

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकर अपील सं./ITA No. 388/SRT/2017

निर्धारणवर्ष/Assessment Year: (2012-13)

(Physical Court Hearing)

The ITO, Ward-2(1)(4), Surat.	Vs.	Venus Upcountry Trading Pvt. Ltd., 6-1181, Dalia Sheri, Mahidharpura, Surat-395003.
(Appellant)		(Respondent)
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AACCV7694N		

Assessee by	Shri Sapnesh Sheth, CA
Respondent by	Shri Vinod Kumar, Sr. DR
Date of Hearing	21/09/2022
Date of Pronouncement	23/11/2022

आदेश / ORDER

PER DR. A. L. SAINI, AM:

Captioned appeal filed by the Revenue, pertaining to Assessment Year (AY) 2012-13, is directed against the order passed by the Learned Commissioner of Income Tax (Appeals)-2, Surat [in short “the Id.CIT(A)”], in Appeal No. CAS/2/165/2015-16, dated 06.10.2017 which in turn arises out of an order passed by Assessing Officer under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”), dated 31.03.2015.

2. The grounds of appeal filed by the Revenue are as follows:

“i) On the facts and in the circumstance of the case and in law, the Ld. CIT(A) erred in restricting the addition of Rs.1,73,98,920/- being unexplained purchases to Rs.12,29,604/- .

ii) On the facts and in the circumstance of the case and in law, the Ld. CIT(A) ought to have appreciated the fact that the assessee failed to furnish confirmation from 5 out of 6 creditors to whom notices u/s. 133(6) were issued by AO. These confirmations were not filed before the AO during assessment proceedings as well as during the remand proceedings and not before the Ld. CIT(A) during appellate proceedings, (para 6.1.4 of appeal order no CAS/2/165/15-16 dated 06/10/2017.

iii) On the facts and in the circumstance of the case and in law, the Ld. CIT(A) ought to have uphold the findings of the AO that the assessee could not furnish the confirmation of creditors. Ld. CIT(A) ought to have verified all the 19 creditors totalling to Rs.6,95,95,718/-. Alternatively, Ld. CIT(A) ought to have directed the AO to re-examine all the 19 creditors because there was larger possibility of unexplained purchase as the assessee had failed to furnish documentary evidence in respect of 5 out of 6 creditors to whom notices u/s. 133(6) were issued.

iv) On the facts and in the circumstance of the case and in law, the Hon'ble ITAT is requested to issue directions to re-examine all the 19 creditors in this case total amounting to Rs.6,95,95,718/-.

v) On the facts and in the circumstance of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 53,43,257/- on account of unexplained foreign commission expenses. Supporting evidences in respect of these expenses were not produced before the AO.

vi) On the facts and in the circumstance of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.26,91,423/- on account of "advance against purchases". The assessee had failed to explain the nature and purpose of advance and did not submit required documents.

vii) On the facts and in the circumstance of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the assessee company has not provided any details regarding the purchases to be made for M/s. Atlas Haryana Ltd.

viii) On the facts and in the circumstances of the case and in Law, the Ld.CIT(A), Surat ought to have upheld the order of the Assessing Officer. It is, therefore, prayed that the order of the Ld.CIT(A)-2, Surat may be set-aside and that of the Assessing Officer's order may be restored."

3. Ground no.1 to 4 raised by the revenue relates to restricting the addition of Rs.1,73,98,920/-.

4. Succinct facts are that during the assessment proceedings, Assessing Officer issued show cause notice under section 133(6) of the Act to the purchase parties. However, none of the parties have provided any confirmations. Further, assessee was specifically provided reasonable opportunity to comply with such non-compliance of creditors during the course of show cause notice served upon the assessee for which no reply has been provided by the assessee, therefore Assessing Officer, considering such non-compliance, added Rs.1,73,98,930/- (i.e. 25% of Rs.6,95,95,718/- (purchases).

5. Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) who has restricted the addition from Rs.1,73,98,930/- to Rs.12,29,604/-, observing as follows:

“The appellant submitted that the complete payments were made by account payee cheques and the AO has not pointed out in the assessment order that which of the seller parties were issued notices u/s 133(6) and who had not complied and without giving any finding or details, 25% of the purchases have been disallowed in an arbitrary manner.

6.1.2. On the perusal of details, it is observed that the AO has passed a very cryptic, unclear and vague assessment order and has made huge additions without giving any findings or reasons in the assessment order. Huge additions have been made without bringing facts on record. On this issue, it cannot be ascertained that how many parties were sent notices u/s 133(6) during the assessment proceedings, how many confirmed the transactions, etc. Hence the AO was directed vide this office letter dtd.29.12.2016 to furnish a remand report as following:-

“On the perusal of the details on record, filed during the course of the assessment and appellate proceedings, certain issues need further clarifications. The appellant had shown purchases made during the year under consideration. Assessing officer has observed that the confirmations were not received from the purchase parties but no detail have been mentioned that how many parties from whom purchase have been made; to how many parties notices u/s 133(6) have been issued etc.

You are directed to examine the case records & find out the details of the purchasing parties to whom the letter u/s 133(6) was issued for confirmation and who did not filed confirmatory letters during the course of the assessment proceedings in response to notice u/s 133(6). You are directed to furnish the above details in the following proforma:

<i>Sl. No.</i>	<i>Name of the purchasing party</i>	<i>Purchase amount</i>	<i>Letter u/s.133(6) issued (Issued/Not Issued)</i>	<i>Confirmation received or not with date</i>
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6.1.3. The AO vide his letter dt.31/01/2017 submitted his remand report. The copy of the remand report was provided to the appellant vide this office letter dtd. 10/02/2017. In the remand report, the AO informed that he had issued notices u/s 133(6) to six parties and no notice was issued to remaining 13 parties. Out of the six parties, one party namely Akil Enterprise had confirmed the transactions while the following five parties did not file any confirmations:-

<i>Sr. No.</i>	<i>Name of the purchasing party</i>	<i>Purchase amount</i>	<i>Letter u/s 133(6) issued (Issued/Not Issued)</i>
<i>1</i>	<i>Blue Plast Ind. Ltd.</i>	<i>Rs.23,10,800/-</i>	<i>Issued</i>

2	Pearl Thermoplast Pvt. Ltd.	Rs.4,83,866/-	Issued
3	Pearl Impex Vasai	Rs.16,98,752/-	Issued
4	K.M. Jethwani Co,	Rs.2,40,000/-	Issued
5	Kaushalchandra Engineering Works	Rs. 1,85,000/-	Issued
	Total	Rs.49, 18,418/-	

6.1.4. The appellant submitted that the AO had issued notices u/s 133(6) only to six parties out of which one party confirmed. The total purchases made from the five parties was of Rs.49,18,418/- while the total purchases made by the appellant was of Rs.6,95,95,718/- and the AO has disallowed 25% of the entire purchases made from 19 parties. The contention of the appellant is found to be correct. The AO had only issued notices to six parties and the confirmation was not received from these five parties amounting to purchases of Rs.49,18,418/-. During the appellate proceedings also, the appellant could not furnish any confirmations from these five parties, therefore the addition is restricted to 25% of Rs.49,18,418/- which comes to Rs.12,29,604/-. **The appellant gets relief of Rs.1,61,63,325/- (Rs.1,73,98,930 - Rs.12,29,604). The ground of appeal is partly allowed.**”

6. Aggrieved by the order of ld. CIT(A), the Revenue is in appeal before us.

7. The Learned Departmental Representative (Ld. DR) for the Revenue argued that the Ld. CIT(A) has observed that during the course of assessment proceedings, the AO issued notice u/s. 133(6) of the Act in order to verify the purchases from these parties. Only one of the party complied to the notice issued by the AO and the remaining 5 parties remained non-compliant. Therefore, the AO made addition @ 25% of the total purchase of Rs.6,95,95,718/-to the tune of Rs.1,73,98,930/-. However, the Ld. CIT(A) observed that the AO had issued notices u/s. 133(6) of the I.T. Act to 6 parties out of 19 parties. The total purchases made from the 5 parties which remained non-complaint was Rs.49,18,418/-. Therefore, the Ld. CIT(A) has limited the addition to 25% of total purchases made from the above 5 parties which comes to Rs.12,29,604/-. The Ld. DR stated that Ld. CIT(A) ought to have made addition in respect of other parties to whom notices were not issued.

8. On the other hand, Ld. Counsel for the assessee defended the order passed by the ld. CIT(A), and stated that notices were issued to 6 parties by Assessing

Officer and out of these 6 parties are partly has confirmed transaction. Therefore, Ld. CIT(A) has rightly confirmed the addition in respect of remaining 5 parties.

9. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the ld. CIT(A) and other material brought on record. We note that Assessing Officer had issued notices under section 133(6) of the Act only to six parties out of which one party has confirmed the transaction. The five parties did not confirm the transaction and total purchases made from these five parties was Rs.49,18,418/-, therefore Ld. CIT(A) restricted the addition to 25% of Rs.49,18,418/- which comes to Rs.12,29,604/-. We do not find any infirmity in the conclusion reached by Ld. CIT(A), therefore we confirm the findings of Ld. CIT(A) and dismiss the ground nos. 1 to 4 raised by the Revenue.

10. Ground no. 5 raised by Revenue relates to deletion of addition of Rs.53,43,257/- made by Assessing Officer on account of unexplained foreign commission expenses.

11. Brief facts *qua* the issue are that during the assessment proceedings, the Assessing Officer issued show cause notice to assessee to provide complete details of foreign commission expenses of Rs.53,43,257/- along with documentary evidence and other details for which, no explanation have been provided by assessee. Further, during the course of assessment proceedings the assessee has provided an explanation which was not tenable as the explanation provided by the assessee is general in nature. The Assessing Officer noted that explanation of assessee does not cover any sections reference that is why TDS has not been deducted, Double Taxation Avoidance Agreements (DTAA) references, proof in respect of absence of permanent establishment of the recipient parties, their payment evidence in foreign currency and relevant forms which enable assessee to make such payment etc. and hence, in the absence of

all such material evidences, Assessing Officer disallowed whole amount of foreign commission expenses of Rs.53,43,257/-.

12. Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) who has deleted the addition made by the Assessing Officer, observing as follows:

“6.4.1 The Ground No.4: On the facts and circumstances of the case as well as law on the subject, the Id. AO has erred in disallowing amount of Rs.53,43,257/- as unexplained foreign commission expenses. The AO held that the appellant had paid foreign commission expenses but no explanation was offered and therefore this commission expense of Rs.53,43,257/- was disallowed. The appellant submitted that it is engaged in the business of export and the various parties have deducted the commission payments while making remittance towards export proceeds and he had only received net amount which is verifiable from the BRC realization vouchers. The complete details of the expenses were produced before the AO but no cognizance has been taken in the assessment order. It was contended that the similar disallowance was made in the AY 2011-12 which was deleted by CIT(A) vide his order dtd. 17/03/2016.

6.4.2. On the perusal of details it is observed that the AO has not given any finding in her cryptic order and has disallowed the commission payment expenses of Rs.53,43,257/-without pointing out any discrepancies in the submission of the appellant. This issue was also before the undersigned in AY 2011-12 wherein the commission payments have been found to be genuine and the disallowance was deleted. The relevant part of the order dated 17.03.2016 is reproduced hereunder:-

“6.5.1. "During the assessment proceeding on verification of the return of income for the assessment year 2011-12 it is noticed that the assessee has claimed Rs.87,15,418/- on account of commission expenses, although assessee was provided various opportunities to justify claim of commission expenses, no details were filed. In absence of supporting evidence genuineness of the commission expenses accordingly, Rs.87,15,418/- is added to the total income of the assessee. Now the remand report proceeding, the assessee, vide its authorized representative's letter 20/08/2014 has made the submission, it is observed that assessee is engaged in the export of various items & at the time of making remittance of exports proceeds the parties have deducted commission and details of the same is mentioned in BRC realization vouchers. It is assessee's contention that commission represent amount deducted by foreign buyers for making payment to their agent. In remand proceedings the commission expenses have been verified with BRC realization documents together with entries in the relevant ledger account. Although the claim of commission expenses is supported by the BRC realization documents issued by banking authority, assessee could have produced the same at the time of original assessment proceedings. There is no justifiable reason for not producing such evidences at the time of original proceedings.”

6.5.2. In reply to the remand report, the appellant submitted as under:-

"During remand proceedings assessee has submitted complete details and explanation in relation to commission expense vide letter dated 20.08.2014 & 21.08.2014. The assessee has filed BRC realisation vouchers and the same has been verified by assessing officer and no discrepancy with regard to the same has been found. Assessing officer has contended that there is no justifiable reason for not producing such evidences at the time of original proceedings. However, it was clearly explained earlier also that compliance could not be made at the time of assessment proceedings owing to reason beyond the control of assessee as the main director of Assessee Company had gone out of India. There is no intention on assessee's part in not producing relevant evidences as can be seen from the fact that assessee is engaged business of import & export for which complete records have maintained and the books of accounts are also audited u/s 44AB of the I.T. Act. The expenditure claimed by assessee is very much genuine and adverse inference must not be drawn on the ground that evidences were not furnished at time of original proceedings. Relevant letters filed during remand proceedings through which exhaustive details have been furnished is also enclosed herewith."

6.5.3. On the perusal of the details, it is observed that the appellant had claimed commission expenses of Rs.87,15,418/-. During the remand report proceedings, the AO has examined and found that the appellant is engaged in the export of the various items and at the time of making remittance of export proceeds, the parties have deducted commission and the details of the same is mentioned in the BRC realization vouchers. During the remand report proceedings the AO has examined and verified the evidences filed by the appellant regarding the commission expenses and therefore the addition made by the AO is deleted and the grounds of appeal is allowed."

*6.4.3. The facts and circumstances of 2012-13 under appeal are identical to that of in AY 2011-12. Therefore, following the decision in the appellant's own for AY 2011-12 (vide order in Appeal No.CAS/2/394/2013-14 dated 17/03/2016), the **addition made by the A.O. of Rs.53,43,257/- is deleted and the ground of appeal is allowed.**"*

13. Aggrieved by the order of ld. CIT(A), the Revenue is in appeal before us.
14. The Ld. DR for the Revenue argued that the Ld. CIT(A) has made an observation that the AO has not given any finding in her order and disallowed the commission payment expenses of Rs. 53,43,257/- without pointing out any discrepancies in the submission of the appellant. The Ld. CIT(A) has further stated that the said issue was examined by him in the case of the assessee for the A.Y.2011-12 as well wherein the claim of Rs.87,15,418/- of the assessee towards foreign commission expenses was made by the AO and the same was

examined and found to be genuine during the remand proceedings. On the basis of the above findings, the appeal of the assessee was allowed and the addition of Rs.53,43,257/- was deleted by Ld. CIT(A) which is wrong, as each assessment year is different and facts were different, therefore Ld. CIT(A) ought to have upheld the addition made by Assessing Officer.

15. On the other hand, Ld. Counsel for the assessee defended the order passed by the ld. CIT(A), and stated that assessee has filed BRC realisation vouchers, therefore, Ld. CIT(A) has rightly deleted the addition.

16. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the ld. CIT(A) and other material brought on record. We note that assessee has filed the BRC realization vouchers and moreover, assessee's case was covered by the order of Ld. CIT(A) on identical facts in the AY.2011-12. Hence, we are of the view that conclusion reached by Ld. CIT(A) is correct and admit no interference, hence we dismiss ground no. 5 raised by Revenue.

17. Ground no. 6 raised by Revenue relates to deletion of addition of Rs.26,91,423/- made by Assessing Officer on account of "advance against purchase".

18. Brief facts *qua* the issue are that Assessing Officer issued show cause notice and asked the assessee was asked to provide complete details of M/s. Atlas Hariyana Cycle Ltd. to whom an amount of Rs.26,91,423/- was paid as advance against purchases. However, the assessee was failed to provide any such details which were specifically mentioned in the show cause notice. Considering, this non-compliance as default, the Assessing Officer made addition of Rs.26,91,423/-.

19. Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before the ld. CIT(A) who has deleted the addition made by the Assessing Officer, observing as follows:

*“The **Ground of Appeal No.2:**On the facts and circumstances of the case as well as law on the subject, the ld. AO has erred in making addition of Rs.26,91,423/- representing advance against purchases. The AO held in the assessment order that the appellant had given advance of Rs.26,91,423/- to M/s Atlas Haryana Cycle Ltd. against purchases. But no details were provided therefore AO added this amount to the income of the appellant. The appellant submitted that the AO did not consider the details provided during the assessment proceedings that the advance of Rs.26,91,423/- to M/s. Atlas Haryana Cycle Ltd. was given from Loan Account (Loan Cash Credit Account) maintained with Dena Bank and the amount was shown as advance in the balance sheet of the appellant. The advance had been given as 30% advance before delivery of goods and is a regular business transaction.*

*6.2.2 On the perusal of details, it is observed that the AO has made this addition which has got no basis or no findings. The advance has been given which is duly reflected in the balance sheet and has been given from a bank account and under no circumstances such transactions can be added to the income of the appellant. **The addition made by the AO is deleted and the ground of appeal is allowed.”***

20. Aggrieved by the order of ld. CIT(A), the Revenue is in appeal before us.

21. We have heard both the parties. We note that the Ld. CIT(A) has observed that the AO had called for the current address, details of payment and mode of payment of Atlas Haryana Cycle Ltd. in response to which the assessee furnished only the list of parties from which the advances were taken. Therefore, the AO made the addition of Rs.26,92,423/-. The Ld. CIT (A) has stated that the addition made by the AO has got no basis or no finding as the advance has been given to Atlas Haryana Cycle Ltd. from the bank account which is duly reflected in the balance sheet of the assessee as well. Therefore, the Ld. CIT(A) allowed the appeal of the assessee on this ground and deleted the addition. The Ld. DR for the Revenue relied on the stand taken by Assessing Officer, on the other hand, Ld. Counsel has defended the order passed by Ld. CIT(A). We have gone through the order of Ld. CIT(A) and noted that conclusion reached by Ld. CIT(A) is not erroneous, therefore, we confirm the findings of Ld. CIT(A) and hence ground no.6 raised by Revenue is hereby dismissed.

22. In the result, appeal filed by the Revenue is dismissed.

Order is pronounced on 23/11/2022 by placing the result on the Notice Board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

सूरत /Surat

दिनांक/ Date: 23/11/2022

SAMANTA

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

By Order

// TRUE COPY //

Assistant Registrar/Sr. PS/PS
ITAT, Surat