

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
& SMT. MADHUMITA ROY, JUDICIAL MEMBER

I.T.A. Nos. with A.Y. 3048/Ahd/2014 (A.Y. 2009-10), 844/Ahd/2015 (2009-10), 3448/Ahd/2016 (A.Y. 2010-11), 126 & 127/Ahd/2019 (A.Y. 2008-09) & 128/Ahd/2019 (A.Y. 2010-11)

M/s. Asian Agency FF-29, Krishna Gopal Estate, Opp. SBI, Nr. Fruit Market, Naroda Road, Ahmedabad – 380025	बनाम/ Vs.	ACIT Circle-12, Ahmedabad (in ITA No.3048/Ahd/2016) & Commissioner of Income Tax-VII, Ahmedabad (in ITA No.844/Ahd/2015) & ACIT Circle-7(2), Ahmedabad (in remaining all)
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAIFA5304K		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

&

आयकर अपील सं./I.T.A. No. 3336/Rjt/2015
(निर्धारण वर्ष / Assessment Years: 2009-10)

I.T.O. Ward 7(2)(1), Ahmedabad	बनाम/ Vs.	M/s. Asian Agency FF-29, Krishna Gopal Estate, Opp. SBI, Nr. Fruit Market, Naroda Road, Ahmedabad - 380025
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Assessee by :	Shri S. N. Soparkar & Shri Parin Shah, A.Rs.
प्रत्यर्थी की ओर से / Revenue by :	Shri V. K. Singh, Sr. D.R.

सुनवाई की तारीख / Date of Hearing	21/07/2022
घोषणा की तारीख / Date of Pronouncement	31/08/2022

आदेश/O R D E R

PER BENCH:

The above seven appeals (six by assessee and one by Revenue) arise from respective orders of the Commissioner of Income Tax (Appeals) ('CIT(A)') for assessment years mentioned above.

ITA No. 3048/Ahd/2014

2. The assessee has raised the following grounds of appeal:

- "1. *Ld. CIT (A) erred in law and on facts in holding that unaccounted profits derived on unaccounted sales of Rs. 5,40,17,485/- remained to be offered by the appellant. Ld. CIT (A) ought to have held that once the unaccounted sales are regularized in the books of the appellant & income earned on total sales is offered separate addition of profits amounts to double taxation. It be so held now.*
2. *Ld. CIT(A) erred in law and on facts in making addition of estimated GP of Rs.37,81,224/- on unaccounted sales failing to consider that income of Rs.49,75,530/- offered on total sales already includes profits earned on unaccounted sales. Ld. CIT(A) ought not to have made double addition of profits. It be so held now.*
3. *Alternatively and without prejudice to the ground not warranting double addition Ld. CIT (A) erred in law and on facts in estimating GP @ 7% in place of 6.60% derived by the appellant on trading. Ld. CIT (A) ought to have restricted addition @ 6.60% of unaccounted sales. It be so held now.*
4. *Ld. CIT (A) erred in law and on facts in making enhancement on account of GP of Rs. 37,81,224/- & unaccounted purchases of Rs. 2,09,23,747/-, in income u/s 69C of the Act. Ld. CIT(A) despite accepting quantitative tally of opening stock, purchases, sales and closing stock factually erred in holding that the*

appellant made unaccounted sale of 1843.25 tones against book stock of 1301.79 tones. Ld. CIT (A) ought not to have made addition u/s 69C of the Act of Rs. 2, 09, 23, 141/- when total sales were made out of duly accounted stock by the appellant. It be so held now.

5. *Without prejudice to the above grounds challenging enhancement made on account of GP addition and unexplained purchases u/s 69C of the Act, once GP addition is made, no further addition in respect of trading account of alleged unaccounted purchases deserves to be made. It be so held now.*
6. *Levy of interest u/s 23 4B & 23 4C of the Act is not justified. Initiation of penalty proceedings u/s 271 (1) (c) is not justified."*

3. Additional ground:

*"Appellant craves leave to raise this additional ground of appeal before the Hon'ble ITAT. This is a legal ground and therefore as per the decision of Hon'ble Supreme Court in the case of **National Thermal Power (229 ITR 383)** it can be raised before the Hon'ble ITAT.*

1. Ld. CIT (A) erred in law and on facts enhancing the income of the appellant considering a different source of income not processed by AO against the sanction of powers conferred upon him u/s 251 of the Act."

4. The 1st interconnected issue raised by the assessee is that the learned CIT-A or in confirming the addition made by the AO in part ₹ 37,81,224/- & further enhancing the addition for unaccounted purchases of Rs. 2,09,23,747/- u/s 69C of the Act.

4.1 The facts in brief are that the assessee in the present case is a partnership firm and claimed to be engaged in the business of trading in all types of the scrap, pig iron, cock, foundry materials. It was also submitted that the assessee is holding the agency of M/s Kirloshkar Ferrous Industries Ltd (for short KFIL) and earning commission income on the sales made by it. The assessee in the year under consideration has shown balance of sundry creditor in the name of M/s KIFL for an amount of ₹ 9,22,40,790/- as on 31st of March 2009 which was inclusive of the opening balance of Rs. 4,15,66,015/- only. As such the credit balance of the current year was worked out at ₹ 5,06,74,775/- (Rs. 9,22,40,790.00 – 4,15,66,015.00) only. On the contrary, the company namely M/s KIFL has shown receivable in its balance sheet as on 31st March 2009 in the name of the assessee at ₹ 96,92,659/- only leading to a difference

of Rs. 4,09,82,116/- representing the excessive amount of sundry creditor shown by the assessee.

4.2 On question about the impugned difference by the AO, the assessee failed to reconcile the same. Therefore, in the absence of any reconciliation by the assessee, the AO treated the impugned amount of difference of ₹ 4,09,82,116/- as unexplained cash credit under section 68 of the Act which was added to the total income of the assessee.

5. Aggrieved, assessee preferred an appeal to the learned CIT-A.

5.1 The assessee before the learned CIT-A has furnished various additional evidences on many occasions and likewise the learned CIT-A has also forwarded the same for the remand report from the AO. Thereafter, the assessee has also filed rejoinder to the remand report on many occasions.

5.2 The core contention of the assessee was that it was earning commission income on the sales in the capacity of commission agent of M/s KIFL. The assessee to this effect has also furnished the copy of the agreement of commission agency. The assessee further submitted that the AO made addition of difference in closing balance of sundry creditor under section 68 of the Act which applies to the sum credited in the books but remained unexplained. However, in its case, the credit entry on account of purchases were not in doubt. All the purchases made during the year were fully matched with party and supported by the invoices which were also accepted by the AO. The difference arises in the amount of sundry creditor on account of payment made against purchases which were not accounted in books. Therefore, the provision of section 68 of the Act cannot be invoked by the AO on the amount of outstanding creditor arising out of the purchases.

5.3 The Assessee further submitted that difference arises due to unaccounted cash sale made and the proceeds of the cash sale was deposited

in account of **Angadaia** which has been utilized for making payment to the creditor, M/s KIFL. However, the same remains to be accounted in its books of accounts. The assessee also submitted that the complete detail of cash sale was not available at the time of assessment. Therefore, the reconciliation sheet was not submitted. But the same has been reconciled now and ledger account also tallied with creditor which can be verified from the ledger confirmation for the month of February 2013. However, the assessee agreed to offer 6.6% profit on unaccounted cash sales of Rs. 5,40,17,485/- only.

5.4 The AO in remand report objected on the acceptance of additional evidence on the ground that the assessee was not prevented by sufficient cause to furnish the evidences during the assessment proceeding. Further, the assessee is changing its stance as per its convenience. At first, the assessee in appellate proceeding submitted that the difference in closing balance is arising due to direct payment made by the customer to the creditor account and submitted additional evidences in this regard. But in remand proceedings, when it was asked to provide the details of the debtor who made direct deposit in the bank of M/s KIFL, the assessee failed to provide the same. Now the assessee came up with entirely new submission. Therefore, the additional evidence submitted by the assessee cannot be relied upon or accepted. The AO in the remand report submitted that the assessee produces 5 individuals claiming the cash customer, but on examination, these person found to be daily wage laborers or rickshaw puller, not having PAN, bank account or any business arrangement or establishment. They received commission of Rs. 200 to 500 for alleged sale shown in their name.

5.5 However, the learned CIT-A after considering the facts in totality held that the provision of section 68 of the Act cannot be applied. However, the Id. CIT-A made the addition of GP on unaccounted sale and also made addition for the unaccounted purchases by observing as under:

"3.31. I have considered all the submissions and rejoinders of the appellant, remand reports of the A.O. and Addl.CIT and it is found that the appellant has sold the stock of

goods lying with him on consignment received from KFIL and the sale proceeds thereof have not been recorded in the books of accounts. These sale proceeds have been directly utilized by purchasing the cheques from the shroffs from the payments by the debtors towards their purchases of goods from the appellant. Those cheques issued by shroffs have been credited in appellant's ledger accounts in the books of KFIL. After making the inquiries from banks by obtaining the bank statement copy, account opening forms and copies of sample cheques with regard to the bank account of M/s.Kavita Enterprises bearing account NO.CR1949 Prop. Shri Subhashbhai Thakkar and another bank account No.CR-1943 in the name of Shri P.S. Verma, Prop. M/s.P.K. Corporation both maintained in the Gujarat Mercantile Co.Op Bank Ltd. and also another bank account No.1981 in Bapunagar Mahila Co.Op. Bank Ltd. in the name of Shri Nathulal Gulabdas Rathe Prop, of Sun Enterprises were sent to the A.O. for necessary inquiries at his end in the remand proceedings. In the remand report, he has not denied that these bank accounts have been maintained by these shroffs. He has not given any adverse comments about the ownership of these bank accounts by the respective shroffs. There is nothing on record and/or brought out by the A.O. that these bank accounts were not pertaining to the shroffs but were belonging to the appellant. Thus, it is proved that the cheques have been taken from these shroffs and credited in appellant's ledger account with the KFIL. These cheques were purchased by the customers by making the cash payments towards the sale proceeds of the accounted stock of the appellant. The major reason for making the sale of the accounted stock without recording into the books of accounts was to earn profits due to increase in the prices of the scrap which were over and above to the commission on consignment. Otherwise the appellant was only entitled to get the consignment commission income @Rs.100/- per ton which he had already booked in the books of accounts.

So the credits in the appellant's ledger account in the books of KFIL is explained from the sources of the unaccounted sales proceeds of the accounted stocks made by the appellant. The total sale proceeds which have been routed through the cheques bought from shroffs amounting to Rs.5,40,17,485/- have been credited in appellant's ledger account which has caused the difference in the balances in books of accounts of both the parties.

3.32. The appellant vide its written submission dtd. 4.9.2014 (reproduced in preceding paras) has replied to the various points raised by the Addl.CIT, Range-12, Ahmedabad in his letter enclosed alongwith the AO's remand report. The same have been verified and found duly replied by the appellant.

