

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER**

**ITA Nos.866, 867 & 872/M/2021
Assessment Years: 2008-09, 2007-08 & 2010-11**

M/s. Offbeat Developers Pvt. Ltd., 2 nd Floor, R.R. Hoisery Building, Shree Laxmi Woollen Mills Compound, Dr. E. Moses Road, Opp. Shakti Mills, Mahalaxmi, Mumbai – 400 011 PAN: AAACO5140L	Vs.	DCIT, CC-8(4), Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Rupak Choudhari &
Shri Varun Chaturverdi, A.R.

Revenue by : Shri Ashish Kumar, D.R.

Date of Hearing : 05 . 07 . 2022

Date of Pronouncement : 04 . 08 . 2022

O R D E R

Per : Kuldip Singh, Judicial Member:

For the sake of brevity aforesaid cross appeals bearing common question of law and facts are being disposed of by way of composite order.

2. Appellant M/s. Offbeat Developers Pvt. Ltd. (hereinafter referred to as the assessee) by filing aforesaid appeals sought to set aside the impugned order even dated 23.03.2021 by Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)], qua the assessment years 2008-09, 2007-08 & 2010-11 on identically worded grounds except the difference in figures inter alia that:

“On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming the additions made by the Ld. AO of Rs.41,88,160/- u/s. 69C on account of commission paid. The appellant prays that the same may kindly be deleted.

The Appellant craves leave to add, alter, amend or withdraw any of the Grounds of Appeal herein above and to submit such further arguments, statements, documents and papers as may be considered necessary either at or before the hearing of the appeal.”

3. Briefly stated facts necessary for adjudication of the controversy at hand are : the assessee company is a Pvt. Ltd. company in development of commercial, retail and entertainment complex. Initially the assessee's assessment was framed for A.Y. 2007-08, 2008-09 under section 143(3) read with section 153A of the Income Tax Act, 1961 (for short 'the Act'). Subsequently, the case was reopened for both the years by recording reasons and proceedings under section 147/148 of the Act were initiated. Assessee's objection against reopening of assessment under section 147 of the Act was dismissed. During the search proceedings Assessing Officer (AO) noticed that the assessee had withdrawn purchases with certain parties amounting to Rs.9,30,56,866/- & Rs.20,94,07,870/- for A.Y. 2007-08 & 2008-09 respectively. On failure of the assessee to explain, the AO proceeded to make disallowance of 2% commission expenses on purchases withdrawn and made addition thereof being the unexplained expenses to the

tune of Rs.18,61,140/- & Rs.41,88,160/- being 2% of withdrawn purchases made by the assessee with certain parties and thereby framed the assessment under section 147 read with section 143(3) of the Act for A.Y. 2007-08 and 2008-09 respectively. Similarly, during scrutiny proceedings qua A.Y. 2010-11 AO also noticed that the assessee had withdrawn purchases with certain parties amounting to Rs.12,31,14,311/- and made disallowance of 2% commission expenses on purchases withdrawn being the unexplained expenditure and thereby made addition of Rs.24,62,286/- by framing assessment under section 143(3) of the Act.

3. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has partly allowed the same.

4. Then the matter travelled to the Tribunal which has remitted the case back to the AO for fresh decision vide order dated 25.08.2016. Then the AO passed assessment order dated 22.06.2017 under section 143(3) read with section 254 of the Act. Again in the second round of litigation appeal was filed before the Ld. CIT(A) who has confirmed the addition made by the AO on account of addition of commission @ 2% by dismissing the appeals. Again feeling aggrieved assessee has come up before the Tribunal by way of filing present appeals.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

6. Undisputedly, co-ordinate Bench of the Tribunal vide order dated 25.08.2016 set aside a specific issue raised by the assessee to the AO to decide afresh as to making/confirming the addition of commission @ 2% of the bogus purchases qua the purchases withdrawn by the assessee with certain parties by returning following findings:

“17. We heard both the parties, on hearing both the parties on this issue of Commission Payment @ 2%, we find that there is need for finding of fact on if the purchase bills/invoices are bogus purchases or not. It is the case of the assessee that they are genuine purchases and without prejudice, he offered the same as unverifiable purchases in order to avoid the protracted litigation. If they constitute genuine purchases, as argued by the assessee’s counsel, there is no need for purchase of accommodation entries against Commission Payment. There is need for exploring the facts from the market, if the payment of cash for Commission Payment is involved over and above the amount given in the bogus invoices. Alternatively, i.e. if they are bogus purchases, assessee is under commercial need to make payment for purchase of the said bogus bills from the suppliers and against the Payment of Commission. Without prejudice; it is case of the Ld. AR that the said amount appearing on the bogus bill constitutes entire amount including the Commission Payment.

Therefore, we are of the view that the AO needs to bring on record the facts gathered by the survey team on this issue and record the questions/answers if any explaining the issue of Commission Payment made to the suppliers.

AO shall note that unless relevant facts are brought on the records after garnering the statements of the persons cited above, materials gathered in survey action to suggest that assessee incurred any expenditure, as specified in the provision of section 69C validly invoked by the AO, AO is not justified in invoking these provisions, Therefore, AO should also deal with the argument that the amount mentioned in bogus purchases/invoice includes the Commission Payment too.

With the above, we remand all the appeals of the assessee to the file of the AO. AO shall re-adjudicate after granting reasonable opportunity of being heard to the assessee.”

7. In the second round of litigation Ld. Lower Revenue Authorities have reached the conclusion that it is proved fact that

assessee has taken bogus bills to inflate the purchases, though the assessee has claimed that they are genuine purchases but without prejudice assessee has offered the same as unverifiable purchases in order to avoid the protracted litigation. The factum of taking bogus purchases by the assessee in A.Y. 2007-08, 2008-09 & 2010-11 got further corroborated with the fact that assessee himself has withdrawn the said purchases on the ground that they are not in a position to substantiate the same.

8. AO as well as Ld. CIT(A) proceeded on the premise that when factum of taking bogus purchases by the assessee has been proved on record and by virtue of the natural corollary assessee must have paid the commission to buy the bogus bills/invoices for purchases.

9. Co-ordinate Bench of the Tribunal keeping in view the contention raised by the assessee that “they are genuine purchases and without prejudice the assessee offered the same as unverifiable purchases in order to avoid the protracted litigation” and as such there was no need for purchase of accommodation entries against the commission payment and further argued that without prejudice the said amount appearing on bogus bills constitute entire amount including the commission payment, remitted the case back to the AO to readjudicate the issue by bringing on record necessary facts after recording the statements of the persons from whom assessee alleged to have made the genuine purchases.

10. AO in the second round of litigation provided adequate opportunity of being heard to the assessee to produce the parties from whom the alleged genuine purchases were made. But the

assessee has failed to produce any of such parties and the AO has reached the conclusion that these are bogus purchases and accounted in the books of account through accommodation entry providers. Since these entries are not free of cost assessee has incurred expenditure to the tune of 2% of the bogus purchases taken.

11. The Ld. CIT(A) also upheld the findings returned by the AO by returning the following findings:

“6.4.2 From the above finding of the Hon'ble Tribunal, it can be seen that while setting aside the matter of addition of commission @2% to the file of the Ld. AO, they had observed that they are of the view that there is need for finding of fact on if the purchase bills/invoices are bogus purchases or not. It is the case of the assessee that they are genuine purchases and without prejudice, he offered the same as unverifiable purchases in order to avoid the protracted litigation and if they constitute genuine purchases, as argued by the assessee's counsel, there is no need for purchase of accommodation entries against Commission Payment. From the facts available on records it is evident that the appellant themselves have withdrawn the said purchases on the ground that they are not in a position to substantiate the same. In the impugned order u/s 143(3) rws 254 of the Act, the Ld. AO has given a factual finding that there is no denial of the fact on the part of the appellant, that there are no supporting evidence available with the assessee for the bogus Bills identified by the Department. The Ld. AO has further held that the appellant has not produced the parties under consideration before him for verification. It is also observed that the Hon'ble Tribunal vide its above referred order dated 25.08.2016, while adjudicating the issue of disallowance of interest from CWIP has observed that "In our view, the CIT(A) is not justified in granting relief. CIT(A) did not appreciate the fact that the assessee surrendered all the bogus purchases for all three years, which implies that the purchases are mere case of buying the accommodation entries for commission payment and pocketing the cash after necessary deductions, if any." From the said observation of the Hon'ble ITAT it is evident that they have given a factual finding that the appellant had surrendered the bogus purchases and the same implies that the purchases are mere case of buying the accommodation entries for commission payment. The said finding of the Hon'ble ITAT that accommodation entries were

taken for payment of commission has not been negated by the appellant. Further, the reliance placed by the appellant on the

decision of the Hon'ble Tribunal in its own case for A.Y. 2009-10 is of no help to decide the issue in the present set-aside proceedings as from the said decision of Hon'ble ITAT dated 24.04.2017 in ITA No. 3723/M/2016 for A.Y. 2009-10, it is observed that their earlier decision dated 25.08.2016 in appellant's own case for A.Y. 2007-08, 2008-09 and 2010-11 was not brought to their notice and hence, they didn't have any occasion to consider the factual finding given by the Hon'ble ITAT in A.Y. 2007-08, 2008-09 and 2010-11. Moreover, this is not a fresh proceeding, but the set-aside proceeding and hence, the factual finding given by the Hon'ble ITAT while setting aside the issue which is under consideration is more germane to decide the issue. In view of the above discussion, I am of the considered opinion that no fault can be found with the decision of the Ld. AO in making addition u/s 69C of the Act on account of commission paid for obtaining accommodation entries and therefore, the addition of Rs.24,62,286/- is CONFIRMED. Hence, the Ground No.1 raised in appeal is DISMISSED.”

12. We are of the considered view that when assessee has himself opted to prove the fact that he had actually made genuine purchases but withdrawn the said purchases without prejudice that the said purchases if assumed to be taken as bogus the amount of bogus purchases is inclusive of commission payment only, but failed to produce any of the parties before the AO to prove this fact. So when the assessee himself has withdrawn the bogus purchases for all the three assessment years it goes to prove that it is a simple case of purchasing accommodation entries on commission payment.

13. So in these circumstances, when the assessee has failed to produce any of the parties for verification to prove its contention raised before the co-ordinate Bench of the Tribunal, assessee has no case to putforth as accommodation entries in the markets are sold only on the commission basis. AO has rightly estimated the commission on the bogus purchase entries made by the assessee @ 2%. Reliance placed by the Ld. A.R. on the order passed by the co-

ordinate Bench of the Tribunal in assessee's own case for A.Y. 2009-10 is misplaced because the facts of cases at hand are distinguishable and were required to be decided on the facts only as per directions of the Tribunal. So finding no illegality or perversity in the impugned order passed by the Ld. CIT(A) for A.Y. 2007-08, 2008-09 & 2010-11 appeals filed by the assessee are hereby dismissed.

Order pronounced in the open court on 04.08.2022.

**Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 04.08.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.