

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, ए, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI**

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री रमित कोचर, लेखा सदस्य, के समक्ष

**Before Shri Joginder Singh, Judicial Member, and
Shri Ramit Kochar, Accountant Member**

**ITA No.6216 /Mum/2014
Assessment Year: 2011-12**

ACIT-25(2), Room No.108, 1 st Floor, Bldg. No.C-11, Pratyakshakar Bhavan, Bandra Kurla Complex, Bandra (East), Mumbai-400051	बनाम/ Vs.	Shri Kantilal P Shah, Prop:-M/s Prince Decoware Industries, 701, Bhavik Darshan, Rokadia Lane, Mandpeshwar Road, Boriwali (West), Mumbai-400103
(राजस्व /Revenue)		(निर्धारिती /Assessee)
PAN. No. ACJPS8637G		

राजस्व की ओर से / Revenue by	Shri Rajesh Kumar Yadav
निर्धारिती की ओर से / Assessee by	Shri Sanjiv M. Shah

सुनवाई की तारीख / Date of Hearing :	18/09/2017
आदेश की तारीख /Date of Order:	26/09/2017

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The Revenue is aggrieved by the impugned order dated 17/07/2014 of the Ld. First Appellate Authority, Mumbai, deleting the addition of ₹11,38,721/- made on the ground of excess commission paid without appreciating the fact that such commission was paid in comparison to earlier years.

2. During hearing, the Ld. DR, Shri Rajesh Kumar Yadav, defended the addition made by the Ld. Assessing Officer by advancing arguments, which is identical to the ground raised. On the other hand, Shri Sanjiv M. Shah, ld. counsel for the assessee, contended that the issue in hand was decided in favour of the assessee in earlier four years and the First Appellate Authority has followed the decision of Assessment Year 2008-09 and 2010-11. This factual assertion of the Ld. Counsel was not controverted by the Revenue.

2.1. We have considered the rival submissions and perused the material available on record. It is noted that the Tribunal for Assessment Year 2010-11, vide order dated 26/05/2017 in the case of ACIT vs Kantilal P. Shah (the present assessee) held as under:-

Challenging the order dated 22/04/2013 of CIT(A)-35,Mumbai,the Assessing Officer(AO)has filed the present appeal.Assessee,an individual, engaged in the business of important reselling of hardware,filed his return of income on 15/10/2010,declaring income of Rs. 48, 58,856/-. The AO completed the assessment under section 143 (3) of the Act, on 31/01/2013, determining his income at Rs. 86.43 lakhs.

2.First ground of appeal is about holding that rejection of books of accounts by the AO was not correct and admission of additional evidences was in violation of rule 46A of the Income Tax Rules, 1962(Rules).During the assessment proceedings, the AO found the assessee had shown gross profit at the rate of 17.22%, that last year it had shown gross profit at the rate of 17.89%. He directed the assessee to file working of item-wise closing stock and produce all the books of accounts on stock register. As per the AO the assessee produced bills of purchase and sales for a few months stating that it was not possible to produce all the books and bills due to heavy volume, that the assessee informed that it was maintaining stock register but same was not reliable.In absence of the books of accounts, the AO held that, book results declared by the assessee were not acceptable. Invoking the provisions of section 145 of the Act, he rejected the book results and determined the gross profit at the rate of 20%. Finally, he made an addition of Rs.27.40 lakhs to the total income of the assessee under the head under-reported gross profit.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA) and made elaborate submissions. After considering the submission of the assessee and the assessment order, the FAA held that the AO could invoke section 145 only if the books of accounts were either incomplete or incorrect, that he did not examine the applicability of section 145, that the assessee had produced purchase and sales bills with Ledger account, that the AO had estimated GP at the rate of 20%, that he had nowhere mentioned that the purchase value and the sale value were not correctly recorded in the Ledger maintained by the assessee, that there was negative GP in case of a few items, that the AO was not justified in rejecting the book results. He deleted the addition made by the AO on account of lower GP.

4. During the course of hearing before us, the Departmental Representative (DR) stated that assessee had not produced stock register for verification before the AO, that he had also not produced all bills during the assessment proceedings, that the FAA had admitted additional evidences, that he should have confronted the AO with the new evidences produced before him, that the AO had rightly rejected the book results. The Authorised Representative contended that no new evidences were filed before the FAA, that identical issue was dealt by the Tribunal while deciding the appeal for the AY. 2009-10 (ITA/4891/Mum/20211 dated 12/01/2017).

5. We find that the Tribunal has deliberated upon the similar issue while deciding the appeal for the AY. 2009-10 (supra), in following manner:

“3. Briefly stated, the facts are that during the course of assessment proceedings, the AO asked the assessee to file working of item-wise closing stock and produce all the books of accounts and stock register. The assessee produced bills for purchase and sells of few months under the plea that it was not possible to produce all the books and bills files due to heavy volume. The AO asked the assessee to produce at least the stock register to verify the stock quantity and basis of valuation of closing stock declared. The AR of the assessee stated before the AO that the stock register was maintained but the same was not traceable now. As the assessee could not produce all the bills and stock register for verification, in spite being specifically asked to do so, the AO rejected the books of accounts u/s 145 of the Act and estimated gross profit @22% on

the total turnover. The same comes to Rs. 1,60,21,172/-. As the assessee had declared gross profit of Rs. 1,30,29,163/-, the AO brought to tax the difference of Rs. 29,92,009/-

XXXXX

4. The assessee preferred an appeal before the learned CIT(A). The assessee submitted before him that his books of accounts are audited u/s 44AB of the Act and the AO was not justified in rejecting the books of accounts as he had not pointed out any defects. The assessee also submitted before the learned CIT(A) that he had not maintained any stock register and only the closing stock inventory was taken. He further submitted that the estimate of GP @22% is nothing but mere guess work. Having considered the submission of the assessee, the learned CIT(A) observed that if the AO wanted to reject the books of accounts, he ought to have compared the purchase bills and sales bills with the ledger account and established that there was either inflation of purchase or suppression of sales which was not done. Further the net profit admitted by the assessee is higher when compared to last year. In view of the above, the learned CIT(A) directed the AO to delete the addition of Rs. 29,92,009/- made on account of alleged lower GP.

4.1 The learned CIT(A) observed that the assessee had paid commission by means of account payee cheques and the cheques were cleared in the name of commission agents as seen from the bank statements of the assessee. The AO has not conducted any enquiry with commission agents to prove that the assessee paid commission at a less rate and the AO made only adhoc disallowance by comparing the commission rate with the earlier years. Even though, the major portion of the commission was remaining unpaid at the end of the year, the assessee paid the same in the subsequent year. Therefore, the learned CIT(A) directed the AO to delete the addition of Rs. 7,42,521/- made on account of excess commission.

5. Before us, the learned DR supported the order passed by the AO. The learned counsel of the assessee supported the order passed by the learned CIT(A) and also relied on the order of the ITAT "A" Bench, Mumbai in the case of the assessee for the A.Y. 2007-08 (ITA No. 3737/Mum/2010) and A.Y. 2008-09 (ITA No. 4389/Mum/2011)

6. We have heard the rival submissions and perused the relevant material on record. We find that similar issues arose before the Coordinate Bench in the case of the assessee during the A.Y. 2007-08 and A.Y. 2008-09. In respect of ground of appeal similar to 1st ground in the instant case, the Tribunal held as under: 'After hearing both the parties and on perusal of the impugned order and material placed on record, we find that the main basis for rejecting the trading result of the assessee by the AO was that, the assessee has not maintained stock register and the entire purchase and sale bills were not produced. The assessee's contention had been that, it has maintained detailed ledger account of purchase and sale and on sample basis sale and purchase bills for few months were filed. It was submitted that due to huge volume it was practically not possible to produce the entire bills, but if the AO would have insisted, the same would have been filed/ produced before him. We agree with such a

contention of the assessee, because, firstly, the AO looking to the huge volume of bills and details could have asked for purchase and sale bills on test check basis i.e., on sample basis to tally as per the entries in the books of accounts, which he has not done; secondly, the AO has applied the Gross Profit Rate of 25% without considering the assessee's past history or any other material or comparability; before the CIT(A) and before us, it has been submitted that the gross profit ratio was 19.99% as compared to 18% in the earlier years and overall net profit has also increased. Thus, there may not be any prima facie inference that assessee's profit is not in commensurate with the earlier years' so as to doubt the correctness of the profit shown by the assessee; and lastly, the manner in which the AO has worked out the gross profit on the basis of selected samples is also not a correct approach and if going by the trading result and gross profit of various items, it can be very well held that assessee's profit and trading results are much better this year, hence, the observation and the finding of the CIT(A) cannot be deviated from and accordingly, the same is affirmed. Thus, ground no. 1 as raised by the revenue is dismissed.'

Respectfully following the above, we confirm the order of the FAA and hold that there was no justification for rejecting the books of accounts and making ad hoc addition on account of alleged low GP. We want to mention that though the AO had alleged violation of rule 46A, yet, it was not mentioned as to which documents were produced before the FAA that were not made available to the AO. We decide first effective ground of appeal (GOA-1&2) against the AO.

6. Next ground is about deleting the addition of Rs. 10.44 lakhs made by the AO on account of excess commission paid. It was brought to our notice that the Tribunal had dealt with the issue while adjudicating the appeal for the AY.2009-10 (supra). We are reproducing the relevant portion of the said order and it reads as under:

“3.1 The AO noticed from the P&L account that the assessee had shown commission payment of Rs. 29,70,083/-. The assessee was asked to file party-wise details of commission paid along with details of services rendered by the payees and the basis for the quantification of such commission paid. The assessee filed the partywise details of commission paid and the details of TDS made thereon. The AO observed that in the immediate preceding year, the assessee had claimed commission payment of Rs. 15,71,986/- @3% and in the F.Y. 2005-06, the assessee had shown commission payment of Rs. 6,38,059/- which was @2.5% of the sales made through salesmen. In the F.Y. 2006-07, the assessee had shown commission payment @3.25% and reduced the same to 3% in F.Y. 2007-08 and then substantially increased the rate of

commission to 4%. The AO took into consideration the fact that the nature of business of assessee has remained the same and payment commission has been made to persons closely related to the assessee and some portion of such commission is outstanding on the last day of the financial year. The AO disallowed the excess commission paid @1% in comparison to F.Y. 2005-06 and thereby added Rs. 7,42,521/-.

6.1 In respect of ground of appeal similar to 2nd ground in the instant case, the Tribunal has held as under:

“After considering the rival contention of the parties and on perusal of the impugned material on record, we find that AO has made an ad-hoc disallowance on this score on the ground that firstly, there is enhancement of rate of commission from 2.5% to the rate of 3.25%; secondly, some of the commission agents are also the relatives of the assessee. Such a basis drawn by the AO for making the disallowance cannot be sustained for the reason that, the Ld. CIT(A) has clarified that overall rate of commission paid is @ 3% on the total turnover and not 3.25% and the commission has been paid uniformly to all the parties including the relatives. Out of 11 party, only 2 are relatives, therefore, it cannot be held that any unreasonable payment have been made to the relatives as compared to the outsiders. Such an ad-hoc disallowance of payment of commission made by the AO cannot be sustained and finding of the CIT(A) is thus, affirmed. Accordingly, ground no. 2 of the revenue is dismissed.”

Respectfully following the above order of the Tribunal, we decide third Ground of appeal against the AO.

As a result, appeal filed by the AO stands dismissed.”

2.2. We find that in the aforesaid order, the Tribunal affirmed the stand of the Ld. Commissioner of Income Tax (Appeal), wherein, the addition of ₹10.44 lakhs made on account of excess commission was made by the Ld. Assessing Officer by following the decision in the case of assessee itself for Assessment Year 2009-10. Before us, the Revenue neither brought on record any contrary facts nor any contrary decision. Therefore, following the aforesaid decision of the

Tribunal that too in the case of assessee itself, we find no infirmity in the conclusion drawn by the Ld. Commissioner of Income Tax (Appeal), therefore, the impugned order is affirmed, resulting into dismissal of the appeal of the Revenue.

Finally, the appeal of the Revenue is dismissed.

This order was pronounced in the open court in the presence of the ld. representative from both sides at the conclusion of the hearing on 18/09/2017.

Sd/-

(Ramit Kochar)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 26/09/2017

Shekhar, 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