

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA Nos.4182, 4183 & 4184/M/2017
Assessment Years: 2007-08, 2008-09 & 2009-10**

Mr. Navin Shantilal Mehta, D/102, Shiv Krupa, Misquita Nagar, Vidya Mandir Road, Dahisar (East), Mumbai – 400 068 PAN: AAOPM2720P	Vs.	Income Tax Officer, Ward -32(2)(4), Third Floor, C-11, Pratyakshakar Bhavan, Bandra Kurla Complex, Bandra East, Mumbai - 400051
(Appellant)		(Respondent)

Present for:

Assessee by : Shri S.K. Dubey, A.R.
Revenue by : Shri Prasoon Kabra, D.R.

Date of Hearing : 05 . 04 . 2023

Date of Pronouncement : 27 . 04 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

Since common question of law and facts have been raised in these inter-connected appeals, the same are being disposed of by way of composite order to avoid repetition of discussion.

2. The appellant, Mr. Navin Shantilal Mehta (hereinafter referred to as 'the assessee') by filing the present appeals, sought to set aside the impugned order dated 16.02.2017 passed by Commissioner of Income Tax (Appeals), Mumbai [hereinafter

referred to as the CIT(A)] qua the assessment years 2007-08, 2008-09 & 2009-10 on the grounds inter-alia that :-

“1) Assessment of income by Ld. ITO-25 (1)(3) was for Rs.2,08,84,640/- as per Order of Assessment dated 28.03.2014. Being aggrieved the Appellant herein had preferred an Appeal against the order of said Ld. ITO 25 (1) (3) in front of Commissioner of Income Tax(Appeals)-44 and grounds made were as below:

a) The Ld. ITO erred in law and on facts in assessing the income at Rs.2,08,84,640/-. The total income as per CIT(A)'s order dated 03.06.2010 was Rs.7,11,260/-

b) The appellant submits that the income was correctly computed as per the provisions of Income Tax Act, 1961 by Commissioner of Income Tax (Appeals) - 35 and the additions made by Ld. ITO for Rs.2,08,84,640/- [consisting u/s 69C of the Income Tax Act, 1961 i.e. Unexplained Expenditure of Rs. 164,45,105/- and u/s 68 of the Income Tax Act, 1961, i.e. Unexplained Cash Credits of Rs.37,28,276/-] be deleted in total.

c) The Ld. ITO erred in law and seriously violating the provisions of natural justice in ignoring the Return of Income and documents attached thereon and passing an order without offering adequate opportunity of being heard.

d) Appellant have furnished the requisite details and had requested for and opportunity of being heard for furnishing the details, which was not granted to the appellant and the appellant requests to accept the return of income and the documents attached herewith.

e) The appellant prayed that the order passed is in violation of natural justice and be quashed.

After various submission and explanation by assessee and his Representatives from time to time the Appeal has been partly allowed as below:

f) Addition of Rs.1,64,45,105/- u/s 69C:

The Hon'ble CIT(A)-44 agreed to the contention of appellant that the purchases claimed by appellant were not bogus purchases and relied on the ratio of Saraswathi Oil Traders vs CIT(SC) & opined that it is the profit element on the total component in dispute which needs to be added to the income of the appellant. Thus, 12.5% of Rs.164,45,105/- which is Rs.20,55,638/- is taken as profit of the appellant on purchases.

g) Addition of Rs.37,28,276/- u/s 68:

The appellant furnished the cash flow statement before the ITO and also submitted daily cash summary for the period 01.04.2006 to

31.03.2007. While in Remand called by CIT (A)-44 the Ld. ITO 32(2)(4) was in error of understanding while seeing submitted cash flow statement and just taken amount deposited in bank(s) as balance. It was explained to Ld. ITO 32(2)(4) that the deposit in bank is from rightful sources i.e. inter bank transfers, collection from debtors which Ld. ITO overlooked in total. As remand Report is negative the CIT(A) had confirmed the addition for Rs. 37,28,376/- u/s. 68 in full without giving opportunity to Appellant to explain and cause him to explain.

h) Addition of Rs.4,30,980/- :

This addition for Rs.4,30,980/- was made by Ld. ITO 25(1)(3) while giving effect to previous order of CIT(A)-35 dated 05.05.2010 which assessee cum appellant herewith has agreed.

APPELLANT PRAY HEREWITH

a) The Appellant herewith prays for a relief of Rs. 57,83,914/- in Income as below :

Sr. No.	Nature of Addition	Amount of Relief (INR)
1.	Addition u/s. 69-C	20,55,638/-
2.	Addition u/s. 68	37,28,276/-
	TOTAL	57,83,914/-

b) Total Relief Claim in Tax for Rs.31,05,248/-

2) Further, The appellant craves leave of Your Honour to add, amend, alter, delete or modify any of the above grounds and Pray”

3. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee is an individual engaged in wholesale business of iron & steel and steel & material intending agency. During the survey action it was noticed that the assessee has claimed to have made purchases from various parties out of which some parties are found to be hawala operators as blacklisted by official website of Sales tax Department, Government of Maharashtra. On the basis of said information assessment was reopened under section 147/148 of the Act. For the bogus purchases made by the assessee during the years under

consideration the Assessing Officer (AO) made addition of Rs.1,64,45,105/-, Rs.3,66,47,798/- & Rs.3,66,35,458/- for A.Y. 2007-08, 2008-09 & 2009-10 respectively under section 69C of the Act by declining the contentions raised by the assessee that the purchase transactions are genuine and he had received actual delivery of the goods.

4. The AO also made addition of Rs.37,28,276/-, Rs.96,35,640/- & Rs.81,42,250/- for A.Y. 2007-08, 2008-09 & 2009-10 respectively under section 68 of the Act by treating the negative cash balance as unexplained cash credit (for A.Y. 2007-08, 2008-09 & 2009-10 respectively) under section 68 of the Act and thereby framed the assessment under section 143(3) read with section 147 of the Act.

5. The assessee carried the matter before the Ld. CIT(A) by way of filing appeals who has partly allowed the same. Feeling aggrieved with the impugned orders passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing present appeals.

6. We have heard the Ld. Authorised Representatives of the parties to the appeal, 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 law applicable thereto.

7. So far as first addition made by the AO under section 69C of the Act on account of bogus purchases made by the assessee is concerned, the Ld. CIT(A) has restricted the addition @ 12.5% of the bogus purchases which has been computed as Rs.20,55,638/-,

Rs.45,80,975/- & Rs.45,79,432/- for A.Y. 2007-08, 2008-09 & 2009-10 respectively.

8. The Ld. A.R. for the assessee challenging the impugned addition contended that the assessee has made real purchases for which he has made payment through banking channel but the AO has not brought any evidence on record by his own enquiry but simply relied upon the names mentioned in the list of hawala dealers published by the Sales Tax Department and that the assessee has filed complete details of the purchases and sales before the AO.

9. However, on the other hand, the Ld. D.R. for the Revenue relied upon the order passed by the Ld. CIT(A).

10. Undisputedly the Revenue has not disputed the sales made by the assessee during the years under consideration. But at the same time the Ld. A.R. for the assessee has failed to bring on record the evidence of making payment for the said bogus purchases through banking channel, only bald statement is there. The Ld. CIT(A) decided the issue by taking into account the fact that during A.Y. 2007-08 the assessee has made total sale of Rs.12.01 crores while the total purchase was made of Rs.11.64 crores but has shown the GP rate of 3.14% which is lower considering the nature and scale of the assessee's business. Furthermore, when this fact is examined in the light of cash deposit in the bank account of the assessee certainly the assessee has shown lower GP rate of 3.14%. The Ld. CIT(A) while taking into consideration aforesaid facts returned the findings qua A.Y. 2007-08 as under:

“4.3 I have carefully gone through the assessment order as well as the written submission and details filed by the appellant. Some 5-6 years

ago, the Sales Tax Department of the Government of Maharashtra had conducted extensive enquiries against such dealers who used to provide bills facilitating bogus purchases/sales. As a result of this inquiry, information about many assesseees were forwarded to the Income Tax Department. The A.O. has stated in the assessment order that the appellant is one such person who has inflated his purchases by showing bogus purchases from such persons who appear in the list of bogus entries providers as prepared by the Sales Tax Department. During the course of assessment proceedings, the A.O. also found that the assessee had not been able to establish the genuineness of purchases in dispute. The main arguments of the AO on the basis of which he had formed his opinion were-

- 1. The assessee was not able to submit any lorry receipts or any details regarding transportation of goods.*
- 2. The suppliers from whom the disputed purchases have been made are included in the list of hawala operators prepared by the Sales Tax Department.*
- 3. The suppliers from whom the disputed purchases have been made, were not produced before the AO.*
- 4. The suppliers from whom the disputed purchases have been made, did not comply to notice u/s 133(6).*

4.4 The appellant is a trader. The AO in his order has dealt exclusively with the purchases of the appellant. However, in the case of a trader, if there are no purchases of materials there cannot be any sales also. The AO had disallowed part of purchases without at the same time questioning the receipt figure of the assessee. The AO has not brought any material on record to show that there is suppression of sales also by the appellant. Further, the AO has not rebutted the arguments of the appellant that the payments have been made through banking channels. The fact remains AY 2007-08 that the appellant has taken care to make his purchases through banking channel and since the banks are required to follow KYC norms the identity of the supplier cannot be doubted. As far as the issue of producing the supplier before the AO is concerned, the assessee cannot be reasonably expected to force the supplier to reply to the AO or to appear before the AO.

4.5 In a judgment given by the Allahabad High Court in the case of CIT Vs Jagdish Prasad Tewari 220 Taxmann 0141 (2014), it has been held that if the payments have been made by cheques and are reflected in the books of account of the assessee, no adverse inference can be drawn.

4.6 It has been held in the case of M/s. Nikunj Enterprises 372 ITR 619 (Bom) by the Hon'ble Bombay High Court that merely because the suppliers have not appeared before the Assessing Officer or the CIT(A), one cannot conclude that the purchases were not made by the respondent-assessee. Further it has been held in the case of Saraswathi

Oil Traders vs. CIT 254 ITR 259 (Supreme Court) that when the sales have not been doubted then there was no question to doubt the purchases and the addition should have been made only to the extent of gross profit. To this extent, I am in agreement with the appellant that if the appellant has fulfilled his onus of making the payments by banking channels and has supplied the address of the sellers, then it cannot be presumed that the sellers were bogus simply because the sellers were not found at the given addresses. However, at the same time it cannot be said that the information provided by the sales tax department should not be taken cognizance of by the A.O. Therefore, after considering the totality of facts and after following the ratio of Saraswathi Oil Traders vs. CIT(SC) cited supra, I am of an opinion that it is the profit element on the total component in dispute which needs to be added to the income of the appellant. During the year, the total sales of the appellant was Rs.12.01 crores while the total purchases was Rs 11.64 crores. The appellant has however shown a GP rate of 3.14% which seems to be low considering the nature and scale of appellant's business and also considering the fact that huge cash deposit has been found in the bank account of the appellant. The additional profit which should have arisen to the appellant on the disputed purchases is therefore taken as 12.5% of the disputed purchases. The total amount which is being treated as bogus by the AO is Rs.1,64,45,105/-. Thus, 12.5% of Rs.1,64,45,105/- which is Rs.20,55,638/- is taken as profit of the appellant on purchases that are not fully and properly explained. Addition of Rs. 20,55,638/- is accordingly confirmed out of an addition of Rs. 1,64,45,105/- and the balance is deleted. Grounds of appeal No.1 is therefore partly allowed.”

11. The Ld. A.R. for the assessee contended that profit element assessed by the Ld. CIT(A) @ 12.5% of the bogus purchases is on higher side as the assessee's GP rate is not more than 3.14%, 2.59% and 2.83% for A.Y. 2007-08, 2008-09 & 2009-10 respectively. Hon'ble Bombay High Court in case of Pr. CIT vs. JK Surface Coatings Pvt. Ltd. in ITA No.1850 of 2017 order dated 28 October, 2021 upheld the view taken by the Tribunal that in such circumstances gross profit should be in the range of 5% to 12.5% as reasonable estimation of profit element embedded in the bogus purchases by returning following findings:

“4. Having considered the memo of Appeal and the Orders passed by AO / CIT(A) and the Order of ITAT, the only issue that comes up for consideration is with respect to the extent of ad-hoc disallowance to be sustained with respect to bogus purchases. The AO has observed 100% of the purchase value to be added to the income of Assessee, the CIT(A)

has said it should be 15% and ITAT has said it should be 10%. First of all, this would be an issue which requires evidence to be led to determine what would be the actual profit margin in the business that Assessee was carrying on and the matter of calculations by the concerned authority. According to the Tribunal, in all such similar cases, it is ranged between 5% to 12.5% as reasonable estimation of profit element embedded in the bogus purchase when material consumption factor do not show abnormal deviation.

5. Whether the purchases were bogus or whether the parties from whom such purchases were allegedly made were bogus was essentially a question of fact. When the Tribunal has concluded that the assessee did make the purchase, as a natural corollary not the entire amount covered by such purchase but the profit element embedded therein would be subject to tax.”

12. So keeping in view the totality of the facts and circumstances of the case, we consider the profit element by including VAT etc. @ 9% of the bogus purchases by following the decision rendered by Hon'ble Bombay High Court in case of Pr. CIT vs. JK Surface Coatings Pvt. Ltd. in all the three years for A.Y. 2007-08, 2008-09 & 2009-10. The AO is directed to make the addition on the bogus purchases of Rs.1,64,45,105/-, Rs.3,66,47,798/- & Rs.3,66,35,458/- for A.Y. 2007-08, 2008-09 & 2009-10 respectively @ 9%. So first issue is partly decided in favour of the assessee.

13. So far as second issue raised by the assessee in all the aforesaid three appeals as to making addition of Rs.1,64,45,105/-, Rs.3,66,47,798/- & Rs.3,66,35,458/- for A.Y. 2007-08, 2008-09 & 2009-10 respectively on account of cash deposit under section 68C is concerned, the Ld. CIT(A) has decided the issue against the assessee by returning following findings (for the sake of brevity findings of A.Y. 2007-8 are taken as the issue in all the three years is the same):

“5.1 The relevant facts are like this. There was a survey operation in the premises of the appellant on 24.01.2013. As per assessment order it was noticed during the course of survey that the assessee has made cash deposits in his bank account totaling upto Rs 46,39,000/-. The AO

asked the assessee to explain the nature and source of the cash deposits in the bank account. The appellant furnished the cash flow statement before the AO and also submitted daily cash summary for the period 01.04.2006 to 31.03.2007. On verification of the daily cash summary it was noted by the AO that after considering the closing balance of AY 2006-07 as Rs 6,57,284/- there is negative cash balance to the extent of Rs.37,28,276/- for which the assessee has not filed any explanation. The AO treated the negative cash balance as unexplained cash credit u/s 68 and added Rs 37,28,276/- to the total income of the appellant.

5.2 During the course of appeal proceedings, written submission was filed by the appellant. It was stated that as per cash book submitted by the appellant in the office of the assessing officer the cash balance was positive. The appellant also submitted copy of daily cash register and summary before the undersigned. Since there was an apparent contradiction in the view taken by the AO and the appellant, a remand report was sought from the AO and the copy of daily cash register filed before the undersigned was forwarded to the AO. The AO in his report AY 2007-08 stated that the computer-generated cash book summary submitted before the undersigned does not reflect the closing balance of AY 2006-07. The AO further stated that the cash book submitted by the authorized representative of the appellant showing positive cash balance is not correct and there is negative cash balance for AYS 2007-08, 2008-09, 2009-10, 2010-11 & 2011-12. In the concluding remarks the AO wrote the following:

"The daily cash register prepared by the assessee through computer and furnished cannot be relied upon as the same was prepared by assessee through computer system as per their convenience and no original cash book furnished for verification with details."

5.3 After the receipt of remand report the case of the appellant was re-fixed for hearing on 30.01.2017. Copy of the remand report was also sent by post and was further handed over to the appellant himself. The appellant sought an adjournment and the case was adjourned for hearing to 15.02.2017. However, on this date no one appeared nor was any written submission made. Thus, it is understood that the appellant has nothing to comment on the issue of addition u/s 68 of Rs 37,28,276/-. Further there is merit in the argument of the Assessing Officer that the appellant was not able to establish his claim of having positive cash balance as the details found in the course of survey provided direct evidence of the extent of cash balance held by the appellant during the particular assessment year. The addition of Rs 37,28,276/- is therefore confirmed.

6. In the grounds of appeal no.2 the appellant has raised the issue of violation of natural justice. It is stated that the assessment order was passed without providing adequate opportunity of being heard. However, it is seen from the assessment order that during the course of assessment proceedings, the AR of the appellant appeared before the

AO on several occasions and filed various details called for. Thus, there is no merit in the argument that adequate opportunity of being heard was not given by the AO. Grounds of appeal no. 2 is dismissed.”

14. The Ld. CIT(A) has confirmed the addition made by the AO under section 68 in all the three years by thrashing the facts and by calling a remand report. Since the assessee has failed to explain the cash deposit in the bank account found during the course of survey proceedings nor produced original cash book receipt rather relied upon the computer generated excel sheet, which shows continuous negative balance. When the assessee has not produced the original cash book for verification the Ld. CIT(A) has rightly decided the issue after duly thrashing the facts. Even before the Tribunal the assessee has not preferred to produce any original cash book. So we find no ground to interfere into the findings returned by the Ld. CIT(A) confirming the addition made by the AO to the tune of Rs.1,64,45,105/-, Rs.3,66,47,798/- & Rs.3,66,35,458/- for A.Y. 2007-08, 2008-09 & 2009-10 respectively under section 68 of the Act. So this issue is decided against the assessee.

15. Resultantly, appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 27.04.2023.

**Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER**

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

Mumbai, Dated: 27.04.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.