

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE**

Before Shri George George K, JM & Ms.Padmavathy S, JM

ITA No.1129/Bang/2013 : Asst.Year 2008-2009

The Deputy Commissioner of Income-tax , Central Circle 2(3) Bengaluru.	v.	Sri.H.K.Parveez Prop: H.K.Trading & Transport Sharique Cottage, 2 nd Block Katipalla Mangalore - 575 030. PAN : AJQPR2642G.
(Appellant)		(Respondent)

ITA No.938/Bang/2013 : Asst.Year 2008-2009

Sri.H.K.Parveez Prop: H.K.Trading & Transport Sharique Cottage, 2 nd Block Katipalla Mangalore - 575 030.	v.	The Deputy Commissioner of Income-tax , Central Circle 2(3) Bengaluru.
(Appellant)		(Respondent)

Revenue by : Sri. Dilip, Standing Counsel for Dept.
Assessee by : Sri. Sri.Narendra Sharma, Advocate

Date of Hearing : 23.02.2022	Date of Pronouncement : 23.02.2022
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ORDER

Per George George K, JM

These cross appeals are directed against CIT(A)'s order dated 20.03.2013. The relevant assessment year is 2008-2009.

2. The brief facts of the case are as follows:

The assessee is an individual. There was a search u/s 132 of the I.T.Act in the case of M/s.Fiza Developers and Inter Trade Private Limited on 17.01.2008. Consequent to the search in the premises of the above mentioned entities, the case of the assessee was centralized and notice u/s 142(1) of

the Act was issued. Though the AR of the assessee appeared from time to time, the details called for and the return of income was not filed. Therefore, the assessment was completed u/s 144 of the Act vide order dated 24.12.2009. The Assessing Officer in the assessment completed u/s 144 of the Act, made a solitary addition by making disallowance u/s 40A(3) of the Act of Rs.3,34,09,319. The relevant finding of the Assessing Officer reads as follows:-

“7.2 As per the findings made during post search, the assessee has not maintained any books of account and has not obtained bills for the purchase of iron ore from the miner workers. The purchases have been made by means other than by cross cheque of a bank or demand draft in violation of the provisions of section 40A(3). Hence, the entire sale consideration of iron ore amounting to Rs.3,34,09,319 is added to the total income of the assessee and brought to tax (Addition : Rs.3,34,09,319).”

3. Aggrieved by the addition made by the Assessing Officer, the assessee preferred an appeal before the first appellate authority. The CIT(A) substantially granted relief vide the impugned order. The CIT(A) restricted the total addition to the extent of Rs.31,12,101 as against originally disallowed by the Assessing Officer of Rs.3,34,09,319. The relevant finding of the CIT(A) reads as follows:-

“6.4 I have considered the submission of the AR , it appears that the observation of the AO is right to the extent that all the deposits were out of the trading in iron ore. However as decided in various case laws, it is a well settled law that when there is addition made at the time of search, corresponding expenditure has to be allowed and the provisions of Sec 40A (3) does not apply as the same is only a control mechanism to control the circulation of Cash. When there are cash deposits and the same is added as income, as a principle of natural justice the expenditure incurred on such purchases has to be accounted. This being the case I am of the considered opinion that in line with assuming all the cash deposits out of sale of iron ore, I consider entire withdrawal as purchases and tax the differential amount of Rs.31,12,101/-. In result cash withdrawal of Rs.3,02,97,218/- is allowed as expenditure against the income offered to tax and a sum of Rs.31,12,101/- is confirmed.”

4. Aggrieved by the order of the CIT(A), both the Revenue and the assessee have filed these cross appeals. We shall first adjudicate the Revenue's appeal.

ITA No.1129/Bang/2013 (Revenue's appeal)

5. The solitary ground raised reads as follows:-

"1. Whether the ld.CIT(A) is correct in facts and in law in deleting the amount of Rs.3,02,97,218/- out of the total addition of Rs.3,34,09,319/- made by the Assessing Officer."

5.1 The learned Departmental Representative supported the order of the A.O.

5.2 The learned AR reiterated the submissions made before the Income Tax Authorities.

5.3 We have heard rival submissions and perused the material on record. The Assessing Officer in his order passed u/s 144 of the Act had made an addition of Rs.3,34,09,319 based on the bank statement of South Indian Bank and the statement recorded u/s 131 of the Act. The Assessing Officer had held that the assessee is not maintaining any books of account and has not obtained bills for the purchase of iron ore from the mine workers. The A.O. held that since the purchases have been made other than by cross cheque or demand draft, there is violation of provisions of section 43A(3) of the I.T.Act. Hence, he brought the entire sale consideration of iron ore of Rs.3,34,09,319 as income of the assessee. The CIT(A) in his order brought down the addition to Rs.31,12,101 as against the original addition made by the A.O. at

Rs.3,34,09,319. The CIT(A) held that all withdrawals in the bank accounts as purchases and cash deposits made in the said account as sales and brought the difference between the cash deposit and withdrawals to tax (Rs.3,34,09,319 – 3,02,97,318 = 31,12,101).

5.4 The A.O's action in invoking provisions of section 40A(3) of the Act and disallowing the amounts of credits / payments received is legally untenable. The disallowance u/s 40A(3) of the Act is on the expenditure incurred / outgoings by the assessee. Therefore, if at all, section 40A(3) disallowance is to be made, it is to be only of Rs.3,02,97,218 (withdrawals). In the instant case, admittedly, the disallowance has been made u/s 40A(3) of the Act by the Assessing Officer on deposits / receipts which is not legally correct. As per the statement recorded u/s 131 of the Act, there was no question regarding these bank accounts raised. Therefore, there is no evidence to prove that the entire cash deposits are in respect of iron ore trading. In other words, the purchases / expenditure made by the assessee cannot be clearly identifiable and linked to the withdrawals. In such a situation, invocation of section 40A(3) of the Act is always a matter of dispute. Therefore, in given facts of the case, only estimation of income is a correct course open to the authorities below. In essence, the CIT(A) in the impugned order has resorted to estimation of income (though indirectly), which cannot be faulted in the facts of the instant case. Therefore, the deletion of addition by the CIT(A) of Rs.3,02,97,218 is upheld.

ITA No.938/Bang/2013 (Assessee's appeal)

6. Though the assessee has raised several grounds in the memorandum of appeal, the learned AR had argued only the issue raised in ground 6. Ground 6 raised reads as follows:-

“Without prejudice to the above the estimation of net profit by the learned Commissioner of Income-tax (Appeals) i.e., about 9.31% is highly excessive and which cannot be achieved in a trading business and the percentage of profit determined by the learned CIT(A) is unachievable and the same requires to be reduced substantially by giving certain reduction towards expenditure under the facts and circumstances of the case.”

6.1 The limited submission of the learned AR is that estimation of net profit by the CIT(A), i.e., about 9.31% is highly excessive and cannot be achieved in a trading business. In this context, the assessee has not produced any material / evidence to show what is the net profit earned in comparable cases / similar line of business (to prove that net profit in such cases is less than 9.31%). Therefore, in absence of any material to prove the contrary, we uphold the order of the CIT(A). Hence, the addition of Rs.31,12,101 is sustained. It is ordered accordingly.

7. In the result, the appeal filed by the Revenue and assessee are dismissed.

Order pronounced on this 23rd day of February, 2022.

Sd/-
(Padmavathy S)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 23rd February, 2022.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mysore.
4. The CIT(Central), Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore