

IN THE INCOME TAX APPELLATE TRIBUNAL PANAJI BENCH, PANAJI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAM LAL NEGI, JM

ITA No.226/Pan./2017
(Assessment Year: 2010-11)

Income Tax Officer, Ward-1(2), F. K. Commercial Complex, Dr. B. R. Ambedkar Road, Opposite: Civil Hospital, Belagavi-590 001	Vs.	Shri Girish Prakash Vernekar No. 264, Mahalasa Krupa, Shastri Nagar, Vadagaon, Belagavi
PAN/GIR No. ADNPP 5618 F		
(Revenue)	:	(Assessee)

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CO No. 25/Pan./2017
(Arising out of ITA No.226/Pan./2017)
(Assessment Year: 2010-11)

Shri Girish Prakash Vernekar No. 264, Mahalasa Krupa, Shastri Nagar, Vadagaon, Belagavi	Vs.	Income Tax Officer, Ward-1(2), F. K. Commercial Complex, Dr. B. R. Ambedkar Road, Opposite: Civil Hospital, Belagavi-590 001
PAN/GIR No.		
(Cross Objector)	:	(Revenue)

Appellant by	:	Shri A. S. Patil
Respondent by	:	Shri Y. V. Raviraj
Date of Hearing	:	13.11.2018
Date of Pronouncement	:	19.12.2018

ORDER

Per Shamim Yahya, A. M.:

This appeal by the Revenue and cross objection by the assessee against the order of the learned Commissioner of Income Tax (Appeals)- Belagavi, pertaining to assessment year 2010-11.

2. The grounds raised by the Revenue are as under:-

(1) The Id.CIT(A) did not appreciate that assessee has not discharged the onus of proving cash purchases and also the assessee has also not given any evidence of rotation of seed capital.

(2) The Id. CIT(A) has not ruled out that the business relations of the assessee with M/s Rajesh Exports. The Id. CIT(A) has observed that in bullion business cash transaction are normally destroyed. The Id. CIT(A) failed to appreciate the fact that the evidence in the form of Cash transaction noted in the hidden files of the computer disc with the assessee by M/s Rajesh Exports which was seized during the search was sufficient evidence.

(3) The Id.CIT(A) failed to appreciate the fact that the assessee was provided with year wise details of cash purchases made, however, assessee had failed to submit convincing reply, to substantiate that the cash purchases from Rajesh Exports have been accounted in the books nor the assessee produced evidence rebutting the cash purchases.

(4) The Id.CIT(A) erred in deleting the additions u/s 69C on account of unexplained cash purchases while the Id.CIT(A) confirmed the addition made on gross profit which proves that the assessee had indeed undisclosed the cash purchases.

(5) The Id.CIT(A) failed to sustain the addition u/s 69C considering the facts that the assessee has invested unexplained funds into accounted business in the form of cash purchases which can be defined as a seed capital in such business.

(6) For these and other grounds that may be urged at the time of hearing, the order of the learned CIT(Appeals) may be set aside and that the order of the Assessing Officer be restored.

3. The grounds raised by the assessee in the cross objection read as under:

1] Departmental appeal is against law and facts of the case as Learned Income-Tax Officer failed to prove even one rupee Purchases out of alleged Cash Purchases of Rs.1,16,62,754/- from Rajesh Exports without any clinching evidence of Purchase. Hence, additions of Rs.1,16,62,754/- made as deemed income U/S 69C and GP additions of Rs.62,142/-not justified.

2] Learned Commissioner [Appeals] in PARA 9.3 Page 8 of the Order rightly held that without any supporting evidence addition is unsustainable. Hence: AO's addition of Rs.1,16,62,754/- made U/S 69C be deleted and the decision of the Commissioner [Appeals] be restored.

3] Learned Commissioner [Appeals] having held that AO's addition of Rs.1,16,62,754/- is unsustainable is not justified in confirming GP additions of Rs.62,142/- on unproved Purchases. Hence, GP additions of Rs.62,142/- requires to be deleted.

4. Brief facts of the case are as under:

A search operation u/s 132 was conducted in the case of M/s Rajesh Exports Limited on 17.12.2013. During the course of search, the forensic imaging of hard disks seized from the office of M/s Rajesh Exports Limited, Bangalore marked as A/REL/7. It was found that M/s Rajesh Exports Limited maintained bullion sales record in one

database which contained details of cash and cheque/RTGS Sales. From the analysis of the data base, it was gathered that M/ s Rajesh Exports Limited has made cash sales of bullion amounting of Rs.4,37,07,261/- (from A.Y.2009-10 to 2013-14) to Shri Girish Vernekar, Belgaum. Based on the said information assessments were reopened u/s 147 of Income-tax Act, 1961.

5. The Assessing Officer (A.O. for short) in his assessment order stated that the assessee had failed to submit any convincing reply to substantiate the purchases have been accounted in his books. Assessee did not produce any evidence rebutting the said cash purchases. Therefore, the AO had made an addition of Rs.1,16,62,754/- as unexplained expenditure as per provisions of section 69C of Act and Rs.62,142/- as profit on alleged sales at GP rate of 0.52%.

6. Upon the assessee's appeal, the Id. CIT(A) noted the submissions as under:

1] ".....From Assessment Year 2009-2010 to AY 2013-2014 all the completed assessments were re-opened by issue of notice U/S 148 dated 22-3-2016 & 28-3-2016 Without giving any reasons. Appellant by letter dated 25-3-2016 & 27-5-2016 requested the basic reasons for re-opening. Income-Tax Officer by letter dated 8-7-2016 furnished that there was action U/S 132 in the cose of RAJESH EXPORTS PVT LTD, Bangalore On 17-12-2013. During the course of Search Hard Disks Seized where in alleged cash sales to appellant were found. Except alleged cash sales by RAJESH EXPORTS no other clinching evidence or proof was given to appellant.

1] Appellant has already given the brief facts in the Statement of Facts. Except Assessment Years 2010-2011 & Assessment Year 2013-2014 all other assessments were completed u/s 143[3J. Out of the five completed assessments in respect of following Assessment Years Appeals are Pending before Your Honour namely:

Asst.Year 2011-2012 ITA No.25/Bgm/2014-2015 Filed On 15-4-2014 AsstYear 2012-2013 ITA No.25/Bgm/2014*2015 Filed On 23-3-2015 Both Appeals are partly heard.

[3] Once again appellant by letter doted 12-12-2006 requested AO either to furnish details or alternatively to issue notice U/S 133[6] or Summons U/S 131 to RAJESH EXPORTS calling for the details as all reopened assessments were getting time barred by 31-12-2016. But it appears that neither notice U/S 133[6] or

Summons U/S 131 was issued to Rajesh Exports. Simultaneously appellant also by RPAD letter dated 9-12- 2016 requested Rajesh Exports to furnish the details in respect of alleged Cash Sales of Rs.4,37,07,261/-. However, there was absolutely no response from Rajesh Exports.

However, assessments for all the years were finalized by the assessing Officer vide assessment Order dated 23-12-2016 by treating entire alleged Cash Purchases of Rs.4,37,07,261/- and GP thereon total amounting to Rs.4,42,21,129/- as additional income and orders were served on the appellant On 23-12-2016 itself. The details of additions are as under:-

Asst Year	Additions of Cash Purchases	GP Additions	Total Addition
2009-2010	Rs.25,69,571	+Rs. 24121 =	Rs. 25,93,692
2010-2011	Rs. 1,16,62,754	+ Rs. 62,142 =	Rs. 1,17,24,891
2011-2012	Rs. 17,26,837	+Rs. 25,052 =	Rs. 17,51,889
2012-2013	Rs. 2,49,48,919	+Rs.3,61,945 =	Rs. 2,53,10,864
2013-2014	Rs. 27,99,180	+Rs. 40.608 =	Rs.28,35,788
Total	Rs.4,37,07,261	+Rs. 5,13,868 =	Rs.4,42,21,129

Additions of Rs.4,42,21,129/- made by The Income-Tax Officer is against law and facts of the case. Hence, appellant by way of appeal has challenged the above orders.

[4] For filing Appeals once again appellant by his request letter dated 26-12-2016 requested that the details given by Rajesh Exports are used against the appellant and that natural justice requires that copy of details should be given at least now to file effective reply at the time of hearing of appeals and challenge the additions made. Unfortunately there is a very cold response from the A.O. and no details were given. In the aforesaid circumstances it appears that even the Learned Income-Tax Officer is also not having any details except the said information which was passed on to the Office by ACIT[Central] Bangalore Vide his letter in F.No.Rajesh/DCIT/CC-1[2] 2015-2016 dated 28-12-2015 to verify the Cash Purchases made by the appellant. This is evident from PARA 2 of the assessment order.

In NUTSHELL the Income-Tax Officer is not justified in making total wild additions of Rs. 4,42,21,129/ on account of alleged Cash Purchases and GP addition on following grounds:-

[A] Appellant is one of the major customer of Rajesh Exports, Bangalore. Appellants Purchases were all on Credit and Payments were made through RTGS. Appellant has not made even one Rupee Purchases in Cash. For the said years Purchases details are as under: -

Assessment Year	Credit Purchases	Alleged Cosh Purchases
2009-2010	Rs. 1,25,52,370	Rs. 25,69,571
2010-2011	Rs.21,80,86,284	Rs. 1,16,62,754
2011-2012	Rs. 50,16,427	Rs. 17,26,837
2012-2013	Rs. 5,17,23,279	Rs. 2,49,48,919
2013-2014	NIL	Rs. 27,99,180

Total	Rs.28,73,78,360	Rs. 4,37,07,261
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Entire Credit Purchases of Rs.28,73,78,360/- which are duly accounted in the appellants Books of accounts. Hence, there is absolutely no reason for Cash Purchases of Rs.4,37,07,261/-.

[B] Since appellant is one of the regular major customer of RAJESH EXPORTS they might have misused the name of appellant to cover up their alleged Cash Sales. The possibility is not ruled out in the absence of any concrete evidence.

[C] Alleged Cash Sales to the tune of Rs.4,37,07,261/- is in the books of RAJESH EXPORTS LTD. Hence, the onus is on the RAJESH EXPORTS to prove or explain the Cash Sales of Rs.4,37,07,261/- and onus is not on the appellant.

[D] From plain reading of PARA 2 of the Assessment Order the reason given by The Income-Tax Officer without any concrete evidence is not enough to invoke Section 148 for the said years.

[E] During action U/S 132 on the Premise of RAJESH EXPORTS not a Single bill copy or any record on loose paper or any other evidence was found except alleged hard disk details fed by RAJESH EXPORTS. It is self serving evidence which has no evidentiary value.

[F] HARD DISK seized was used against the appellant without giving any opportunity to test the HARD DISK or to Cross examine RAJESH EXPORTS. Hence, additions made not justified.

[G] Finally appellant closed his business On 31-3-2013 and thereafter absolutely no business connection for last 4 years with the RAJESH EXPORTS. In the absence of any business dealings RAJESH EXPORTS have not responded to my Phone Calls or RPAD letter sent On 9-12-2016 till today.

In view of the above facts wild additions of Rs.4,37,69,403/- made by The Income-Tax Officer is not justified and requires to be deleted".

7. The Id. CIT(A) deleted the addition by holding as under:

The addition made by the AO is on the identical issue for the five assessment years from 2009-10 to 2013-14. The AR of the appellant categorically states that assessee never purchased any items which were not shown in the books of account. AR alleges that there was no details of any Date wise/ Month wise /Item wise purchases in those entries found in the Computer Hard Disc. M/s Rajesh Exports Ltd., usually supplied Gold only on RTGS payments made in advance. Hence such cash purchases were nothing to do with assessee. The assessee makes huge turnover on minimum capital with less margins as dealing in Gold bullion. Hence turnover is very high and admitting profits ranging from 1.43% to 0.45% of total turnover. During the financial year 2010-11 survey u/s 133A had taken place on the business premise of the assessee and no evidence was found by the department regarding suppression of sales or unaccounted purchases of Gold. This makes assessee's stand strong that alleged cash purchases with M/s Rajesh Exports Ltd as observed from notings in the seized hard disk may not be related to the appellant. During the course of re-assessment proceedings for the assessment years 2008-09 to 2013-14, the AO's finding was that the assessee failed to submit any convincing reply to substantiate the purchases have been accounted in his books. The AO had not found any corroborative evidence in

support of the cash purchases from the M/s Rajesh Exports Ltd., Bengaluru except the notings analysis of the data base which showed the aggregate figure for the year without any break up of invoice wise or date wise details. It was only gathered that M/ s Rajesh Exports Limited had made cash sales of bullion amounting of Rs.4,37,07,261/- (from A.Y.2009-10 to 2013-14) to Shri Girish Vernekar, Belgaum from the hidden files of M/s Rajesh Exports.

9.1 Except unilateral entries in the computer hard disk of M/s Rajesh exports, no other corroborative evidence was found in relation to cash sales to the appellant. Even during survey operations at the appellant's premises u/s 133A in the FY 2010-11, no incriminating documents were found by the department related to either un-accounted cash purchases or suppression of sales. Considering the facts of the case, there is some strength in the argument of the assessee that cash sales observed from the hard disk of Rajesh exports may not be related to the appellant. It could be a unilateral adjustment of ,r. M/s Rajesh Exports to cover up its mistake by taking name of appellant. However, there is a £.25 clear relationship of seller and buyer between the Rajesh exports and the appellant -\$ Evidence was found during the search operations, evidence was in the form of a hidden file not disclosed to the department. Considering these facts, transactions mentioned there in cannot be simply ruled out. It is a normal tendency observed in many cases that evidence related to suppressed sales/purchases etc is normally destroyed by the assessee. From the facts narrated above, I am of the opinion that there should have been some un-accounted purchases from M/s Rajesh Exports by the appellant as there is a clear business relations with him and in this trade cash purchases are not ruled out. The evidence was found during the search operation in a hidden file. Considering these facts in totality, issue need to be analysed and correct income need to be assessed.

9.2 Appellant is a bullion dealer. Purchases are made through RTGS in the regular books. During the year relevant to the assessment year under consideration, Gold Bullion sales made of Rs.70,66,08,374/- declaring gross profit of Rs.36,99,962/- @ 0.52% which is accepted by the Assessing Officer.

9.3 Appellant being the bullion dealer, he is rotating his capital. AO has accepted margin % of appellant for working of un-accounted income. It is observed from the regular books that appellant normally pui Jidieb untr lot uf bullion reguldrly which is dbuul one ky at a time. Comparing various invoices of the purchases made during the FY 2008-09 from the books regularly maintained and comparing market rate of gold during the year one lot of one KG gold is worth Rs.12,50,000/-. This should be the reasonable un-accounted initial investment for cash purchases of the appellant. This capital reasonably might have got rotated cycle after cycle for subsequent purchases. Considering these facts, initial investment of Rs.12,74,121/-(Rs.12,50,000/- plus Rs.24,121/-) was confirmed in the appeal for the assessment year 2009-10. Hence, the capital of the appellant of Rs.12,74,121/-which is available with the appellant at the beginning of the previous year relevant to assessment year 2010-11 must have rotated for subsequent purchases during the year. The total alleged un-accounted purchase for this year as per M/s Rajesh Exports was Rs.1.16 Crores. Regular total turnover of the appellant is in the range of Rs.20 Crores. It is a high volume, low margin trade. Appellant is rotating his minimum capital for huge volume. Appellants' each invoice in normal business is worth One Kg of gold. That regularly comes to about 10 to 12

cycles during the year. In the forensic data, "NO" date wise/Invoice wise details were available. It was only a lump sum figure for the whole year. It is presumed reasonably that appellant is using his capital available (Rs.12,74,121/-) on rotation to generate this volume of purchases. Hence, I do not find any reason to concur with the AO's addition for un-accounted purchases of Rs. 1,16,62,754/- during the year. No other eligence was brought out by the Assessing Officer. This alleged un-accounted purchase taken place in cycles of 10 to 12 each time with purchase of about 1 Kg of gold i.e., if appellant is rotating his capital every month as it is seen in normal course of business of the same appellant, the same capital should have resulted in the purchase of Rs.1.16 crores of gold bullion. Considering the nature of bullion business characterized by low margin high value achieving with rotating the capital, no further addition on un-accounted purchase warranted. The addition made of Rs.1,16,62,754/- u/s 69C by the AO is not tenable. AC had not considered the lot wise purchases nor he had considered the rotation of the same capital during the year. Hence such addition merely based on one lump sum figure found in the hidden file without any other supporting evidence is un-sustainable and not in accordance with law. Hence, AO's addition of Rs.1,16,62,754/- made u/s 69C of the I T Act, 1961 is deleted. Appeal of the appellant on this ground is allowed.

10 In relation to addition of Rs.62,142/- on account of gross profit, the appellant has not pressed for this ground. Hence the addition made by the A.O on this account is confirmed.

8. Against the above order, the Revenue has filed the appeal and the assessee has filed cross objection.

9. We have heard both the counsel and perused the records. We find that the addition in the hands of the assessee has been done by the A.O. on the basis of materials found on the hard disk of M/s Rajesh Export Private Limited, Bangalore during the search operation. These details of cash sale to the assessee have said to be filed on the said hard disk has not been brought on record. The details of the same were also sought by the assessee. But the A.O. has not provided the same to the assessee. Assessee has requested the A.O. to issue notice or summons to M/s Rajesh Export Private Limited, to send the details of cash purchase by the assessee but no detail has been provided. Furthermore, it is the plea of the assessee that no other evidence and voucher of cash purchase by the

assessee from the said company was found during search. The assessee's claim is that it has never made cash purchases from the said party. Furthermore, no shortcoming in the accounts or purchase or sale detail of the assessee has been detected by the A.O.

10. The submissions of the assessee have not been cogently rebutted. When the addition is based solely upon some material found on the hard disk of the said suppliers, it was incumbent upon the A.O. to provide the details to the assessee so that he can have the possibility to rebut the same. In the present case, we find that on what basis the addition has been made has not at all been brought on record. The details of such finding in case of the supplier have not been provided to the assessee despite request. In such circumstances, there is no opportunity to the assessee rebut the allegation. The facts of the case point out that even the A.O. is not in possession of any detail on the basis of which addition has been done.

11. In such circumstances, it is evident that addition has been made on surmise and conjecture. No cogent evidence has been brought on record for the addition made. It is the settled law that when material has been obtained from third-party, the assessee is required to be given proper opportunity to rebut and cross examine the said third party. In the present case, leave alone the question of cross examining the said suppliers, even the details found has not been provided to the assessee. In such circumstances, in our considered opinion, the addition is not at all sustainable.

12. We are aware the ld. CIT(A) has observed the deficiency in evidence, however, he had deleted the addition on the basis that, on the basis of addition in the earlier year, the

same amount was rotated by the assessee, hence, the addition is not sustainable. Since, we have already deleted the addition on the basis of our earlier observation, the deletion by the Id. CIT(A) on some other basis is only of academic interest. Accordingly, we confirm the deletion of the addition in this case.

13. As regards the assessee's C.O. is concerned, when the addition itself is deleted, there is no question of sustaining the addition of GP on these addition. Hence, the addition of GP on the deleted addition does not survive. Hence, the same is deleted.

14. In the result, the appeal filed by the Revenue is dismissed and the cross objection by the assessee is allowed.

Order pronounced by listing the result on the Notice Board of the Bench under Rule 34(4) of the Appellate Tribunal Rules, 1963.

Sd/

Sd/-

RAM LAL NEGI
JUDICIAL MEMBER

SHAMIM YAHYA
ACCOUNTANT MEMBER

DATED: 19.12.2018

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Panji City concerned;*
- (5) *The DR, ITAT, Panji;*
- (6) *Guard file.*

Roshani, Sr. PS

By Order

(Sr. P.S./P.S.)
ITAT