

**IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI**

**BEFORESHRI AMARJIT SINGH, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA Nos.2415, 2417, 2419/Mum/2015
(A.Ys. 2005-06, 2006-07 & 2008-09)**

M/s Miki Industries & Companies Pvt. Ltd. 1 st Floor, Haroon House, 294, Perin Nariman Street, Opp: RBI Fort, Mumbai – 400001	Vs.	DCIT, CC-2(2) (Earlier known as DCIT,CC-12, Mumbai before restructuring) Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AABCM9423D		
Appellant	..	Respondent

**ITA Nos.2920 to 2926/Mum/2015
(A.Ys. 2004-05 to 2010-11)**

DCIT, C.C. -2(2) Room No. 804, 8 th Floor, Old CGO Annexe Bldg, M.K. Road, Mumbai – 400 020	Vs.	M/s Miki Industries & Co. Pvt. Ltd. 1 st Floor, Haroon House, 204, Perin Nariman Street, Mumbai – 400 001
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AABCM9423D		
Appellant	..	Respondent

Appellant by :	Shri Neelkanth Khandelwal
Respondent by :	Shri Achal Sharma

Date of Hearing	07.03.2022
Date of Pronouncement	20.04.2022

आदेश / O R D E R

PER AMARJIT SINGH, AM:

The aforesaid 10 appeals were disposed off by the ITAT, Mumbai, by its common order dated 09.11.2017. Subsequently, the assessee has filed Miscellaneous Application No. 29/Mum/2018 against the decision of ITAT vide ITA No. 2415/Mum/2015, M.A. No. 27/Mum/2018 against ITA No. 2419/Mum/2015, M.A. No. 28/Mum/2018 against ITA No. 2417/Mum/2015 & M.A.No.26/Mum/2018 against ITANo.2920/Mum/2015.

2. Thereafter taking into consideration the miscellaneous application filed by the assessee the ITAT vide order dated 18.05.2018 has allowed the miscellaneous application and recalled its finding in respect of para no. 32 of the ITAT order dated 09.11.2017 and restored the following ground no. 3(a) to (c) raised by the assessee to be heard on merit for deciding afresh. The relevant para of the order of the ITAT dated 18.05.2018 is reproduced as under:

“10. As far as ground No. 3(a) to (c) arc concerned, the assessee has raised these grounds to support his contentions for recalling the orders passed by the Hon'ble Tribunal the same are reproduced below:-

3(a) It is not correct to say that the representative of assessee has not the issues in relation to the Sec. 153A before Ld. CIT(A). The appellants say and submit that'll is evident from page no. 20, ground 4 under the head of Estimation of Gross Profit 24% in respect of 2005- 06 of the written submission made before CIT(A). Appellants submit that the said submission have already been made before Ld. CIT(A) in their written/ verbal submissions filed by the appellants but the same was not considered by Ld CIT (A) (a copy of the relevant extract is annexed hereto and marked as Exhibit 'B'). This fact is also mentioned in this impugned Order in para No. 32. The relevant portion of this para is reads as under:

"Before parting, we may add that the Id. Counsel of the assessee has submitted a chart that in these eases

assessments were Completed and addition in assessment in these cases u/s 153 A have been made de hors any incriminating material found on search relating to the addition. In this regard, the Id. Counsel of the assessee submitted that this aspect has been submitted before the Ld. CIT(A) who has not considered the same. "

b-The Appellants further submit that the point of 'No incriminating evidence against the Appellants' had also been raised before Hon'ble ITAT vide a written submission in respect of A Y 2005-06 on page no. 20, Ground No. 4 under (he head of 'Estimation of G.P 24%. (a copy of the relevant extract of the written submission is already annexed as exhibit is point was also pressed in written/verbal submission as well. The contention that the said crucial point was not raised is not right.

The Appellants submit that the condition stipulated in Section 153A is not satisfied in the said impugned order. The appellants submit that this point has not been considered despite the fact that the appellants had pressed in their written submission, rejoinder as well in verbal submission before the Ld CIT (A). This is a very serious mistake and error on the part of Hon'ble Tribunal that despite making of the said submissions by the Appellants, by way of written as well as verbal submissions, it perhaps escaped the kind attention of the Honorable Tribunal and thus was not considered. Thus a serious mistake and error occurred as this crucial point has been ignored despite the best efforts by the appellants to press the same. It is not correct to say that the said point was neither pressed before the Ld. CIT(A) nor the Honorable IT AT. The appellants make repeated submissions that the said point as stipulated in Sec 153 A was pressed abundantly at all stages in their written as well as verbal submissions. The appellants reiterate that this was pressed in many ways and at all levels by the appellants.

After having gone through the grounds as mentioned above and submissions of both the parties and orders passed by us in the main appeal, we find that since we have already given a categorical finding in para no. 32 of the order dated 09.11.17 wherein it has been categorically mentioned that assessee had not taken any such ground nor had raised the issue earlier and even Ld. Counsel of the assessee did not press the matter further.

Nevertheless, if this part of misc. application is allowed and the appeal of the restored qua this portion to be decided afresh, then in our view no prejudice would be caused to the interest of the revenue, whereas if the contrary view is taken, then the rights of the assessee would be prejudiced.

Be that ns it may, considering the facts of the present case, we are of the view that ends of justice would be met in case, we restore ground No. 3(a) to (c) raised by the assessee to be heard on merits qua this portion, by regular bench. Therefore, we recall our finding in para no. 32 of the order dated 00.11.17 and restore this portion of the appeals to be decided afresh. Hence the present M.A's qua recalling this portion of the order dated 09.11.2017 stands partly allowed. Therefore, registry is directed to fix the present appeals before regular bench and issue notices to both the parties for deciding these grounds on merit.”

3. Accordingly, to adjudicate the limited issue as referred in the order of the ITAT dated 18.05.2014 which was restored for deciding afresh was discussed with both the parties at the time of appellate proceedings before us.

4. During the course of appellate proceedings before us the ld. Counsel of the assessee submitted that in the case of the assessee assessment pertaining to A.Y. 2004-05 to 2008-09 were unabated assessment. By taking the ITA No. 2415/Mum/2015 as lead case the ld. Counsel submitted that at para 27 of the assessment order the assessing officer has made addition of bogus purchase from M/s Bright Global Paper Pvt. Ltd. and the ld. CIT(A) confirmed the disallowance to the extent of Rs.44,89,830/- being 15% of the total purchases of Rs.299,32,190/- made by the assessing officer. The ld. Counsel contended that during the course of search not any incriminating material were found and assessment in these cases were already completed and page nos. 72 to 88 referred by the A.O were pertained to the duly recorded ledger accounts available in the regular books of account which were already considered in the assessment made in the case of the assessee and there was not any incriminating material on the basis of which addition was made in the case of the assessee.

On the other hand, the ld. D.R. supported the order of the lower authorities.

5. Heard both the sides and perused the material on record. The ITAT vide its order dated 18.05.2018 has allowed the M.A. of the assessee by recalling its order for adjudicating the ground no. 3(a) to 3(c) afresh on merit as referred in the order of the ITAT dated 18.05.2018. During the course of assessment the Assessing Officer treated the purchases made by the assessee from M/s Bright Global Paper Pvt. Ltd. as bogus purchases on account of various reasons as mentioned in the assessment order based on finding of search conducted by Sales Tax & Income Tax Department. Before the ld. CIT(A) the assessee submitted detail of purchases made from BGPPL and bank statement showing payments made by account payee cheques. The assessee submitted before ld. CIT(A) that A.O has merely doubted the transaction on the basis of some seized material which were not related to it. The ld. CIT(A) has called the remand report from the Assessing Officer relating to assessee's transaction with BGPPL. It is stated that the A.O has issued notices u/s 133(6) to parties to whom sales were made and majority of the replies were received and examined. All these parties confirmed the sales made by the assessee, however, no transport document/stock register were provided by these parties. The ld. CIT(A) further stated in his finding in para 5.3 that though A.O has not stated in the remand report, the reference was apparently to non production of delivery challan in respect of purchases from BGPPL. The ld. CIT(A) also stated that the assessee had submitted the details of corresponding sales against purchases from BGPPL to the A.O and there cannot be sales without corresponding purchases. If the purchases were considered to be bogus, the sales must also be bogus and the ld. CIT(A) held that the

assessee might have made purchases from grey market, therefore, he has restricted the disallowance to the extent of 15% of the impugned purchases. This appeal was recalled by the ITAT on the limited issue of addition made by the A.O without any incriminating document. The Id. CIT(A) has restricted the addition to 15% of such purchases and the ITAT vide order dated 09.11.2017 sustained the addition to the extent of 12.5% of such purchases. During the course of assessment the A.O has relied on pages 72 to 88 of annexure 9. In this regard the assessee has also enclosed the copies of annexure 9 in its submission demonstrating that these copies were pertained to the regular ledger account of M/s Bright Global Paper Pvt. Ltd. in the books of account of the assessee and there was no any incriminating material referred by the A.O and these ledger account were as per the regular books of account of the assessee company and this was not an incriminating material. It is further submitted that assessment in the case of the assessee was already completed and same was not abated assessment. In this regard the Id. Counsel has also placed on the following decisions:

- (i) Continental Warehousing Corporation (NHAVA SHEVA) Ltd. 374 ITR 645 (Bom)
- (ii) Murli Agro Products Ltd. 49 taxman.com 172 (Bom)
- (iii) All Cargo Global Logistics 23 taxman.com 03 (ITAT, Mum) (SB)

After considering the relevant material on record we consider that it is an undisputed fact that in the case of the assessee assessment u/s 143(3) was already made and case of the assessee was unabated for the purpose of making assessment u/s 154A of the Act. In this regard, no addition can be made in respect of unabated assessment which have become final if no incriminating material is found during search. The revenue could not prove contrary that there was incriminating seized material in the

case of the assessee and could not disprove the contention of the assessee that material referred in the assessment order was the copy of ledger account of the assessee which was regularly accounted in the books of account of the assessee. Therefore, in the light of the above facts and circumstances we consider that when assessment in the case of the assessee already had been completed prior to date of search in such circumstances in the absence of any incriminating material the addition made by the A.O is not justified, therefore, this ground of appeal of the assessee is allowed.

ITA No. 2417 & 2419/Mum/2015

6. The ITAT vide its order dated 28.05.2018 has also recalled its order on the similar issue on identical facts, therefore, applying the finding of 2415/Mum/2015 as mutatis mutandis these appeals of the assessee are also allowed.

ITA No.2920/Mum/2015

7. During the course of appellate proceedings before us it was brought to our notice that ITA No 2920/Mum/2015 pertaining to A.Y. 2004-05 was already adjudicated by the ITAT vide order dated 09.11.2017 and appeal effect to the order of the ITAT has already been given by the assessing officer vide order dated 03.02.2022 and there was no any issue pertaining to incriminating material related to this year and it was wrongly listed. In view of the above facts and circumstances since there is no any issue involved in this year pertaining to incriminating material as pointed out in the recalled order of the ITAT. Therefore, this appeal has become infructuous and same stand dismissed.

ITA Nos. 2921 to 2926/Mum/2015

8. During the course of appellate proceedings before us, it was brought to our notice that these appeals were filed by the revenue and the ITAT has not recalled its order for any further adjudication and these were wrongly listed for hearing. Therefore we treat these appeals as infructuous and not required any adjudication since these appeals were already adjudicated vide order dated 09.11.2017.

9. In the result, the appeals of the revenue stand dismissed.

10. In the result, the appeals of the assessee are partly allowed.

Order pronounced in the open court on 20.04.2022

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Mumbai, Dated 20.04.2022

PS: Rohit

आदेश की प्रतिलिपि ँ ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,
सत्यापित प्रति //True Copy//

(Asst. Registrar)
ITAT, Mumbai