

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'G' BENCH
MUMBAI**

**BEFORE: SHRI SAKTIJIT DEY, JUDICIAL MEMBER
&**

SHRI M.BALAGANESH, ACCOUNTANT MEMBER

**ITA No.4455/Mum/2018
(Assessment Year :2009-10)**

&

**ITA No.4454/Mum/2018
(Assessment Year :2010-11)**

Shri Zaverchand Damji Haria Prop. Of Zeal Apparel 124, Ashish Industrial Estate Gokhale Road Mumbai – 400 025	Vs.	ACIT- 21(3) 2 nd Floor, Piramal Income Tax, Mumbai Maharashtra
PAN/GIR No.AALPH7225H		
(Appellant)	..	(Respondent)

Assessee by	Shri Chhamgur Shrikant
Revenue by	Shri Pankaj Kumar
Date of Hearing	04/10/2021
Date of Pronouncement	22/10/2021

आदेश / ORDER

PER M. BALAGANESH (A.M):

These appeals in ITA Nos.4454/Mum/2018 & 4455/Mum/2018 for A.Yrs.2009-10 & 2010-11 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-33, Mumbai in appeal No.CIT(A)-33/Rg.21/321/2015-16 & CIT(A)-33/Rg.21/320/2015-16 dated 18/04/2018 (Id. CIT(A) in short) against the order of assessment passed

u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 31/03/2015 by the Id. Asst. Commissioner of Income Tax-21(3), Mumbai (hereinafter referred to as Id. AO).

Identical issues are involved in both the appeals and hence, they are taken up together and disposed of by this common order for the sake of convenience.

ITA No.4455/Mum/2018 (A.Y.2009-10) Assessee Appeal:

2. The ground Nos. 1.1. - 1.6. raised by the assessee are challenging the disallowance made on account of non-genuine purchases amounting to Rs.36,897/-.

3. We have heard rival submissions and perused the materials available on record. We find that assessee is engaged in the business of manufacturing and selling of readymade garments on wholesale and retail basis. The assessee, an individual had filed his return of income for the A.Y.2009-10 on 29/09/2009 declaring total income of Rs.24,30,432/- which was duly processed u/s.143(1) of the Act. Later information was received from sales tax authorities, Government of Maharashtra that assessee had taken certain bogus bills from M/s. Monish Enterprises amounting to Rs.36,897/-, who was found to be an entry operator providing accommodation bills without actual supply of goods to the parties. This information apparently triggered the reopening of assessment in the case of the assessee. The reasons recorded for reopening the assessment was duly furnished to the assessee and in the re-assessment proceedings, the Id. AO observed that since no details were provided by the assessee by conclusively proving the genuineness of

the purchases made by the assessee from Monish Enterprises, the Id. AO disallowed the entire value of purchases of Rs.36,897 as bogus. This action was upheld by the Id. CIT(A).

3.1. We find that assessee had furnished the copy of the bills of the suppliers along with evidence of payment made to them by cheque through its bank account and merely because the assessee had failed to produce the supplier for verification by the Id. AO, the entire purchases made by the assessee could not be treated as bogus. We find that similar purchases made from the same party in A.Y.2011-12 by the assessee, this Tribunal in ITA No.300/Mum/2017 dated 19/09/2018 had restricted the disallowance only to 12.5% of value of purchases on the premise that only the profit element embedded thereon could be brought to tax. We also find that for A.Y.2011-12, the Id. CIT(A) himself restricted the disallowance only to 25% of value of purchases from Monish Enterprises by estimating the profit percentage at 25%, which was brought down to 12.5% by this tribunal. Respectfully following the decision of this Tribunal in assessee's own case for A.Y.2011-12 referred to supra, we direct the Id. AO to adopt the profit percentage at 12.5% of 36,897/- and bring to tax the said profit for the year under consideration also. Accordingly, the ground Nos. 1.1 to 1.6 are partly allowed.

4. The ground Nos. 2.1. – 2.5. raised by the assessee are challenging the disallowance of payment made to designers working in the factory without deduction of tax at source.

4.1. We have heard rival submissions and perused the materials available on record. We find that assessee has made the following

payments to its designers working in the factory during the year under consideration :-

(a) Ankita Jain	-	Rs.1,82,454/-
(b) Chaula D Trivedi	-	Rs.1,59,467/-
(c) Khushbu Agrawal	-	<u>Rs.1,81,041/-</u>
Total		Rs.5,22,962/-

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4.2. The assessee stated that these three are ultimately designers working in the assessee's own factory as employees and amounts paid to them is actually salary but debited to designer charges in the books. The aforesaid payments are a total figure paid to them on a monthly basis. It was also pointed out that all the workers are having their PAN and the total salary paid to them does not exceed the basic exemption limit and hence, there is no obligation for the assessee to deduct tax at source. It was also pointed out that all these salary payments, (though categorised as designer charges) are paid only by cheques and genuine business expenditure. The Id. AO however, disregarded these contentions and observed that these payments are only designing charges which would fall within the ambit of Section 194J of the Act and since no tax was deducted at source while making payments to them, the same would become eligible for disallowance u/s.40(a)(ia) of the Act. This action of the Id. AO was upheld by the Id. CIT(A).

4.3. We find that assessee had enclosed the entire salary register for all the months starting from pages 71 to 118 of the paper book filed before us which was also filed before the Id. CIT(A). The said salary register admittedly contains three names i.e. Ankita Jain, Chaula Trivedi and Khushbu Agrawal as employees of the assessee. This conclusively proves

that all these three people are salaried employees of the assessee and since these people are working in the factory, the assessee has debited the salary paid to them as designer charges under the head 'manufacturing expenses' instead of 'salary'. We hold that the nomenclature of the expenditure does not matter. Substance over form of the transaction is relevant. Apart from this, we also find that assessee has also enclosed an affidavit from all these parties in pages 119 to 127 of the paper book filed before us. We also find that these affidavits were also placed before the Id. CIT(A) and the fact of these affidavits being placed on record has also been acknowledged by the Id. AO in the remand report which is reproduced in page 33 para 16 of the order of the Id. CIT(A). Despite this fact, the Id. CIT(A) had ignored the same and upheld the action of the Id. AO by simply relying on his remand report. The Id. AR also stated that salary paid to the very same three female employees was not disallowed by the Id. AO for A.Ys. 2010-11 and 2011-12. We find that what is paid to these female employees are only salary and since the same is below the basic exemption limit available to those individuals, there is no obligation for the assessee to deduct tax at source. Accordingly, we categorically hold that what is paid to these three employees are only in the nature of salary falling within the ambit of Section 192 of the Act. Hence, the provisions of Section 40(a)(ia) of the Act could not be invoked at all in the instant case. Accordingly, the ground Nos. 2.1. – 2.5. raised by the assessee are allowed.

5. The ground Nos. 3.1. – 3.5. raised by the assessee are challenging the adhoc disallowance of the following expenses made and partially confirmed by the Id. CIT(A) as under:-

Sr. No.	Nature of Expenses	Total Expenses	Disallowance confirmed by CIT(A)
a)	Tea & Coffee expenses	Rs. 27,078/-	20% (Rs.5,416/-)
b)	Sundry expenses	Rs.1,24,741/-	20% (Rs.24,948)
c)	Telephone Expenses	Rs.26,845/-	Rs. 26,845/-
d)	Laptop Expenses	Rs.17,400/-	Rs. 17,400/-
e)	Depreciation of Motor Vehicle and Motor Vehicle Expenses	Rs.2,17,724/-	10% (Rs.21,712)

5.1. We have heard rival submissions and perused the materials available on record. No specific arguments were advanced by the Id. AR at the time of hearing with regard to this disallowance. Hence, we uphold the order of the Id. CIT(A) in this regard. Accordingly, the ground Nos. 3.1. - 3.5. are dismissed.

6. The ground Nos. 4.1. to 4.4. raised by the assessee are challenging the disallowance of cash expenses amounting to Rs.57,742/- u/s.40A(3) of the Act.

6.1. We have heard rival submissions and perused the materials available on record. We find that the Id. AO observed that assessee had incurred expenses of Rs.35,021/- being vehicle expenses and Rs. 22,721/- being payment made to Ayesha Dresses in cash. The Id. AO invoked the provisions of Section 40A(3) of the Act and disallowed the total sum of Rs.57,742/- in the assessment. The assessee submitted that Rs.35,021/-

was incurred towards repairs and maintenance of vehicles and Rs.22,721/- was incurred on account of damage of goods. Since, assessee did not furnish any documentary evidence in this regard, the Id. CIT(A) upheld the action of the Id. AO.

6.2. Admittedly disallowance has been made by applying the provisions of Section 40A(3) of the Act. Before us, the Id. AR was not able to prove that the said payments fall under any of the exceptions provided in Rule 6DD of the income tax Rules 1962. Hence, we do not deem it fit to interfere in the order of the Id. CIT(A) in this regard. Accordingly, the ground Nos. 4.1. – 4.4. raised by the assessee are dismissed.

7. The ground No.5 raised by the assessee is general in nature and does not require any specific adjudication.

8. In the result, appeal of the assessee in ITA No.4455/Mum/2018 for A.Y.2009-10 is partly allowed.

ITA No.4454/Mum/2018 (A.Y.2010-2011) Assessee Appeal

9. The ground Nos. 1.1. -1.5. raised by the assessee are challenging the disallowance of ingenuine purchases of Rs.16,606/-.

9.1. We have heard rival submissions and perused the materials available on record. The assessee for the A.Y.2010-11 had filed his return of income on 15/10/2010 declaring total income of Rs.41,72,132/- which was duly processed u/s.143(1) of the Act. Later information was received from sales tax authorities, Government of Maharashtra that assessee had taken certain bogus bills from M/s. Monish Enterprises & Trichipuram

Trading Pvt. Ltd., amounting to Rs.1,20,499/- & Rs.45,562/- respectively, who were found to be entry operators providing accommodation bills without actual supply of goods to the parties. This information apparently triggered the reopening of assessment in the case of the assessee. The reasons recorded for reopening the assessment was duly furnished to the assessee and in the re-assessment proceedings, the Id. AO observed that since no details were provided by the assessee by conclusively proving the genuineness of the purchases made by the assessee from Monish Enterprises & Trichipuram Trading Pvt. Ltd., the Id. AO disallowed the entire value of purchases of Rs.1,66,061/- (Rs.1,20,499/- + 45,562/-) as bogus. This action was upheld by the Id. CIT(A).

9.2. We find that assessee had furnished the copy of the bills of the suppliers along with evidence of payment made to them by cheque through its bank account and merely because the assessee had failed to produce the supplier for verification by the Id. AO, the entire purchases made by the assessee could not be treated as bogus. We find that similar purchases made from the same party in A.Y.2011-12 by the assessee, this Tribunal in ITA No.300/Mum/2017 dated 19/09/2018 had restricted the disallowance only to 12.5% of value of purchases on the premise that only the profit element embedded thereon could be brought to tax. Respectfully following the decision of this Tribunal in assessee's own case for A.Y.2011-12 referred to supra, we direct the Id. AO to adopt the profit percentage at 12.5% of 1,66,061/- and bring to tax the said profit for the year under consideration also. Accordingly, the ground Nos. 1.1. to 1.5. are partly allowed.

10. The ground Nos. 2.1. – 2.6. raised by the assessee are challenging the disallowance of payments made in the sum of Rs.5,39,247/- by applying the provisions of Section 40A(3) of the Act.

10.1. We have heard rival submissions and perused the materials available on record. At the outset, it would be relevant to identify the break-up of Rs.5,39,247/- which was disallowed by the Id. AO as under:-

Sr. No.	Particulars	Amount (Rs.)	Date
1.	Hotel TJS Royal	30,323/-	20/06/2009
2.	South Indian Hotel	32,924/-	20/06/2009
	Total	63,247/-	
Sale of Old Machines			
3.	Saudawale Saukat Ali Nazurdin	93,000/-	30/10/2009
4.	Ayesha Dresses	1,50,000/-	02/06/2009
5.	A to Z Garments	1,01,500/-	02/06/2009
6.	Hussain Garments	31,500/-	02/06/2009
7.	Manoj Garments	1,00,000/-	02/06/2009
	Total	5,39,247/-	

10.2. With regard to payments made to hotel TJS Royal and South Indian Hotel supra, the assessee submitted that the same are incurred towards hotel expenses in 3-4 different bills which are actually consolidated in one bill. With regard to payments made to parties mentioned in 3-7 supra, the assessee pointed out that they are labour contractors associated with the

assessee for so many years doing the business of stitching of clothes, job work on per piece rate basis and after completion of job, they used to return the finished clothes to assessee. For doing this job, they would raise labour job work bill on the assessee. It was also pointed out that all these labour contractors are regularly filing their income tax returns in their respective jurisdictions. It was specifically submitted that assessee sold its old machineries to the said labour contractors which was debited to their ledger account of the concerned labour contractors on the respective dates as detailed supra. But the said entry was wrongly mentioned by the accountant of the assessee as cash paid to those labour contractors in the narration. The assessee categorically denied having made any cash payments to these labour contractors. The assessee stated that the same is evident from the running account maintained with these labour contractors and that this sale of old machinery to the concerned labour contractor stood adjusted with the subsequent payments to be made by the assessee for the labour services rendered by the contractors. Ignoring all these contentions and the entries in the books of accounts of the assessee company, the Id. AO proceeded to apply the provisions of Section 40A(3) of the Act and disallow the total of the sum of Rs.5,39,247/- in the assessment. This action of the Id. AO was upheld by the Id. CIT(A).

10.3. We find from the ledger account of hotel TJS Royal enclosed in pages 100 of the paper book that a sum of Rs.30,323/- was paid by the assessee in cash in respect of two bills i.e. Bill No.467 to 468. This payment was made on 20/06/2009. The same is the case in respect of South Indian Hotel, wherein a sum of Rs.32,924/- was paid on 20/06/2009 for the bill Nos. E0696, E0697, E0662 and E0661 dated 01/07/2009. Though we find that individual bills are below Rs.20,000/-,

all these bills are dated 01/07/2009, whereas payment was made by the assessee on 20/06/2009 itself. Hence, payment made on 20/06/2009 could at best be treated only as an advance payment in cash, on which date, it is not logical for the assessee to know the bill number together with the bill date which is going to be raised at a later point in time. In these facts and circumstances, the evidences enclosed in pages 100 – 101 of the paper book of the assessee goes against the assessee and hence, disallowance made u/s.40A(3) of the Act in the sum of Rs.30,323/- and Rs.32,924/- stand confirmed.

10.4. With regard to sale of old machinery made by the assessee to Ayesha Dresses for Rs.1,50,000/-; M/s. Hussain Garments for Rs.31,500/- on 02/06/2009; M/s. Manoj Garments for Rs.1,00,000/-; M/s. A to Z Garments for Rs.1,01,500/- on 02/06/2009 and Mr. Saudawala Saukat Ali Nazurdin for Rs.93,000/- on 30/10/2009 are concerned, there is no dispute that all these parties are doing job works to the assessee and are having running account with the assessee. All these parties used to raise labour charges bill / job work bill on the assessee which will be credited to their ledger account in the books of the assessee. As and when payments are made by the assessee to these parties, their respective ledger accounts are debited including TDS portion thereon. During the year under consideration, the assessee instead of making payments to them had chosen to sell its old machinery to those parties on their respective dates as tabulated supra and debited the ledger accounts of the concerned labour contractors. This sum has been wrongly shown by the Accountant as cash payments made to those labour contractors. In fact all these facts have been duly confirmed by the concerned labour contractors by way of filing affidavits before the lower authorities which had been completely ignored by the lower authorities. The evidences in

this regard are enclosed in pages 100-120 of the paper book. The law is very well settled that once, an affidavit is placed on record by the assessee, it is the duty of the Id AO to put that affidavit to test in order to prove that the contents in the said affidavit are false. Once, the Id. AO chooses not to examine those affidavits in the manner known to law, then the contents of the said affidavits are to be accepted as true. Hence, no adverse inference could be drawn on the said affidavits. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of Mehta Parikh and Co., vs. CIT reported in 30 ITR 181.

10.4. We also find that this Tribunal in assessee's own case for A.Y.2011-12 in ITA No.300/Mum/2017 dated 19/09/2018 had restored the issue to the file of the Id. AO and in the giving effect proceedings, the Id. AO vide order dated 01/04/2021 which is enclosed in page 143 of the paper book had granted complete relief to the assessee. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we direct the Id. AO to delete the disallowance made u/s.40A(3) of the Act in the sum of Rs.4,76,000/- (Rs.93,000/- + Rs.1,50,000 + Rs.1,01,500/- + Rs.31,500 + Rs.1,00,000/-). Accordingly, the ground Nos. 2.1. – 2.6. raised by the assessee are partly allowed.

11. The ground Nos.3.1. – 3.4. raised by the assessee are similar to ground Nos.3.1.-3.5. raised by the assessee for A.Y.2009-10. Hence, the decision rendered for A.Y.2009-10 would apply with equal force for this assessment year also except with variance in figures.

12. The ground No. 5 raised by the assessee is general in nature and does not require any specific adjudication.

13. In the result, both the appeals of the assessee are partly allowed.

Order pronounced on 22/10/2021 by way of proper mentioning in the notice board.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Mumbai; Dated 22/10/2021
KARUNA, *sr.ps*

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai