

**आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में  
IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "B", PUNE**

**सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष  
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM**

**आयकर अपील सं. / ITA Nos.1347 to 1349/PUN/2013  
निर्धारण वर्ष / Assessment Years : 2007-08, 2008-09 & 2010-11**

The Asst. Commissioner of Income Tax,  
Central Circle 1(1), Pune ..... अपीलार्थी/Appellant

Vs.

Shri Vimalkumar Jeevraj Nahar,  
D.No.10-1-128/3/A/3,  
Nahar Niwas, Masab Tank,  
Hyderabad – 500028 ..... प्रत्यर्थी / Respondent

PAN: ABFPN1614D

**आयकर अपील सं. / ITA Nos.1362 to 1364/PUN/2013  
निर्धारण वर्ष / Assessment Years : 2007-08, 2008-09 & 2010-11**

Shri Vimalkumar Jeevraj Nahar,  
D.No.10-1-128/3/A/3,  
Nahar Niwas, Masab Tank,  
Hyderabad – 500028 ..... अपीलार्थी/Appellant

PAN: ABFPN1614D

Vs.

The Asst. Commissioner of Income Tax,  
Central Circle 1(1), Pune ..... प्रत्यर्थी / Respondent

Assessee by : Shri Kishore Phadke  
Revenue by : Mrs. Nirupama Kotru, CIT

सुनवाई की तारीख / <b>Date of Hearing : 27.12.2017</b>	घोषणा की तारीख / <b>Date of Pronouncement: 25.01.2018</b>
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**आदेश / ORDER****PER SUSHMA CHOWLA, JM:**

The cross appeals filed by the Revenue and assessee are against respective orders of CIT(A)-II, Pune, all dated 29.03.2013 relating to assessment years 2007-08, 2008-09 and 2010-11 against respective orders passed under section 153A r.w.s. 143(3) / 143(3) of Income Tax Act 1961 (in short the 'Act').

2. The cross appeals filed by the Revenue and assessee were heard together and are being disposed of by this consolidated order for the sake of convenience. However, in order to adjudicate the issues, reference is being made to the facts in ITA Nos.1347/PUN/2013 & 1362/PUN/2013 relating to assessment year 2007-08.

3. The Revenue in ITA No.1347/PUN/2013, relating to assessment year 2007-08 has raised the following grounds of appeal:-

01. *On the facts and in circumstances of the case the Ld. Commissioner of Income-tax(A) has erred in taking the G.P. @ 22% of unaccounted cash received by assessee.*
02. *The order of the CIT(A) may be vacated and that of the Assessing Officer be restored.*

4. The assessee in ITA No.1362/PUN/2013, relating to assessment year 2007-08 has raised the following grounds of appeal:-

1. *The learned CIT (A)-II, Pune erred in law and on facts in confirming the order of the learned AO in holding jurisdiction for assessment for A.Y.2007-08 in the absence of any incriminating material found for said A.Y. 2007-08.*
2. *The learned CIT (A)-II Pune erred in law and on facts confirming addition of Rs.1,34,36,200/- made by the learned AO on the basis of diary found at the premises of Shri Sohanlal Mehta, though no incriminating material found during the search proceedings at the appellant's premises w.r.t. the said amount.*

3. *The learned CIT (A)-II did not allow any reasonable opportunity to the appellant to cross examine Shri Sohanlal Mehta.*
4. *Without prejudice to the above grounds, the learned CIT (A)-II, Pune erred in law and on facts in applying gross profit ratio of 22% on the quantum of receipts as per the diary of Shri Sohanlal Mehta for unaccounted sales which is very high as compared to average normal gross profit margins earned by the appellant at the rate of 12% during previous.*
5. *The learned CIT(A)-II erred in law and on facts that even in case the appellant had received the above money from Shri Sohanlal Mehta, the said amount would always be forming an element of the cash amounting to Rs.2,35,00,000/- found at the premises of the appellant during the search proceedings.*

5. Briefly, in the facts of the case, search action under section 132(1) of the Act was conducted on the RMD Gutkha Group of cases on 20.01.2010. The assessee was also searched on 20.01.2010. The Assessing Officer issued notice under section 153A of the Act to the assessee, who in turn, filed the returns of income disclosing additional income in the respective years in addition to the original returns of income. The said additional income was declared on account of net profit from undisclosed sales. Further, show cause notice was issued to the assessee as to why addition should not be made for receipt of cash from Sohanraj Mehta on behalf of Dhariwal Industries. The assessee denied receipt of any cash and said that there were no other transactions apart from recorded transactions accounted for in his books of account. It was stressed by the assessee that there was no transaction or supply of any material to Sohanraj by the assessee. Hence, there was no question of any payment being made by him and the entries, if any, were fictitious and not substantiated. The assessee further claimed that during search operation, no corroborated document or evidence were found in the name of Sohanraj or M/s. Dhariwal Industries. The assessee also questioned whether the two directors of M/s. Dhariwal Industries had accepted the fact of payment to the assessee in their statements. However,

the contention of assessee was not accepted by the Assessing Officer since Sohanraj had accepted in his statement under section 132(4) of the Act and declared additional commission income in his return of income. Hence, the cash paid by him to the assessee in the respective years was treated as undisclosed income and added in the hands of assessee.

6. The CIT(A) dismissed the plea of assessee that in the absence of any incriminating discovery during the search, corroborating the allegation of cash payment made by Shri Sohanraj Mehta to the assessee. However, he was of the view that the addition of Rs.1.34 crores in assessment year 2007-08 and Rs.1.77 crores in assessment year 2008-09 on account of undisclosed income has to be computed on the basis of evidence found and he directed the Assessing Officer to apply GP rate of 22% on unaccounted sales to compute the income in the hands of assessee.

7. Both the assessee and the Revenue are in appeal against the order of CIT(A).

8. The learned Authorized Representative for the assessee pointed out that the basis for making addition in the hands of assessee was on account of sale of Gutkha outside the books of account in cash. The allegation of the Department was that Shri Sohanraj Mehta was collecting cash from customers on instructions of M/s. Dhariwal Industries and that cash was given to the vendors from whom the raw material was purchased, wherein the assessee was one of the vendors. However, referring to various case laws of different Tribunals relating to search on M/s. Dhariwal Industries, the learned Authorized Representative for the assessee pointed out that diary and statement of Shri Sohanraj Mehta was held

to be not sufficient to make addition in the hands of vendors. He further referred to the order of Tribunal in the case of M/s. Dhariwal Industries, with special reference was made to paras 125 to 135 of the said order, wherein the addition made on account of these cash transactions was deleted in the hands of M/s. Dhariwal Industries. He further stated that the Assessing Officer in assessee's own case had made addition on alleged chain of events which were not there. In respect of assessment years 2007-08 and 2008-09, the learned Authorized Representative for the assessee pointed out that the said assessment proceedings are non-abated and since no evidence of any alleged transaction outside books of account was found during the course of search, hence no addition can be made in the hands of assessee in assessment years 2007-08 and 2008-09. He further pointed out that no scrutiny proceedings had been taken up and also period for taking up the scrutiny proceedings had expired. The learned Authorized Representative for the assessee in this regard placed reliance on the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. Continental Warehousing Corporation (2015) 374 ITR 645 (Bom) and the Pune Bench of Tribunal bunch of cases with lead order in Manish Hiralal Malu Vs. DCIT in ITA Nos.2226 & 2227/PUN/2014, relating to assessment years 2002-03 & 2003-04, order dated 04.05.2017 and Dhariwal Industries Ltd. Vs. ACIT in ITA Nos.1318 to 1324/PN/2013 and in ACIT Vs. Dhariwal Industries Ltd. in ITA Nos.1389 to 1391/PN/2013 & 1408 to 1410/PN/2013, relating to assessment years 2004-05 to 2010-11, order dated 02.05.2016. The learned Authorized Representative for the assessee pointed out that in assessment years 2007-08 and 2008-09, the grounds of appeal No.1 and 2 are the technical issues and once the same are decided, then the grounds of appeal No.3 to 5 would become academic.

9. The learned Departmental Representative for the Revenue on the other hand, pointed out that SLP has been admitted against decision of the Hon'ble Bombay High Court in CIT Vs. Continental Warehousing Corporation (supra).

10. We have heard the rival contentions and perused the record. Pursuant to search on the premises of assessee, proceedings under section 153A of the Act were initiated against assessee. The issue which is the jurisdictional issue raised by the assessee by way of grounds of appeal No.1 and 2 in assessment year 2007-08 goes to root of the case, hence the same is taken up first. For addressing jurisdictional issue, we refer to the facts of the case. Consequent to search on M/s. Dhariwal group of cases, statement of Shri Sohanlal Mehta was recorded, who admitted that cash was being collected from the customers on instructions of directors of M/s. Dhariwal Industries and the same was given to vendors from whom raw material was purchased. The assessee was one such vendor and the case of Revenue is that the assessee had also received such cash. However, no evidence in this regard was found. Further, even in series of cases when the issue of noting in diaries and statement of Shri Sohanlal Mehta was considered by the Tribunal, it was held that the same was not sufficient to make the addition in the case of vendors. There are series of decisions and one such decision in the case of Pradeep Amrutlal Runwal Vs. Tax Recovery Officer (2014) 47 taxmann.com 293 (Pune-Trib.). Further, consequent to search, additions were made in the hands of M/s. Dhariwal Industries Ltd. and the similar plea of transactions through Shri Sohanlal Mehta and the statement recorded of him was considered by the Tribunal starting from paras 125 to 130. The conclusion in para 130 reads as under:-

*"130. So far as the finding of the Revenue authorities that the profit generated from suppressed production and sale was diverted to various persons whose*

names appear in the seized documents is concerned, we find the different Benches of the Tribunal have deleted such addition made in their hands. We find the Bangalore Bench of the Tribunal in the case of CIT Vs. H.S. Chandramouli vide ITA No.1551/Bang/2012 order dated 20-08-2013 has upheld the order of the CIT(A) in deleting the addition of Rs.22,75,000/- which was added by the AO on account of receipt of the above sum from Shri Sohanraj Mehta, C&F agent of M/s. DIL for Karnataka Region. The Lucknow Bench of the Tribunal in the case of Mohd. Yakub perfumers Pvt. Ltd. vide ITA No.388/Lkw/2013 order dated 10-12-2014 has upheld the order of the CIT(A) in deleting the addition of Rs.50 lakhs which was added by the AO on account of entry found in the documents of Shri Sohanraj Mehta, C&F Agent of RMD Group at Bangalore. The Lucknow Bench of the Tribunal in the case of DCIT Vs. Pavan Kumar Agarwal vide ITA No.413/Lkw/2012 and CO No.70/Lkw/2012 order dated 16-02-2015 has upheld the order of the CIT(A) in deleting the addition of Rs.1,13,40,000/- made by the AO on account of addition on the basis of seized document of Shri Sohanraj Mehta. The Delhi Bench of the Tribunal in the case of M/s. Bholanath Radhakrishna vide ITA No.5149/Del/2012 order dated 15-04-2013 has upheld the order of the CIT(A) in deleting the addition of Rs.9 crores made by the AO on the basis of entries found in the books of Shri Sohanraj Mehta, C&F Agent for Karnataka Region of RMD group. The Pune Bench of the Tribunal in the case of Pradeep Arun Runwal reported in 149 ITR 548 has also deleted the addition made by the AO and upheld by the CIT(A) on account of additions made on the basis of the seized papers from Shri Sohanraj Mehta, C&F Agent of RMD group.”

11. The Tribunal further went on to refer to the decision in the case of Shri Vinit Ranawat Vs. ACIT vide ITA Nos.1105 and 1106/PN/2013 order dated 12.06.2015 for assessment years 2006-07 and 2007-08, wherein the addition made on account of loose papers found during the course of search in the case of Shri Sohanlal Mehta was deleted. The relevant findings of the Tribunal are as under:-

“131. Based on the above decisions, the Pune Bench of the Tribunal in the case of Shri Vinit Ranawat vide ACIT vide ITA Nos. 1105 and 1106/PN/2013 order dated 12-06-2015 for A.Yrs. 2006-07 and 2007-08 has deleted the addition of Rs.21 crores made in the hands of the assessee on account of loose papers found during the course of search in the case of Shri Sohanraj Mehta, C&F Agent of M/s. DIL for Karnataka Region. Thus, we find some force in the submission of the Ld. Counsel for the assessee that the different Benches of the Tribunal have deleted the additions made in their hands on the basis of so called deployment of funds by the assessee company out of the generation of unaccounted income out of suppressed turnover.”

12. The Tribunal thus, concluded as under:-

“132. As mentioned earlier, no incriminating documents in shape of any unaccounted purchase, unaccounted sale, unaccounted transport receipt was found either during the course of search at the place of Shri Sohanraj Mehta/Shri Mithulal or at the premises of the assessee. If the extent of unaccounted

production and unaccounted turnover as computed by the AO is believed, then atleast 700 to 800 trucks are required, a finding given by the Commissioner, Central Excise. Therefore, we find force in the submission of the Ld. Counsel for the assessee that if the assessee was indulging in the clandestine manufacturing of Gutkha, then atleast some evidence could have been found which is not in the instant case. Even the Commissioner, Central Excise has also given his findings that there was no unaccounted production. In our opinion, the question of unaccounted turnover will arise only when there is unaccounted production. Since one Government authority, after thorough investigation, has given a finding that there is no unaccounted production and clearance of such unaccounted Gutkha to the C&F Agent, therefore, estimation of huge unaccounted production and sale thereof as determined by the AO in the body of the assessment order and upheld by the CIT(A), in our opinion is uncalled for.

133. There is another aspect which we have noticed is regarding decoding of the figures. We find there are certain chits which are found during the course of search in the place of Shri Sohanraj Mehta/Shri Mithulal, copies of which are placed at paper book pages 41 to 102 of the paper book. These chits show amounts written both in words as well as in figures. Therefore, when the chits contain the amounts written both in words and figures, therefore, in absence of any cogent evidence in the hands of the department, it is not proper to decode the same by adding two more zeros.

134. So far as the statement of various persons recorded during the course of search in the case of Shri Sohanraj Mehta are concerned, the presumptions u/s.132(4A) will apply to the person who is searched and in whose custody the papers are found. Therefore, we find merit in the submission of the Ld. Counsel for the assessee that loose papers found with Shri Sohanraj Mehta cannot be presumed to be belonging to the assessee or reflecting the business transaction of the assessee. It has been held in various decisions that the presumption u/s.132(4A) is applicable only against the person from whose possession the books of account or other documents were found and not against any other person. It has been held that as per section 132(4A) where any books of account or document is found in the possession and control of any person in the course of the search, it is to be presumed that they belong to such person. Thus, clearly the presumption is in respect of the person from whom they were found. In the instant case, such incriminating documents were found from the possession of Shri Sohanraj Mehta/Shri Mithulal. Therefore, we find force in the submission of the Ld. Counsel for the assessee that presumption u/s.132(4A) will be applicable to Shri Sohanraj Mehta and not to the assessee company.

135. Another aspect to be considered is non-finding of any unaccounted cash or asset or investment of such huge amounts from generation of such huge unaccounted money. No doubt the courts have held that if evidence of undisclosed income is found then corresponding asset/expenses need not be proved. However, if such undisclosed income is determined on the basis of estimation, as in the instant case, then finding of such corresponding asset could have given some credence to such estimated income. However, the same is not there in the instant case.

136. We also find force in the submission of the Ld. Counsel for the assessee that papers found from Shri Sohanraj Mehta is for the period from January 2003 to February, 2008. The search took place on 09-10-2009 at Shri Mehta's place. However, for the period from March 2008 till the date of search, no loose papers were found. Therefore, if the assessee was having such roaring unaccounted business, there was no reason to stop such lucrative business from March 2008 onwards. Secondly, if the inference is that Shri Sohanraj Mehta has already

*given the account for this period to the assessee and therefore he has destroyed the papers, there is no reason as to why he should have maintained the papers for the old period. This defies logic.”*

13. In view of the findings of Tribunal in the case of person searched i.e. M/s. Dhariwal Industries Ltd., who was alleged to be involved in receipt of cash on sales of its products and further payment of cash to the vendors from whom raw material was purchased, has been deleted, then there is no basis for making any addition in the hands of assessee. The question thus, arises is in the absence of any incriminating material found during the course of search whether assessment proceedings can be taken up for the years which had not abated.

14. The claim of assessee is that in both the assessment years i.e. 2007-08 and 2008-09, assessment proceedings had not abated and in the absence of any incriminating material found during the course of search, there is no merit in making any addition in the hands of assessee. In this regard, he placed reliance on the ratio laid down by the jurisdictional High Court in the case of CIT Vs. Continental Warehousing Corporation (supra). The assessee further relies on the ratio laid down by the Pune Bench of Tribunal in the case of Manish Hiralal Malu Vs. DCIT (supra), wherein the addition made in the case of assessment years which have not abated, and in the absence of any incriminating documents found, the additions were deleted. The relevant findings of the Tribunal are in paras 10 to 15 of the said order. In the facts of the present case before us, the scrutiny assessment had not been taken up and also the period for taking up scrutiny had expired, hence in the absence of any incriminating evidence found during the course of search, there is no merit in making any addition in the hands of assessee in the years where the proceedings were not abated. We place reliance on the ratios laid down by the Hon'ble Bombay High Court in CIT Vs.

Continental Warehousing Corporation (supra) and Pune Bench of Tribunal in Manish Hiralal Malu Vs. DCIT (supra) and hold so. Consequently, grounds of appeal raised by the assessee on jurisdictional issue stands allowed and the issue on merits would become academic. The appeal of Revenue is thus, dismissed.

15. The facts and issues in assessment year 2008-09 are identical to the facts and issues in assessment year 2007-08 and our decision in assessment year 2007-08 shall apply *mutatis mutandis* to assessment year 2008-09. The appeals of Revenue on merits would thus, become academic and the same are dismissed.

16. Now, coming to the appeal for assessment year 2010-11. The assessee has raised the following grounds of appeal:-

1. *The learned CIT(A)-II, Pune erred in law and on facts in confirming the additions made by the learned AO amounting to Rs.5,22,37,102/- on account of purchases invoking provisions of sec.40A(3), carrying a view that the purchases are settled vide cash payments exceeding Rs.20,000/-*
2. *The learned CIT(A)-II, Pune erred in law and on facts confirming separate addition of Rs.2,31,383/- made by ACIT, CC 1(1), disregarding the request for telescoping the same against overall declaration of Rs.2,87,10,000/-*

17. The Revenue in the appeal relating to assessment year 2010-11 has raised the following grounds of appeal:-

- 1) *On the facts and in circumstances of the case, the Ld. CIT(A) erred in allowing the set off of income disclosed during search action under head income from other sources against statutory disallowances u/s.40A(3) of the Act.*
- 2) *The order of the Commissioner of Income-tax(A) may be vacated and that of the Assessing Officer be restored.*

18. The assessee has only pressed ground of appeal No.1 and the ground of appeal No.2 is not pressed, hence the same is dismissed as not pressed. The

issue in ground of appeal No.1 is against invoking of provision of section 40A(3) of the Act resulting in addition of Rs.5,22,37,102/-.

19. The Revenue is in appeal against directions of CIT(A) in allowing the set off of income disclosed during search action under the head 'Income from other sources' against statutory disallowance made under section 40A(3) of the Act.

20. The issues raised by the assessee and the Revenue are connected and hence, we proceed to decide the same after referring to the factual aspects of the case.

21. Briefly, in the facts relating to the issue, during the course of search, diary was found in which transactions of trading in cardamom outside the books of account were found. During the course of search, cash of Rs.11,75,000/- was found from the office premises of assessee at Hyderabad and Rs.10 lakhs was seized and cash of Rs.1 lakh in that belongs to assessee. Further, at the residential premises of assessee in Hyderabad, cash of Rs.2.39 crores was found, out of which, cash of Rs.2.34 crores was seized, the same also belonged to the assessee. During the course of search, the assessee admitted the said cash of Rs.2.35 crores to be his unaccounted income i.e. represented by undisclosed profit on unrecorded sales and undisclosed commission income. Accordingly, he offered Rs.2.35 crores as his additional income. Further, he declared additional physical stock found of Rs.6,94,000/- and unexplained expenses amounting to Rs.28,021/-; and further disclosure of Rs.44,87,979/- as income from other sources. The total declaration of Rs.2.87 crores was made by the assessee during the course of search. In the return of income, the assessee declared additional income of Rs.2.87 crores. The Assessing Officer asked the

assessee about the expenses disclosed of Rs.2337.20 and their decoding to the true expenses. The assessee explained the same but additional income of Rs.2,31,383/- was made in the hands of assessee. Though the assessee had raised ground of appeal No.2 in this regard but the same is not pressed, hence we are not adjudicating the same.

22. The next issue which was raised in the case of assessee was where the Assessing Officer asked the assessee as to why unaccounted purchase expenses amounting to Rs.5,22,37,102/- should not be disallowed under section 40A(3) of the Act. The assessee explained that it had already made disclosure of Rs.2.91 crores of additional income. It was further explained by the assessee that he had declared gross profit on unrecorded sales which was discovered as per certain loose papers seized. He further stated that no set off of undisclosed purchases was asked for. He stressed that all the seized documents pertaining to purchases and sales were in loose leaves and in scattered form and could not be corroborated; the estimated adhoc income on the basis of gross profit on sales recorded in loose papers was declared to buy peace of mind. Therefore, there was no merit in holding that there is violation of provisions of section 40A(3) of the Act. He stressed that once the gross profit has been estimated in the hands of assessee, then no disallowance could be made under any section. However, the Assessing Officer rejecting the claim of assessee, made the aforesaid disallowance under section 40A(3) of the Act on account of purchase expenses made in cash at Rs.5.22 crores.

23. The CIT(A) upheld the addition made by the Assessing Officer. However, he directed the Assessing Officer to allow set off of Rs.44,87,970/- which is the amount available for investment.

24. Both the assessee and the Revenue are in appeal against the order of CIT(A).

25. The learned Authorized Representative for the assessee pointed out that the declaration of Rs.2.91 crores made by the assessee during the course of search and the cash found of Rs.2.35 crores were sourced out of unaccounted trading of cardamom and spices and the commission income. However, at the fag-end of scrutiny proceedings, the Assessing Officer raised the query that why purchases should not be disallowed under section 40A(3) of the Act amounting to Rs.5.22 crores. Our attention was drawn to the bills found, which totaled Rs.5.22 crores. He further referred to the explanation of assessee before the Assessing Officer, which is available at page 3 of Paper Book and it was pointed out that declaration was made on account of GP on undisclosed sales. There was no correlation between the documents found i.e. of purchases and sales and no set off of purchases was asked for, only GP was estimated. Hence, there is no question of making any disallowance under section 40A(3) of the Act. In this regard, he placed reliance in various case laws of Hon'ble High Courts and various Tribunals. He further stressed that diary which was found had notings of sales in cash. Our attention was drawn to the page 87 of Paper Book, where the sales were to the tune of Rs.6.46 crores. He further pointed out that GP @ 12% was declared on the said sales of Rs.6.46 crores. He admitted that the assessee was purchasing raw material from different entities at different locations. However, the payment was made in the bank account of purchasers totaling Rs.2.95 crores. He further stated that declaration of Rs.2.91 crores made by the assessee during the course of search included Rs.81.45 lakhs, which was disclosed. He stressed that in the absence of maintenance of books of account,

there is no merit in making disallowance under section 40A(3) of the Act. He stressed that whatever was available with the assessee was offered to tax and there is no merit in making additional disallowance under section 40A(3) of the Act. He further stated that it is not a case of cash payment *per se* but it was case of cash being deposited in the bank accounts of purchasers, hence no violation of provisions of section 40A(3) of the Act. He placed reliance on the decision of the Hon'ble High Court of Allahabad in CIT Vs. Banwari Lal Banshidhar (1998) 229 ITR 229 (All.).

26. The learned Departmental Representative for the Revenue on the other hand, placed reliance on the ratio laid down by the Hon'ble High Court of Gujarat in CIT Vs. Hynoup Food & Oil Industries Pvt. Ltd. (2006) 150 TAXMAN 194 (Guj) and the Hon'ble High Court of Andhra Pradesh in S. Venkata Subba Rao Vs. CIT (1987) 35 TAXMANN 401 (AP).

27. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is against the disallowance made under section 40A(3) of the Act. During the course of search, certain loose papers were found, which related to transactions of trading in cardamom outside the books of account. The documents relating to sales were found and the same have been computed at Rs.6.21 crores. The assessee was also found in possession of cash of about Rs.2.35 crores during the course of search itself. The assessee made a declaration of Rs.2.91 crores, which was on account of unaccounted trading in cardamom, spices and on account of commission income. The assessee had honoured the declaration made during the course of search and added the additional income in his return of income itself. The

Assessing Officer during the course of assessment proceedings sought explanation of assessee vis-à-vis declaration of GP rate in his hands on the undisclosed sales. In other words, the amount which has been declared by the assessee is on account of alleged purchases made against which the documents in respect of both purchases and sales were found but the same were not in serial order. Hence, declaration of GP rate @ 12% on sales of Rs.6.64 crores which transactions were outside the books of account. Once the estimated GP has been added in the hands of assessee on account of transactions outside the books of account, the question which arises is whether any addition could be made for violation of provisions of section 40A(3) of the Act. The said section requires that no expenditure is to be incurred above Rs.20,000/-, except by way of crossed cheque or bank draft and in case it is incurred in cash, then the said amount is not to be allowed as deduction in the hands of assessee. The assessee had made purchases in cash and had also received the sale consideration in cash. However, no such entries were found in the books of account and the GP rate has been estimated in the hands of assessee. Once the GP rate has been so estimated, the next consequence is that no addition is warranted under section 40A(3) of the Act. In this regard, we find support from the ratio laid down by the Hon'ble High Court of Allahabad in CIT Vs. Banwari Lal Banshidhar (supra). The Hon'ble High Court held that where the income of assessee was computed applying the GP rate and when no deduction was allowed with regard to the purchases of assessee, then there was no need to look into the provisions of section 40A(3) of the Act. The Hon'ble High Court held that *no disallowance could have been made in view of the provisions of section 40A(3) of the Act read with Rule 6DD(j) of the Income Tax Rules, 1962 as no deduction was allowed to and claimed by the assessee in respect of purchases.*

*When the gross profit rate was applied, that would take care of everything and there was no need for the Assessing Officer to make scrutiny of the amount incurred on the purchases by the assessee.*

28. Further, we find that similar ratio has been laid down by the Pune Bench of Tribunal in bunch of appeals with lead order in DCIT Vs. Shri Narendra Mithailal Agrawal in ITA Nos.811 & 808/PN/2010, relating to assessment years 2006-07 & 2000-01, order dated 26.09.2012. Relying on the ratio laid down by different High Courts, differentiating the decision of the Hon'ble High Court of Gujarat in CIT Vs. Hynoup Food & Oil Industries Pvt. Ltd. (supra) (relied upon by the learned Departmental Representative for the Revenue), the Tribunal held that there was no merit in making any disallowance under section 40A(3) of the Act. The relevant findings of the Tribunal are in paras 5.4 to 5.7. In view of the above said proposition laid down by various High Courts which has been applied by the Pune Bench of Tribunal in DCIT Vs. Shri Narendra Mithailal Agrawal (supra), we hold that while estimating the gross profit on the alleged unaccounted sales, where no deduction has been allowed on account of unaccounted purchases *per se*, even if the purchases are made in cash, no disallowance is warranted under section 40A(3) of the Act.

29. The next stand of assessee in respect of so-called purchases was that the cash was deposited in bank accounts of purchasers and hence, no violation of section 40A(3) of the Act is not being addressed by us since we allowed the claim of assessee on preliminary issue itself. Consequently, the ground of appeal No.1 raised by the assessee is allowed and the ground of appeal No.2 being not pressed, is dismissed. The grounds of appeal raised by the Revenue

would become academic once the addition is deleted on account of non violation of section 40A(3) of the Act. Accordingly, we hold so.

30. In the result, appeals of assessee for assessment years 2007-08 and 2008-09 are allowed and appeal for assessment year 2010-11 is partly allowed and the appeals of Revenue for all three years are dismissed.

Order pronounced on this 25<sup>th</sup> day of January, 2018.

Sd/-  
(ANIL CHATURVEDI)  
लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-  
(SUSHMA CHOWLA)  
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 25<sup>th</sup> January, 2018.

GCVSR

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-II, Pune;
4. The CIT(Central), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary  
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune