

आयकर अपीलीय अधिकरण "एक-सदस्य मामला" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH, PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA Nos.1055 & 1056/PUN/2018
निर्धारण वर्ष / Assessment Years : 2009-10 & 2010-11

Shirish Dagdulal Sodani
Prop. of Pooja Distributors,
Main Road Ambad,
Tq. Ambad,
Dist. Jalna - 431202

PAN : ACZPS0095A

.....अपीलार्थी / Appellant

बनाम / V/s.

Income Tax Officer,
Ward -1 (3), Jalna

.....प्रत्यर्थी / Respondent

Assessee by : S/Shri C.N. Chobe & J.B. Samdani
Revenue by : Shri Rajesh Gawali

सुनवाई की तारीख / Date of Hearing : 07-01-2019

घोषणा की तारीख / Date of Pronouncement : 15-01-2019

आदेश / ORDER

PER VIKAS AWASTHY, JM :

These two appeals have been filed by the assessee. ITA No.1055/PUN/2018 is directed against the order of Commissioner of Income Tax (Appeals)-1, Aurangabad dated 16-03-2018 for the assessment

year 2009-10. In ITA No.1056/PUN/2018, the assessee has assailed the order of Commissioner of Income Tax (Appeals)-1, Aurangabad dated 16-03-2018 for the assessment year 2010-11.

Since the issue raised in both the appeals is identical and is arising from same set of facts, therefore, these appeals are disposed vide this consolidated order.

2. The brief facts as emanating from records are: the assessee is engaged in the business of trading in Jarda, oil, sugar, tea, etc. on wholesale basis. Search and seizure operation was conducted in the case of Malpani Group on 06-10-2009. The statement of Shri Rajesh Omprakash Malpani, Director, Sargam Retails Pvt. Ltd. was recorded u/s 132(4) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') on 03-12-2009. In his statement, Rajesh Omprakash Malpani explained the business model and *modus operandi* for collecting cash from several parties / dealers. The assessee is one of the dealers of Malpani group trading in Gai Chhap Jarda. The Assessing Officer after examining the statement of Rajesh Omprakash Malpani observed that Rajesh Omprakash Malpani had accepted in his statement that the Company has received unaccounted cash from some dealers in Financial Year 2008-09 and 2010-11 and the said cash was collected @ ₹ 95/- per bag on sale of Gai Chhap Jarda. Since the assessee is a dealer of Malpani group, therefore, admission by Rajesh Omprakash Malpani of cash transactions with dealers cannot be treated as mere allegations. The confirmations filed by the assessee are in respect of accounted transactions only, they do not pertain

to unaccounted cash transactions. Therefore, furnishing of confirmations do not sufficiently prove that the assessee has not paid cash premium to Malpani group. The Assessing Officer thus, made addition of ₹ 14,70,620/- as unexplained expenditure u/s 69C of the Act in assessment year 2009-10 and ₹ 19,12,505/- in assessment year 2010-11 on account of cash premium paid to Malpani Group.

3. Aggrieved by the assessment orders for the respective assessment years, the assessee filed appeals before the Commissioner of Income Tax (Appeals). Before the Commissioner of Income Tax (Appeals), the assessee sought cross examination of Rajesh Omprakash Malpani, which was allowed. The Commissioner of Income Tax (Appeals) after considering cross examination and statement of Rajesh Omprakash Malpani, rejected the same stating it to be an afterthought and confirmed the additions in toto as made by the Assessing Officer.

4. Now, the assessee is in second appeal before the Tribunal and has assailed the order of Commissioner of Income Tax (Appeals) by raising following grounds in assessment year 2009-10:

1. *On the facts and circumstances of the case and in law, the learned CIT Appeal, Aurangabad in confirming the addition of Rs.1470620/- made by the assessing officer on account of unexplained cash payments to Malpani Group U/s. 69C of the Income Tax Act 1961.*
2. *On the facts and circumstances of the case and in law, the learned CIT Appeal, Aurangabad has erred in confirming the addition of Rs.1470620/- made by the A.O. without considering the fact that the unexplained cash credit to Malpani Group have not been concrete and conclusively proved and corroboratively established.*

3. The addition made by the A.O. which is confirmed by the CIT Appeal, may kindly be deleted.

Identical grounds have been raised by the assessee assailing the order of Commissioner of Income Tax (Appeals) in assessment year 2010-11. For the sake of brevity, grounds raised by the assessee in assessment year 2010-11 are not reproduced.

5. Shri C.N. Chobe and Shri J.B. Samdani appearing on behalf of the assessee submitted that the statement of Rajesh Omprakash Malpani was recorded u/s 132(4) of the Act, wherein he admitted to have received unaccounted cash from some dealers in financial years 2008-09 and 2010-11. The said cash was allegedly collected by the dealers on their behalf as cash receipts from sale of Gai Chhap Jarda. The ld. AR submitted that nowhere in the entire statement, the name of assessee has been mentioned by Rajesh Omprakash Malpani. During assessment proceedings the assessee was not granted opportunity to cross examine Rajesh Omprakash Malpani, however, during first appellate proceedings, opportunity was granted to assessee to cross examine Rajesh Omprakash Malpani. In the cross examination, Rajesh Omprakash Malpani admitted that no cash was collected from the assessee, cash was directly collected from wholesalers and retailers. Shri Rajesh Omprakash Malpani further stated that they have no dealings in cash with the assessee and all transactions are reflected in the books of account and the same have been confirmed and reconciled with the assessee from time to time. The ld. AR further pointed that the additions on similar grounds were made in the case of other dealers which were knocked down by the Tribunal. The ld. AR placed

reliance on the following decisions of Tribunal in support of his contentions:

- i) Shri Shrenik Shantilal Dhadiwal Vs. The Tax Recovery Officer (IT) in ITA No.1909/PN/2013, for assessment year 2009-10, order dated 08.10.2015.*
- ii) ITO Vs. Shri Dinesh Satyanarayan Tawani in ITA No.938/PN/2013 and ITO Vs. Shri Sanjay Mohanlal Chhajed in ITA No.1746/PN/2012, both for assessment year 2009-10, order dated 20.02.2015.*
- iii) Shri Mahesh Abdeskumar Rathi Vs. ITO in ITA No.208/PN/2014, for assessment year 2009-10, order dated 27.10.2015.*
- iv) ITO Vs. M/s. Parakh Agency in ITA No.1112/PN/2013, for assessment year 2009-10, order dated 09.09.2014.*

6. On the other hand, Shri Rajesh Gawali representing the Department vehemently defended the impugned order of Commissioner of Income Tax (Appeals). The ld. DR submitted that Rajesh Omprakash Malpani in his statement recorded u/s 132(4) of the Act admitted that cash was received from various dealers. The assessee is one of the dealers, therefore, the addition has been rightly made by the Assessing Officer and upheld by the Commissioner of Income Tax (Appeals). The ld. DR submitted that the statement made by Rajesh Omprakash Malpani in cross examination is an afterthought to protect the assessee.

7. We have heard the submissions made by rival sides and have perused the orders of authorities below. In both the assessment years under appeal i.e. assessment years 2009-10 and 2010-11, the additions have been made on identical grounds. The solitary basis for making the additions is the statement of Rajesh Omprakash Malpani recorded u/s

132(4) of the Act on 03.12.2009. Undisputedly, in his statement, Rajesh Omprakash Malpani admitted that they have received unaccounted cash from some dealers in financial years 2008-09 and 2010-11. It would be relevant to mention here that in the entire statement, the name of assessee does not figure. An opportunity of cross examination of Rajesh Omprakash Malpani was not afforded by the Assessing Officer to assessee. However, in first appellate proceedings, the Commissioner of Income Tax (Appeals) following the principles of natural justice, gave the opportunity of cross examination. In cross examination, Rajesh Omprakash Malpani in reply to a specific query admitted that they have no dealings in cash with the assessee. For the sake of completeness, relevant extract of cross examination is reproduced hereunder:-

“Q1 In your statement recorded, today, at question No 6A, you have stated that the transactions with Pooja Distributors are through purchase orders, bills raised and payments received through banking channels. My question is during the financial years 2008-09 and 2009-10, or during any other periods, have you received any payments in cash from Pooja Distributors? If yes, do you have any documentary evidence to establish these transactions?”

Ans: No. We have no dealings in cash with Pooja Distributors and all transactions are reflected in our books of account which have from time to time confirmed and reconciled with Pooja Distributors.

Q2 You have stated at question No 10, that you have collected cash and this cash was collected by your field staff in Ambad area. Can you please specify whether this cash was received from or on behalf of Pooja Distributors? If yes, do you have any documentary evidence?”

Ans: In my answer to question No 15, I have stated that the cash is collected on our directions only. Pooja Distributors is not concerned or responsible.

Q3

Q4. Please specify whether the cash was collected from the whole-sellers and retailers under Pooja Distributors and whether Pooja Distributors was aware, responsible and accountable to such transactions?”

Ans: No. The cash is collected directly from the whole-sellers and retailers and Pooja Distributors is no way concerned with these transactions.”

A perusal of the cross examination clearly indicates that there were no cash transactions between Malpani Group and the assessee.

8. We find that additions on identical grounds were made in the hands of various other dealers. The issue travelled to the Tribunal. The Co-ordinate Bench of Tribunal in the case of Shri Shrenik Shantilal Dhadiwal Vs. The Tax Recovery Officer (supra) deleted the addition by observing as under:-

“5. We have heard the rival contentions and perused the record. The only issue raised in the present appeal is in relation to the addition made on account of unaccounted cash payment. The case of the Revenue was that the assessee had made unaccounted payments for the purchase of Gai Chap Zarda from M/s. Sargam Retailers Pvt. Ltd. The basis for the said addition was the statement recorded of one Shri Malpani. The case of the assessee was that it had not made any such payments to M/s. Sargam Retailers Pvt. Ltd. and further, the reliance on the statement of Shri Malpani without giving any opportunity of cross-examination, was bad in law.

6. We find that an identical issue arose before the Pune Bench of the Tribunal in M/s. Balaji Agencies Vs. ITO in ITA No.353/PN/2014 (supra), wherein the Tribunal in turn, relied on the decision in ITO Vs. Shri Dinesh Satyanarayan Tawani, ITA No.938/PN/2013 and ITO Vs. Shri Sanjay Mohanlal Chhajed, ITA No.1746/PN/2012 both relating to assessment year 2009-10. The Tribunal vide order of even date in ITO Vs. Shri Dinesh Satyanarayan Tawani (supra), held as under:-

“7. The brief facts of the case are that the assessee was a dealer of Gai Chap Zarda, Tea and other goods of Sargam Retailers Pvt. Ltd., Malpani Teal Corporation and Malpani Products, Sangamner. The assessee was carrying on trading on wholesale basis. The Assessing Officer received a reference from DDIT (Inv.), Unit-I(2), Pune, in the case of Malpani Group of cases of Sangamner and Pune. On the basis of the said information, the case of the assessee was selected for scrutiny and notices under section 143(2) / 142(1) were issued. In the search action carried out under section 132 of the Act, in the Malpani Group of cases, certain documents were found and seized from various premises of the said group. The statement of Shri Rajesh Omkarnath Malpani, director of Sargam Retailers Pvt. Ltd. was recorded under section 132(4) of the Act on 3rd December 2009. In his statement, he had accepted that M/s. Sargam Retailers Pvt. Ltd., had

collected cash from the dealers of Gai Chap Zarda on account of failure of fulfillment of targets set for sale of Gai Chap Zarda. A list of dealers and amount of cash collected from each dealer was made part and parcel of the statement. As per the list forwarded by the DDIT (Inv.), a sum of Rs.16,51,445/- was collected from the assessee for the instant assessment year on account of non-fulfillment of target of sales of Gai Chap Zarda. The assessee, in reply, stated that the assessee had not given any cash payment of Rs.16,51,445/- other than the payment recorded in the books of account towards purchases made from M/s. Sargam Retailers Pvt. Ltd. The A.O. rejected the reply of the assessee and observed that since the payments were received in cash, the same would not be recorded in the books of account. In view of the statement of Shri Rajesh Omkarnath Malpani, recorded under section 132(4) of the Act, which as per the A.O. had evidentiary value could be taken as true. Hence, the said amount of Rs.16,51,445/- was added to the total income of the assessee on account of unexplained expenditure within the meaning of section 69C of the Act. Further, Shri Rajesh Omkarnath Malpani, also admitted that M/s. Sargam Retailers Pvt. Ltd., had collected cash from dealers on account of rejected goods. It was admitted by him that the same amount was collected from the dealers against the said rejection. The amount collected from the assessee on account of rejected goods for the year under appeal was Rs.10,80,207/-. The assessee explained that it had returned 727 bags of Gai Chap Zarda and except the said goods returned no other cash payment on account of rejected goods was made by the assessee. The Assessing Officer, in view of the statement of Shri Rajesh O. Malpani, made an addition of Rs.10,80,207/- in the hands of the assessee.

8. Before the CIT(A), the case of the assessee was that it had not made the said payment. Further, no agreement has been found between the said concern and the dealers towards alleged payment to be made for non-fulfillment of targets by the dealers. Entire contention raised by the assessee was where the concerned person had admitted the transaction found in the seized material and had offered the same to tax and paid due taxes, then there was no question of addition in respect of said transaction in the hands of the third party. The CIT(A) forwarded the submissions of the assessee to the A.O. who submitted the remand report. The assessee filed counter comments and stated that the A.O. had failed to give copies of the statement recorded of Shri Rajesh O. Malpani, and the alleged papers found during the course of search. The assessee also asked for cross examination of Shri Rajesh O. Malpani. The A.O., in the remand proceedings, provided the copy of the statement and other papers to the assessee and also allowed cross examination of Shri Rajesh O. Malpani, which was carried out on 1st January 2013. The relevant portion of the said statement is reproduced at Page-9 and 10 of the appellate order. The Assessing Officer, in his report dated 4th January 2013, stated that Shri Rajesh O. Malpani, in reply to Question no.9, denied to have received any cash from the assessee. However, in reply to Question no.10, he had stated that cash was collected by their field staff from Beed area. The A.O. further stated that Shri Rajesh O. Malpani, had accepted that they have recorded the business transaction made with the assessee in their books of

account and the amounts not recorded in the books of account have been offered to tax as income. The ld. CIT(A), vide Para-14.2, observed that "In view of the above specific replies given by Shri Rajesh O. Malpani, it cannot be said that the alleged cash payment of Rs.16,51,445/-and Rs.10,80,207/- has been made by the appellant to SRPL. It has also been pointed out by Shri Rajesh O. Malpani in reply to Q.no.17 as under:-

Qeu. No.17 Do you have anything to say anything more.

Ans. I am submitting the copy of assessment order passed in the case of one of our dealer Mr. Omprakash Jagannath Laddha, Prop. Tulsi Sales Corporation, Solapur, where the assessment is passed by Central Circle, Pune without making any addition on account of our disclosure.

The A.O. in his report has not commented on the reply given by Rajesh O. Malpani, to the above Q.no.17."

The CIT(A) in view thereof deleted the addition against which the Revenue is in appeal before the Tribunal.

9. We find that similar issue of cash premium in respect of Gai Chap Zarda arose before the Tribunal in the case of ITO v/s M/s. Parakh Agency in ITA no.1112/PN/2013, relating to assessment year 2009-10. The Tribunal, vide order dated 9th September 2014, considered the facts in brief vide Para-3 and 3.1 as under:-

"3. Facts of the case, in brief, are that a search and seizure action u/s.132 of the I.T. Act was carried on in the cases of Malpani group of Sangamner on 06-10-2009. During the course of said search, a statement on oath of Shri Rajesh O. Malpani was recorded u/s.132(4) on 03-12-2009. In the statement, the deponent has stated that the Malpani group has collected cash premium upto Rs.95/- per bag in respect of sale of Gai Chap Zarda from some of the dealers in F.Ys. 2008-09 and 2009-10 which is unaccounted income of Sargam Retail Pvt. Ltd. Further, in the statement recorded u/s.132(4) on 03-12-2009, Shri Rajesh O. Malpani has given the details of cash collected from the dealer on sale of Gaichap Zarda as under :

Name of Dealer	A.Y. 2009-10		A.Y. 2010-11		Total unaccounted cash collected
	Qty.(Bags)	Unaccounted cash collected	Qty.(Bags)	Unaccounted cash collected (Rs.)	
Parakh Agencies Nandgaon PAN AAFFP6717L	8478	777190	11190	1103915/-	1881105/-

In view of the above information the AO has asked the assessee to explain as to whether the above amount of Rs.7,77,190/- has been reflected in the books of account and to explain the nature of the said transactions. In response to this query of the AO, the assessee filed details of transactions with Sargam Retails Pvt. Ltd. Sangamner and denied any such payment of Rs.7,77,190/- to Sargam Retails Pvt. Ltd. Sangamner. However, the AO rejected the reply of the assessee and made the additions of Rs.7,77,190/- by relying on the statement recorded u/s 132(4) of Shri Rajesh O. Malpani, Director of Sargam Retails Pvt. Ltd. during search action in the case of the said Co. In support of this addition, the AO relied on the decision of Hon'ble ITAT, Delhi in the case of Hersh Win Chadha Vs. DDIT. The AO, relying on the above decision observed that unlike criminal proceedings, the charge is not required to be proved beyond doubt in the case of Income Tax proceedings. The technical rules contained in the Indian Evidence Act are not applicable in the Income Tax proceedings. In clandestine transactions, it is impossible to have direct evidence to prove the said transactions. The AO has to assess the tax liability considering the material available on record, surrounding circumstances, preponderance of probabilities and evidence available on record.

3.1 The AO further noticed that during the impugned year the assessee has transacted 8478 bags whereas the amount of Rs.7,77,190/- has been paid to S.R.P.L. towards premium paid in cash which is unaccounted. The AO, therefore, asked the assessee to explain as to why it should not be treated that in respect of balance quantity of 3122 bags the premium @ 91.67 per bag, i.e. Rs.2,80,193/- was also collected from the market as unaccounted cash and retained with himself as unaccounted income. The assessee denied any such collection and replied to the Assessing Officer accordingly. The Assessing Officer, however, rejected the reply of the assessee and made addition of Rs.2,86,193/- on account of unaccounted income.”

10. The Tribunal, thereafter, deleted the addition upholding the order of the CIT(A) observing as under:-

“7. We have considered the arguments advanced by the Ld. Departmental Representative and perused the material on record. We find the Assessing Officer, based on the statement recorded u/s.132(4) of Shri Rajesh O. Malpani, Director of Sargam Retails Pvt. Ltd. made addition of Rs.7,77,190/- on the ground that Sargam Retails Pvt. Ltd. has collected premium on sale of Gaichap Zarda from the dealers in cash by charging less price of the product to the dealers. We find the Ld.CIT(A) deleted the addition made by the Assessing Officer on the ground that the Assessing Officer has not allowed cross examination of Shri Rajesh O. Malpani, Director of Sargam Retails Pvt. Ltd. by the assessee although it was specifically raised before the Assessing Officer. He further held that addition cannot be made on the basis of a statement recorded on oath unless opportunity of cross examination is given to the

assessee. The Ld. CIT(A) has further observed that even if it is accepted that assessee has paid the excess amount to Sargam Retails Pvt. Ltd., same are collected on behalf of Sargam Retails Pvt. Ltd. from various retailers and the resultant income of the assessee on these transactions will be NIL. This reasoned finding by the Ld.CIT(A) in our opinion does not suffer from any infirmity in absence of any contrary material brought to our notice by the Ld. Departmental Representative. Therefore, the addition of Rs.7,77,190/- deleted by the Ld. CIT(A) in our opinion is justified and the ground of appeal No.1 by the Revenue is dismissed.

7.1 So far as the addition of Rs.2,86,193/- is concerned, we find the Assessing Officer made the addition on the basis of difference between the total bags transacted and the bags in respect of which the addition has been made at 8478 bags. The Ld.CIT(A) has given a finding that this addition of the Assessing Officer is not supported by any evidence. The Ld. Departmental Representative also could not bring any material to controvert the finding given by the Ld.CIT(A) which according to the Ld.CIT(A) is based on assumption, presumption and suspicion. In view of the above, the order of the CIT(A) deleting the addition of Rs.2,86,193/- in our opinion, also does not suffer from any infirmity. Accordingly, the same is upheld. Ground of appeal No.2 by the Revenue is accordingly dismissed.

7.2 So far as the grounds of appeal No.3 is concerned, we find from the remand report of the Assessing Officer dated 05-03-2013 that he has accepted that no cross examination of Shri Rajesh O. Malpani was allowed to the assessee during assessment proceedings. Therefore, ground of appeal No.3 by the Revenue is dismissed.”

11. The facts and issue arising in the present appeal are identical to the facts and issue before the Tribunal in the case of M/s. Parakh Agency (supra) and following the same parity of reasoning, we uphold the order of the ld. CIT(A) in deleting the addition of Rs.16,51,445/- and Rs.10,80,207/-. The grounds of appeal raised by the Revenue are thus dismissed.”

7. The issue raised in the present appeal is identical to the issue before the Tribunal in M/s. Balaji Agencies Vs. ITO (supra), ITO Vs. Shri Dinesh Satyanarayan Tawani (supra) and ITO Vs. Shri Sanjay Mohanlal Chhajed (supra) and following the same parity of reasoning, we direct the Assessing Officer to delete the addition made on account of unaccounted cash payment of Rs.24,54,140/-. Thus, the grounds of appeal raised by the assessee are allowed.”

9. Thereafter, the Tribunal taking the same view deleted identical additions in the case of Shri Mahesh Abdeshkumar Rathi Vs. ITO (supra). Thus, in view of the facts discussed above and various case laws on

identical set of facts, the additions were deleted. The Revenue has not been able to show that the facts in the case of assessee are at variance. Thus, in our considered view the impugned orders deserve to be set aside. Consequently, appeals of assessee are allowed.

10. In the result, both the appeals of assessee are allowed.

Order pronounced on Tuesday, the 15th day of January, 2019.

Sd/-
(R.S. Syal)
VICE PRESIDENT

Sd/-
(Vikas Awasthy)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 15th January, 2019
GCVSR

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-1, Aurangabad
4. The Pr. Commissioner of Income Tax-1, Aurangabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "एक-सदस्य मामला" बेंच, पुणे / DR, ITAT, "SMC" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

//सत्यापित प्रति // True Copy//

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