3.33. During the course of appellate proceedings, on verification, it was found that the appellant has sold the accounted stock without recording into the books of accounts and the unaccounted sales was in excess to the closing stock shown in the books of accounts. Further, it is found that the unaccounted sales were at Rs.5,40,17,485/- against the book stock only of Rs.2,93,12,514/- which means for the balance unaccounted sales the appellant had made unaccounted purchases and same has not been recorded in the books of accounts. The summary of the stock position in this regard is depicted as under :-

<i>Opening Stock</i>	<i>178.960 Tones</i>
<i>Add: Purchases</i>	<i>25339.830 Tones</i>
<i>Total</i>	<i>25518.79 Tones</i>
<i>Less: Sales</i>	<i>24217 Tones</i>
<i>Closing Stock</i>	<i>1301.79 Tones Valued at Rs.2,93,12,514/-</i>
<i>Unaccounted Sales</i>	<i>1843.25 Tones Valued at Rs.5,40,17,485/-</i>

So it is apparent from the above that the appellant has made the unaccounted sale of 1843.25 Tones as against the book stock of 1301.79 tones. Thus, it has sold the excess stock of 541.46 Tones have been purchased by the appellant out of books for which the unaccounted payments have been made and the same attracted the provisions of Section 69C of I.T. Act.

3.34. During the course of appellate proceedings, it was submitted that although the appellant has made the unaccounted sales of Rs.5,40,17,485/- including the accounted stock by making the delivery of the goods but not showing the sales in the books of accounts. But to cover-up these discrepancy, it was pleaded that the appellant has issued the fictitious sale bills for the same quantity and value but no corresponding delivery of the goods in respect to such fictitious sales have been given in such cases. Thus, the total sales and the closing stock shown in the books of accounts have not been affected from these set of transactions. The appellant pleaded that this practice is also supported with the fact that had he not issued the fictitious sale bills corresponding to the unaccounted sales the closing stock would have been much more what has been shown in the books of accounts. In support of this practice since starting vide his submission dtd. 10.4.2013 it has given the details of the squaring off the fictitious debtors account from F.Y. 2008-09 to F.Y. 2012-13 created on account of fictitious sale in different financial years. This submission of the appellant is not verifiable in absence of the details of the specific fictitious sale instances although as per the quantitative tally of the opening stock, purchases, sales and closing stock, the practice shown by the appellant might have been followed. However, in absence of any verification, this contention of the appellant is not accepted.

3.35 Since the appellant has made the sale of Rs.5,40,17,485/- on which the unaccounted profits have been derived and the same have not been offered for taxation. It derived the G.P. rate of 6.60% on sales in trading business. So considering this base, the G.P. of 7% is estimated on this unaccounted sales of Rs.5,40,17,485/- which works out to Rs.37,81,224/- and the same needs to be taxed in the hands of the appellant over and above to the normal income shown in the books of accounts. No set off of the expenditure against this G.P. working/addition is allowed for the reason that the expenditures relating to the business activities have already been debited in the books of accounts.

Further, it is noticed that the unaccounted sales of Rs.5,40,17,485/- includes the gross profit of Rs.37,81,224/- thereupon and excluding this gross profit the cost of goods sold works out to Rs.5,02,36,261/- (Rs.5,40,17,485/- (-) Rs.37,81,224/-). Against the cost of goods sold at Rs.5,02,36,261/- the appellant was having the closing stock of Rs.2,93,12,514/- only in its books of accounts which means the rest of the stock has been purchased by the appellant out of books which works out to Rs.2,09,23,747/- (Rs.502,36,261/- (-) Rs.2,93,12,5,14/-) for which addition u/s.69 C is warranted.

3.36. In other words on the unrecorded sales of Rs.5,40,17,485/- the addition on account of gross profit of Rs.37,81,224/- and the unaccounted purchases u/s,69C amounting to Rs.2,09,23,747/- totaling to Rs.2,47,04,971/- is worked out as above for which an enhancement notice vide order sheet entry dtd. 05.09.2014 was given to the appellant to give submission upon the above enhancement. The appellant was asked to give his submission upon the above enhancement. The appellant was asked to give his submission upon the aforesaid show cause of enhancement on or before 15.09.2014. On the aforesaid date the A.R. of the appellant attended the office and submitted that all the written submissions on this issue has already been filed in this office and he relied upon the same. During the course of hearing, no further written submission on the aforesaid enhancement was made.

In view of the aforesaid discussion, considering all the written submissions the enhancement on account of gross profit at Rs.37,81,224/- and unaccounted purchases u/s.69C at Rs.2,09,23,747/- totaling to Rs.2,47,04,971/- is made to the income of the

appellant as against the addition made by the A.O. u/s.68 of I.T Act of Rs.4,09,82,116/- In the result, in place of the addition made by the A.O. at Rs.4,09,82,116/-, the additions on account of G.P. and unaccounted purchases u/s.69C as discussed above remains at Rs.2,47,04,971/-. The appellant get the relief of Rs.1,62,77,145/-. Penalty proceedings u/s.271(1)(c) of the I.T. Act is also initiated for furnishing of inaccurate particulars of income and concealing the income. Thus, the grounds of the appellant are partly allowed."

6. Being aggrieved by the order of the learned CIT-A both the assessee and the Revenue are in appeal before us. The assessee is in appeal against the confirmation of the addition of ₹ 37,81,224/- being 7% of the unaccounted sales as discussed above and enhancement of income under section 69C of the Act for ₹ 2,09,23,747.00 whereas the Revenue is in appeal against the deletion of the addition made by the AO for ₹ 4,09,82,116/- under section 68 of the Act. The relevant ground of appeal of the Revenue in ITA No. 3336/AHD/2014 reads as under:

"1. The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.4,09,82,116/-, despite the fact that the credit appearing in the books of assessee is established, on admitted facts, to be not genuine in view of unaccounted payment made to the creditor."

7. The learned AR before us filed a paper book running from pages 1 to 303 and contended that there was no difference in the amount of purchases shown by the assessee viz a viz sales shown by the party namely M/s KIFL. The difference between the balances shown by the respective parties was arising mainly on account of the payment made by the debtors of the assessee directly to the supplier (KIFL) which the assessee could not reconcile. According to the learned AR, there was no difference between the purchase shown by the assessee and the sales shown by the concerned party and the sundry creditor was arising out of such purchases. Therefore, the question of doubting or making any addition of such sundry creditor without disturbing the corresponding purchases does not arise.

7.1 The learned AR further contended that there was no issue arising from the order of the AO with respect to the investment in the unaccounted purchases under section 69C the of the Act and therefore no addition is warranted by way of enhancement. As such the Id. CIT-A has no power to

enhance the income of the assessee with respect to the item of addition which was not disturbed by the AO in the assessment order. The learned AR in support of his contention has relied on the judgment of Hon'ble Supreme Court in case of CIT vs. Shapoorji Pallonji Mistry reported in 44 ITR 891.

7.2 On the other hand, the learned DR before us filed a paper book and contended that it was the duty upon the assessee to furnish the documentary evidence that the debtors have made the payment directly to the supplier namely KIFL. Thus the AO rightly treated the amount of difference as unexplained cash credit under section 68 of the Act.

7.3 The learned DR with respect to the enhancement of income contended that there is direct nexus of the item of addition enhanced in the assessment order with the unaccounted sales of the assessee. Thus it can be inferred that the issue of relating to enhancement of income by making the addition was very much arising from the order of the AO.

7.4 Both the learned AR and DR before us vehemently supported the order of the authorities below to the extent favourable to them.

8. We have heard the rival contentions of both the parties and perused the materials available on record. There is no dispute to the fact that there was the difference between the closing balance shown by the assessee in its books of accounts as on 31 March 2009 in the name of KIFL viz a viz the balance shown by the corresponding party. Such difference was amounting to ₹ 8,25,48,131/- which includes opening balance of Rs. 4,15,66,015/-, thus the difference on account of current year transaction was of Rs. 4,09,82,116/- only. The entire amount of difference on account of current year transaction was treated by the AO as unexplained cash credit under section 68 of the Act Whereas the learned CIT-A held no addition under section 68 of the can be made on account of difference for the reason that the credit amount i.e. purchases has been fully explained and difference was arising on account of debit amount i.e. payment.

However the learned CIT(A) estimated the income on unaccounted sale of Rs. 5,40,17,485/- offered by the assessee during the appellate proceedings at the rate of 7% i.e. Rs. 37,81,122/-. Further the learned CIT(A) found that for the unaccounted sale of Rs. Rs. 5,40,17,485/-, the assessee was not having sufficient inventory in the books. Accordingly, the learned CIT-A worked out value of unaccounted purchases at Rs. 2,09,23,747/- and treated the same as unexplained expenses under section 69C of the Act. Hence the learned CIT-A was pleased to enhance the addition for the amount of Rs. 2,09,23,747/- only under section 69C of the Act on the reasoning that the assessee has made purchases outside the books of accounts for the said amount.

8.1 The 1st controversy arises for our adjudication whether the difference in the balance as discussed above can be made subject to the addition under section 68 of the Act. The answer stands in negative. It is for the reason that such credit balance was arising out of the purchases which have not been disputed. As such the amount of credit was not reflecting against any loans and advances from the parties. In holding so we draw support and guidance from the judgment of Hon'ble Allahabad High court in case of CIT vs. Pancham Das Jain reported in 156 Taxman 507/205 CTR 444, where it was held as under:

The Tribunal had recorded a categorical finding of fact based on appreciation of materials and evidence on record that the said amounts represented the purchases made by the assessee on credit and, therefore, the provisions of section 68 could not be attracted in the instant case. The view taken by the Tribunal was correct and, therefore, there was no question of, making any addition under section 68. [Para 8]

8.2 The next controversy arises whether the addition can be made on estimated basis on the amount of unaccounted sales as admitted by the assessee during the appellate proceeding and elaborated above. In this regard we note that assessee itself has admitted that sales were made outside books in order to gain some extra profit besides commission and admitted to have earned profit around 6.6% on such unaccounted sale. Thus, we find no infirmity in the order of the learned CIT-A with respect to such addition made by him (the learned CIT-A) in his appellate order. Hence, the addition made by the learned CIT-A for Rs. 37,18,224/- is hereby confirmed.

8.3 With respect to the enhancement of the addition by the learned CIT-A on account of alleged purchases made by the assessee outside the books of accounts, we note that such issue was not arising from the order of the AO. In other words there was no dispute before the AO with respect to the unaccounted purchases which can be verified from the assessment order. Now, the controversy arises whether the learned CIT-A can make the addition of altogether a new item which was not subject matter of dispute at the assessment stage. The answer stands in favour of the assessee and against the revenue by the judgment of Hon'ble Supreme Court in the case of CIT vs. Shapoorji Pallonji Mistry reported in 44 ITR 891 wherein it was held as under:

In Gajalakshmi Ginning Factory v. CIT [1952] 22 ITR 502, it has been held by the Madras High Court that it would not be open to the AAC to introduce into the assessment new sources, as his power of enhancement is restricted only to income which was the subject-matter of consideration for purposes of assessment by the ITO. In Bishwanath Prasad Bhagat Prasad v. CIT, the Division Bench appeared to have approved the above decision of Madras High Court in Narrondas Manordas v. CIT [1956] 29 ITR 748, the High Court quoted the said decision of the Madras High Court.

In view of the provisions of sections 34 of the 1922 Act and 33B of the 1922 Act by which escaped income can be brought to tax, there is reason to think that the view expressed uniformly about the limits of the powers of the AAC to enhance the assessment has been accepted by the legislature as the true exposition of the words of the section. If it were not, one would expect that the legislature would have amended section 31 of the 1922 Act and specified the other intention in express words. The Act was amended several times in the last 37 years, but no amendment of section 31(3) of the 1922 Act was undertaken to nullify the rulings. In view of this, one should not interpret section 31 of the 1922 Act differently from what has been accepted in India as its true import, particularly as that view is also reasonably possible.

8.4 In view of the above, we hold that the learned CIT-A has exceeded his jurisdiction by making the addition of an item representing the unaccounted purchases which was not subject matter of dispute before the AO. The Id. DR at the time of hearing has also not brought anything on record contrary to the argument advanced by the Id. AR for the assessee. Accordingly, we set aside the finding of the learned CIT-A, and direct the AO to delete the addition made by him. Hence, the ground of appeal of the assessee is partly allowed whereas the ground of appeal of the Revenue is dismissed.

9. In the result, the appeal of the assessee is partly allowed.

Coming to ITA No. 3336/Ahd/2014 an appeal by the Revenue for A.Y. 2009-10

10. At the outset we note that the issue raised by the Revenue in its grounds of appeal has been adjudicated along with assessee's grounds of appeal in ITA No. 3048/Ahd/2014, where we have decided the issue vide paragraph no. 8 of this order partly in favour of the assessee and against the Revenue. For detailed discussion, please refer the aforesaid paragraph of this order. Hence the ground of appeal raised by the Revenue is hereby dismissed.

11. In the result, the appeal of the Revenue is hereby dismissed.

Coming to ITA No. 126/Ahd/2019 an appeal by the assessee for A.Y. 2008-09

12. The assessee has raised following grounds of appeal:

- "1 *Ld. CIT (A) erred in law and on facts confirming addition made by AO of Rs. 3,85, 78,246/- difference of credit balance with one of the creditor Kirloskar Ferrous Industries Ltd. as unaccounted income of the appellant.*
- 2 *Ld. CIT (A) erred in law and on facts confirming addition not appreciating that appellant due to shortage of pig iron material sold goods in cash, made payment through shroff to the creditor and subsequently reconciled the difference preparing regular sale invoices without delivery and corrected the stock position.*
- 3 *Ld. CIT (A) erred in law and on facts confirming entire difference as unaccounted income of the appellant without giving credit of closing stock as on 31.3.2008 as corresponding purchase for making unaccounted sale.*
- 4 *Ld. CIT (A) erred in law and on facts not giving credit of opening stock on against unaccounted sale on the erroneous premise of disturbing appellate finding of A Y 2009/10 not appreciating the accounting principle that there cannot be sale without stock."*

13. Additional ground

"Appellant craves leave to raise this additional ground of appeal before the Hon'ble IT AT. This is a legal ground and therefore as per the decision of Hon'ble Supreme Court in the case of National Thermal Power (229 ITR 383) it can be raised before the Hon'ble ITAT.

1. *Ld. CIT (A) erred in law and on facts enhancing the income of the appellant considering a different source of income not processed by AO against the sanction of powers conferred upon him u/s 251 of the Act."*

14. At the outset, we note that the issues raised by the assessee in its grounds of appeal for the AY 2008-09 are identical to the issues raised by the assessee in ITA No. 3048/Ahd/2014 for the assessment year 2009-10. Therefore, the findings given in ITA No. 3048/Ahd/2014 shall also be applicable for the year under consideration i.e. AY 2008-09. The appeal of the assessee for the assessment 2009-10 has been decided by us vide paragraph No. 8 of this order where we have decided the issue partly in favour of the assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2008-09. Hence, the ground of appeal filed by the assessee is hereby partly allowed.

15. The other issues raised by the assessee vide ground No. 5 & 6 of its appeal are either consequential or premature to decide at this stage. Hence the same are dismissed as infructuous.

16. In the result appeal of the assessee is hereby partly allowed.

Coming to ITA No. 3448/Ahd/2016 an appeal by the assessee for A.Y. 2010-11

17. The assessee has raised following grounds of appeal:

- "1. *Ld. CIT (A) erred in law and on facts in not adjudicating ground no. 4 challenging reassessment order passed by AO being invalid, bad in law and without jurisdiction as conditions required under the provisions of sec. 147 of the Act are not fulfilled. Ld. CIT (A) ought to have quashed the order passed in absence of 'reason to believe' that income escaped assessment.*
2. *Ld. CIT (A) erred in law and on facts in confirming addition made by AO of Rs. 2,93,12,514/- opening stock u/s 69C of the Act simply following appellate order of A Y 2009/10. Ld. CIT (A) ought to have deleted addition allowing opening stock as expenditure against credit of sales.*
3. *Ld. CIT (A) erred in law and on facts in confirming action of AO making addition of opening stock of Rs. 2,93,12,514/- without rejecting books of accounts. Ld. CIT (A) ought to have deleted addition holding stock shown by the appellant as per books of accounts duly audited as correct.*

4. *Ld. IT (A) erred in law and on facts in confirming action of AO invoking provisions of sec. 69C of the Act ignoring stock register, excise records & book results. Ld. CIT (A) ought to have deleted addition when appellant has maintained tally stock register for excise duty that is duly audited."*

18. The first issue raised by the assessee is that the learned CIT(A) erred in not adjudicating the ground no-4 of its appeal changing the validity of assessment framed under section 143(3) read with section 147 of the Act.

19. At the outset, we note that the issue has not been pressed before us by the learned AR for the assessee. Therefore the same is hereby dismissed being not pressed.

20. The next issue raised by the assessee is that the learned CIT(A) erred in confirming the disallowance of opening stock of Rs. 2,93,12,514/- made by the AO by following the finding of CIT(A) for A.Y. 2009-10.

21. In the immediate previous assessment, the learned CIT(A) found that the assessee has made unaccounted sale of Rs. 5,40,17,485/- from accounted stock of 2,93,12,541/- shown as closing stock and from unaccounted purchase of Rs. 2,09,23,747/- only. Accordingly, the AO concluded the there was no closing stock as on 31-03-2009 with the assessee as the same were utilized for making unaccounted sale. However, the for the year under consideration i.e. as on 1st April 2009, the assessee claimed opening stock of Rs. 2,93,12,541/- which resulted in understatement of profit of the year. Thus the AO, in view of finding of leaned CIT(A) for the A.Y. 2009-10 disallowed the opening stock of Rs. 2,93,12,541 and added to the total income of the assessee.

22. On appeal by the assessee, the learned CIT-A also confirmed the order of the AO by observing as under:

"4.2 I have considered the assessment order and the submissions made by the appellant. A perusal of the same shows that the ld. CIT(A) in his order for Asst Year 2009-10 analyzed the transaction of the appellant with KFIL in detail and after examining the same, clearly held that the submissions of the appellant were not verifiable and that the closing stock of Rs.2,93,12,514/- was only reacted in the books

of accounts where it had actually" been sold outside the books. It was held that there was actually no closing stock of this amount. The appellant also has stated in its submissions that there had been unaccounted sales with delivery of goods for which there had been no entries in the books of accounts and to cover up the same, fictitious bills for the same quantity and, value without actual delivery had been prepared. Considering the detailed order of the ld. CIT(A) in Asst. Year 2009-10, the discussion of the AO in her assessment order and the submissions made by the appellant, I am of the view that the AO was justified in making the impugned addition and the addition of Rs.2,93,12,514/- is confirmed. Grounds of appeal Nos. 1 to 6 are dismissed."

23. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

23.1 The learned AR before us contended that the amount of closing stock was brought forward as opening stock in the year under consideration. As such, brought forward opening stock cannot be disturbed without disturbing the closing stock of the earlier year.

23.2 On the other hand learned DR vehemently supported the order of the authority below.

24. We have heard the rival contentions of both the parties and perused the materials available on record before us. Admittedly, the assessee in the books of accounts has shown opening stock of Rs. 2,93,12,514/- which is treated as NIL by the AO and the learned CIT(A). The view of the AO is based upon the finding of learned CIT (A) in the own case of the assessee for immediate previous assessment year i.e. A.Y. 2009-10 where the learned CIT(A) found that the closing stock of Rs. 2,93,12,514/- shown by the assessee was utilized for making unaccounted sale meaning thereby no actual closing stock available. Thus, it means that the opening stock carried forwarded from A.Y. 2009-10 in the year under consideration is also nil. However, we note that the profit declared by the assessee for the A.Y. 2009-10 includes the closing stock of Rs. 2,93,12,514/- but no setoff has been provided by treating the same at nil value, meaning thereby, that the closing stock shown by the assessee was taxed in the previous year i.e. A.Y. 2009-10 and thus again making addition of the same in the year under consideration by disallowing of opening stock will

amount to double taxation which is not warranted under the statute. As such, if the Revenue wants to make addition in the year under consideration on account of opening stock, then it has to provide setoff of the same in the previous year which will be tax natural exercise.

25. Thus, in view of the above we are of the opinion that that no addition is required to be made on account of opening stock as the same is tax natural exercise. Therefore we hereby set aside the finding of the learned CIT(A) and direct the AO to delete the addition made by him. Hence, the ground of appeal raised by the assessee is hereby allowed.

26. The other issues raised by the assessee vide ground no. 5 & 6 of its appeal are either consequential or premature to decide at this stage. Hence the same is dismissed as infructuous.

27. In the result, appeal of the assessee is partly allowed.

Coming to ITA No. 127/Ahd/2019, an appeal by the assessee for AY 2008-09

28. The assessee has raised the following grounds of appeal:

- "1 *Ld. CIT (A) erred in law and on facts confirming penalty levied by AO of Rs.1,31,12,748/- on addition of alleged unaccounted purchases u/s 69C of the Act. Ld. CIT(A) erred in confirming penalty ignoring that appellant neither furnished inaccurate particulars of income nor concealed income.*
2. *Ld. CIT(A) erred in law and on facts confirming penalty on addition of alleged unaccounted purchases by mis-appreciation of factual position duly explained by the appellant."*

29. The only issue raised by the assessee is that the learned CIT(A) erred in confirming the levy of penalty of Rs. 1,31,12,748/- on account of addition made u/s 69C of the Act on alleged unaccounted purchases.

30. At the outset, we note that the quantum addition made by the AO and confirmed by the learned CIT(A) were deleted by us vide paragraph no. 14 of this order in ITA No. 126/Ahd/2019. Thus, the question of concealment of income or furnishing inaccurate particular of income does not arise and therefore the penalty cannot be sustained. Under the provisions of section 271(1)(c) of the Act, the amount of penalty has been specified which shall not be less than hundred percent of the amount of tax sought to be evaded subject to the maximum limit of 300% of such amount. Under explanation 4 to section 271(1)(c) of the Act, the manner for quantifying the amount of tax sought to be evaded has been specified which has direct nexus with the additions/disallowances made during the quantum proceedings. Therefore, where the quantum additions/ disallowances have been deleted, then the manner of quantifying the amount of penalty under explanation 4 to section 271(1)(c) of the Act as discussed above fails. Accordingly, we are of the view that that there cannot be any penalty with respect to the quantum additions which have been deleted. Thus, the ground of the assessee's appeal is hereby allowed.

31. In the result, the appeal of the assessee is allowed.

Coming to ITA No. 844/Ahd/2019, an appeal by the assessee for A.Y. 2009-10

32. The assessee has raised following grounds of appeal:

"1. *Ld. CIT (A) erred in law and on facts in levying penalty u/s 271 (1)(c) of the Act of Rs. 83, 97, 220/- on enhancement of income by estimation of GP and addition of alleged purchases outside the books of account u/s 69C of the Act by appellate authority. Ld. CIT (A) ought not to have levied any penalty in absence of appellant furnishing inaccurate particulars of income. It be so held now.*

2 *Ld. CIT (A) erred in law and on facts levying penalty without appreciating the fact that addition of GP rejecting explanation of the appellant of actual GP earned on issuance of sales bills in various years already offered and taxed ought not be treated as furnishing of inaccurate particulars of income Ld. CIT (A) ought not to have held Explanation 1 to section applicable to facts of the case when the appellant discharged initial onus cast under law. It be so held now.*

3 *Ld. CIT (A) erred in law and on facts in levying penalty on addition of alleged purchases outside the books made on technical basis without any cogent evidence brought on the record. Ld. CIT (A) ought not to have automatically levied penalty on additions made by rejecting explanation offered with documentary evidences factually establishing absence of any alleged purchases outside the books. It be so held now."*

33. The only effective issue raised by the assessee is that the learned CIT(A) erred in confirming the levy of penalty under section 271(1)(c) of the Act.

34. The facts in brief are that the AO during the assessment proceeding found that there was difference in closing balance of creditor namely M/s KFIL viz-a-viz the amount shown by the KFIL in their books of account. Thus, the AO in absence of proper explanation and reconciliation by the assessee treated the difference amount as unexplained cash credit under section 68 of the Act.

35. The learned CIT(A) in appellate proceeding held that no addition under section 68 of the Act can be made on alleged difference in closing balance of creditor in assessee's books viz-a-viz creditor books. However the CIT(A) found that difference in closing balance arises due to proceeds of cash sale of Rs. 5,40,17,485/- which were directly deposited to the bank of creditor M/s KFIL without recording the same in the books of assessee. Thus the learned CIT(A) made the addition of estimated profit of Rs. 37,81,224/- on account of unaccounted sale of Rs. Rs. 5,40,17,485/-. Besides this the learned CIT(A) was also of the view that there was no sufficient inventory available in the books of the assessee to meet the unaccounted sale of Rs. 5,40,17,485/-. Accordingly the learned CIT(A) drawn inference that assessee made unaccounted purchase which was worked out at Rs. 2,09,23,747/- and in absence of source of purchase the addition of Rs. 2,09,23,747/- under section 69C of the Act was made. Thus, the learned CIT(A) made total addition of Rs. 2,47,04,971/- and initiated penalty proceeding under section 271(1)(c) of the Act for furnishing inaccurate particular of income and thereby concealing the income.

35.1 The assessee during the penalty proceeding submitted that it neither concealed income nor furnished inaccurate particular of income. As such

addition of estimated GP was made on wrong assumption of submission made by it. The income generated on sales invoice issued were duly offered to tax. Therefore, no penalty under section 271(1)(c) of the Act is liable to be levied on account of addition made on estimated basis.

35.2 It was further submitted that the addition made under section 69C on alleged unaccounted purchases is not tenable, therefore no penalty can be levied.

35.3 However, the learned CIT(A) disagreed with the submission of the assessee and held that the CIT(A) in quantum proceeding has given clear finding that that the assessee made unaccounted sale and rightly estimated profit. Similarly learned CIT (A) after giving setoff of the inventory shown in books of account worked out the value of unaccounted purchase and sources of such unaccounted purchases were not explained by the assessee. In the return filed by the assessee, all these informations were not available. Thus, it is clear case of furnishing inaccurate particulars of income by the assessee. Accordingly, the learned CIT(A) after making reference to the judicial precedents laid down by the Hon'ble Supreme court in case of CIT vs. Reliance Petroproducts Pvt Ltd 322 ITR 158 and in case of Dharmendra Textile Processor 306 ITR 277 held that the assessee has furnished inaccurate particular of income and levied penalty of Rs. 83,97,220/- being 100% of the amount of tax sought to be evaded.

36. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

36.1 The learned AR before us contended that there was no inaccurate particulars of income furnished by the assessee and therefore the question of levying the penalty does not arise.

36.2 On the other hand, the learned DR vehemently supported the order of the authorities below.

37. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly the learned CIT(A) levied penalty under section 271(1)(c) of the Act on two different addition made by him/her being estimated profit of Rs. 37,81,224/- on unaccounted sale and unexplained purchase of Rs. 2,09,23,747/- only.

37.1 As far as the addition of Rs. 2,09,23,747/- under section 69C of the Act in concerned, we note that the quantum addition has been deleted by us vide paragraph no. 8 of this order in the assessee's appeal bearing ITA No. 3048/Ahd/2014. Once, the quantum addition on the basis of which penalty levied itself stand deleted, the question of concealment of income or furnishing inaccurate particular of income does not arise and therefore the penalty cannot be sustained.

37.2 Coming to levy of penalty on the addition of Rs. Rs. 37,81,224/- being estimated profit on account of alleged unaccounted sale. In this regard we find that the quantum proceeding and the penalty proceeding are different. Any addition or disallowances under quantum proceeding do not ipso facto empower the revenue authority to levy penalty under section 271(1)(c) of the Act. Further the addition made was based on estimation and it settled position of law by the various Hon'ble High court that the no penalty under section 271(1)(c) can be sustained in case of estimated addition. At this juncture we feel pertinent to refer the judgment of Hon'ble Allahabad High Court in case of *CIT v. Norton Electronics System Pvt. Ltd* [2014] 41 taxamm.com 280 [Allahabad] where the Hon'ble bench observed as under:

6. Needless to mention that the quantum proceedings and penalty proceedings are the independent proceedings as per the ratio laid down in the case of Durga Kamal Rice Mills v. CIT [2004] 265 ITR 25/[2003] 130 Taxman 553 (Cal.). When the addition is made on the estimate basis, no penalty is sustainable as per the ratio laid down in the following cases:—

1. *CIT v. Raj Bans Singh* [\[2005\] 276 ITR 351 \(All.\)](#)
2. *CWT v. Sanghi Brothers (India) Ltd.* [\[2008\] 301 ITR 129 \(M.P.\)](#);
3. *CIT v. Adamkhan* [\[1997\] 223 ITR 264/95 Taxman 215 \(Mad.\)](#); and
4. *Harigopal Singh v. CIT* [\[2002\] 258 ITR 85/125 Taxman 242 \(Punj. & Har.\)](#)

In view of above, by considering the totality of the facts and circumstances of the case, we find no reason to interfere with the impugned order passed by the Tribunal and the same is hereby sustained along with the reasons mentioned therein. No substantial question of law is emerging from the impugned order.

37.3 Similarly the Punjab and Haryana High Court in the case of *CIT vs. Modi Industrial Corpn.* [2010] 195 Taxman 68 has also held that where the assessment of the assessee was completed on estimated basis penalty under section 271(1)(c) of the Act was not imposable with respect to the additions made on such estimate by the Assessing Officer.

37.4 Likewise the Patna High Court in case of *CIT vs. Kailash Crockery House* [\[1999\] 235 ITR 544/107 Taxman 386](#), also in identical circumstances held as under:

For the assessment year 1979-80, the Assessing Officer enhanced the gross profit rate adopted by the assessee, running crockery business. As a result he made certain trading additions. In view of discrepancy between the income returned and income assessed, the Assessing Officer imposed penalty under section 271(1)(c). On appeal, the AAC affirmed the order of the Assessing Officer. On second appeal, the Tribunal specifically found that there was no finding of concealment of income by the lower authorities, and held that sustenance of addition by the Tribunal did not imply that the books of account produced contained inaccurate particulars of total income and that the assessee had given no explanation for decline in gross profit rate. As a result, the Tribunal deleted the penalty imposed.

37.5 Therefore in view of the above judicial precedent we are of the opinion that no penalty under section 271(1)(c) of the Act can be sustained on account of addition of Rs. 37,81,224/- based on estimation. Accordingly we hereby set aside the order of the learned CIT(A). Hence the grounds of appeal raised by the assessee is allowed.

38. In the result appeal, of the assessee is allowed.

Coming to ITA No. 128/Ahd/2019 an appeal by the assessee for A.Y. 2010-11

39. The assessee has raised following grounds of appeal:

- "1 *Ld. CIT (A) erred in law and on facts confirming penalty levied by AO of Rs.90,87,566/- on disallowance of opening stock. Ld. CIT (A) erred in confirming penalty ignoring that appellant neither furnished inaccurate particulars of income nor concealed income.*
- 2 *Ld. CIT (A) erred in law and on facts confirming penalty on disallowance of opening stock without appreciating that as per audited books of account opening stock with quantity and value brought forward from earlier years were sold during the year."*

40. The only issue raised by the assessee is that the learned CIT(A) erred in confirming the levy of penalty under section 271(1)(c) of the Act for Rs. 90,87,566/- on account of disallowances of opening stock.

41. At the outset we note that the quantum additions made by the AO and confirmed by the learned CIT(A) were deleted by us vide paragraph No. 24 of this order in ITA no. 3448/Ahd/2016. Thus, the question of concealment of income or furnishing inaccurate particular of income does not arise and therefore the penalty cannot be sustained. Under the provisions of section 271(1)(c) of the Act, the amount of penalty has been specified which shall not be less than hundred percent of the amount of tax sought to be evaded subject to the maximum limit of 300% of such amount. Under explanation 4 to section 271(1)(c) of the Act, the manner for quantifying the amount of tax sought to be evaded has been specified which has direct nexus with the additions/ disallowances made during the quantum proceedings. Therefore, where the quantum additions/ disallowances have been deleted, then the manner of quantifying the amount of penalty under explanation 4 to section 271(1)(c) of the Act as discussed above fails. Accordingly, we are of the view that that there

cannot be any penalty with respect to the quantum additions which have been deleted. Thus, the ground of the assessee's appeal is hereby allowed.

42. In the result, appeal of the assessee is allowed.

43. In the combined result, ITA Nos. 3048/Ahd/2014, 3448/Ahd/2016 & 126/Ahd/2019 are partly allowed & ITA Nos. 127/Ahd/2019, 128/Ahd/2019 & 844/Ahd/2015 are allowed and ITA No.3336/Ahd/2014 is dismissed.

This Order pronounced in Open Court 31/08/2022

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER
Ahmedabad: Dated 31/08/2022

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

TRUE COPY

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।