presumption and surmises.
- 2) In the facts and circumstances of the case and in law, the learned Commissioner of Income Tax(A) erred in confirming the disallowance amounting to (i) Rs.39,26,813/- being 12.5% of total purchases of Rs.3,14,14,502/- in AY 2010-11 and (ii) Rs.29,16,220/- being 12.5% of total purchases of Rs.2,33,29,763/- in AY 2011-12 on account of alleged bogus purchases
 - a. even though the Appellant has submitted all the relevant copies of the bills, proof of delivery of material purchased from the respective vendors and also merely relying on the third party statement.
 - b. just because notices u/s 133(6) were issued but not served to the suppliers.
 - c. even though the payment for purchases is made from the books and cannot be termed as unexplained expenditure.
 - d. without allowing cross-examination of the said suppliers and without furnishing the copy of the statement of the suppliers recorded by the sales tax department.
 - e. without rebutting the fact that no sales can be made by trader without purchases.
 - f. confirming only on the basis of the information on the website www.mahavat.gov.in about suspicious dealers.
 - g. Without rebutting Written submissions and case laws cited by the Appellant.
- 3) The Assessing Officer wrongly charged interest u/s 234 and initiated penalty 271(l)(c).

3. Facts being similar, we begin with AY 2010-11. The assessee filed its return of income for the AY 2010-11 on 24.09.2011 declaring total income at Rs.9,70,720/-. The assessee is a whole sale supplier of iron and steel. The return of income was processed u/s 143(1). The AO received information from the Director General of Income Tax (Inv.), Mumbai that the assessee had obtained accommodation bills amounting to Rs.3,14,14,502/- from five parties. Therefore, the AO issued notice u/s 148 reopening the earlier assessment made u/s 143(1). During the course of reassessment proceedings, the AO issued notices u/s 133(6) to the said parties in the address given by the assessee to verify the genuineness of transactions. However, the said notices were returned by the postal authorities with the remark 'not known/refused/left' etc. Thereafter, the AO vide order sheet entry dated 29.07.2015 requested the assessee to produce the above parties before him for verification. The assessee failed to do so. Again the AO requested the assessee vide order sheet entry dated 18.01.2016 to produce the above parties before him for verification. The assessee failed again to produce the above parties before the AO for examination. The AO also requested the assessee to prove the genuineness of transactions. In response to it the assessee submitted before the AO that it had paid by cheque the amount of purchase bills. Then the AO estimated the profit @ 12.5% of the alleged bogus purchases of Rs.3,14,14,502/- which comes to Rs.39,26,813/-.

3.1 In the same way the AO estimated the profit @ 12.5% of the alleged bogus purchases of Rs.2,33,29,763/- for the AY 2011-12 and it comes to Rs.19,16,220/-.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that the Ld. CIT(A) agreed with the reasons given by the AO and dismissed the appeal filed by the assessee for the above two assessment years.

5. Before us, the Ld. counsel of the assessee files copy of the purchase bills, challans, proof of delivery, ledger accounts of the suppliers, bank statements etc. He submits that the assessee should have been given opportunity to cross-examine the said parties.

6. On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

7. We have heard the rival submissions and perused the relevant materials on record. We begin with the 1st ground of appeal. As mentioned hereinbefore, the AO reopened the assessment made earlier u/s 143(1) by issuing notice u/s 148. In *ACIT vs. Rajesh Jhaveri Stock Brokers P. Ltd.* 291 ITR 500 (SC), the Hon'ble Supreme Court has held that intimation u/s 143(1)(a) is not an assessment. It held the notice issued u/s 148 as valid. Thus we hold that the AO has rightly issued notice u/s 148 on the basis of information received from the Director General of Income Tax (Inv.), Mumbai. Thus the 1st ground of appeal is dismissed.

7.1 We now turn to the 2nd ground of appeal. The fact remains that after the notice u/s 133(6) issued by the AO came back unserved by the postal authorities, he had requested the assessee to produce the above

parties for examination. The assessee failed to produce the above parties before the AO.

We are of the considered view that the contentious issues in the instant case could be resolved by examining the above parties. It is the duty of the AO to enforce attendance of a witness if his evidence is material. At the same time the assessee must furnish the complete address of such person.

A proper hearing must always include a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view. Cross-examination is allowed by procedural rules and evidently also by the rules of natural justice. Any witness who has been sworn on behalf of any party is liable to be cross-examined on behalf of the other party to the proceedings.

The Hon'ble Supreme Court in *State of Kerala vs. K.T. Shaduli Grocery Dealer* AIR 1977 SC 1627, recognised the importance of oral evidence by holding that the opportunity to prove the correctness or completeness of the return necessarily carry with it the right to examine witnesses and that includes equally the right to cross-examine witnesses.

In *ITO vs. M. Pirai Choodi* (2012) 20 taxmann.com 733 (SC), the Hon'ble Supreme Court has held that "Order of assessment passed without granting an opportunity to assessee to cross-examine, should not have been set aside by High Court; at most, High Court should have

directed Assessing Officer to grant an opportunity to assessee to cross-examine concerned witness.”

The importance of cross-examination has been emphasized by the Hon'ble Bombay High Court in the case of *Om Vinyls P. Ltd. vs. ITO* [WP(L) No. 3114 of 2014].

In view of the above, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make a fresh assessment in the light of our observation hereinbefore after giving opportunity to the assessee to cross-examine the concerned parties. We also direct the assessee to file the relevant documents/evidence before the AO. Needless to say the AO would give reasonable opportunity of being heard to the assessee before finalizing the assessment order.

As we have restored the matter to the file of the AO to make a fresh assessment, we are not adverting to the case laws relied on by the Ld. counsels.

Thus the 2nd ground of appeal is allowed for statistical purposes.

8. As the matter has been restored to the file of the AO for making a fresh assessment, the 3rd ground of appeal becomes academic in nature.

9. In the result, the appeals are partly allowed.

Order pronounced in the open Court on 31/10/2017.

Sd/-
(D.T. GARASIA)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 31/10/2017
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai