

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

BEFORE SHRI ABY T. VARKEY, JM AND SHRI AMARJIT SINGH, AM

आयकर अपील सं /I.T. A. No. 2564/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2009-10)

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आयकर अपील सं /I.T. A. No. 2566/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2010-11)

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आयकर अपील सं /I.T. A. No. 2568/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2011-12)

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आयकर अपील सं /I.T. A. No. 2570/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2012-13)

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आयकर अपील सं /I.T. A. No. 2572/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2014-15)

DCIT-5(2) DCIT-CC-5(2), Central Circle-5, Room No. 1908, Air India Building, Nariman Point, Mumbai-400021.	बनाम / Vs.	Prashant Premchand Godha 1701/1702, Oberoy Sky Heights, Lokhandwala Complex-400053. PAN NO-AFFPG4317N
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Madhur Agrawal Shri Mani Jain
Revenue by:	Shri K. C. Selvamani (DR) Mohd Arshad (ITO)

सुनवाई की तारीख / Date of Hearing: 15/02/2024
घोषणा की तारीख /Date of Pronouncement: 08/04/2024

आदेश / ORDER

PER ABY T VARKEY, JM:

These appeals by the Revenue arise out of the orders of the Learned Commissioner of Income Tax (Appeals) -53, Mumbai [in short 'ld. CIT(A)'] dated 03.06.2021 (for AY. 2009-10 & AY. 2010-11) and dated 09.06.2021 (for AY. 2011-12 & AY. 2012-13) and dated 17. 06.2021 (for AY. 2014-15) against

the orders passed by the Dy. CIT, Central Circle-5(2), Mumbai [in short 'the AO'] for the Assessment Years [in short 'AYs']. Since all these appeals involved one single common issue, they were heard together. Accordingly, for the sake of convenience and brevity, we dispose all the appeals by this consolidated order.

2. The sole grievance of the Revenue in all these appeals relate to the Ld. CIT(A)'s action of deleting the protective addition made in the hands of the assessee on account of over-invoicing of purchases by M/s IPCA Laboratories Ltd. Briefly noted, the AO had observed that the assessee was found in possession of cash in the course of search conducted u/s 132 of the Act on 23.12.2014 and he had admitted in his statement recorded u/s 132(4) of the Act that the amount belonged to M/s IPCA Laboratories Ltd and was generated out of over-invoicing done by M/s IPCA Laboratories Ltd. Later on, it is noted that the assessee had retracted his original statement and stated that the cash found from his residential premises represented his own unaccounted income and offered the same to tax in his hands in AY 2015-16. It is noted that this offer was accepted and assessed by the AO. According to AO however his retraction was an after-thought and that he was of the view that M/s IPCA Laboratories Ltd. had indulged in over-invoicing of purchases. The AO had accordingly made substantive addition on account of over-invoicing in hands of M/s IPCA Laboratories Ltd and correspondingly made protective addition in the hands of the assessee holding him to be the beneficiary of the over-invoicing. Being aggrieved by the above action of the AO, the assessee carried the matter in appeal before the Ld. CIT(A) who was pleased to delete the same.

3. Heard both the parties. We have already held in the case of IPCA Laboratories Ltd in their ITA No.879 to 883/Mum/2021 & Others that the company was not indulging in any over-invoicing of purchases and accordingly deleted the addition made by the AO, by holding as under:-

8.6We have heard both the parties and perused the relevant statements and retraction affidavits and also the other material placed on our record. The main thrust of the Revenue's argument was that the addition made by the AO on account of over invoicing was justified as it was made on the basis of statements given by the three employees in the course of search u/s 132(4) of the Act, which is an important piece of evidence in itself and that their subsequent retraction, being an afterthought, was of no relevance. In order to adjudicate this contention, it is first relevant to examine the extant provisions of Section 132(4) of the Act, which reads as follows:

“(4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.

Explanation.—For the removal of doubts, it is hereby declared that the examination of any person under this sub-section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.”

8.7From a bare reading of the aforesaid provision, it is noted that Section 132(4) of the Act empowers the authorized officer to examine on oath any person who is found to be in possession or control of any books of account, documents, money etc. Such a statement made by that person may thereafter be used in *evidence* in any proceedings under the Act. *Evidence* is a mode or means to prove a fact-in- issue. Statement is an oral testimony of relevant

fact; and an admission of a fact- in-issue is an important piece of evidence, provided it has been voluntarily given without any inducement, promise, threat or coercion. Once a statement recorded of a person who is in possession of any valuable thing or control of books found during search then it can be used as evidence in any proceedings under the Act and the presumption would be that it has been given by that person voluntarily. The burden to prove that the statement was not correct or that it was not voluntarily obtained, but due to threat, coercion, promise etc, is upon the maker of statement. In this context, the Hon'ble Apex Court in the case of **Pullengole Rubber Produce Co. Ltd. v. State of Kerala (91 ITR 18)** has held that although an admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It was held that, it is open to the assessee who made the admission to show that it is incorrect. A statement is only a piece of evidence, and the weight to be attached to it must depend on the circumstances in which it is made. It is open for the assessee to show it to be erroneous or untrue. Hence, the position which emerges is that a statement u/s 132(4) of the Act by itself cannot be reason enough to justify an addition, if the assessee is able to show that the facts admitted by him was purely based on wrong assumption of facts and able to adduce evidence/material to show that he was wrong on the facts he admitted. So when an admission u/s 132(4) of the Act has been retracted on the aforesaid reasons, then the AO should cross-examine the person again to ascertain the correct facts. The AO ought to conduct proper investigation into the affairs of the assessee and gather corroborative material which would negate such retraction and prove that the facts admitted originally is correct and thus retraction can be discarded.

8.8In view of the above position of law, we now proceed to examine the facts on the present case. It is noted that the impugned addition on account of over-invoicing emanated from the statement of Mr. Prashant Godha. He is noted to have admitted in his statement that the cash found in his possession was generated out of over-invoicing and that these proceeds belonged to the assessee-company. Based on his statement, the Investigating Authorities are noted to have enquired into the source/party from whom such over-invoicing

was done. As noted from the statements of the three (3) employees extracted above, the Investigating Authorities had questioned them as to whether they were aware of any bogus purchases booked by the assessee company. To this, each of the employee is noted to have made the same averment that purchases were booked from M/s Reynolds Petro Chem Ltd but these purchases were not bogus and that only over invoicing was done. The Investigating Authorities are noted to have followed up this answer with another question to explain the details of transactions made with M/s Reynolds Petro Chem Ltd and these employees are noted to have explained the same. Having perused each of these statements given by these three employees, it is evident that they had only admitted to over-invoicing being done through M/s Reynolds Petro Chem Ltd. The Ld. AR has rightly pointed out that none of these employees have named the assessee, i.e. M/s IPCA Laboratories Ltd. in their answers. Instead, while explaining the modus operandi, these employees are noted to have named M/s Maker Laboratories Ltd, which we note to be sister concern of the assessee who had made purchases from M/s Reynolds Petro Chem Ltd. It is not the Revenue's case that the assessee had made any purchases from M/s Reynolds Petro Chem Ltd. The AO instead is noted to have used these statements to allege that purchases made from other vendors, namely, M/s Sarna Chemicals Pvt Ltd, M/s Anuh Pharma Ltd, M/s Mehta API Pvt Ltd, M/s Calyx Chemicals and Pharmaceuticals Ltd and M/s Farmson Pharmaceuticals Pvt Ltd were also subjected to over-invoicing. Upon query by this Bench on this aspect, the Ld. AR confirmed that there were no purchases made by the assessee from M/s M/s Reynolds Petro Chem Ltd and this admitted factual position was not controverted by the Revenue. The Ld. AR brought to our notice that only M/s Maker Laboratories Ltd had conducted transactions with M/s Reynolds Petro Chem Ltd, and that the AO had already drawn adverse inference on account of over-invoicing in the hands of M/s Maker Laboratories Ltd. The Ld. AR also brought to our notice that Shri Prashant Godha was also an erstwhile Director of M/s Maker Laboratories Ltd and that he had remitted his office only a few months prior to the date of search. The Ld. AR has therefore rightly suggested that even if the statement of Mr. Godha was to be taken at face value, i.e. the cash found

on him was generated from over-invoicing, then he has mistakenly named the assessee instead of M/s Maker Laboratories Ltd in his statement. Having regard to these facts and evidences brought on record, we find force in the submissions of the Ld. AR that the statement given by Shri Prashant Godha that the cash found from his possession belonged to the assessee, which it had generated from over-invoicing, was based on mistaken understanding of fact and that his testimony was factually incorrect. This is also found to be corroborated by the fact that Shri Prashant Godha had backed his retraction affidavit by offering the cash found in his possession to tax as his own unaccounted income and the Revenue is also noted to have accepted the said offer and assessed it to tax in his hands. The contemporaneous facts showed that assessee had not made any purchases from M/s Reynolds Petro Chem Ltd, which was found to be engaged in giving inflated invoices. Moreover, the Revenue had already made additions on account of over-invoicing in hands of M/s Maker Laboratories Ltd in relation to the purchases from M/s Reynolds Petro Chem Ltd. Also, the cash found from the possession of Shri Prashant Godha had been ultimately assessed as his own undisclosed income. Considering the entire gamut of facts therefore, the original testimony of Shri Prashant Godha is found to be unreliable and that the assessee has rebutted the same with evidence. Hence, we hold that it was unsafe for the AO to draw adverse inference in the hands of the assessee solely based on an incorrect admission made by the Director on mistake of fact.

8.9As already noted above, the AO had erroneously referred to the statement of three (3) employees to justify the addition on account of over-invoicing from purchases made from vendors, M/s Sarna Chemicals Pvt Ltd, M/s Anuh Pharma Ltd, M/s Mehta API Pvt Ltd, M/s Calyx Chemicals and Pharmaceuticals Ltd and M/s Farmson Pharmaceuticals Pvt Ltd. The AO, instead, is noted to have drawn this inference on his own surmises and not any incriminating material found in the course of search. Overall therefore, we find that the entire premise on which the AO alleged over-invoicing of purchases by the assessee was fundamentally flawed and not backed by any

material or evidence. Accordingly, the additions made in this regard in the hands of the assessee is held to be unsustainable.

8.10 Before us, the Ld. AR for the assessee has also demonstrated through the details of purchases that the purported statements obtained from the three (3) employees regarding over-invoicing was also not corroborated by the given facts of the case. He has thus shown us that the admission obtained by them was untrue and hence their retractions should not be discarded straightaway. The Ld. AR has accordingly pointed out apparent fallacies in the manner in which the AO inferred over-invoicing from the vendors in question. The Ld. AR showed us that the AO had cited instances and made comparison on selective data. For instance, it was shown to us, that the AO had cherry picked six (6) transactions of M/s Sarna Chemicals Pvt Ltd as opposed to the twenty (20) transactions undertaken during the entire year. Likewise, in the case of purchases from M/s Mehta API Private Limited, the AO has picked up only two (2) out of thirteen (13) transactions actually entered into by the assessee. The Ld. AR has shown us similar cherry picking exercise in almost all cases. It was shown to us that, if the overall transactions were compared, the rates were commensurate and the differences were minimal. Hence, the purported values of over-invoicing obtained from these employees were not backed by the given facts of the case. We also find merit in the submissions of the Ld. AR that the price comparison undertaken by the lower authorities was inherently flawed as the lower authorities had failed to consider the functional, economic and risk differences amongst different vendors. The Ld. AR pointed out that, the terms of contract and terms of payment varied across vendors and hence an apple to apple comparison was not possible until functional adjustments were made. The Ld. AR also showed us that there was quantitative differences as well. He explained that it is well-known that bulk purchases carry discounted value in comparison to small/retail purchases. The Ld. AR also brought to our notice certain quality differences as well, which according to him, would have a bearing on the price. For instance, he took us through the different grades of paracetamol used in Indian market, European market and other countries. He accordingly

explained that the rates of paracetamol varied across different grades. Having regard to the foregoing, we overall find merit in the assessee's plea that the benchmarking exercise conducted by the lower authorities suffered from several infirmities and was therefore unreliable.

8.11 The Ld. AR also pointed out that this benchmarking exercise undertaken by the lower authorities had no legal backing. He submitted that Chapter X of the Act contained provisions giving authority to the officers for undertaking the transfer pricing exercise in relation to international or specified domestic transactions with associated enterprises. Similarly, according to him, only if the purchases from related parties are found to be inflated then the excess portion was disallowable u/s 40A(2)(b) of the Act. The Ld. AR thus submitted that there was no provision in law, which empowered the AO to undertake comparison of different prices paid for purchases made from different unrelated independent parties. He thus contended that this entire exercise undertaken by the AO was irrelevant. The Ld. AR explained that the difference in rates amongst purchases from unrelated and independent vendors can be on account of varied reasons such as availability of quantity with them, urgency/need of the assessee, place of delivery and terms of credit, etc. He also showed us that the purchases of these raw materials were made from both MSME vendors as well as reputed manufacturers. He thus contended that it is common in any industry that the rates would vary based on the reputation of the manufacturers. Having considered the foregoing, we find force in these submissions put forth by the assessee. Unless, the AO is able to bring on record tangible material or evidence that the assessee had paid excess price and got back monies / cash from suppliers, according to us, merely because there were rates differential amongst purchases from different vendors cannot be sole reason to infer over-invoicing / inflation of purchases. We also note that the AO himself had ultimately not given any relevance to the enquiry and comparison made by him, which although was extensively discussed in the assessment order. It is noted that the AO had ultimately made the addition based on the value of over-invoicing as stated by the employees in their statements and not based

on his comparison/ independent enquiry from these vendors. As already held above, the statements of the employees had no bearing in the given facts of the assessee's case as the over-invoicing component admitted by them was in relation to purchases made from M/s Reynolds Petro Chem Ltd. Hence, for the various reasons as discussed in the foregoing, we hold that the impugned addition on account of alleged over-invoicing was unwarranted on the given facts as well.

8.12 In light of the above findings, we direct the AO to delete the addition made on account of over invoicing in purchases across all AYs. Hence, the grounds raised by the assessee are allowed and the grounds of Revenue are dismissed.”

- 4.** In view of the above therefore, we are therefore in agreement with the Ld. CIT(A) that since the substantive addition itself has been held to be unjustified, the impugned protective addition has no legs to stand on. We accordingly uphold the order of Ld. CIT(A) and dismiss the grounds raised by the Revenue.
- 5.** In the result, all the appeals of the Revenue are dismissed.

Order pronounced in the open court on this 08/04/2024.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 08/04/2024.
Vijay Pal Singh, (Sr. PS)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai