

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” Bench, Mumbai**

**Before Shri Ravish Sood, Judicial Member
and Shri N.K. Pradhan, Accountant Member**

**ITA No.1358/Mum/2016
(Assessment Year: 2008-09)**

DCIT-3(2)(2),
R. No. 674, 6th Floor,
Aayakar Bhavan, M.K. Road,
Mumbai – 400 020

M/s Premier Ltd
58, Nariman Point,
Vs. Mumbai -21

PAN – AAAC5523G

(Appellant)

(Respondent)

Appellant by: Shri Abi Rama Kartikiyen, D.R

Respondent by: Shri Jayesh Dadia &
Ms. Vidhi Gupta, A.Rs

Date of Hearing: 04.04.2019

Date of Pronouncement: 10.04.2019

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-8, Mumbai, dated 28.12.2015, which in turn arises from the order passed by the A.O under Sec.143(3) r.w.s 147 of the Income Tax Act, 1961 (for short 'I.T Act'), dated 18.03.2013. The revenue assailing the order of the CIT(A) has raised before us the following grounds of appeal:

- “1. Whether on the facts of the case and in law the ld. CIT(A) was right in deleting the addition made by the A.O u/s. 69A of Rs.4,49,03,354/ holding that since no valuables such as cash, jewellery etc. were found during the survey action no addition / can be made u/s.69A of the I.T Act. 1961.?”

2. *Whether on the facts of the case and in law, the ld. CIT(A) was right in deleting the addition made by the A.O u/s.69A of Rs.4,49,03,354/- without appreciating the fact that the assessee had accepted that it had taken bogus bills for such expenditures & which were recorded in books of account after payments were made to such bogus bills providers through bank accounts.*
3. *Whether on the facts of the case and in law the ld. CIT(A) was right in deleting the addition made by the A.O u/s,69A of Rs.4,49,03,354/- without appreciating the fact that the Assessing Officer made addition u/s.69A on the basis of circumstantial evidence since assessee did not file necessary evidences & details in respect of bogus billing. ?*
4. *The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.*
5. *The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”*

2. Briefly stated, the assessee company which is engaged in the business of manufacturing and sale of on road automobiles and machine tools had filed its return of income for A.Y. 2008-09, declaring total income at Rs.Nil and ‘book profit’ under Sec.115JB of the I.T Act at Rs. 1,893.16 lacs on 25.09.2008. Subsequently, the assessee filed a revised return of income on 16.03.2009, declaring total income at Rs.Nil. Thereafter, assessment under Sec.143(3) was framed on 07.12.2010 and the income was assessed at Rs.Nil and ‘book profit’ at Rs.18,94,23,043/-. The case of the assessee was reopened under Sec.147 of the I.T Act. Income of the assessee was assessed by the A.O, vide his order passed under Sec.143(3) r.w.s.147, dated 18.03.2013 at Rs.18,95,99,896/-.

3. In the course of the assessment proceedings it was observed by the A.O that the assessee was subjected to survey proceedings under Sec.133A of the I.T Act on 28.12.2010. During the course of the survey action it was revealed that the assessee company had taken accommodation entries in the nature of various expenses which were debited as capital expenditure and consumables. For the year under consideration the total accommodation entries on account of capital

expenditure on which depreciation was claimed was Rs.4,81,68,303/-. Insofar the expenses on account of consumables were concerned, the same worked out to an amount of Rs.13,58,869/-. Observing, that the assessee was found to have made purchases of Rs.4,95,27,172/- which were admitted to be bogus during the course of the survey proceedings under Sec.133A of the I.T Act, the A.O was of the view that the amount paid by the assessee to the accommodation entry providers after deduction of commission of 0.10% to 0.25% would have definitely been received back by the assessee from them. In the backdrop of his aforesaid observations the A.O held a conviction that keeping in view the admission of the assessee during the course of the survey proceedings that it had obtained accommodation entries, the sum of Rs.4,94,03,354/- (after reducing the commission @ 0.25%) could safely be brought to tax under Sec.69A of the I.T Act in its hands.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). Insofar the addition of Rs.4,94,03,354/- under Sec.69A made by the A.O was concerned, the CIT(A) followed the view that was earlier taken by him while disposing off the appeal of the assessee for A.Y. 2007-08 and deleted the same.

5. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee took us through the facts of the case pertaining to the addition made by the A.O under Sec.69A. It was submitted by the ld. A.R that the issue involved in the present appeal was squarely covered by the consolidated order passed by the ITAT Bench "D", Mumbai in the assessee's own case viz. DCIT-3(2)(2) Vs. M/s Premier Ltd. (ITA No. 1357 & 1566/Mum/2017) for A.Y. 2007-08 and A.Y. 2010-11 (copy placed on record). It was

submitted by him that the Tribunal while disposing off the appeal of the revenue involving the identical issue of addition made under Sec. 69A, had restored the matter to the file of the A.O with a direction to pass a fresh order after affording a reasonable opportunity to the assessee. The ld. A.R taking support of the aforesaid observations of the Tribunal in the case of the assessee for the aforementioned years i.e A.Y. 2007-08 and A.Y. 2010-11 submitted that on the same terms the present appeal in context of the issue under consideration may also be restored to the file of the A.O for fresh adjudication

6. Per contra, the ld. Departmental Representative (for short 'D.R') did not controvert the aforesaid contentions so advanced by the counsel for the assessee.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. Admittedly, the issue involved in the present appeal pertains to an addition of Rs.4,94,03,354/- made by the A.O under Sec.69A, vide his order passed under Sec.143(3) r.w.s 147, dated 18.03.2013, which on appeal was deleted by the CIT(A) by following the view earlier taken by him while disposing off the appeal of the assessee for A.Y. 2007-08. On a perusal of the order of the CIT(A), we find that the latter while disposing off the appeal before him had relied on his earlier order passed for A.Y. 2007-08, wherein it was observed as under:

"I have given due consideration to the facts as summarised above the observations of the AO in his order and the contentions of the appellant on this ground as also extracted above It is noted that nowhere has the AO mentioned that any money, bullion jewel/cry or other valuable article was found during the course of the survey. It is trite to say that the starting point of invocation of provision of section 69A is the presence of money, bullion, jèt4iëllery or any other valuable articles, in any financial year which is found to be owned by the assessee. If nothing is found in the possession of the assessee and/or if the assessee establishes that

he doesn't have the ownership of what is found, then provision of section 69A cannot be invoked.

I Place my reliance on [2015] 59 taxmann.com 65 (Mumbai –Trib) ITAT Mumbai Bench “C” Cannon Industries (P) ltd. Vs. Deputy Commissioner of Income tax wherein the following ratios were laid down.

- In absence of any, direct evidence showing non - genuineness of purchases, addition made on account of bogus purchases by merely relying on statements of third parties recorded tender survey proceedings, was not sustainable
- Whether once assessee ha discharged its onus by producing necessary evidence, burden was shifted on to Assessing Officer to disapprove evidence produced by assessee in support of his claim - Held, yes

It is noted that the AO himself in para 4.8 of his order has stated, it is a common phenomena that after issuing bogus bill issue after deducting his commission, returns back the remaining sum in cash. As this cash as not been disclosed by the assessee, therefore, as per the provisions of section 69A, it is required to be taxed.

It is also noted that the alleged "bogus purchases" were recorded in the appellants books of account The payments to suppliers was also made through cheques from appellants known bank accounts and duly recorded in the audited accounts. These facts have not been contradicted or disproved by the AO. The AO has also not rejected the books of account The AO has made the addition on basis of certain presumptions, which in my opinion are unwarranted and unjustifiable. In para 4.9 the AO has propounded a theory that is based on surmises. In fact, he states, 'the assessee has withdrawn money from the Bank and paid it to bogus parties from whom the purchases made.' In other words, the AO is himself explaining the nature and source of the expenses incurred as being from the appellant's bank account. He has brought no finding or evidence on record to establish that the appellant issued cheques and made payments to bogus suppliers who returned the same in cash after deducting a commission, He avers, "The most probable mode of receipt would be by way of cash

In absence of any evidence support of his theory, and in view of the fact that no money, bullion, jewellery or other valuable article was found during the course of the survey, I am unable to uphold the view of the AO it is also observed that no addition u/s 69A was made for AY 2009-10 where the facts are identical and which assessment was completed before the instant one. Therefore, addition of Rs.3,75,03,182/- u/s 69A is deleted. This ground of appeal is allowed.”

We find that the aforesaid order passed by the CIT(A) in the case of the assessee for A.Y. 2007-08 on an appeal filed by the revenue was restored by the Tribunal to the A.O, with a direction to pass a fresh

order after giving a reasonable opportunity to the assessee. The Tribunal while disposing off the appeal of the revenue for A.Y. 2007-08, had observed as under :

“7.1 We find that Shri Maitreya V. Doshi, the Chairman and Managing Director of the assessee company has gone through the statement of Shri K.S. Nair, General Manager (Finance & Accounts) and admitted that the transactions with the concerned parties were only, adjustment entries. Shri Doshi has stated that the amount under the head capital expenditure amounting to Rs.30,67,76,084/- has not been claimed as revenue expenditure in any of the years. He proposed to withdraw the depreciation that has been claimed wrongly on capitalised asset till date and also promised to withdraw the concerned capitalisation and not to claim any further depreciation on that amount. Shri Doshi has also stated that (i) the amount of Rs. 14,60,42,078/- on account of purchase of trading goods is a tax neutral, (ii) the amount of Rs.1,44,54,564/- booked under the head consumables in the P&L. Account shall be reversed in the respective years and taxes, if any shall be paid on the same and (iii) the amount of Rs. 9,07,83,728/- under the head land development expenses incurred for Dombivali (arid has no tax effect.

Shri Doshi was the Chairman and Managing Director of the assessee company during the relevant period. His statement is of seminal value. He has given the above statement after perusing the statement given by Shri K.M. Nair, General Manager (Finance & Accounts) of the company.

We find that neither the A.O. nor the learned CIT(A) has done proper analysis of the above statement of Shri Doshi. The assessee has also failed to file the complete details before the A.G. to substantiate the statement of Shri Doshi.

In CIT vs. Calcutta Agency Ltd. (1951) 19 ITR 191 (SC), it has been held that the burden of proving the necessary fact in order to entitle the assessee to make a claim is on the assessee. The same ratio has been reiterated in Nund & Samont Co. (P) Ltd. vs. CIT (1970) 78 ITR 268 (SC). The burden of proof is limited, to primary or initial onus. One such primary onus is discharged, such burden shifts to revenue. We find that in the instant case the assessee has not discharged the primary onus. In view of the above The order of the CIT(A) is set aside and the case is restored to the file of the AO. with a direction to make an order afresh as per the provisions of the Act after giving a reasonable opportunity to the assessee to substantiate the statement of Shri Maitreya V. Doshi. The Assessee is directed to file the relevant details before the A.O. Thus the 1st and 2nd and 3rd ground of appeal are allowed for statistical purposes.”

In the backdrop of the aforesaid facts, we are of the considered view that now when the order of the CIT(A) in the case of the assessee for A.Y. 2007-08 had in itself been set aside by the Tribunal while

disposing off the appeal of the revenue i.e DCIT-3(2)(2) Vs. M/s Premier Ltd. (ITA No. 1357/Mum/2016; dated 28.04.2017), therefore, the order of the CIT(A) for the year under consideration i.e A.Y. 2009-10, which as observed by us hereinabove was passed by him following the view earlier taken by him while disposing off the appeal in the assessee's own case for A.Y. 2007-08, would in all fairness require to be restored in the same terms to the file of the A.O. We thus in terms of our aforesaid observations set aside the order of the CIT(A) and restore the case to the file of the A.O, who is directed to pass a fresh order after affording a reasonable opportunity of being heard to the assessee.

8. The **Grounds of appeal Nos. 1 to 3** are allowed for statistical purposes.

9. As the **Grounds of appeal Nos. 4 and 5** are general, therefore, the same are dismissed as not pressed.

10. The appeal of the revenue is allowed for statistical purposes.

Order pronounced in the open court on 10.04.2019

Sd/-

Sd/-

(N.K. Pradhan)
ACCOUNTANT MEMBER

(Ravish Sood)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 10.04.2019

Ps. Rohit

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)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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

**आयकर अपीलीय अधिकरण, मुंबई / ITAT,
Mumbai**