

आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

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

श्री अमित शुक्ला, न्यायिक सदस्य एवं

श्री राजेन्द्र, लेखा सदस्य के समक्ष ।

**BEFORE SHRI RAJENDRA ACCOUNTANT MEMBER AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER,**

ITA No. : 3734/Mum/2010

(Assessment year: 2007-08)

ITA No. : 4389/Mum/2011

(Assessment year: 2008-09)

Dy. Commissioner of Income Tax -25(2), C-11, 1 st Floor, Pratyakshkar Bhavan, Bandra (East), Mumbai -400 051	Vs	Shri Kantilal P Shah, 701, Bhavik Darshan, Rokadia Lane, Mandpeshwar Road, Borivali(W), Mumbai -400 092
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri R A Dhyani
Respondent by	:	Shri M Shah

ITA No. : 4285/Mum/2011

(Assessment year: 2008-09)

Shri Kantilal P Shah, Mumbai -400 092 स्थयी लेखा सं.:PAN: ACJPS 8637 G	Vs	Dy. Commissioner of Income Tax -25(2), Bandra (East), Mumbai -400 051
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri M Shah
Respondent by	:	Shri R A Dhyani

सुनवाई की तारीख /Date of Hearing : 20-10-2015

घोषणा की तारीख /Date of Pronouncement : 24-11-2015

आदेश
ORDER

अमित शुक्ला, न्या. स.:

PER AMIT SHUKLA, JM:

Revenue has filed the appeal against impugned order dated 12.03.2010 for the quantum of assessment passed u/s 143(3) for the assessment year 2007-08; and cross appeals have been filed by the revenue as well as assessee against impugned order dated 09.03.2011 passed by CIT(A)-35, Mumbai for the quantum of assessment passed u/s 143(3) for the assessment year 2008-2009.

Since the issues involved in all the appeals are common, therefore, they were heard together and are being disposed off by way of this consolidated order.

2. We will first take-up revenue's appeal in ITA No. 3734/Mum/2010 for the assessment year 2007-08, vide which following grounds have been raised :-

- “i) On the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in deleting the addition of Rs. 19,59,477/- made by the AO on account of disallowance of part of the commission claimed by the assessee.*
- ii) On the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in deleting the addition of Rs. 2,97,048/- made by the AO on account of disallowance of part of the commission claimed by the assessee.*
- iii) On the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in deleting the addition of Rs. 4,65,063/- made by the AO on account of disallowance of part of the interest claimed by the assessee”.*

3. Brief facts *qua* the issue raised in ground no. 1 are that, assessee is an individual engaged in the business of importing & reselling of hardware from his proprietorship concern, M/s Prince Decoware Industries. The assessee had declared the net profit of Rs.19,17,871/- on total turnover of Rs. 2,82,98,825/-i.e., @ 5.54%. The AO noted that there was fall in the net profit rate but the gross profit of the assessee was Rs. 78,22,139/- which was though bit higher than the gross profit declared in the earlier year. He required the assessee to justify the same after producing purchase and sale bills for the entire year. The assessee as noted by the AO, could produce purchase and sale bills for few months on the ground that it was not possible to produce all the books of account and the entire bills because of very heavy volume and the assessee also could not furnish stock register. Thus, in absence of production of entire books of accounts, the AO held that the book

results are liable to be rejected u/s 145 and he made the addition of Rs. 19,54,479/- after observing and holding as under :-

In absence of production of books of accounts as required to verify the correctness of the profit declared, the books results declared cannot be accepted. The same is therefore rejected u/s 145 of the Act. Now to determine the correct profit, verification of few of the bills produced by the assessee was carried out and it was noticed that in respect of Handles imported from China as per purchase bill of Beijing Minda Trading Co. dated 02.11.2006 the purchase price of 32 MM size handle was of 0.0460 dollar per handle. In rupee terms after adding 30% purchases incidental cost including customs duty the cost to the assessee works out to Rs.3 per handle whereas the same is sold by assessee at Rs.8/- per handle. The margin of profit thus in this item is of 62.5% on sales price. Similarly the purchase cost of 9510-100 handle works out to Rs.10.74 per handle where as the sales made is at Rs.36/- per handle. Thus, the gross profit margin in this item is also almost 30% The AR of the assessee when confronted on this issue stated that there are number of items assessee deals in where in profit margin is very low and profit declared is proper and adequate. The submission of the assessee is found to be general and without any evidences. Not all the bills and stock register were produced for verification inspite of specifically asked to do. Having regard to all these facts, and even after giving due weight to the submission of the AR, that GP may be lower in some other items traded by the assessee, the overall gross profit of 19.99% declared by the assessee cannot be accepted to be adequate and correct especially when GP rate in one item mentioned hereinabove, is found to be so high. The gross profit of 25% is therefore estimated to be the correct and fair gross profit rate having regard to overall facts of the case. The gross profit @ 25% works out to Rs.97,81,616/- on the declared turnover. The assessee has declared gross profit of Rs.78,22,1391-.The difference of Rs.19,59,477/- is therefore added to the total income of the assessee for under reported gross profit”.

4. Before the CIT(A), the assessee after submitting the computation of trading result of the last year and the current year submitted that not only the net profit but also the gross profit ratio is also high. Apart from that, the assessee has been maintaining

regular books of accounts which are subject to Audit u/s 44AB and also explained that the Ld. AO has taken selective items for comparing the GP. The turnover of the sample selected by the AO was very insignificant. To rebut the finding of the AO, the assessee submitted the trading result of certain items along with GP rate which has been incorporated at page 3 of the appellate order. Regarding slight fall in net profit ratio, it was submitted that there was certain increase in the borrowings which has enhanced the interest expense, however, if overall net profit ratio to sales is seen then, the net profit has slightly increased in this year. If comparability with earlier year is made then the overall net profit has increased in this year. Such a comparability of net profit ratio to sale for assessment year 2006-07 and 2007-08 have been given at page 8 of the appellate order.

5. The Ld. CIT(A) after considering the submissions of the assessee, finding recorded by the AO as well as material on record, noted that, assessee has maintained regular books of account, details, bills etc. Tax Audit Report clearly mentions that day-to-day stock register has not been maintained, but whether such a stock register at all was required has not been justified by AO. The AO can invoke section 145 only if the books of accounts were incomplete or assessee is following incorrect method of accounting leading to incorrect determination of the total income. The assessee has otherwise maintained the entire purchase and sale bills, details of stock and if he had any doubts then he could have called upon bills on sample basis from the entries given in the ledger accounts. Assessee's gross profit was also better this year. Relevant observation by the CIT(A) in this regard for deleting the addition is as under :-

3.3 I have considered the submissions of the representative and the stand taken by the AO. The AO has mentioned that it was stated by the representative that the stock register is maintained but the same was not traceable. However, it is seen from the tax audit report that the

appellant has not maintained any day to day stock register. Thus the remarks of the AO are incorrect. The AO can invoke section 145 only if the books of account were either incomplete or incorrect and the method of accounting followed by the appellant is not correct to determine the total income of the appellant but the AO did not examine the applicability of section 145 in the light of the provisions contained in section 145. Admittedly the appellant produced purchase and sales bills for few products and if the A.O. wanted to reject the books of accounts, he ought to have compared the purchase bills and sales bills with the ledger account and established that there was either inflation of purchase or suppression of sales which was not done. The A.O. selected few items of handles and found that the appellant earned profit of 30% but he has nowhere mentioned that the purchase value and the sale value were not correctly recorded in the ledger maintained by the appellant. If the appellant had correctly recorded the purchase figure and sales figure in the ledger with reference to the purchase bills and sales bills, it means that the appellant had already admitted the actual profit earned in the transaction verified by the AO. When he accepted the transactions in respect of items verified by him, there is no reason to reject the other transactions entered in the same books of accounts without pointing out any mistake. As contended by the representative, the appellant has earned gross profit of 11 to 12% in few items as shown above in para 3.2 which the AO completely ignored. I find that the AO has resorted to summary rejection of books of accounts without bringing adequate material on record. Further, the gross profit admitted by the appellant is higher when compared to the last year and even the net profit is comparable with the net profit of last year and it was less during this year only on account of the fact that the interest claimed during this year was higher. I find that there is no reason to reject the books of account which were audited and the points made by the AO in the assessment order are not sufficient to reject the books of accounts. In the circumstances, the addition is deleted”.

6. After hearing both the parties and on perusal of the impugned order and material placed on record, we find that the main basis for rejecting the trading result of the assessee by the AO was that, the assessee has not maintained stock register and the entire purchase and sale bills were not produced. The assessee's contention had been that, it has maintained detailed ledger account of purchase and sale and on sample basis sale and purchase bills for few months were filed. It was submitted that due to huge volume it was practically not possible to produce the entire

bills, but if the AO would have insisted, the same would have been filed/ produced before him. We agree with such a contention of the assessee, because, *firstly*, the AO looking to the huge volume of bills and details could have asked for purchase and sale bills on test check basis i.e., on sample basis to tally as per the entries in the books of accounts, which he has not done; *secondly*, the AO has applied the Gross Profit Rate of 25% without considering the assessee's past history or any other material or comparability; before the CIT(A) and before us, it has been submitted that the gross profit ratio was 19.99% as compared to 18% in the earlier years and overall net profit has also increased. Thus, there may not be any prima facie inference that assessee's profit is not in commensurate with the earlier years' so as to doubt the correctness of the profit shown by the assessee; and *lastly*, the manner in which the AO has worked out the gross profit on the basis of selected samples is also not a correct approach and if going by the trading result and gross profit of various items, it can be very well held that assessee's profit and trading results are much better this year, hence, the observation and the finding of the CIT(A) cannot be deviated from and accordingly, the same is affirmed. Thus, ground no. 1 as raised by the revenue is dismissed.

7. Coming to the issue raised in ground no. 2, i.e. addition of Rs. 2,91,048/- on account of disallowance of commission, it is seen that the AO has made the addition on the ground that commission has been paid to relatives and the major portion of the sales commission remained unpaid at the end of the year. The AO has further noted that, the assessee has paid commission @ 3.25% of the sales as against the rate of 2.5% paid in the earlier years. Thus, he disallowed the excess of 0.75% of the commission paid by the assessee to all the parties.

8. Before the CIT(A), assessee submitted that he has paid uniform commission rate to all the parties including the relatives. Out of 11 persons, only 2 persons were related to the assessee, hence no adverse inference should be drawn. The assessee has enhanced the commission rate in this year so that the agents should work hard to increase the turnover and in fact, such payment of commission has led to enhancement of the turnover in this year. All the payments were made through account payee cheques on which TDS have been deducted. The Ld. CIT(A) first of all observe that the AO has wrongly presumed that the assessee has paid commission @ 3.25%, whereas, the assessee has only paid commission @ 3% on the turnover. Looking to the fact that the assessee has paid uniform commission to all the parties and on the face of the material on record such a payment were genuine and thus, he deleted the disallowance.

9. After considering the rival contention of the parties and on perusal of the impugned material on record, we find that AO has made an *ad-hoc* disallowance on this score on the ground that *firstly*, there is enhancement of rate of commission from 2.5% to the rate of 3.25%; *secondly*, some of the commission agents are also the relatives of the assessee. Such a basis drawn by the AO for making the disallowance cannot be sustained for the reason that, the Ld. CIT(A) has clarified that overall rate of commission paid is @ 3% on the total turnover and not 3.25% and the commission has been paid uniformly to all the parties including the relatives. Out of 11 party, only 2 are relatives, therefore, it cannot be held that any unreasonable payment have been made to the relatives as compared to the outsiders. Such an *ad-hoc* disallowance of payment of commission made by the AO cannot be sustained and finding of the CIT(A) is thus, affirmed. Accordingly, ground no. 2 of the revenue is dismissed.

10. Now, coming to the addition of Rs. 4,65,063/- as raised vide ground no. 3 on account of disallowance as part of interest claimed by the assessee. The relevant facts are that the assessee has claimed interest to the extent of Rs. 27,90,312/- in the profit and loss account. The AO noted that the assessee has paid interest @ 12% to various parties as against rate of 10% paid in the earlier years. Accordingly, he disallowed excess rate of interest @ 2% which worked out to Rs. 46,65,063/-.

11. Before the CIT(A), the assessee had submitted that the interest rate paid on unsecured loan @ 10% was too low looking to the fact the assessee had availed bank loan on which interest charged was @ 13.25% which too was against hypothecation of stock. If one compares the bank rate, then the interest rate of 12% per month was very reasonable. The ld. CIT(A) accepted the assessee's contention and held that *firstly*, the genuineness of the payment of interest has not been disputed and looking to the bank rates which were 12% to 15% the payment of 12% per annum is reasonable and cannot be held to be excessive.

12. We also find that, the reason given by the CIT(A) for deleting the disallowance of interest is absolutely correct, because the rate of interest paid by the assessee on unsecured loan during the year @ 12% is still quite less as compared to the interest paid to the bank @13.25% which was on hypothecation of stocks. Thus, the reasoning of the CIT(A) on this score is affirmed and ground no. 3 of the revenue's appeal stands dismissed.

13. In the result, appeal of the revenue for AY 2007-08 stands dismissed.

14. Now, we will take-up revenue's appeal for AY 2008-09 in ITA No. 4389/Mum/2010 vide which following ground has been raised:-

- “i) On the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in deleting the addition of Rs. 20,41,043/- made by the AO on account of estimation of gross profit at 25% as compared to 20.81% declared by the assessee without appreciating the fact that the assessee has not maintained proper stock records.
- ii) On the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in deleting the addition of Rs. 2,62,831/- made by the AO on account of disallowance of portion of the commission claimed by the assessee in his profit & loss account.
- iii) On the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in deleting the addition of Rs. 12,52,158/- made by the AO on account of disallowance of portion of the interest claimed by the assessee in his profit & loss account”.

15. Besides this, the revenue has also raised additional ground, which reads as under :-

“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not upholding the rejection of books of accounts by the Assessing Officer u/s 145 of the IT Act, without appreciating the fact that during the assessment proceedings, the assessee had not maintained Stock Register and failed to produce bills/vouchers for verification”.

16. It has been admitted by both the parties that all the grounds raised by the revenue are exactly similar to the ground raised in earlier years hence the finding given therein will apply *mutatis mutandis* in this appeal also.

17. After considering relevant finding given in the impugned order, we find that so far as issue raised in ground no. 1, the AO has made addition exactly on similar ground and has estimated the gross profit rate of 25% compared to 20.81% declared by the assessee. The Ld. CIT(A) has deleted the said addition after observing and holding as under :-

“I have considered the submissions of the representative and the stand taken by the AO. The AO has mentioned that it was stated by the representative that the stock register is maintained but the same was not traceable. However, it is seen from the tax audit report that the appellant has not maintained any day to day stock register. Thus the remarks of the AO are incorrect. The AO can invoke section 145 only,

if the books of account were either incomplete or incorrect and the method of accounting followed by the appellant is not correct to determine the total income of the appellant but the AO did not examine the applicability of section 145 in the light of the provisions contained in section 145. Admittedly the appellant produced purchase and sales bills for few products and if the AO wanted to reject the books of accounts, he ought to have compared the purchase bills and sales bills with the ledger account and established that there was either inflation of purchase or suppression of sales which was not done. The AO selected few items of handles and found that the appellant earned profit of 30% but he has nowhere mentioned that the purchase value and the sale value were not correctly recorded in the edger maintained by the appellant. If the appellant had correctly recorded the purchase figure and sales figure in the ledger with reference to the purchase bills and sales bills, it means that the appellant had already admitted the actual profit earned in the transactions verified by the AO. When he accepted the transactions in respect of items verified by him, there is no reason to reject the other transactions entered in the same books of accounts without pointing out any mistake. As contended by the representative, the appellant has earned gross profit of 11 to 12% in few items as submitted vide Annexure to letter dated 8-12-2010 which the AO completely ignored. I find that the AO has resorted to summary rejection of books of accounts without brining adequate material on record. Further, the gross profit admitted by the appellant is higher when compared to the last year and even the net profit is comparable with the net profit of last year and it was less during this year only on account of the fact that the interest claimed during this year was higher. I find that there is no reason to reject the books of account which were audited and the points made by the AO in the assessment order are not sufficient to reject the books of accounts. In the circumstances, the addition is deleted”.

18. Since reasoning given by the AO for rejecting the books of accounts and enhancing the gross profit rate is the same, therefore, the finding given in AY 2007-08 will apply here in this year also. Further, the finding of the CIT(A) as above, is based on correct appreciation of facts and law and there is no reason to deviate from such a finding. Thus, we do not find any merit in the ground raised by the revenue, accordingly, ground no. 1 along with additional ground raised by the revenue are treated as dismissed.

19. As regards the issue raised in ground no. 2 & 3, exactly similar reasons have been given by the AO as was given in AY

2007-08. Accordingly, the finding given in AY 2007-08 will apply here and in view of the reasoning given therein, we uphold the order of the CIT(A) and dismissed grounds 2 & 3 raised by the revenue. Accordingly, appeal of the revenue is dismissed.

20. Now, we will take-up the Cross appeal in assessee's case in ITA No. 4285/Mum/2011 for AY 2008-09, vide which following grounds have been raised :-

“1. Under the facts and circumstances of your appellant, the Learned CIT(A) has erred in confirming the disallowance of interest u/s 40(a)(ia) made by the Learned AO of Rs. 9,43,446/-.

10.1 The Learned CIT(A) has erred confirming disallowance of interest of Rs. 9,43,446/- by invoking section 40(a)(ia) of IT Act, 1961”.

21. The AO noted that assessee has debited interest paid of Rs. 32,35,989/-, when required to file the details of interest paid and details of TDS made, he noted that the assessee has shown payment of interest to various parties but had not deducted TDS on the interest paid amounting to Rs. 21,95,604/-. The assessee's case had been that, it has not deducted the TDS as parties have furnished declaration in Form No. 15G/15H. The AO after noting the names of various parties and amount paid and also form 15G and 15H absolved that these forms were not filed before the Department, hence they are not valid. Accordingly, he disallowed the amount of Rs. 21,95,604/- u/s 40(a)(ia).

22. Before the CIT(A), the assessee reiterated the said submission he made before the AO and contended that the assessee had accepted the Form No. 15G & 15H from various persons and income of some of them were below taxable limit, the details of which have been incorporated at page 7 of the appellate order. The Ld. CIT(A), after perusing the entire details of the interest payment and taxable limit of the various persons, noted that payment made to five parties for sum aggregating to Rs. 9,43,446/- were to be disallowed, because these parties had a

taxable income and assessee has wrongly accepted the From No. 15G & 15H.

23. Before us, the Ld. Counsel submitted that, the provision of section 40(a)(ia) cannot be applied, because the parties to whom the assessee has paid interest have given Form 15G & 15H and in wake of such Form, the assessee was not liable to deduct TDS. The fact that these Forms 15G & 15H were given by these parties is not in dispute. So far as the parties to whom the interest aggregating to Rs. 9,43,446/- has been made / paid which has been disallowed by the CIT(A) u/s 40(a)(ia), he submitted that these parties have offered the income to the Department and all these receipts have been included in their return of income. Therefore, in view of the Second *Proviso* to section 40(a)(ia) no disallowance can be made. With respect to the applicability of such *Proviso* with retrospective effect, the Ld. Counsel strongly relied upon the decision of Hon'ble Delhi High Court in the case Landmark Townships Pvt Ltd, reported in of 377 ITR 635.

24. Ld. DR on the other hand, strongly relied upon the order of the CIT(A) and submitted that, it is an admitted fact that in the case of the five parties, From No. 15G & 15H was not called for as these parties had taxable income. Therefore, disallowance u/s 40(a)(ia) have rightly been held.

25. After considering the rival contention and on perusal of the record, we find that out of disallowance of Rs. 21,95,605/- the same has been reduced to Rs. 9,43,446/- on the ground that in the case, five such party's the income was above taxable limit. Before us, the Ld. Counsel made a statement that these recipient have included the said amount on interest in the return of income, therefore, such a disallowance cannot be made in view of the newly inserted *Proviso* to section 40(a)(ia) w.e.f. 1.4.2013. The Hon'ble Delhi High Court in the case of Landmark Townships Pvt Ltd (*supra*) has held that *such a Proviso* has to be given retrospective

effect. Thus, respectfully following the decision of Delhi High Court, we hold that in case recipients have included 'interest income' in their return of income then 'no disallowance should be made'. Accordingly, we direct the AO to verify the contention of the assessee and give consequential relief. Accordingly, ground raised by the assessee is treated as partly allowed.

26. In the result, both the appeal of the revenue are dismissed as appeal of the assessee is partly allowed.

Order pronounced in the open court on 24th November, 2015.

Sd/-
(राजेन्द्र)
लेखा सदस्य
(RAJENDRA)
ACCOUNTANT MEMBER

Sd/-
(अमित शुक्ला)
न्याईक सदस्य
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai, Date: 24th November, 2015

प्रति/Copy to:-

- 1) अपीलार्थी /The Appellant.
 - 2) प्रत्यर्थी /The Respondent.
 - 3) The CIT(A) -41, Mumbai.
 - 4) The CIT- Central -III, Mumbai.
 - 5) विभागीय प्रतिनिधि "A", आयकर अपीलीय अधिकरण, मुंबई/
The D.R. "A" Bench, Mumbai.
 - 6) गार्ड फाईल \
- Copy to Guard File.

आदेशानुसार/By Order

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उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, मुंबई
Dy./Asstt. Registrar
I.T.A.T., Mumbai

*चव्हाण व.नि.स

*Chavan, Sr.PS