

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

**BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM**

**ITA No. 381/Mum/2022
(Assessment Year: 2015-16)**

Prime Star
3-M, Ambika Darshan
Moti Kadiya Sheri
Sayedpura,
Surat, Gujarat-395003

Vs.

The ACIT
Central Circle-1(3)
Pratishtha Bhavan
Mumbai

(Appellant)

(Respondent)

PAN No. AAHFM7351H

**ITA No. 347/Mum/2022
(Assessment Year: 2015-16)**

Madhur Gems Pvt. Ltd.
310, Panchratna,
Opera House,
Mumbai-400 004

Vs.

The ACIT
Central Circle-1(3)
Pratishtha Bhavan
Mumbai

(Appellant)

(Respondent)

PAN No. AABCM0155G

**ITA No. 353/Mum/2022
(Assessment Year: 2015-16)**

Miles Stone
204, Sapna Apartment,
Jadda Khadi, Mahidharpura,
Surat, Gujarat-395003

Vs.

The ACIT
Central Circle-1(3)
Pratishtha Bhavan
Mumbai

(Appellant)

(Respondent)

**PAN No. AAHFM7351H
ITA No. 358/Mum/2022
(Assessment Year: 2015-16)**

M/s Mother Exports
315 New DT Chat Falia
Haripura
Surat-395003

Vs.

The ACIT
Central Circle-1(3)
Pratishtha Bhavan
Mumbai

(Appellant)

(Respondent)

PAN No. AATFM3999B

**ITA No. 343/Mum/2022
(Assessment Year: 2015-16)**

2. On the fact and circumstances of the case and in law the Ld. CIT (A) erred in confirming the addition of alleged commission income arising out of alleged bogus unsecured loans, bogus purchases and bogus sales amounting to Rs. 18,95,951/- on protective basis without appreciating the fact that the same amount has been substantively added in the case of Shri Bhanwartal Jain, thereby making the same addition in the hands of two assesseees leading to double taxation.

3. On the facts and circumstances of the case and in law the Ld CIT(A) erred in confirming addition of Rs. 34,02,256/- (being 9 23% of Rs. 1,51,92,378/-), on estimation basis, by treating genuine turnover of the appellant as bogus sales:

4. On the facts and circumstances of the case and in law the Ld. CIT(A) erred in confirming the addition of alleged commission income arising out of alleged bogus unsecured loans, bogus sales and bogus purchases and also confirming the addition of gross profit, on estimation basis, of a percentage of the total turnover, without appreciating the fact that both such additions cannot co- exist together.

5. On the facts and circumstances of the case and in law the Ld. CIT(A) erred in confirming addition of alleged commission income arising out of alleged bogus unsecured loans, bogus sales and bogus purchases, without appreciating the fact that for the very same assessee for previous assessment years, being A.Y. 2008-09 to A.Y. 2014-15, the Ld. CIT(A) has deleted the protective addition of alleged commission Income, thereby not following the principal of consistency.

6. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in changing protective addition of commission income on alleged bogus sales to substantive addition on the incorrect presumption that the same was not considered in the order of the Hon'ble ITAT in the case of Shri Bhanwarlal Jain.

7. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in changing protective addition to substantive addition without issuing any show cause notice or opportunity of being heard to the appellant, which is in violation of section 251(2) of the Income Tax Act, 1961 and in violation of the principles of natural justice.*

8. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in confirming the addition made by Id. AO, without providing any opportunity of cross examination, without any corroborative evidence and without providing copy of statements relied upon.*

9. *The appellant craves to add, alter, classify, reclassify, delete or modify any of the above grounds of appeal and requests to consider each of the above grounds without prejudice to one another”*

04. The brief facts of the case is that

- i. assessee is a company who filed its return of income on 7th October, 2015 declaring total loss of ₹1,29,264/-.
- ii. Assessee is stated to be engaged in business of import and export and trading of cut and polished and roughed diamonds.
- iii. The return of income was not selected for scrutiny.
- iv. Subsequently, a search took place on 30th October, 2013, in case of Mr. Bhanwarlal Jain Group.
- v. Mr. Bhanwarlal jain in his statement he has categorically admitted that he is issuing bogus bills through 70 concerns and operated and managed by him through dummy directors, partners, etc. Assessee is one of them.
- vi. During the year, assessee has purchased of ₹16.17 crores, sales of ₹15 crores and loans etc. of ₹8 crores which are alleged to be an accommodation entries. Thus, case of assessee was reopened by issuing notice u/s 148 of the Act.

- vii. The return was filed on 28th October, 2018. Subsequently, show cause notice was issued, nobody complied with the notices.
 - viii. The learned Assessing Officer categorically held that Mr. Bhanwarlal Jain has admitted accommodation entries through web of several concerns. The learned Assessing Officer made detail description of the accommodation entries given by Mr Bhanwarlal jain using this company as a conduit.
 - ix. The learned Assessing Officer thereafter determined that on this accommodation entries of unsecured loan, bogus purchases and bogus sales, total commission income of the assessee is ₹21,06,501/-. Deduction of 10% was granted for expenses and undisclosed commission income of ₹18,95,851/- was made.
 - x. The learned Assessing Officer categorically noted that addition in the case of Shri Bhanwarlal Jain of the above amount is made on substantive basis and in the case of the assessee; it is made on protective basis.
 - xi. The learned Assessing Officer further noted that no transactions of the assessee are supported by proper evidence and further summons issued under Section 131 of the Act are not complied. He found that the gross profit shown by the assessee is very less. Therefore, he compared the gross profit of four different entities and then estimated the gross profit of the assessee at 11.5%, where assessee has disclosed gross profit of 2.27%, made the addition of ₹34,02,256/- of the balance gross profit.
 - xii. Accordingly, assessment order under Section 143(3) read with section 147 of the Act was passed on 27th November, 2019, determining the total income of the assessee at ₹31,68,843/-.
05. Assessee challenged the same before the learned CIT (A). The learned CIT (A) dismissed the appeal of the assessee. The learned CIT (A)
- i. Confirmed the addition of accommodation entry commission of bogus unsecured loans and bogus purchase on protective basis.

- ii. He confirmed the addition of commission of the bogus sales on substantive basis.
 - iii. With respect to the addition on the gross profit he confirmed the addition holding that the other group concerns Mr. Bhanwarlal Jain has shown gross profit, the gross profit disclosed by the assessee is very low and therefore, the addition is properly made.
 - iv. Thus, part of the addition of accommodation entry is made on protective basis and part of the addition of accommodation entry on substantive basis was confirmed by the learned CIT (A) over and above addition on account of lower gross profit.
06. The learned Authorized Representative submitted that the learned CIT (A) has confirmed protective addition in the hands of the assessee without confirming where substantive addition is made. It was the claim that the appellate authorities cannot confirm the addition on protective basis. With respect to the gross profit, it was submitted that it amounts to double addition as no defects in the books of accounts are pointed out. With respect to the substantive addition made by the learned CIT (A) it was submitted that the learned CIT (A) has not considered that ITAT in case of Mr. Bhanwarlal Jain has confirmed the commission income on the sale and further the learned CIT (A) while making the variation in the addition has not issued any notice under Section 251(2) of the Income-tax Act, 1961 (the Act). It was stated that when the notice under Section 251(2) of the Act is not issued, the addition is not sustainable.
07. On enquiry by the bench that where the order of Mr. Bhanwarlal Jain, where the learned Assessing Officer has made substantive addition, is pending at what stage. The learned Authorized Representative submitted that substantive addition in the case of Mr. Bhanwarlal Jain for A.Y. 2015-16 is pending before the learned CIT (A).
08. The learned Departmental Representative vehemently supported the order of the learned CIT (A).
09. We have carefully considered the rival contentions and perused the orders of the lower authorities. Facts emerging from the order of the learned Assessing

Officer clearly show that the return of the assessee was picked up for reassessment on the basis of search in case of Mr. Bhanwarlal Jain. It is also noted that assessee is one of the entity being operated by Mr. Bhanwarlal Jain for issuing accommodation entries for bogus loan, bogus sales and bogus purchase. The learned Assessing Officer has also discussed in Para 11 about the types of accommodation entries for loans and advances, bogus purchases and bogus sales were provided through this assessee. The learned Assessing Officer held that commission at the rate of 2.4% is earned on unsecured loan of ₹8.22 crores, ₹1,21,275/- on bogus purchases of ₹ 16.17 crores and on bogus sales of ₹1.51 crores amounting to ₹11,394/-. The learned Assessing Officer has categorically held that the total undisclosed commission income of ₹18,95,851/- is added in the hands of Mr. Bhanwarlal Jain on substantive basis for A.Y. 2015-16. This addition is also made in the hands of the assessee on protective basis to protect the interest of the Revenue. Further, with respect to declared loss of ₹1,29,264/- in its return of income, accounts maintained by the assessee were not at all supported by requisite evidences. The learned Assessing Officer determined the gross profit comparing the four different entities of Bhanwarlal Jain Group and for differential gross profit, the addition of ₹34,02,256/- was made. This addition was made in the hands of the assessee. Thus, part of addition is made in the hands of assessee on substantive basis and part of addition is on protective basis. The learned CIT (A) confirmed the protective addition. He further confirmed part of addition on substantive basis. With respect to the lower gross profit in paragraph no.2.3, he also confirmed the differential gross profit addition. We were informed as per the statement of the learned Authorised Representative, the addition made by the learned Assessing Officer on substantive basis in case of Mr. Bhanwarlal Jain is pending before the learned CIT (A). We find that before ascertaining whether on the substantive basis the addition is required to be made in the hands of Mr. Bhanwarlal Jain or not, the learned CIT (A) has confirmed the addition on protective basis in the hands of the assessee. Furthermore, when the assessee itself is proved to be one of the concern being operated by Mr. Bhanwarlal Jain for providing accommodation entries, it is also required to be established whether the addition is required to be made on substantive basis in the hands of Mr. Bhanwarlal Jain or not. Further, with respect to the addition of gross profit, when there is a conclusive finding that assessee is one of the entities used by Mr. Bhanwarlal Jain, even the lower gross profit addition is required to be examined

whether it should be made in the hands of the real beneficiary Mr. Bhanwarlal Jain or the conduit entity i.e. assessee. In short, where the substantive addition is pending for adjudication in case of Mr. Bhanwarlal Jain, whether this addition is required to be made and to what extent can only be determined as and when the learned CIT (A) decides the appeal in case of Mr. Bhanwarlal Jain. By confirming the addition in the hands of a conduit entity of gross profit, the examination whether this income belongs to the assessee or Mr. Bhanwarlal Jain has not been made by lower authorities.

010. Any way deciding the protective addition without deciding first the substantive addition and till becomes final, protective addition in the hands of assessee cannot be confirmed. It is not the case that the addition is confirmed in the hands of assessee on all issues on substantive basis. It is more important when it is the finding of the lower authorities that Mr. Bhanwarlal Jain is the beneficiaries of accommodation entries and assessee is merely a conduit and addition in the hands of assessee is made merely to protect the revenue. Thus at least without examining taxability of total income of assessee in the hands of Mr. Bhanwarlal Jain, it would be premature to decide the appeal of assessee.
011. In view of this, ground no. 2 and 3 are resorted back to the file of the learned CIT (A) with a direction to decide this issue along with the appeal of Mr. Bhanwarlal Jain for A.Y. 2015-16. The learned CIT (A) may also examine whether the addition made by the learned Assessing Officer on account of low gross profit is required to be added in the hands of Mr. Bhanwarlal Jain or not. For examination of this, proper procedure under Section 251 of the Act and issue of show cause notice in the hands of the respective assessee's may be followed. Ground no.4 to 9 are not pressed before us and therefore, same are dismissed.
012. In the result, appeal of the assessee is allowed to the above extent for statistical purposes.
013. The facts relating to M/s Madhur Gems Pvt. Ltd in ITA No.347/Mum/2022, M/s Miles Stone in ITA No.343/Mum/2022, M/s Mother Exports in ITA No.358/Mum/2022 and M/s Prime Star in ITA No.381/Mum/2022, are also involving the same issues and therefore, with similar direction, we also set

aside the respective grounds of these appeals to the file of learned CIT (A). All other grounds of reopening etc as stated in ITA No.343/Mum/2022 are dismissed.

014. In the result, all five appeals are partly allowed for statistical purposes with above direction.

Order pronounced in the open court on 17.04.2023.

Sd/-
(SANDEEP SINGH KARHAIL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 17.04.2023

Sudip Sarkar, Sr.PS,

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai