IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC" MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 6144/MUM/2018
Assessment Year: 2009-10
&
ITA No. 6145/MUM/2018
Assessment Year: 2010-11
&
ITA No. 6146/MUM/2018
Assessment Year: 2011-12

M/s Fashion Impex, 205, Ashish Industries Estate, Gokhale Road (S), Dadar (West) Mumbai-400025. **PAN No. AABFF3486G**	Vs.	Income Tax Officer, 21(1)(5), Piramal Chambers, Lalbaug, Mumbai-400012.
Appellant		**Respondent**

Assessee by : Mr. Girish Dave & Sashank Dundu, ARs
Revenue by : Mr. Bhera Ram, Sr.DR

Date of Hearing : 19/11/2019
Date of pronouncement: 29/11/2019

ORDER

PER N.K. PRADHAN, A.M.

The captioned appeals filed by the assessee are directed against the order of the Commissioner of Income Tax (Appeals)-48, Mumbai [in short CIT(A)] and arise out of the assessment completed u/s 143 r.w.s. 147 of the Income Tax Act 1961 (the 'Act'). As common issues are involved, we are

proceeding to dispose them off through a consolidated order for the sake of convenience.

ITA No. 6144/MUM/2018
Assessment Year: 2009-10

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

1. The Ld. CIT(A) and the AO has erred in law and on facts and in circumstances in upholding the order passed by A.O. in violation of the procedure laid down by Hon'ble Apex court in the case of GKN Drive shaft reported in 259 ITR 19(SC) in as much as notice under Sec. 142(1) of the Act was issued before providing reasons for the reopening of assessment though a request in this regard was made on 24/05/2014, thus the order is illegal, ab initio void and bad in law and therefore be quashed /cancelled.
2. The AO has failed to issue notice mandated u/s 143(2) of the Act and wrongly mentioned the said notice as u/s 143(2) though the notice issued u/s 142(1) of the Act. The assessment is illegal ab initio void and bad in law. The Ld. CIT(A) has also erred in confirming the assessment. The assessment requires to be cancelled/ quashed and may be cancelled/quashed.
3. The Ld. CIT(A) has erred in law and on the facts and in circumstance in upholding the order passed by A.O. without following the principle of natural justice and without providing an opportunity of cross examination despite a request made in this regard. Hence the order is bad in law and may be quashed/ cancelled.
4. The Ld. CIT(A) has erred in law and on facts and in the circumstances, in confirming an addition of Rs.98,863/- in the total income of the appellant.
5. The AO has erred in law and on the facts in making additions of Rs.515/- interest on late payment of profession tax.
6. The Ld. CIT(A) has erred in confirming the levy of interest under section 234A, 234B & 234C of the Act.

3. During the course of hearing, the Ld. counsel for the assessee submits that the above 2nd ground of appeal is not pressed as the assessee accepts that the notices u/s 143(2) and 142(1) were properly issued.

Briefly stated, the facts of the case are that the assessee filed its return of income for the assessment year (AY) 2009-10 on 24.09.2009 declaring total income of Rs.3749/-. On receipt of information from the Sales Tax Department, Government of Maharashtra that the assessee had obtained bogus purchase bills amounting to Rs.3,95,452/- from four parties, the Assessing Officer (AO) issued notice u/s 148 dated 03.02.2014 to the assessee to re-open the assessment. In response to it, the assessee filed a reply dated 26.05.2014 stating that the original return filed be treated as return filed in response to notice u/s 148 of the Act. During the course of assessment proceedings, the AO issued notice u/s 133(6) dated 16.01.2015 to the said parties, in order to verify the genuineness of the purchases. However, those notices were returned un-served by the postal authorities with the remarks 'left' or 'not known'. Considering the above aspects, the AO asked the assessee to produce those parties before him for examination on 09.03.2015. In response to it, the assessee relying on case-laws stated that mere non-production of parties cannot make transactions non-genuine or bogus. Considering the facts and circumstances of the case, the AO relying on the judgment of the Hon'ble Gujarat High Court in the case of *CIT v. Simit P. Sheth* (2013) 38 taxmann.com 385 estimated the profit @ 25% of the disputed amount of Rs.3,95,452/- which comes to Rs.98,863/-.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that *vide* order dated 31.08.2018, the Ld. CIT(A) agreed

with the reasons given by the AO and confirmed the disallowance @ 25% made by the AO.

5. Before us, the Ld. counsel for the assessee submits that in the instant case the AO has passed the order in violation of the procedure laid down in *GKN Drive Shaft* (supra) as the notice u/s 142(1) was issued by the AO before providing reasons for reopening the assessment though a request in this regard was made on 24.05.2014. Thus it is argued that the order passed by the AO is bad in law and therefore be cancelled.

The Ld. counsel further submits that the estimation @ 25% made by the AO on the disputed purchases is without any basis and the same be deleted.

6. On the other hand, the Ld. Departmental Representative (DR) submits that in the instant case, though the notices u/s 133(6) were issued by the AO in the address given by the assessee, those notices were returned un-served by the postal authorities with the remarks 'left' or 'not known'. Though the AO had requested to produce those parties for verification, the assessee failed to do so. Therefore, the Ld. DR submits that the AO has reasonably estimated the profit @ 25% of the disputed purchases which comes to Rs.98,863/- which has been subsequently confirmed by the Ld. CIT(A) and the same should be upheld.

7. We have heard the rival submissions and perused the relevant materials on record. After examining (i) reasons recorded by the AO dated 23.03.2015, (ii) reply to notice u/s 148 dated 13.04.2015 filed on 25.04.2015, (iii) objection to reasons recorded dated 06.06.2015 filed on 12.06.2015, (iv) disposal of the objection against re-opening dated 24.06.2015 received on

02.07.2015, we find that there was no violation of the principles laid down in *GKN Drive Shaft* (supra).

A perusal of the assessment order clearly indicates that the AO has not called for any details from the assessee for further examination. Simply he has relied on the findings of the Sales Tax Department.

As the AO has not called for any details from the assessee nor tried to make any verification, the estimation @ 25% done by him which comes to Rs.98,863/-, subsequently, confirmed by the Ld. CIT(A) is hereby deleted.

Similar disallowance of Rs.73,847/- for AY 2010-11 and Rs.8,287/- for AY 2011-12 are deleted.

8. In AY 2009-10, the AO has disallowed the claim of interest on late payment of professional tax of Rs.515/-, which is confirmed by the Ld. CIT(A). As the interest on professional tax is not penal in nature, we delete the said disallowance made by the AO.

9. In AY 2010-11, the assessee has debited rent paid of Rs.4,80,000/-. During the course of assessment proceeding, the AO asked the assessee to furnish details of tax deducted at source and amount paid. In response to it, the assessee submitted *vide* letter dated 30.12.2015 the following :

Name of the party	Amount	TDS	Net paid to party
Kumar Khurana	2,40,000	0	2,40,000
Chandradevi Khurana	2,40,000	0	2,40,000

The assessee submitted before the AO that (i) Kumar Khurana did not submit the certificate for non deduction of TDS. However, he has already

shown rent received by him as his income and had already paid tax on same as per his return of income for said assessment year. Copy of acknowledgment of his income tax return along with computation, Balance sheet and Capital account for said assessment year was enclosed for ready reference, (ii) Chandradevi Khurana had submitted Certificate under section 197(1) r.w.s 194-I of the Income tax Act 1961 for non deduction of TDS (copy is enclosed). She has also shown rent received by her as her income for said assessment year. Copy of acknowledgment of her income tax return along with computation for said assessment year was enclosed herewith for ready reference.

The AO was convinced with the explanation in the case of Chandradevi Khurana where the assessee has submitted the certificate u/s 197(1) r.w.s. 194(I) for non-deduction of tax. But he did not agree the contentions in the case of Kumar Khurana for the reason that the provisions of section 40(a)(ia) do not speak about the same for the impugned assessment year, as the amendment in the said proviso came into effect from 01.04.2013. Therefore, the AO disallowed the TDS on rent paid of Rs.2,20,000/-.

10. In appeal, the Ld. CIT(A) observed that the law was in force in AY 2010-11 and 2011-12 (Amendment under second proviso to section 40(a)(ia) are w.e.f. 01.04.2013) and provisions of section 40(a)(ia) are attracted in view of non-deduction of tax. Thus the Ld. CIT(A) confirmed the disallowance made by the AO.

11. Before us, the Ld. counsel for the assessee submits that the assessee had received a certificate for non-deduction of tax from Mr. Kumar Khurana also but the nature of income mentioned in the certificate was mistakenly

mentioned as interest instead of rent and therefore, it was not submitted to the AO. It is further stated that the revenue is not at loss since the party i.e. Mr. Kumar Khurana to whom rent was paid has paid tax on his part and his return of income along with his computation of income showing rent income were filed before the AO.

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

12. We have heard the rival submissions and perused the relevant materials on record. In the case of *Hindustan Coca-Cola Beverage Pvt. Ltd. v. CIT* (2007) 163 Taxman 355 (SC), the Hon'ble Supreme Court has held that "where deductee, recipient of income, has already paid taxes on amount received from deductor, department once again cannot recover tax from deductor on same income by treating deductor to be assessee-in-default for shortfall in its amount of tax deducted at source". The above position of law has been reiterated by the Hon'ble Bombay High Court in *Pr.CIT v. Perfect Circle India* Pvt. Ltd (ITA No.707 of 2016)

Considering the facts of the case, we direct the AO to verify whether Mr. Kumar Khurana to whom rent was paid has paid tax on his part and reflected it in his return of income which would be evident from the computation of income. In case Mr. Khurana has done so then no disallowance u/s 40(a)(ia) is called for. We direct the assessee to file the relevant details filed before the AO.

Similar disallowance amounting to Rs.4,40,000/- has been made by the AO in AY 2011-12. It is the contention of the Ld. counsel that in AY 2011-12

Mr. Kumar Khurana and Mrs. Chandradevi Khurana to whom rent payments were made had paid tax on their part and their return of income along with their computation of income showing rent income were filed before the AO. Considering the above contentions of the Ld. counsel, we direct the AO to make verification similar to our direction for AY 2010-11 given above.

13. In the result, the appeal for the AY 2009-10 is allowed and for AYs 2010-11 and AY 2011-12 are partly allowed for statistical purposes.

Order pronounced in the open Court on 29/11/2019.

Sd/-	Sd/-
(SAKTIJIT DEY) JUDICIAL MEMBER	(N.K. PRADHAN) ACCOUNTANT MEMBER

Mumbai;
Dated: 29/11/2019
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai