



**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI RAHUL CHAUDHARY (JUDICIAL MEMBER)**

**ITA No. 4258/MUM/2017
Assessment Year: 2011-12**

ACIT-25(3),
Room No. 601, C-10, 6th floor,
Pratyakshkar Bhavan, Bandra
Kurla Complex, Bandra (East),
Mumbai-400051.

Appellant

Revenue by
Assessee by

Date of Hearing

Date of pronouncement

Vs.

M/s Span Associates,
302, Galaxy Arcade, 10, MG
Road, Vile Parle (E),
Mumbai-400057.

**PAN No. ABKFS 7492 R
Respondent**

: Mr. Manish Ajudiya, DR
: Mr. Vijay Mehta, AR

: 20/12/2022

: 30/12/2022

ORDER

PER OM PRAKASH KANT, AM

The present appeal is filed by the Revenue against the order dated 17/03/2017 passed by the Id. Commissioner of Income Tax (Appeals) – 49, Mumbai [in short, the Ld. CIT(A)] for A.Y. 2011-12.



2. The grounds of appeal raised by the revenue are reproduced as under :

1. *"On the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in deleting the addition of Rs 2,37,43,226/- on account of undisclosed receipts, treating the same as agreement value in absence of evidences."*

"2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering the statement of Shri Gopalii Dwivedi, partner in assessee firm wherein he admitted that receipt of on money of Rs 13,89,12,774/- in relation to two project Span Excellency and Span Heights were recorded in two note books, impounded during survey proceedings."

3. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the cash expenses of Rs 1.41.81.062/- which were remained unexplained as the assessee failed to furnish the details of these expenses and thereby attracting provisions of section 40A(3)."*

4. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred to appreciate that the order of the Hon'ble Settlement Commission was in relation to AY 2008-09 to 2010-11 only, not for the year under consideration."*

5. *"On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of on account of purchases made from M/s SamEnterprises which has*



same TIN number as M/s Forum Traders/Apple India Marketing and restricting addition to 12.5 % of alleged bogus purchases made from M/s Siddhi Enterprises

6. *"On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not considering that the addition was made on the basis of information received from DIT(Inv) with regard to bogus purchases made by the assessee from HAwala parties who admitted in their statement recorded on oath that only accommodation entries of purchases were provided without actual supply of goods."*

7. *"On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that applicability of provisions of section 40A(3) attracts 100% bogus purchases to be held as profit." Reliance is placed on the decision of Hon'ble Supreme Court in the case of NK Proteins Ltd vs DCIT(2017) SLP CC No. 769 of 2017 which has upheld the 100 % disallowance of bogus purchase as ordered by the Hon'ble Gujrat High Court"*

8. *"The appellant prays that the order of Ld. CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."*

3. Briefly stated the facts of the case are that the assessee firm is a builder and developer and had filed its return of income for the year under consideration on 29.09.2011 declaring total income of Rs. 6,48,73,489/-. A survey was conducted u/s. 133A of the Income Tax Act, 1961 [in short, "the Act"] on 29.09.2011 on the



business premises of M/s. Gujarat Realtor and others at Bhayandar, Mumbai. During the course of survey, two note books were found and impounded at the said premises from the possession of Shri Gopalji K. Dwivedi, who is a partner of M/s. Gujarat Realtor, and also a partner in the assessee firm. The said note books contained details of cash receipts relating to two projects namely 'Span Excellency' and 'Span Heights' of the assessee firm. During the survey proceedings, statement of Shri Gopalji Dwivedi was recorded on 11.02.2011 and in reply to Question no. 8, he accepted that the amounts appearing in those note books were cash receipts not recorded in the books of account of the assessee firm. He further in the same statement, stated that in his business, there are many expenses which are not recorded in books of accounts. He accordingly offered undisclosed income of Rs. 9,50,00,000/- in the hands of the assessee firm pertaining to multiple assessment years. Accordingly, the case of the assessee was selected for scrutiny and statutory notices were also issued and complied with. In the completed assessment, the Assessing Officer made various additions aggregating to Rs. 4,33,78,604/-. Aggrieved by the said additions, the assessee preferred the appeal before the Id. CIT(A) wherein partial relief was granted to the assessee. Being aggrieved by the order passed by the Id. CIT(A), the revenue is in appeal before us.



4. The ground nos. 1 to 4 of the appeal of the revenue relates to deletion of addition of Rs. 2,37,43,226/- on account of undisclosed receipts and claim of 30% expenses on the gross receipts offered and the applicability of the order of the Income-tax Settlement Commission (ITSC) of earlier years to the year under consideration as well.

5. Brief facts qua this issue are that during the survey conducted u/s. 133A of the Act wherein two note books were found and impounded which contained details of cash receipts relating to two projects of the assessee firm, aggregated to Rs. 13,89,12,774/-. Shri Gopalji K. Dwivedi, partner in the assessee firm had accepted that the amounts in these note books were cash receipts not recorded in the books of accounts. He also stated that in his business, there were many expenses which were not recorded in books of accounts and offered undisclosed income of Rs. 9,50,00,000/- for three assessment years i.e. A.Y. 2008-09, 2009-10 and 2010-11. As regards the A.Y. 2011-12 i.e. the year under consideration, it offered the additional income of Rs. 3,30,89,144/- on account of survey in the Profit & Loss A/c. itself. The details of income declared on account of survey are as under:-

“8. Ground No.5 is regarding non genuine purchase of Rs.4,98,844/- based on information received Maharashtra Vat web site. Facts of the case are that the information was received from Maharashtra Sales Tax authorities that the



following parties from whom the appellant firm had made purchases are listed as suspicious dealers and accommodation bill providers:-

Name of the party	TIN	Amount
Foram Traders/Apple India Marketing	27790325482v	₹2,01,957/-
Siddhi Enterprises	27860154093V	₹2,96,887/-

5.1 From the aforesaid table, it is found that the total disclosure of cash receipts made by the assessee is Rs. 11,51,69,548/- whereas the aggregate of such receipts on account of two note books found at the time of suvey worked out to Rs. 13,89,12,774/-. The said amount of Rs. 13,89,12,774/- is also mentioned in para 11 of the ITSC order dated 16.02.2012. Thus, there is difference of Rs. 2,37,43,226/- between the total cash receipts mentioned in the two note books and the offer of on-money (gross) made by the assessee which the Assessing Officer added to the total income of the assessee for the year under consideration. However, the Id. CIT(A) found that the said difference of Rs. 2,37,43,226/- is consideration against the agreement value for which the sale consideration is already recorded in the books of accounts of the assessee.

6. The Id. Departmental Representative appearing for the revenue argued that once the partner of the assessee firm, Shri Gopalji K. Dwivedi accepted in his statement about the cash receipts being made as appearing in the two note books, the assessee firm ought to have offered the same in the year under consideration and



accordingly, the difference of cash receipts as already offered being Rs. 2,37,43,226/- has been rightly added by the Assessing Officer.

7. In rebuttal, the Id. Counsel of the assessee submitted that subsequent to the survey, the assessee found that total figure of Rs. 13,98,12,774/- comprised of cash component of Rs. 11,51,69,548/- and agreement value of Rs. 2,37,43,226/-, the year-wise break up of which is as under:-

A.Y.	Amount	Part of agreement value	Gross On-money
2008-09	52,21,000	NIL	52,21,000
2009-10	1,55,92,160	6,00,000	1,49,92,160
2010-11	5,04,86,182	28,00,000	4,76,86,182
Total	7,12,99,342	34,00,000	6,78,99,342
2011-12	6,76,13,432	2,03,43,226	4,72,70,206
Grand Total	13,89,12,774	2,03,43,226	4,72,70,206

7.1 Accordingly, the assessee filed an application before the ITSC on 07.04.2011 for 3 A.Y.s i.e. A.Y. 2008-09, 2009-10 and 2010-11. The gross on money declared by the assessee before ITSC was Rs. 6,78,99,342/- after segregating the agreement value of Rs. 34,00,000/- from the notings found in the two note books of Rs. 7,12,99,342/- for the said 3 A.Y.s. The additional income offered by the assessee thereafter before ITSC for the 3 A.Y.s was Rs. 4,75,29,539/- i.e. after deducting expenses of 30% on the total gross on-money of Rs. 6,78,99,344/-. In the same way, the assessee offered undisclosed income of Rs. 3,30,89,144/- after deducting 30% of expenses on the gross on-money of Rs. 4,72,70,206/-. Hence, the Id. Counsel requested that once the said issue of claim



of expenses @30% has been accepted by the ITSC and stands settled, there is no reason as to why the same cannot hold good even in the year under consideration. In this regard, he also relied on following case laws:

- ACIT v. Sahakar Developers (ITA no. 6235/Mum/2012)
- Tulip Land & Developers P. Ltd. v. DCIT (ITA no. 2980/Mum/2019)
- Bhalchandra Trading P. Ltd. v. DCIT (ITA no. 2977/Mum/2019)

8. We have heard the rival contentions of both the parties and perused the material on record and the relevant case laws relied upon. It is seen that the cash receipts offered by one of the partners of the assessee firm Shri Gopalji K. Dwivedi actually included two components i.e. cash income and the income recorded in the books as per the agreement value. It is a trite principle that mere admissions or confessions in the survey proceedings cannot be relied upon. Further, the person concerned can always clarify the statements later if it is backed by corroborating evidences. In the present case, the same issue had been already discussed and decided by the ITSC in its order dated ___ and the fact that the offer of undisclosed income found during the course of survey proceedings pertained to all 4 A.Y.s and income offered for A.Y. 2011-12 is in continuity to the income offered before the ITSC for earlier A.Y.s., Similarly, even the claim of expenditure of 30% of the gross on-money deserved to be allowed to the assessee in view of



the fact no contrary evidence has been brought by the Revenue that percentage of such expenditure was lower and department has accepted this percentage of 30 % before the ITSC also. Accordingly, we are in conformity with the decision of the Id. CIT(A) and uphold his findings which is reproduced below:

“6.3.7 In view of the fact that entire details with charts in respect of claim of cash receipt being part of agreement value were submitted during the course of assessment proceedings before the Id. AO and Id. AO has not pointed out any factual discrepancies in the claim of the assessee that cash receipts to the tune of Rs.2,03,43,226/- appearing in the said impounded note books is part of agreement value and, hence, the same is reflected as receipts duly accounted for in the regular books of account of the assessee, am of the considered view that in the light of discussion made in the preceding paragraphs and judicial pronouncements referred there in, there was no case to make additions merely on the basis of amount admitted in the statement of Shri Dwivedi, as the same could not be accepted as correct procedure for computation of unaccounted income discussed earlier. for the reasons as Moreover, consideration received against agreement value is already accounted for as sale of flats in regular books of account and, therefore making additions of the same would amount to double taxation.

6.3.8 In view of the facts and ratio of the decisions of Hon'ble Courts and ITATS as discussed in the preceding paragraphs, it is held pertaining to that amount of Rs.34,00,000/- earlier years received against agreement value as well as Rs.2,03,43,226/- pertaining to year under consideration received against agreement value, aggregating to Rs.2,37,43,226/-, cannot be treated as appellant's undisclosed business receipts and taxed separately as done in the assessment order. Addition of Rs. 2,37,43,226/- made on this account is accordingly directed to be deleted. Ground No. 3 is allowed.”



“7.3.1 Besides, as discussed earlier, the assessee filed an application before the Settlement Commission for immediate three previous assessment years and has offered income as under:-

AY	On money received declared as additional income	Deduction claimed	Net additional income offered
2008-09	52,21,000	15,66,300	36,54,700
2009-10	1,49,92,160	44,97,648	1,04,94,512
2010-11	4,76,86,182	1,43,05,855	3,33,80,327
Offered before Hon'ble SC	6,78,99,342	2,03,69,803	4,75,29,539

It is stated on page 8 of the order of the Hon'ble Settlement Commission that it was explained before it that though impounded note books contained full record of unaccounted receipts, the expenses recorded therein are only partial. During the course of hearing, it was clarified before Hon'ble Settlement Commission as stated at para 18 of the order that unaccounted receipts of Rs.6,78,99,344/- represented gross figure recorded in impounded note books and no set off whatsoever has been taken in regard to refunds given by the appellant and recorded in these note books. It was further clarified that even set off in regard to brokerage expenditure and litigation expenses and other expenses recorded in note books has not been taken. In view of this it was explained before Hon'ble Settlement Commission that claim of expenditure @ 30% includes expenses which are recorded in diaries and also the other expenses not recorded. This issue is discussed exhaustively with illustrations at page 9 to 15 of the order of the Hon'ble Settlement Commission and at para 22, Hon'ble Settlement Commission has accepted appellant's claim of 30% expenses. Relevant para is reproduced as under:-

"Para 22. We have heard both the parties and also considered the facts evidences brought on record. In view of the illustrations cited



and considering the nature of expenses which are normally incurred in this line of business (recorded or not recorded) as well, and further considering the fact that CIT(DR) has not controverted the arguments of the A.R. in an emphatic manner, we are of the considered view that claim of expenses at the rate of 30% of total receipt is quite reasonable.....

7.3.2 Undisclosed income, taxable in the hands of the assessee for the year under consideration, is on account of undisclosed income found during the course of survey proceedings pertaining to all the four assessment years, three of which are covered by the order of Hon'ble Settlement Commission. Hence, there is no reason why the principle of allowing 30% expenses out of the gross unaccounted receipts be not followed while computing income taxable in the hands of the assessee for the assessment year under consideration, when the same has been accepted by the Hon'ble Settlement Commission in the order for immediate previous assessment years on the basis of same set of evidences being note books impounded during the course of survey and statement of Shri Dwivedi recorded in respect of the same.

7.3.3 In the case of Radhasoami Satsang v. CIT (supra) it was held by the Hon'ble Supreme Court that "We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

7.3.4 In view of the above, since in appellant's own case, Hon'ble Settlement Commission has accepted claim of 30% deduction out of the undisclosed cash receipts, facts of current year being same as emerging from the survey proceedings and, further, as only real income can be taxed and not the total receipts of business without considering expenses, claim of the appellant for allowing expenses @ 30% out of the total unaccounted receipts has to be allowed even in



this year. Addition of Rs. 1,41,81,062/- made on this account is accordingly directed to be deleted. Ground is accordingly allowed.”

8.1 In view of the above discussion, the ground nos. 1 to 4 of the Revenue are dismissed.

9. The ground no. 5 to 7 relates to bogus purchases from two parties namely Forum Traders/Apple India Marketing (Rs. 2,01,957/-) and Sidhhi Enterprises (Rs. 2,96,887/-).

9.1 In view of information from Maharashtra sales-tax authorities that these two parties had provided accommodation entry of bogus purchases to the assessee, the Assessing Officer made addition disallowing the corresponding amount of the purchase. The Ld. CIT(A) however in respect of the first party M/s Forum Trader/ Apple India marketing observed that assessee has not recorded any purchase from the said party in its books of accounts but the TIN No. of said party is same as that of another Party namely M/s Sam Enterprises , from whom the assessee has shown purchases during the year. In respect of purchase from M/s M/s Siddhi enterprises of Rs. 2,96,887/-, the Ld CIT(A), upheld the same as bogus purchase , but upheld addition to the extent of 12.5 % of the bogus purchases. The relavent finding of Ld CIT(A) is reproduced as under:

8.3 have considered submissions made on behalf of the appellant, and the assessment order. It is found that the appellant had not made any purchase from Forum traders / Apple India Marketing which is listed party as per information received from Maharashtra Sale Tax authorises. Even



the assessing Officer has not controverted this fact that the assessee had made purchases from M/s. Sam Enterprises, which is having same TIN Number as Foram traders / Apple India Marketing. Said purchases from M/s. Sam Enterprises, is supported by all necessary evidences that are purchase bill, payments by cheque, transportation bills etc and hence, addition of Rs. 2,01,957/- is directed to be deleted. The Id. Assessing Officer has not conducted any enquiry with the said M/S Sam Enterprises, which is important because name of this concern was not found to be appearing in the sales tax website and it's TIN number was apparently used by the other concerns. In the given facts of the case. purchases made from M/S Sam Enterprises could not be held as bogus. Addition of Rs 2,01,957/-on account of purchase from M/S Sam Enterprises is accordingly directed to be deleted.

8.3.1 As regards purchase from other party naming M/S Siddhi Enterprises, it is found that the Sales Tax Department, Mumbai had identified over 1100 Hawala Operator (bogus bill issuers) and over 37,000 beneficiaries involving amounts aggregating to over Rs.20,000 crores and statements of the Hawala operators were also recorded. Subsequently, the office of the DGIT(Inv.), Mumbai carried out action by way of searches and survey on the basis of such information which has resulted in establishing bogus purchases. Based on specific input from the DIT(Inv), Mumbai that the assessee had entered into Hawala Transactions for obtaining bogus purchase bills from the said parties, the purchase from the said concern was held as not genuine.

8.3.2 On the issue of genuineness of purchase primary onus is on the assessee to establish identity of the persons from whom the purchases were shown to have been made and genuineness of such transactions. In a case, where it was established by one Govt, department (sales tax in this case) that the parties from whom purchases were shown to have been made are indulging into Hawala transactions, the onus on the assessee is even greater to establish genuineness of transaction as it was found that such Hawala Operators have never sold any goods, but have issued only bogus bills to the beneficiaries for a meager commission. It is also not the case of the assessee that the said party is available to confirm the transactions independently. Hence, as to the claim of the appellant that the payments were made through banking channels, it is pertinent to note that this is a case where substance is under serious doubt and not the



form. In the case where an assessee obtains bogus bills he will certainly obtain purchase bills from the said parties and may also make payment through banking channels to create evidence to establish sanctity of form as evidence. However, what is important is that the said parties are not available for further enquiry or verification to confirm the substance of the claimed transactions. Hence, it is not enough if there are documents evidencing an apparent situation, if such documents do not record a real transaction, but are made to cover up what could be inferred reasonably as unreal. In McDowell and Co. vs CTO(1985)154 ITR 148(SC) the position of law is that if substance attracts tax, the form can be ignored by the tax collector. Further, In the case of Assistant Commissioner of Income-tax v. Tribhovandas Bhimji Zaveri [2000] 74 ITD 92 (MUM.), Hon'ble Mumbai Bench of ITAT while dealing with the issue of bogus purchases where similar arguments were advanced to buttress the claim of purchases, held that,

"Considering the number of coincidences involved in the scheme, we are of the view that the entire scheme has been planned and coordinated by the firm. In the case of Homi Jehangir Gheesta v. CIT [1961] 41 ITR 135, the Apex Court held that while deciding an issue, the Tribunal can consider probabilities properly arising from the facts alleged or proved and by doing so the Tribunal does not indulge in conjectures, surmises or suspicions. The Apex Court expressed a similar e in the case of Sumati Dayal v. CIT [1995] 214 ITR 801/80 Taxman 89 (SC) and held that e decision of an adjudicating body based on surrounding circumstances and probabilities is not bad in law and deserves to be upheld. In the case of McDowell & Co. Ltd. o. CTO [1985] 154 ITR 148 /22 Taxman 11, the Apex Court held that colourable devices are not part of legitimate tax planning, "

8.3.3 Hon'ble ITAT Mumbai has in the case of Shri Rajeev G. Kalathil Vs. DCIT (ITA No. 6727/Mum/2012 dt, 20.08.2014 AY 2009-10), observed that "Transportation of goods to the site is one of the deciding factor to be considered for resolving the issue." In this case, however, it is an admitted fact that there are no evidences of transportation of goods as the assessee has not been able to furnish any evidence to establish delivery of the goods claimed to have been purchased from these parties. In the given facts and circumstances of the case, I am of the considered opinion that the Id. AO has rightly held that the purchases claimed to have been made



from the said party is not genuine and the claim of the assessee is not acceptable to that extent.

8.3.4. Having said that, another issue which requires consideration as regard this ground is that whether it was justified to disallow and add the whole amount of purchases claimed to have been made from the said parties and treat the same as income of the appellant. Ld. AO has not doubted the sales. This leads us to a circumstances where there is no doubt or dispute about the business activities of the appellant and the sales of the goods made by it. There is also no doubt about the fact that the appellant actually made purchases of the goods which were eventually sold as reflected in it's books of account. The issue has been considered in several judicial pronouncements including in the case of Vijay proteins Ltd. Vs ACIT (1996) 58 ITD 428 (Ahd.) and CIT v. Sanjay Oil Cake Industries v. CIT (2009) 316 ITR 274 (Guj.)(HC) wherein it was held that not the entire amount, but the profit margin embedded in such amount would be subjected to tax. Similar views were expressed in Bholanath Polyfab Pvt. Ltd. 355 ITR 290 (Guj). Further, It has been held in the case of f CIT vs. Simit Sheth (2013) 38 Taxmann.com 385 (Guj), that addition to the extent of 12.5% of the bogus purchase could be said as reasonable in such circumstances. Hence, am of the view that considering the facts and circumstances of the case, estimation of 12.5 % as profit embedded in impugned purchases shown from the said party and adding the same to the total income returned, would meet the ends of justice. I, accordingly, direct the AO to compute profit to the extent of 12.5% of the bogus purchases, which works out to Rs. 37,111/- (12.5% of Rs. 2,96,887/- and treat the same as income of the appellant. The addition made on this account is accordingly restricted to Rs. 37,111/- .The appellant gets relief for the balance amount. The Ground is, accordingly, Partly allowed.

10. We have heard rival submission of parties and perused the relevant material on record. As far deletion of disallowance of rs 2,01,957/- is concerned, we find that purchases from the alleged party M/s Foram Traders. Apple India marketing are not recorded in the books of account of the assessee, making addition in the hands of the assessee by the AO is not justified , without bringing



on record any evidence that said party and samEnterprises whose TIN has been cited by the said party. In the circumstances, we uphold the finding of Ld Cit(A) on the issue in dispute. Regarding disallowance sustained at the rate of 12.5% in the case of Siddhi Enterprises , we finf the Ld CIT(A) has followed binding precedent on the issue in dispute , therefore , we don't find any error ij the same and we uphold the same. The ground of the appeal of the Revenue is accordingly dismissed.

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

**Order pronounced under Rule 34(4) of the ITAT Rules,
1963 on 30/012/2022.**

**Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER**

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

Mumbai;
Dated: 30/12/2022
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai