

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.1395/M/2019  
Assessment Year: 2009-10**

<p>Shri Dharmendra A. Babel, H.No.5/1117/A-B-C-D, 1118, Office No.503, 5<sup>th</sup> Floor, Sairam Flats, Gujjar Fariyu, Somnath Mahadev Sheri, Haripura, Surat – 395 003</p> <p>RMR &amp; Co., 425, The Summit Business Bay, Prakashwadi, Near WEH Metro Station, Andheri (E), Mumbai – 400 093 <b>PAN: ADVPJ5757F</b></p> <p style="text-align: center;">(Appellant)</p>	Vs.	<p>Dy. Commissioner of Income Tax, Central Circle-8(3), Room No.659, Aayakar Bhavan, 6<sup>th</sup> Floor, M.K. Road, Mumbai - 400020</p> <p style="text-align: center;">(Respondent)</p>
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**Present for:**

Assessee by : None  
Revenue by : Shri Anil Gupta, D.R.

Date of Hearing : 28 . 09 . 2022  
Date of Pronouncement : 31 . 10 . 2022

**O R D E R**

**Per : Kuldip Singh, Judicial Member:**

The appellant, Shri Dharmendra A. Babel (hereinafter referred to as 'the assessee') by filing the present appeal, sought to set aside the impugned order dated 31.12.2018 passed by

Commissioner of Income Tax (Appeals), Mumbai [hereinafter referred to as the CIT(A)] qua the assessment year 2009-10 on the grounds inter alia that :-

**“1. The Ld. CIT(A) and Ld. AO has erred in holding that the assessee is not involved in actual business on the basis of statement underoath without any material evidence on record.**

**2. The Ld. CIT(A) and Ld. AO has erred in holding that the assessee is not involved in actual business based on u/s 131(1A) of the Act which was retracted immediately, without bringing any cogent material evidence in support of their claim.**

**3. The Ld. CIT(A) and Ld. AO has erred in relying on retracted statement/s of assessee recorded forcefully u/s 131(1 A) of the Act, particularly in the following situations:**

**(i) When the statement was recorded at place other than the place belong to the assessee or in department and that too on Sunday at 8.30 AM in morning.**

**(ii) When on a single day long statements of more than five person recorded on single day.**

**(iii) When the confession statement of more than 20 lines is taken for five different person had same by word to word in all five statements, which means words in confession statement was not of the assessee and was of someone else forcefully put in the mouth of assessee.**

**(iv) When the assessee is not knowing English and recorded in English and again on computer.**

**(v) When the statement recorded on same day for five persons and no normal breaks were allowed.**

**(vi) When the Member of Parliament has stated and reported in various local newspaper that forcefully statements were recorded by Income-tax authority and no breaks are allowed for lunch, dinner, rest etc.**

**[vii] When the report submitted by Vijay Kelkar Committee (appointed by Govt. of India) in 2003 submitted/reported that in search and survey action statements are recorded by putting force.**

**4. The Ld. CIT(A) has erred by ignoring the letter dated 10.03.2003 issued by the Ministry of Finance & Company Affairs, Department of**

*Revenue, Central Board of Direct Taxes in search and seizure matters to collect evidence.*

*5. The Ld. CIT(A) has erred in confirming the rejection of the books of accounts u/s 145(3) of the Act and Ld. AO has erred in rejecting the books of accounts, without pointing out single defect in audited books of accounts, particularly when the appellant has produced books of accounts before Addl. DIT at the time of statement recorded u/s 131(1A) of the Act.*

*6. The Ld. CIT(A) in confirming and Ld. AO in relying the statement of third party namely Rakesh M Kothari, Sharad K Shah, Trupti Sharad Shah without giving copy of their statement and also without giving cross examination of such parties for making/confirming such huge addition.*

*7. The CIT(A) and Ld. AO has erred in relying the part statement of assessee recorded u/s 131 [1 A] of the Act which is favourable to department and rejected the remaining without giving any reason/s. The assessee has categorically stated in the statement that he has earned the income what he has disclosed in return of income has not been accepted without any reason or without bringing any evidence that the assessee has received/earn income more than what is stated in return of income. Further, the appellant has not disclosed any income in search operation, hence without evidence of receiving income no addition can be made.*

*8. The Ld. CIT(A) has erred in confirming the addition made by Ld. AO on estimation basis without giving any evidence of receiving such income or/and also without matching assets with corresponding income of the assessee estimated by Ld. AO in search assessment. Further, neither the Ld. CIT(A) nor Ld. AO has brought on record any evidence particularly in search assessments:*

*(i) The appellant has produced all the books of accounts with all the details of purchase parties, sales parties, stock records etc.*

*(ii) No evidence brought on record about any alleged cash transaction with purchase/ sales parties.*

*(iii) None of the alleged sales parties has confirmed that such commission of 1% of sales is given to the appellant or Ld. AO has not brought on record any evidence-by which it can be proved the assessee has received such huge commission.*

*9. The Ld. CIT(A) in confirming and Ld. AO has erred in making huge addition of Rs.31,16,079/- being 0.5% of alleged sales.*

*10. The Ld. CIT(A) has erred in enhancing the addition by assuming that the appellant has received commission on sales and purchase both. The Ld. CIT(A) has not answered that if commission is*

*receivable/received both on purchase and sales then who paid the commission as purchase party of appellant is seller in his books.*

*11. The Ld. CIT(A) has erred in enhancing the addition of Rs.1,23,99,855/- as 1% of alleged commission on purchase, sales and 2.4% on loans & advances without any base.*

*12. The appellant reserves the right to add, alter, amend or withdraw any grounds of appeal.”*

2. Briefly stated facts necessary for adjudication of the issues at hand are: assessee's return of income was initially assessed under section 143(3) of the Income Tax Act, 1961 (for short 'the Act') at Rs.4,33,695/- by making addition of Rs.1,35,761/- on account of withdrawal and out of expenses. Subsequently, assessee's case was reopened under section 147 and 148 of the Act on the ground that during the search and seizure operation carried out under section 132 of the Act on Surat Diamond Group, statement of one Mr. Dharmendra Babel, the assessee, was recorded. During the course of search information was received from the investigation wing that the assessee has stated in his statement on oath that proprietary firm has not done any genuine business and has provided accommodation entries. Consequently, assessee's books of account were rejected under section 145 of the Act and the net commission income of the assessee was calculated at 0.5% of the total sale/turnover of Rs.62,32,15,730/-. Assessee has also pleaded that the statement recorded during search operation was retracted by filing an application before magistrate. So declining the contentions raised by the assessee the AO proceeded to make addition of Rs.31,16,079/- @ 0.5% of the total turnover of Rs.62,32,15,730/- and thereby framed the assessment under section 143(3) read with section 147 of the Act.

3. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has not only upheld the addition made by the AO rather made an enhancement under section 251(2) of the Act by dismissing the appeal. Feeling aggrieved assessee has come up before the Tribunal by way of filing present appeal.

4. Assessee appeared in the first four dates/hearings. Thereafter none appeared and notices sent for 21.03.2022, 11.05.2022, 27.06.2022, 27.07.2022, 30.08.2022, 27.09.2022 & 28.09.2022, through registered post with acknowledgement due (RPAD) not received back served/unserved. Since period of more than one month has already elapsed the notices sent to the assessee are presumed to have been served, but the assessee has not preferred to put in appearance to prosecute this appeal, the Bench has decided to dispose of the appeal on the basis of documents available on record with the assistance of the Ld. D.R. for the Revenue.

5. I have heard the Ld. Departmental Representative for the Revenue, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and case law relied upon.

6. I have perused the impugned order passed by the Ld. CIT(A) who has enhanced the income of the assessee under section 251(2) of the Act from Rs.31,16,079/- to Rs.19,71,38,162/- by returning following findings:

***“31.0 On going through the material on record, it has been observed that the AO, while working out the unaccounted income earned by the Appellant by way of commission on accommodation entries had not taken into consideration the local purchases and imported purchases. In this case, the finding of the Investigation***

***Wing was that all dealings of the appellant, whether, purchase / sale/ loans or advances etc. were for the purposes of providing accommodation entries.***

***31.1 The AO had himself held in the assessment order that the imports made by the group concerns of the Appellant were actually done on behalf of the real importers, which were third parties. The AO had clearly held that the group concerns of the Appellant had just lent their names for making imports by real importers. Thus, the group concerns of the Appellant had acted as benamidars for the real importers. It is also a part of the material on record that for lending their names, the group concerns had charged commission from the real importers. In these circumstances, it is not clear as to why the AO had not charged commission on the imports made by the group concerns.***

***31.2 Similarly, commission income should have been worked out by the AO on purchases made from registered dealers (Local Purchases). I have noted that the entire sales of the group concerns have been treated by the AO as accommodation entries. Once, the entire sales of the group concerns have been treated as not genuine, the natural corollary is that the purchases also are not genuine and just accommodation entries. Thus, the AO can't take a contradictory stand as regards purchases are concerned. Thus, the AO has failed to consider these imported / local purchases for the purposes for determining the unaccounted commission income that have been received by the Appellant in cash outside the books of account.***

***31.3 In view of the above facts and circumstances of the case, unaccounted cash commission income needs to be worked out on the local purchases and imports. Accordingly, the unaccounted commission income of the appellant needs to be for the various assessment years. Since, this involved enhancement of income, in view of the provisions of Section 251(2) of the Act, the appellant was duly show-caused, as to why further addition should not be made on account of unaccounted commission income on local purchases & imports made by the group concerns. The appellant has not furnished any reply on this issue.***

***31.4 To sum up, the A.O. had finally concluded that the group concerns of Gautam Bhanwarlal Jain are not carrying on any genuine business of trading in diamonds, but are engaged in giving accommodation entries. After categorically holding & classifying the appellant as an entry operator, it is not clear as to why no addition has been made on account of unaccounted cash commission income on the imports & local purchases of the group concerns of the Appellant. Since, there is no exchange of goods, either at the time of sale or purchase, then the natural corollary is that the local***

***purchases of the group concerns are also just accommodation entries. Further, it is a proven fact on record that the imports had been made by the group concerns on behalf of third parties, which were real beneficiaries / importers. The A.O. has not taken any adverse view regarding the imports / local purchases and treated them, as if they are genuine transactions and no unaccounted commission income has been added on the same in the assessment order.***

***31.5 Hence, the flawed approach of the A.O. needs to be corrected, as this approach of the A.O. stands in stark contradiction to the seized material, various statements & other material on record. Further, this erroneous view of the A.O. is also inconsistent with the detailed modus-operandi described above, in the appellate order. It is certainly not the case of the A.O. that the local purchases made by the group concerns are genuine purchases. By not taking any adverse view about the local purchases, the A.O. has contradicted his own findings that the entire business activity carried on through the group concerns is that of accommodation entries.***

***31.6 I have also noted that though in the assessment order, the A.O. had discussed in great details about benami nature of the imported purchases, but a perusal of the calculation of the unaccounted commission income reveals that the AO had not added the same in final computation. Hence, this prima-facie mistake of the AO needs to be rectified in the present appellate order.***

***31.7 I have also noted that the AO had made addition on account of commission @ 0.5% of the sales turnover for the A. Y. 2009-10, A.Y. 2011-12 & A.Y. 2014-15. However, it is pertinent to note that the AO had made addition @ 1% of the sales in the assessment orders passed in the case of other concerns of the Gautam B Jain Group and the same had also been confirmed by the undersigned in appeal. It is also an undisputed fact on record that for the A.Y. 2013-14, the AO himself had applied a rate of 1% on the sales for working out the commission income. Hence, these inconsistencies in the assessment order of various assessment years needs to be corrected and a flat rate of 1% is being applied on the sales turnover.***

***31.8 Further, it is also noted that for the A. Y. 2009-10, A.Y. 2011-12 & A.Y. 2014-15, no addition on account of commission had been made by the AO on the entries of loan-&advances given by the Appellant. However, for the A.Y. 2013-14, the AO himself had applied a rate of 2.4% on the loans and advances for working out the unaccounted commission income. Thus, this inconsistency in the assessment order of various assessment years is also being corrected and a flat rate of 2.4% is being applied on the entries of loans and advances.***

**31.9 All this will result in enhancement of income u/s 251(2) of the Act, for which the appellant had already been given a show-cause notice during the course of the appellate proceedings. In view of the above facts and circumstances of the case, unaccounted cash commission income is worked out and accordingly, the income of the appellant is enhanced on this account for various assessment years, as below:-**

<b>Dharmender Babel (Proprietorship Concerns)</b>					
	<b>A.Y. 2009-10</b>	<b>A.Y.2011-12</b>	<b>A.Y.2013-14</b>	<b>A.Y.2014-15</b>	<b>Total</b>
<b>Sales</b>	<b>62,32,15,730</b>	<b>6,65,54,00,447</b>	<b>4,62,27,04,017</b>	<b>2,03,35,21,353</b>	<b>13,93,48,41,547</b>
<b>Internal Purchase</b>	<b>13,00,000</b>	<b>48,57,20,062</b>	<b>4,20,71,000</b>	<b>1,44,30,000</b>	<b>54,35,21,062</b>
<b>Total Local Purchase</b>	<b>64,51,02,325</b>	<b>7,21,77,16,341</b>	<b>4,76,46,40,180</b>	<b>1,98,14,22,331</b>	<b>14,60,88,81,177</b>
<b>Import</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	
<b>Loans &amp; Advances dosing Balance</b>	<b>11,80,31,397</b>	<b>97,38,504</b>	<b>24,66,26,576</b>	<b>8,66,14,139</b>	<b>46,10,10,616</b>
<b>Commission on Sales</b>	<b>62,32,157</b>	<b>6,65,54,004</b>	<b>4,62,27,040</b>	<b>2,03,35,214</b>	<b>13,93,48,415</b>
<b>Commission on Local Purchase</b>	<b>64,51,023</b>	<b>7,21,77,163</b>	<b>4,76,46,402</b>	<b>1,98,14,223</b>	<b>14,60,88,812</b>
<b>Commission on Import</b>					
<b>Commission on Loans &amp; Advances</b>	<b>28,32,754</b>	<b>2,33,724</b>	<b>59,19,038</b>	<b>20,78,739</b>	<b>1,10,64,255</b>
<b>Total Commission</b>	<b>1,55,15,934</b>	<b>13,89,64,892</b>	<b>9,97,92,480</b>	<b>4,22,28,176</b>	<b>29,65,01,482</b>
<b>Less:</b>					
<b>Addition made by AO of Commission on Sales</b>	<b>31,16,079</b>	<b>3,32,77,002</b>	<b>4,67,27,040</b>	<b>1,01,67,607</b>	<b>9,32,87,728</b>
<b>Addition made by AO of</b>			<b>60,75,592</b>		<b>60,75,592</b>

<b>Commission on Loans &amp; Advances</b>	<b>1,23,99,855</b>	<b>10,56,87,890</b>	<b>4,69,89,848</b>	<b>3,20,60,569</b>	<b>19,71,38,162</b>
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**31.10 Thus, a total enhancement of Rs.19,71,38,162/- is being made u/s 251(2) of the Act for the various assessment years as worked out above. Further, penalty proceedings u/s 271(l)(c) of the Act are separately initiated for concealment of income for the various assessment years on the enhanced amount. Accordingly, Ground No. 5 of A.Y. 2009-10 is dismissed, with enhancement of income."**

7. Bare perusal of the impugned order passed by the Ld. CIT(A) goes to prove that Ld. CIT(A) has passed the impugned order of enhancement by giving due opportunity to the assessee and after analyzing all the contentions made by the assessee during appellate proceedings. Enhancement has been made by the Ld. CIT(A) by taking into consideration inconsistencies committed by the AO qua various assessment years as in A.Y. 2013-14 AO himself had applied a rate of Rs.2.4% on loans and advances for working out the unaccounted commission. But in the instant case he has proceeded to apply the rate of 1% on the sale for working out the commission income. Rule of consistency is required to be followed by the Revenue Authorities. In these circumstances, we find no scope to interfere into the impugned order passed by the Ld. CIT(A), hence appeal filed by the assessee is hereby dismissed.

**Order pronounced in the open court on 31.10.2022.**

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

Mumbai, Dated: 31.10.2022.

\* Kishore, Sr. P.S.

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

The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.