

**IN THE INCOME TAX APPELLATE TRIBUNAL  
HYDERABAD BENCHES "B", HYDERABAD**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER  
AND  
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**I.T.A. No. 1644/HYD/2017**

Assessment Year: 2008-09

Dy. Commissioner of  
Income Tax,  
Circle-16(2),  
HYDERABAD

M/s. Prajay Engineers  
Vs Syndicate Limited,  
HYDERABAD  
[PAN: AACCP2287M]

**(Appellant)**

**(Respondent)**

For Revenue : Shri Y.V.S.T. Sai, CIT-DR  
For Assessee : Shri Mohd. Afzal, AR

Date of Hearing : 05-02-2019  
Date of Pronouncement : 08-03-2019

**ORDER**

**PER S. RIFAUR RAHMAN, A.M. :**

This appeal filed by the Revenue is directed against the order of the Commissioner of Income Tax (Appeals)-4, Hyderabad, dated 31-07-2017.

2. Brief facts of the case are that the assessee, a company, engaged in the business of construction, development of property and hospitality etc., filed its return of income for the AY 2008-09 admitting an income of Rs. 62,40,44,910/-. Subsequently, the case was selected for scrutiny and

assessment u/s. 143(3) of the Income Tax Act [Act] was completed on 30-12-2010 determining the total income at Rs. 67,76,28,385/-.

2.1. A survey operation u/s. 133A of the Act was conducted by the DDIT(Inv), Unit-1(2), Hyderabad in the business premises of assessee-company on 12-09-2013. Subsequently, the Assessing Officer issued notice u/s. 148 r.w.s. 147 of the Act on 08-07-2014. Accordingly, the Assessing Officer issued notices u/s. 143(2) & 142(1) of the Act. In response to the said notices, the assessee submitted detailed explanation along with relevant documents as required by the Assessing Officer.

2.2. The AO also asked the assessee to submit the details of purchase of Steel and Tar etc., project-wise. In response, assessee submitted details of list of suppliers along with their details of quantity particulars, PAN card numbers, addresses along with confirmation letters, Excise Invoices, Purchase Orders, Delivery Challans, Stock Registers, Proof of Transportation and other details as required by the Assessing Officer. After going through the information filed, the AO completed the assessment by disallowing total purchases @ 13.5% and assessed the total income at Rs. 83,58,01,814/-.

3. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A).

4. Before the CIT(A), the assessee submitted elaborately, which were extracted by the CIT(A) at pages 4 to 13 in his order.

5. After considering the submissions of the assessee, the CIT(A), inter-alia, observed that the AO in the assessment order himself mentioned that *“it is seen that most of the supplies were supported by proper documents such as invoices, excise invoices, purchase orders, delivery challans, stock registers, respective entries in the purchase register, proof of payment of sale consideration and proof of transportation,”* however, the AO simply concluded the assessment by mentioning that, the invoices and vehicles numbers are not available and adopted 13.5% of total purchases and completed the assessment. In view of the above contrary findings, the CIT(A) held that the action of the AO is not justifiable and accepting the submissions of the assessee before him, deleted the addition made by the AO.

6. Aggrieved by the order of Ld.CIT(A), the Revenue is in appeal before us, raising the following grounds of appeal:

*“1. The CIT(A) erred in deleting the disallowance of Rs. 20,58,91,429/- made on account of disallowance of 13.5% of the purchases as non-genuine.*

*2. The CIT(A) erred by ignoring the decision of jurisdictional ITAT in the case of D. Rajarao (HUF) in ITA No. 718/Hyd/2002, wherein it was held that agreed additions cannot be contested in appeal.*

3. Any other ground that may be urged at the time of hearing”.

7. On the other hand, Ld. DR filed written submissions, which are extracted below for the sake of clarity:

*“1. The following submissions are made for kind consideration of Hon'ble ITAT in the appeal filed by the Department. It is submitted that three grounds of appeal are taken but the issue is deleting the agreed disallowance of Rs. 20,58,91,429/- being 13.5 % of the purchases as non-genuine.*

*2. It is humbly submitted that in case of the assessee a survey u/s 133A was conducted on 12/09/2013 by DDIT(lnv), Unit - 1(2), Hyderabad and it was noticed that certain purchases of Tor-Steel etc claimed to have been made from the concerns at Mumbai were not genuine and the value was quantified at Rs. 100.60 Cr. Subsequent verification revealed that the figure was Rs. 113,59,97,850/-. A show cause notice was issued to show cause why the entire amount should not be treated as non-genuine. In reply, the assessee furnished names of 17 parties and stated that to develop and construct the projects of the assessee, steel and cement are essential raw materials. According to the assessee, the purchases were genuine because without adequate quantities of steel and cement, the projects would not have been completed. As the AO noticed that the supplies are not properly supported by necessary documents such as invoices, in some cases vehicle numbers are not available and delivery challans were not furnished. As the assessee could not discharge the onus fully, the AO proposed disallowance of 13.5 % of the total purchases of Rs. 152,51,21,695/- (excluding land cost) i.e addition of Rs. 20,58,91,429/-. The assessee came forward and agreed for such disallowance. It is humbly submitted that the AO reproduced order sheet noting dated 31/03/2016 in the assessment order wherein the acceptance of the AR of the assessee is seen.*

*3. However, the assessee contested the addition in appeal as well as the reopening. In the appellate proceedings, the assessee mentioned that during the investigation by DDIT(lnv), no issue of any substance, suspecting genuineness of purchases was deducted. It was also argued that the AO started with Rs. 100.60 Cr and ended up disallowing certain*

*percentage of purchases on estimate basis on frivolous reasons without even a semblance of evidence and he could not have treated 89% of the purchase of tar and steel to be nongenuine. The assessee also argued that the AO could not have reopened the assessment for verification of genuineness of purchases. The assessee also argued that without causing any enquiry, the AO was not correct in treating the purchases as non-genuine because he did not communicate the shortcomings in the invoices or any findings of his enquiry if any with the suppliers. He also stated that the assessee is not bound to maintain lorry numbers or delivery challans under the law. The assessee argued that it is mandatory on the part of the AO to give findings on both issues before proceeding to estimate the disallowance u/s 145(3). The estimation was also arbitrary according to the assessee. It was also stated that the way in which the ITO conducted himself in obtaining the so called acceptance shows the kind of coercion and pressure exerted on the AR. The assessee stated that the AO also never communicated his findings till the last date of assessment and forcibly obtained signature of AR to regularize his inaction in following the established procedures. Therefore, natural justice was denied.*

*4. It is humbly submitted that the CIT(A) accepted the submissions at face value, more so when the assessee was raising serious allegations on the manner in which assessment was completed and also when the personal conduct of the ITO was being questioned. Therefore, without giving any opportunity to the AO, the CIT(A) allowed all the grounds of appeal filed before her. The CIT(A) also did not make any fact finding enquiry on the assertions made by the assessee that the Investigation wing could not find any discrepancies. Therefore, the order of CIT(A) is perverse in the context that the submissions of assessee were accepted in toto at face and no questions were raised on the point that why the addition was agreed upon in the first place.*

*5. It is also humbly submitted that no proof was submitted before the CIT(A) regarding application of force or coercion and if an AR is coerced nothing prevented him from raising the matter with the administrative superiors of the ITO. It is submitted that merely because the AO did not reduce the defects in the purchases in writing, the assessee cannot claim undue advantage of the same later on by claiming that the AR agreed due to force and coercion. The reliance of the learned*

*AR on Instruction no: 8/2011 of CBDT in his written submissions received by the undersigned on 04/02/2019 is misplaced because the CIT(A) accepted the assertions of the assessee at face value and did not record an independent fact finding nor did she afford opportunity of hearing to the ITO against whom allegations are made. It is humbly submitted that once the addition is agreed before the AO, the same cannot be retracted unless adequate proof is shown by the assessee.*

*6. Kind attention of the Hon'ble Bench is invited to point (09) at page 49 of the paper book filed by the assessee on 04/02/2019. The explanation furnished by the assessee at point (09) in his letter dated 23/03/2016 to the AO clearly indicates that the alleged vendors were black listed and apparently the traders from whom alleged purchases were made were not found at the given address. From the said letter also, it can be clearly seen that the genuineness of purchase of Tor Steel was under examination by the AO and the AO was questioning the entire purchases. Therefore, it is incorrect on the part of the assessee to claim that the issue was never raised and all of a sudden addition was made.*

*7. It is also humbly submitted that without adequate quantities of steel, the projects would not have been executed is devoid of merit in the context of the case. No doubt, there could be purchases of steel but it is not necessary that they were from the parties in whose names the purchases are shown.*

*8. It is also humbly submitted that the reliance by the assessee on various decisions is misplaced. The decision of Hon'ble Gujarat High Court in the case of Tejua Rohitkumar Kapadia is not applicable to the present facts because as agreed by the assessee before the AO in the present case, the defects in supporting documents could not be explained. The facts of the case of Chhat Mull Agarwal decided by Punjab and Haryana High Court are also totally different because in the said case, the addition was on account of difference between two reports of valuation of a house. There is no such difficulty in understanding here while agreeing for the addition. In case of Gauri Sahai Ghisa Ram, the concession was made on erroneous understanding of correct legal position. In the case of Ester Industries, the issue was related to addition / disallowance in original/ revised return that could be contested by the assessee in assessment proceedings. In the said case, no opportunity was granted by the AO.*

9. It is humbly submitted that mere argument before the CIT(A) that the admission before the AO was under belief of mistaken fact or law is not a valid argument unless it is supported by factual evidence. Reliance in this regard is placed on the decision of the "Jurisdictional High Court in the case of Kermex Micro Systems Ltd [2014] 47 taxmann.com 375 (Andhra Pradesh) wherein it at paragraph 7 it was held that "The learned counsel thereafter argues that the admission cannot be looked into under the law, as it is a material collected during the period of survey and this is not a valid piece of evidence. We think there must be a distinction between the admission and the evidence collected during the course of survey. This is a voluntary act of the assessee and if the assessee accepts the liability, there is no point or scope to collect further evidence or making any enquiry. Here exercising of power by the Commissioner was not called for. Exercise of power evaluating legal implication of admission was not called for because no case was made out factually. Therefore, the decisions cited by the learned counsel for the appellant before us are absolutely inappropriate. Hence, we ignore all these decisions".

10. It is humbly submitted that admission shifts the onus on the assessee to prove that such admission was wrong. Unless the contentions raised in retracting the admission are examined, the issue cannot be decided. In this regard, reliance is placed on the decision of Hon'ble ITAT, Pune Bench in the case of Hotel Kiran [2002] 82 ITO 453 (Pune), wherein it was held that "It is settled law that admission by a person is a good piece of evidence though not conclusive and the same can be used against a person who makes it. The reason behind this is, a person making a statement stops the opposite party from making further investigation. This principle is also embedded in the provisions of the Evidence Act. But the statement recorded under section 132(4) is on a different footing. The Legislature in its wisdom has provided that such a statement may be used in evidence in any proceedings under the Act. Therefore, great evidentiary value has been attached to such statement. However, there are exceptions to such admission where the assessee can retract from such admission. The first exception exists where such statement is made involuntarily, i.e., obtained under coercion, threat, duress, undue influence, etc. But the burden lies on the person making such allegations to prove that statement was obtained by the aforesaid means. The second exception is where the statement has been given under some mistaken belief either of fact or law. It is well-

*settled that there cannot be estoppel against the law. If a person is not liable to tax in respect of any receipt, he cannot be made liable to pay tax merely because he has agreed to pay the tax in the statement under section 132. He can always retract in such situation if he can show that the statement has been made on mistaken belief of facts, he can retract from the statement if he can show that facts on the basis of which admission was made are incorrect". Therefore, when the assessee made a claim that the agreed addition was made under force or coercion or the AR who agreed for the addition could not understand the implications, he had to prove the allegation first before the issue is decided on merits. Therefore, in the present case it was incumbent on the part of the CIT(A) to examine the contentions of force and coercion as well as the misconception on the part of the AR about the implications of the said admission before proceeding to accept the retraction on merits. On the issue of reopening also, the CIT(A) accepted the submissions of the assessee at face value.*

*11. Therefore, it is humbly submitted that the order of the CIT(A) is incorrect and the same may kindly be set aside."*

7.1. Further, he relied on the following case law:

- i. Kermex Micro Systems (India) Ltd., Vs. DCIT [362 ITR 13] (AP);
- ii. Hotel Kiran Vs. ACIT [82 ITD 453 (Pune)/77 TTJ 87 (Pune);

8. Ld.AR besides relying on the order of Ld. CIT(A), relied on the following decisions:

- i. Decision of the Hon'ble High Court of Gujarat in the case of Pr.CIT Vs. Tejua Rohitkumar Kapadia, in Tax Appeal No. 691 of 2017, dt. 18-09-2017;
- ii. Chhat Mull Agarwal Vs. CIT (P&H HC) [116 ITR 694];

- iii. Gauri Sahay Ghisaram Vs. CIT [120 ITR 338] (All HC);
- iv. Ester Industries Ltd., Vs. CIT [316 ITR 260] (Del HC);
- v. CBDT Instructions No. 08/2011, dt. 11-08-2011;
- vi. Abdul Hameed Khan Vs. CIT [63 ITR 738] (AP-HC);

9. Considered the rival submissions and material on record. We notice that subsequent to survey operations, the genuineness of the purchases of Tar and Steel etc., from some of the concerns at Mumbai were questionable and in order to verify the same, the assessment was re-opened. During assessment, after verification of purchases, Assessing Officer observed that in some of the cases, the supplies are not properly supported by documents such as invoices, invoices available but no vehicle details of delivery or no delivery challans etc. Since assessee could not explain those deficiencies, he proposed disallowance of 13.5% of the total purchases which was agreed by Ld.AR on the last day of the assessment i.e., 31-03-2016 in the order sheet.

9.1. Further, assessee objected before the CIT(A) that the re-opening u/s. 147 of the Act was not in accordance with law, Assessing Officer has not conducted enquiries properly, books were not rejected, adopting arbitrary figure of 13.5% to disallow the total purchases, Assessing Officer has not proposed any disallowance or called for any objection from assessee before making any disallowance. But the Ld.CIT(A) has not dealt with most of the objections raised by assessee except dealt with merits of the case i.e., on adopting 13.5% of

the disallowance and merits of rejection of supporting documents submitted in support of the purchases.

9.2. The Ld.DR made submission that it is agreed addition, Assessing Officer has made addition properly and objected that Ld.CIT(A) has not addressed the issue raised by assessee on the conduct of Assessing Officer. Even though, assessee made objections before Ld.CIT(A) on various issues but Ld.CIT(A) had chosen not to address other issues except adjudicating on merit. Therefore, we also would like to address only two issues, i.e., whether it is agreed addition or not and on merit of making disallowances adopting the method of estimation.

9.3. With regard to the issue of agreed addition, we notice that Assessing Officer has taken signature of AR on the last day of year in which the assessment has to be completed, it could be due to period of limitation. The issue is not that it was agreed on last day of assessment, but the real issue is whether the Assessing Officer was right in obtaining consent on making additions from the Ld.AR instead of assessee itself for making such huge disallowance? AR may be authorised to represent but not for accepting such huge disallowance. We draw force from the following decisions to hold that assessee has a right to appeal in case of agreement by ld. AR before AO.

a) Gauri Sahai Ghisa Ram Vs. CIT, [1979] 120 ITR 338 (All. HC).

b) Himalayan Cooperative Group Housing Society Vs. Balwan Sing, Civil Appeal Nos. 4360-4361 of 2015 and

others, judgment dated 29<sup>th</sup> April, 2015. In this case, the Hon'ble Supreme Court has held as under:

*“32. Therefore, it is the solemn duty of an advocate not to transgress the authority conferred him by the client. It is always better to seek appropriate instructions from the client or his authorized agent before making any concession which may, directly or remotely, affect the rightful legal right of the client. The advocate represents the client before the Court and conducts proceedings on behalf of the client. He is the only link between the Court and the client. Therefore his responsibility is onerous. He is expected to follow the instructions of his client rather than substitute his judgment.*

*33. Generally, admissions of fact made by a counsel is binding upon their principals as long as they are unequivocal; where, however, doubt exists as to a purported admission, the Court should be wary to accept such admissions until and unless the counsel or the advocate is authorised by his principal to make such admissions. Furthermore, a client is not bound by a statement or admission which he or his lawyer was not authorised to make. Lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or statement is clearly a proper step in accomplishing the purpose for which the lawyer was employed. We hasten to add neither the client nor the Court is bound by the lawyer's statements or admissions as to matters of law or legal conclusions. Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. We may add that in some cases, lawyers can make decisions without consulting client. While in others, the decision is reserved for the client. It is often said that the lawyer can make decisions as to tactics without consulting the client, while the client has a right to make decisions that can affect his rights. We do not intend to prolong this discussion. We may conclude by noticing a famous statement of Lord Brougham:*

*“an advocate, in the discharge of his duty knows but one person in the world and that person is his client.”*

From the above decisions, it shows that Assessing Officer has not followed due process and made procedural lapse. Since, assessee itself has not given any consent for the disallowance, assessee has a right to appeal before higher forum. The argument of Ld.DR cannot be accepted and case laws relied by

him are relating to the agreed addition by the assessee itself. Therefore, case law relied by him are distinguishable.

9.4. Coming to the merits, Assessing Officer has verified the document submitted for purchases, he observed that in some cases the documentations are not proper and he has not quantified the extent of such discrepancies in the documentation. He disallowed 13.5% of total purchases and he had not justified for making such estimation in the assessment order or reasons for adopting such percentage. At the same time, in the assessment order, he also expresses that most of the supplies were supported by proper documents and entries in the books. It clearly shows that Assessing Officer had adopted and completed the assessment arbitrarily without any justification or proof of discrepancies. Considering the overall circumstances and action of Assessing Officer, we do not find any infirmity in the order of Ld.CIT(A). Therefore, the grounds raised by Revenue are dismissed.

10. In the result, the appeal of Revenue is dismissed.

*Order pronounced in the open court on 8<sup>th</sup> March, 2019*

Sd/-  
**(P. MADHAVI DEVI)**  
**JUDICIAL MEMBER**

Sd/-  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

Hyderabad, Dated 8<sup>th</sup> March, 2019

*kv*

*Copy to :*

- 1. Dy. Commissioner of Income Tax, Circle-16(2), Hyderabad.*
- 2. M/s. Prajay Engineers Syndicate Limited, 8-2-293/82/A, Plot No. 1091, Road No. 41, Near Peddamma Temple, Jubilee Hills, Hyderabad.*
- 3. CIT(Appeals)-4, Hyderabad.*
- 4. Pr.CIT-4, Hyderabad.*
- 5. D.R. ITAT, Hyderabad.*
- 6. Guard File.*