

**IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "F", MUMBAI  
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND  
SHRI PAWAN SINGH, JUDICIAL MEMBER**

ITA No.2411/Mum/2015 (Assessment Year- 2010-11)

M/s Paton Fashion Pvt. Ltd. 10, Sagar Complex, M. G. Road, Vile Parle (East), Mumbai-400057 <b>PAN:AADCP8002H</b>	<b>Vs.</b>	ACIT -10(3)(2) Aayakar Bhavan, Mumbai.
(Appellant)		(Respondent)

ITA No.2578/Mum/2015 (Assessment Year- 2010-11)

ACIT -10(3)(2) Aayakar Bhavan, Mumbai.	<b>Vs.</b>	M/s Paton Fashion Pvt. Ltd. 10, Sagar Complex, M. G. Road, Vile Parle (East), Mumbai-400057 <b>PAN:AADCP8002H</b>
(Appellant)		(Respondent)

Assessee by : Mrs. Rashmi Modi/Ketki  
Rajeshirke (AR)

Revenue by : Mrs. Pooja Swaroop (DR)

Date of hearing : 15.03.2018

Date of Pronouncement : 16.05.2018

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

**PER PAWAN SINGH, JUDICIAL MEMBER:**

1. These Cross Appeal by assessee as well as Revenue under section 253 of Income Tax Act are directed against the common order of Ld. Commissioner of Income-Tax (Appeals)-17, Mumbai, [for short the Id. CIT(A)] dated 20.02.2015 for Assessment Year 2010-2011. For appreciation of facts, we are referring the fact of ITA No. 2411/Mum/2015. The assessee has raised the following grounds of appeal:

1. The learned Commissioner of Income Tax (Appeals) erred in estimating the gross profit @ 27% of the sales inspite of the fact that the gross profit for the year was higher than the profit estimated for earlier years.
2. The learned Commissioner of Income Tax (Appeals) erred in further estimating additional gross profit @ 2% on the amount of purchases held to bogus purchases by the A.O, inspite of the fact that the books of account of the appellant were rejected and the income of the appellant was directed to be computed @ 27% of the cash sales.
3. The learned Commissioner of Income Tax (Appeals) erred in directing in para 5.3.7 of the appellate order that the income of the appellant be estimated by adopting the GP rate of 29%.

2. Brief facts of the case are that the assessee-company is engaged in the business of retail traders of readymade garments, filed its return of income for relevant Assessment Year on 13.10.2010 declaring total income at Rs. 38,70,770/-. The assessment was completed on 25.03.2013 under section 143(3) r.w.s. 145(3) of the Act. The Assessing Officer assessed the total income of assessee at Rs. 5,58,02,070/-. The assessing officer while passing the assessment order made various addition consisting of difference in Gross Profit , unaccounted sale of goods, bogus purchases, expenditure on sale promotion made in cash, unexplained expenditure from hawala parties, addition on circular transactions, peak credit in circular transaction, interest paid to NBFC and additions for non deduction of tax at sources etc. on appeal before Id CIT(A) the assessee was granted substantial relief. Therefore, aggrieved by the order of Id CIT(A) bothe the parties have filed their respective appeals.

3. We have heard the Id. AR of the assessee and Ld. DR for the Revenue and perused the material available on record. At the outset of hearing, the Ld. AR submits that a survey action was conducted on the premises of the assessee on 02.03.2010. On the basis of survey conducted, the assessment for AY 2007-08, 2008-09 and 2009-10 was also reopened. The Assessing Officer made the similar additions and additions on the basis gross profit addition. The matter came to the Tribunal and the Tribunal on the identical grounds of appeal. The Tribunal restricted the

gross profit addition to 22.5%. The Ld. AR further submits that the grounds of appeal raised in the present appeal are therefore covered by the decision of the Tribunal in assessee's own case for AY 2007-08, 2008-09 and 2009-10 in ITA No.3912, 3913 & 6967/Mum/2012, order dated 23.12.2015. On the other hand, the Ld. DR for the Revenue after going through the contents of the order of the Tribunal has submitted that she has no objection the similar order is passed or following the decision of the Tribunal in earlier orders.

4. We have considered the submission of both the parties and perused the material available on record. We find that on the basis of survey conducted at the premises of the assessee on 02.03.2010, the assessment for AY 2007-08, 2008-09 and 2009-10 was also reopened. The Assessing Officer passed the assessment order for AY 2007-08, 2008-09 and 2009-10 u/s 143(3) r.w.s. 147 of the Act and estimated the income of the assessee on the basis of gross profit addition. The assessee filed appeal before the Tribunal and the Tribunal vide its order dated 23/12/2015 restricted the addition to 22.5% with following observations:-

*13. We have considered rival contentions, carefully gone through the orders of the authorities below. We have also deliberated on the judicial pronouncements cited at bar by ld. AR in the factual matrix of the case. We found that the AO has computed GP of the A.Y. 2008-09 after applying arbitrary GP rate estimated by the AO in the year of survey i.e. to the year under consideration without bringing any positive material on record to the effect that GP rate of assessee during the year under consideration was 54.74%. During the year under consideration, the GP rate of assessee worked out at 13.04%. However, in the past the department itself has applied GP rate of 22.5%. Therefore, the CIT(A) after verifying each and every figures applied GP rate of 22.5% in respect of cash sales and retained the GP addition so made. We also found that even in earlier year when there was search and seizure action in the case of assessee and compulsory audit u/s.142(2A) of the Act was also undertaken, the GP rate*

*was determined at 21%, thus, when no incriminating material was found with respect to the year under consideration then the determination of GP should only be done by comparing the GP shown by the assessee during the current year with that of higher GP rate as determined in assessee's own case by the department in earlier year. Accordingly, the CIT(A) had correctly applied GP rate of 22.5%. Since the credit card sale and credit sales are fully vouched for and verifiable, the CIT(A) had correctly applied the difference in GP rate of 10% to the cash sales of Rs.4,23,14,307/-, accordingly retained addition of Rs.42,31,430/-. The finding recorded by CIT(A) is as per material on record and do not require any interference on our part. Accordingly, the appeal of the revenue for assessment year 2008-09 is dismissed*

*ITA No.6967/Mum/2013(AY : 2009-2010)*

*14. In the A.Y.2009-2010, the AO had made addition by applying the estimated GP rate of the year of survey. 15. By the impugned order the CIT(A) reduced the trading addition to Rs.43,68,243/- after observing as under :-*

*"1.3.1 I have carefully considered the submissions and contention of ld. AR of the appellant and also carefully gone through the facts and explanation given by the ld. AR of the appellant as well as the ld. AO. I find that similar issue came up for consideration of my Ld. Predecessor in the appellant's own case for AY 2008-09 in appeal No.CIT(A)-17/IT-291/ITO-8(2)(4)/10-11, dated 27.03-2012, who partly allowed the appeal on this issue has held as under :-*

*5.6 I am of the opinion that since credit card sales and credit sales are fully vouched for and verifiable – they cannot be disturbed and as stated by the Ld. Counsel for the appellant, the differential G.P.rate of 9.46% can only be considered for making the addition on account of low G.P.rate for the present year under consideration by comparing it with the higher G.P. determined in appellant's case for A.Y.2006-07 at 22.05% and taking overall view, I direct the AO to take differential G.P. at 10% (to cover any leakages etc.) on the cash sales of Rs.4,23,14,307/- which comes to Rs.42,31,430/- this addition will be made on account of low GP and not the GP rate determined at 54.74% as done by the AO. Hence, the AO is directed to make the addition of Rs.42,31,430/- only. Hence, this ground of appeal is partly allowed.*

*1.3.2 Facts remaining the same as explained by the appellant, I have no reason to differ from the findings of my ld. Predecessor,*

*following the order; this ground of appeal of the appellant is partly allowed."*

*16. The facts and circumstances in the assessment year 2009-2010 is pari material and the CIT(A) has followed the reasoning given in assessment year 2008-09. Following the reasoning given by us in the assessment year 2008-09, we dismiss the appeal of the revenue for the assessment year 2009-2010 also.*

*17. In the result, all the appeals of revenue are dismissed."*

5. Considering the decision of the Tribunal in assessee's own case for earlier year, wherein the facts are at not variance, more over the re-assessment of earlier year was based on survey action conducted on 03.02.2010. Therefore, considering the decision of the Tribunal, the Assessing Officer is directed to restrict the gross profit addition @ 22.5% for the year under consideration as well. In the result, grounds of appeal raised by the assessee are partly allowed.

6. **In ITA No. 2578/Mum/2015**, the Revenue has raised the following grounds of appeal:

1. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition on account of difference of rate in gross profit of Rs. 3,41,20,979/- without appreciating the fact that the book results shown by the assessee were undisputedly unreliable as detected as a result of survey u/s.133A of the Act on 02/03/2010 and hence the AO was justified in invoking sec. 145(3) and estimating the assessee's gross profit and accordingly making the addition of Rs. 3,41,20,979/-."

2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made on account of disallowance of bogus purchases of Rs. 3,36,42,470/ - and disallowance of unexplained expenditure of Rs.26,02,310/- without appreciating that the assessee made transactions with those parties who have accepted that they have not done any genuine business and have issues bogus bills only."

3. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting disallowance of Rs.25,14,455/- out of interest expenditure, Rs. 7,11,904/- as administrative expenses and Rs.74,28,074/- as peak credit introduced for effecting the sale/purchase, without appreciating that running a circular transactions requires diversion of resources and these expenses are not incurred for the purposes of business."

4. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance u/s. 40(a)(ia) without appreciating that the provisions of sec. 194H are attracted in respect of payments made on account of commission on credit cards."

7. We have heard the Ld. AR of the assessee and Ld. DR for the Revenue and perused the material available on record. At the outset of hearing, the Ld. AR of the assessee in ground no. 1 to 3 relates to deleting the various disallowances, submits that the Assessing Officer rejected the books of accounts of the assessee and estimated the income of the assessee on gross profit ratio. The Ld. AR further submits that the estimation of income takes care of all the irregularities which allegedly committed by the assessee, therefore, no further addition is permissible. The Ld. AR submitted that the Ld. CIT(A) while relying upon the decision of the Teja Construction Vs ACIT (2010) 36 DTR 220, wherein it was held that the estimation of income takes care of the irregularities committed by the assessee. Further addition amounts to double taxation which is not permissible under the law. On the other hand, the Ld. DR for the Revenue supports the orders of the Ld. Assessing Officer.

8. We have considered the submission of both the parties and perused the material available on record. We have noted that while passing the assessment order, the Assessing Officer rejected the books of accounts of the assessee holding that the assessee has neither maintained any stock register nor inventories the stock, purchase and sales were shown in books just for showing the transfer for bank credit facilities, therefore, correctness of the amount were considered is not satisfactory and was rejected by the Assessing Officer for provision of section 145(3) of the Act. The AO, after rejection of the books of accounts made an addition which consist of Rs. 341,20,971/- on account of its rate of prospective disallowance on account of bogus purchases of Rs.

3,36,42,470/-, disallowance of unexplained expenditure of Rs. 26,02,310/-, disallowance of interest expenditure of Rs. 25,14,455/-, administrative expenditure of Rs. 7,11,209/- and addition of Rs. 4,28,074/- on the basis of peak credit for affecting the sales and purchases. As we have already noted that all the addition was made by rejecting the books of accounts. The AO has estimated the income of the assessee on Gross profit which we have partly upheld in assessee's cross appeal in ITA No.2411/Mum/2015.

9. The Coordinate Bench of the Tribunal in Teja Construction (supra) relied by Ld. Commissioner of Income Tax (Appeals) is squarely applicable on the facts of the present case. Therefore, we do not find any illegality and infirmity in deleting the various additions and disallowances by Ld. CIT (A). No contrary law or decision is brought to our notice; therefore, we do not find any reason to interfere with the finding of the ld. CIT (A). In the result, ground number 1 to 3, raised by the Revenue, are dismissed.

10. Ground number 4 relates to deleting the disallowance u/s 40(a)(ia) of the Act. The ld Departmental Representative (DR) for the Revenue supported the order of the Ld. Assessing Officer. On the other hand the Ld. Authorized Representative of the assessee submits that the AO made disallowance of Rs.3,60,771/- u/s 40(a)(ia) of the Act paid on account of credit card commission by the assessee without making TDS. The Ld. Authorized Representative of the assessee submits that the cross appeal raised by the Revenue is also covered in the favour of the assessee by the decision of the Mumbai Bench of the Tribunal in ITO vs Jet Airway(I) Ltd. (ITA nO.7439 to 7441/Mum/2010) dated 07/07/2013.

11. We have considered the rival submissions and perused the material available on record. The Ld. Assessing Officer made the disallowance of Rs. 3,60,771/- on account of non-deduction of Tax at source and

commission paid to the bank on credit card charges. The Ld. Commissioner of Income Tax (Appeals) while considering the grounds of appeal and observed that the issue is as to whether the payment in dispute can be termed as commission paid or rendering services by the bank to the assessee of bills amount or that whether TDS was deductible u/s 194J of the Act. For non-compliance thereof as rightly resulted in addition u/s 40(a)(ia) of the Act. The Ld. Commissioner of Income Tax (Appeals) by following the decision of coordinate Bench in Jet Airways (I) Ltd. (Supra) and the decision of the Bangalore Tribunal in Tata Tele Services vs DCIT in ITA No.308 to 310 and 393 to 396/Bang/2011 and in ITA No.1014 to 1021 & 1285 to 1290/Bang/2012 held that payment to bank for utilization of credit card are in the nature of bank charges and not commission and therefore no tax deductible at source u/s 194H of the Act and deleted the addition or disallowances made by the AO u/s 40(a)(ia) of the Act.

11. We have also noted that grounds of appeal is covered in favour of the assessee by the decision relied upon by the Ld. Commissioner of Income Tax (Appeals). No contrary decision is brought to our notice, thus, we do not find any reason to interfere with the decision of the ld. CIT(A). Thus, ground no. 4 of the Revenue is dismissed.

12. In the result appeal filed by the Revenue is dismissed.

13. In the result, appeal filed by assessee is partly allowed and Revenue is dismissed.

Order pronounced in the open court on 16<sup>th</sup> day of May 2018.

Sd/-  
(SHAMIM YAHYA)  
**ACCOUNTANT MEMBER**  
Mumbai; Dated 16/05/2018

Sd/-  
(PAWAN SINGH)  
**JUDICIAL MEMBER**

Shekhar.P.S

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. त्यापितप्रति //True C

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