

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD “C” BENCH

**(BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
& SHRI WASEEM AHMED, ACCOUNTANT MEMBER)**

**ITA. No: 2636/AHD/2016
(Assessment Year: 2012-13)**

Dharmanadan Infrastructure Pvt. Ltd. 2, Golden Homes, B/h. Gurudwara, S.G. Road, Thaltej, Ahmedabad- 380054	V/S	The Dy. Commissioner of Income tax, Circle-1(1)(2), Ahmedabad
(Appellant)		(Respondent)

PAN: AADCD 6866B

**Appellant by: Shri Dhiren Shah and Nupur Shah, C.A.
Respondent by : Shri Uma Prasad, Sr. D.R.**

(आदेश)/ORDER

Date of hearing : 10 -10-2019

Date of Pronouncement : 18-11-2019

PER MAHAVIR PRASAD, JUDICIAL MEMBER

1. This appeal filed by the Assessee is directed against the order of the Ld. CIT(A)-1, Ahmedabad dated 22.08.2016 pertaining to A.Y. 2012-13 and following grounds have been taken:

1. Disallowance on account of fictitious loss under the head of business and profession - Rs. 2.53.61.230/-.

1. The Ld. CIT (A) has erred in law and on facts in confirming the disallowance of Rs. 2,53,61,230/- as made by the Ld. A.O on account of alleged fictitious loss under the head of business and profession without properly appreciating the entire facts of the case.

2. The Ld. CIT(A) and the Ld. A.O erred in law and on facts in failing to properly consider the submissions filed by appellant company before them.

3. The Ld. CIT (A) as well the Ld. A.O failed to grant the opportunity of cross examination of Mr. Deepak Chimanlal Shah whose statement recorded behind the back of the appellant has been relied upon in respect of the disallowance in the case of appellant. They ought to have granted the opportunity of cross examination of Mr. Dipakkumar Chinubhai Shah in view of the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata [2015] 62 taxmann.com 3 (SC) as well as various other judicial pronouncements relied upon by the appellant.

2. Facts of the case are that the appellant is the private limited company under the income tax act, 1961. During the Financial Year 2011-12 the appellant was engaged in the business of trading in clothes and dealing the lands for the construction activity. The appellant has offered the income under head of business and profession.
3. The appellant has filed the return of income on 18.10.2012 wherein the appellant has offered Rs. 1,76,18,860/- under the heads of business and profession. The appellant has shown the sale Rs. 7,83,06,950/- which consisting of sale of land of Rs. 4,93,71,950/- and sale of cloths of Rs. 2,89,35,000/-. From the business of trading in cloths and incurred the lossof Rs. 2, 53,61,230/-.
4. The finding of the Assessing Officer in this regard is as under:

4.1 *As per the AIR information, it is seen that the assessee has sold a property of Rs. 6,98,54,400/-, accordingly, a notice u/s. 133(6) of the Act was issued to the Sub-Registrar-3, Ratanpur, Rajkot. On examination of copy of sale deed so-received from Sub-Registrar-3, Ratanpur, Rajkot, it is found that the assessee has is a confirming party in respect of transaction entered into between purchaser GSPC Gas Company Ltd. and the seller Shri Vagherbhai Jivabhai. It is also noticed that the assessee had entered into a banakhat with Shri Vagherbhai Jivabhai on 04/10/2011 for purchase of land for a consideration of Rs. 2,55,87,000/-. Subsequently, the said property was sold by Shri Vagherbhai Jivabhai to GSPC Gas Company Ltd. in conformity with the assessee vide Registration Deed No. RKT-3/55/2012 dated 03/01/2012 for a sale consideration of Rs. 6,98,58,950/-. Hence, verification of this fact clearly reveals that the assessee has earned Rs. 4,42,71,950/- as short term capital gain on such transaction. The assessee vide Point No. 2 of letter dated 05/02/2015 was, therefore, requested to explain the details of income offered for taxation in the return of income filed for A.Y. 2012-13 or else explain as to why the same should not be taxed accordingly. The assessee furnished its reply vide letter dated 12/02/2015, for the sake of reference the same is reproduced as under:*

"We are confirming party in the said transactions. This transaction is our business transactions and the said purchase and sales details are mentioned in sales and purchase account and duty audited by chartered accountant as business transactions.

Initially we have made an agreement to sale to purchase the said property by Rs. 2,55,87,000 and made payment of Rs. 51,70,15,000 to seller. Before making a full payment and executing final sales deed, we have sold the said property for Rs. 6,98,58,950. We are confirming party in the said sales deed. We have received Rs. 4,93,71,950. So we have debited Rs. 51,00,000 as purchase account and credited Rs. 4,93,71,950 as sales in the books of account. So the profit of the id transaction Rs.4,42,71,750 (4,93,71,750-51,00,000) is as income from business profession.

The details of purchase has been given in Annexure-E of our submission dated 24-1-2014 and details of sales and deed has been given in Annexure-A of our submission dated 27-01-2015. The copy of registered deed showing this transaction is given in Annexure-F of our submission dated 24-12-2014

5. In order to verifying the contents of the assessee, ld. A.O. summoned one Shri Deepak Chimanlal Shah and in accordance with his statement who was proprietor of M/s. Nutan Enterprise from whom assessee purportedly made the purchase of goods such as cloths etc. and statement of Shri Deepak Chimanlal Shah was recorded in the absence of the assessee wherein Shri Deepak Chimanlal Shah.
6. In reply to question no. 4 categorically depose that he had only issued sale/purchase bill and no goods were physically delivered to the assessee. And on the basis of the statement of Shri Deepak chimanlal Shah additions were made for fictitious loss to the tune of Rs. 2,53,61,230/-.
7. On the other hand contention of the assessee was that statement of Shri Deepak Chimanlal Shah was recorded in its absence and no opportunity of cross examination was given to the assessee. And in appeal, ld. CIT(A) confirmed the action of ld. Assessing Officer.
8. We have gone through the relevant record and impugned order and heard both the parties. As statement of Shri Deepak Chimanlal Shah was recorded in the absence of assessee and no opportunity was granted by the Assessing Officer and this plea was also taken before the ld. CIT(A) but to no avail.
9. In support of its contention, ld. A.R. cited a judgment of Hon'ble Supreme Court in the matter of C. Vasantlal & Co. vs. CIT 45 ITR 206 wherein it is held that statement u/s. 131 does not have any evidential value if opportunity of cross examination to the other parties not given.

10. In another case of Hon'ble Supreme Court in the matter of Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata [2015] 62 Taxmann.com 3 (SC) wherein it has been held:

"6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be, pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However^ no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guesswork as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price-list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witness price which is mentioned in the price-list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions".

11. In the case of Heirs and LRs of Late Laxmanbhai S. Patgel vs. CIT 327 ITR 290 (2008) (Guj.) wherein it is held:

“Income—Cash credit— Opportunity of being heard—During search of one R, key of bank locker along with two packets containing six promissory notes were recovered- Out of those six promissory notes; one was in the sum of Rs. 8,78,358 executed by one K in the capacity of partner of firm DCI—In his statement recorded during search, R stated that the key: of locker and the two envelopes were handed over to him by the assessee—K also admitted in his statement recorded on the same day at 2.00 AM midnight that he had executed the pronote and signed it on behalf of DCI after obtaining a sum of Rs. 8,78,358—Later, K filed an affidavit that his statement was recorded at late hours in the night under coercion and pressure—Subsequently, K along with two other partners of DCI, made a voluntary disclosure of a sum of Rs. 11 lacs including the amount of Rs. 8,78,358 and same was assessed in the hands of the three partners-Relying on the statement of R and the retracted statement of K, AO made addition of Rs. 8,78,358 under s.68 in the hands of assessee also and the same was confirmed by CIT(A) and Tribunal—Not justified—Apparently, there was a violation of principles of natural justice as the statement of one of the important witnesses, namely, R on which heavy reliance was placed by the AO is neither referred to in the assessment order nor copy thereof was given to the assessee nor the assessee was given an opportunity of cross-examining the said R—Authorities could not be absolved from doing so on the ground that the facts stated by R were admitted by the assessee—K had not only retracted his earlier statement but also made a voluntary disclosure, along with two other partners of DCI, in the sum of Rs. 11 lacs which included the amount of pronote of Rs. 8,78,358—Legal effect of the statement recorded behind the back of the assessee and without furnishing the copy thereof to the assessee or without giving an opportunity of cross-examination, is that if the addition is made, the same is required to be

deleted on the ground of violation of the principles of natural justice—Orders of all the three authorities set aside and addition deleted"

12. Since no opportunity of cross examination was given to the assessee, thus in the interest of justice, we set aside this matter to the file of the Assessing Officer to decide this matter afresh after an opportunity of being heard to the assessee.

13. In the result, appeal filed by the Assessee is allowed for statistical purpose.

Order pronounced in Open Court on 18 - 11- 2019

Sd/-

(WASEEM AHMED)
ACCOUNTANT MEMBER True Copy
Ahmedabad: Dated 18 /11/2019

Sd/-

(MAHAVIR PRASAD)
JUDICIAL MEMBER

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad