

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,जी,मुंबई ।

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

श्री जोगिन्दर सिंह, उपाध्यक्ष एवं

श्री रमित कोचर, लेखा सदस्य, के समक्ष

**Before Shri Joginder Singh, VICE PRESIDENT, and
Shri Ramit Kochar, Accountant Member,**

**ITA NO.1780/Mum/2017
Assessment Year: 2010-11**

Sharmista Mafatlal Mehta, 404, Rekha Apartment, Amrut Nagar, Ghatkopar(W) Mumbai-400086	बनाम/ Vs.	Income Tax Officer-22(2)(3), Mumbai
निर्धारिती / Assessee		राजस्व / Revenue
P.A. No.AFAPM1923P		

निर्धारिती की ओर से / Assessee by	Shri Amit C. Jhaveri
राजस्व की ओर से / Revenue by	Chaudhary Arun Kumar Singh- DR

सुनवाई की तारीख / Date of Hearing	17/10/2018
आदेश की तारीख /Date of Order:	23/10/2018

आदेश / O R D E R

Per Joginder Singh, Vice President

The assessee is aggrieved by the impugned order dated 12/12/2016 of the First Appellate Authority, Mumbai, confirming the addition of Rs.1,29,61,913/- (G.P. at the rate of 25%) on the Hawala purchases

amounting to Rs.5,18,47,653/- under section 69C of the Income Tax Act, 1961 (hereinafter the Act).

2. During hearing of this appeal, Shri Amit C. Jhaveri, ld. counsel for the assessee, claimed that in the case of relative in Income Tax Officer vs Manisha Hemant Mehta (ITA NO.1570/Mum/2017), order dated 31/10/2017, the Tribunal sent the matter to the file of the Ld. Assessing Officer with certain directions. However, the Ld. DR, Chaudhary Arun Kumar Singh, defended the impugned order.

2.1. We have considered the rival submissions and perused the material available on record. Before advertizing further, we deem it appropriate to reproduce hereunder the relevant portion from the aforesaid order of the Tribunal dated 31/10/2017 for ready reference and consideration.

“This is an appeal filed by the Revenue. The relevant assessment year is 2010-11. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-25, Mumbai and arises out of the assessment completed u/s 143(3)r.w.s. 148 of the Income Tax Act 1961, (the ‘Act’).

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

1. On the facts and circumstances of the case the Ld. CIT(A) erred in deleting the addition of Rs.90,56,115/- on account of bogus purchases, without appreciating the fact that the assessee has failed to produce bills, vouchers and other documentary evidence in support of his claim.
2. On the facts and circumstances of the case the Ld. CIT(A) erred in estimating the profit from hawala purchases by disallowing only 25% of the bogus purchases, as even the basic onus of producing bill of purchases ledger account, transport bills delivery challans was not fulfilled by the assessee.
3. On the facts and circumstances of the case the Ld. CIT(A) erred in deleting the addition of Rs.2,58,637/- on account of cash credit u/s 68 of the I.T. Act, 1961.
4. The appellant pray that the order of the Ld. CIT(A) on the above grounds be reserved and that of the Assessing Officer be restored.

3. Briefly stated, the facts of the case are that the assessee filed her return of income for the AY 2010-11 on 12.10.2010 declaring total income of Rs.3,23,230/-. The return of income was processed u/s 143(1). Then the Department conducted a survey u/s 133A in the business premises of the assessee on 22.01.2013. During the course of survey, it was found that the assessee had made purchases from the parties who were held as bogus by the Sales Tax Department, Government of Maharashtra. Then the Assessing Officer (AO) issued notice u/s 148 to reopen the assessment done u/s 143(1). During the course of reassessment proceedings, the AO issued notice u/s 133(6) to 24 parties from whom the assessee had made purchases in order to verify the genuineness of transactions. These notices were returned back by the postal authorities as unserved. The AO then requested the assessee to produce the above parties along with copy of ledger account, bills, bank statement for verification. It is found that the assessee failed to produce the above parties before the AO for examination. The assessee also failed to file before the AO evidence of the purchases like delivery challans, transport bills etc. In view of the above, the AO made an addition of Rs.2,08,70,690/- as unexplained expenditure u/s 69C.

3.1 The AO on perusal of the capital account found that the assessee had introduced fresh capital of Rs.2,58,639/-. It consisted of introduction of new capital

of Rs.1,75,000/- and FD maturity of Rs.83,637/-. The AO was not convinced with the source of the above amount and therefore, made an addition of Rs.2,58,637/- as unexplained cash credit u/s 68 of the Act.

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) has followed the decision in the case of *Vijay Proteins Pvt. Ltd. vs. CIT* 58 ITD 428 and restricted the disallowance to 25% on such alleged bogus purchases.

However, in the case of the addition of Rs.2,58,637/- made by the AO as unexplained cash credit u/s 68, the Ld. CIT(A) deleted the same on the reason that no specific ground has been made by the AO in the assessment order.

5. Before us, the Ld. DR submits that as the assessee failed to produce before the AO the 24 parties and also failed to file delivery challans, transport bills etc., the Ld. CIT(A) should have confirmed the total disallowance of Rs.2,08,70,690/-.

The DR also submits that the Ld. CIT(A) should have confirmed the addition of Rs.2,58,637/- made by the AO as unexplained cash credit u/s 68 as the assessee failed to file the corroborative evidence before the AO.

6. On the other hand, the Ld. counsel of the assessee submits that the assessee had submitted the corresponding details before the AO. He submits that the goods were received and entered into stock register and the corresponding sales were accounted. Since the sales were not suspect, no one could doubt about the purchases.

In respect of the addition made by the AO of Rs.2,58,637/- u/s 68 as unexplained cash credit, the Ld. counsel relied on the order of the Ld. CIT(A).

7. We have heard the rival submissions and perused the relevant materials on record. We deal with the 1st and 2nd ground of appeal together as they address a common issue. The reasons for our decisions are given below.

We find that the notices issued u/s 133(6) by the AO to 24 parties calling for copy of the ledger account of the assessee, nature of goods sold, sample copy of bills issued, copy of delivery challans of goods dispatched along with transport bills, copy of bank statement were returned back by the postal authorities as unserved. Thereafter, the AO requested the assessee to produce the above parties along with their books of accounts 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].

There is no basis in the order of the Ld. CIT(A) in estimating the profit @ 25% in the case of a transaction in which the genuineness is not proved by the assessee.

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.

Thus the 1st and 2nd ground of appeal are allowed for statistical purposes.

8. In respect of the 3rd ground of appeal, we agree with the Ld. CIT(A) that the AO has failed to mention any specific ground while making an addition of Rs.2,58,637/- u/s 68 of the Act. Thus we uphold the order of the Ld. CIT(A) and dismiss the 3rd ground of appeal.

9. In the result, the appeal is partly allowed.”

2.2. We find that in the aforesaid order, the addition on account of bogus purchases was upheld to the tune of 25% of the bogus purchases by the Ld. Commissioner of Income Tax (Appeal) and finally, on appeal by the Revenue, the order of the Ld. Commissioner of Income Tax (Appeal) was set-aside and the matter was restored to the file of the Ld. Assessing Officer with certain directions. In the present appeal, before us, the assessee declared

income of Rs.3,89,450/-. The Ld. Assessing Officer received information from DGIT that the assessee obtained accommodation entry to the extent of Rs.5.18crores from Hawala entry operators, on the basis of which, survey action 133A was carried out on 22/01/2013 and during survey, the statement of the proprietor i.e. the assessee was recorded and incriminating documents were impounded. On the basis of record, the assessment was reopened under section 147/148 of the Act. It was found that the assessee made purchases from certain parties to whom notices were issued under section 133(6) of the Act. As per the Revenue, the assessee did not discharged the onus cast upon the assessee and ultimately addition was made as unexplained expenditure under section 69C of the Act. On appeal, before the Ld. Commissioner of Income Tax (Appeal), various case laws were considered and finally, the disallowance was made @25% of the alleged bogus purchases of Rs.5,18,47,653/- and thus addition of Rs.1,29,61, 913/- was confirmed, which is under challenge before this Tribunal. Considering the aforesaid decision of the Tribunal, we remand this issue to

the file of the Ld. Assessing Officer with similar directions as contained in aforesaid order dated 31/10/2017, thus, the appeal of the assessee is allowed for statistical purposes.

Finally, the appeal of the assessee is allowed for statistical purposes.

This Order was pronounced in the open court in the presence of ld. representatives from both sides at the conclusion of the hearing on 17/10/2018.

Sd/-

(Ramit Kochar)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 23/10/2018

Shekhar. P.S / निजी सचिव

Sd/-

(Joginder Singh)

उपाध्यक्ष / VICE PRESIDENT

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,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai