

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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 5069/Mum/2016 - A.Y.2007-08  
ITA No. 5070/Mum/2016 - A.Y.2008-09  
ITA No. 5071/Mum/2016 - A.Y.2009-10  
ITA No. 5072/Mum/2016 - A.Y.2010-11  
ITA No. 5073/Mum/2016 - A.Y.2011-12  
ITA No. 5067/Mum/2016 - A.Y.2012-13

<b>Mrs. Jyoti Ajit Kulkarni 23B, Gharkul, Ganeshkruda Society Off. Paud Road, Kothrud Pune-411 038. PAN: ABTPK9281B</b>	<b>Vs.</b>	<b>Deputy Commissioner of Income- tax, Central Circle-5(3), Room No.11, Ground Floor, Aayakar Bhavan, M.K. Road Mumbai-400 020.</b>
<b>APPELLANT</b>		<b>RESPONDENT</b>

ITA No. 5119/Mum/2016 - A.Y.2008-09

<b>Deputy Commissioner of Income-tax, Central Circle- 5(3), Room No.11, Ground Floor, Aayakar Bhavan, M.K. Road,Mumbai-400 020.</b>	<b>Vs.</b>	<b>Mrs. Jyoti Ajit Kulkarni 23B, Gharkul, Ganeshkruda Society Off. Paud Road, Kothrud Pune-411 038. PAN: ABTPK9281B</b>
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by : Shri Chandrasekhar  
Respondent by : Smt. Mahita Nair – (SR DR)

Date of hearing : 09/02/2024  
Date of pronouncement : 15/ 04/2024

### **ORDER**

#### **PER GAGAN GOYAL, A.M:**

These 6 appeals by the Assessee and 1 appeal by Revenue (A.Y. 2008-09) are directed against the order of Commissioner of Income-tax (Appeals)-53, Mumbai, all dated 28.04.2014 for A.Ys. 2007-08 to 2012-13. The Revenue filed an appeal for A.Y. 2008-08 in ITA No.5119/Mum/2016. The following are the grounds of appeal raised by the parties (appeal number-wise): -

#### **Assessee's Appeals:**

#### **ITA No. 5069/Mum/2016 (A.Y. 2007-08)**

*"The following grounds are taken without prejudice to each other -*

- 1. the Id. CIT (A) erred in confirming the addition of Rs. 1, 72, 05,172/- being a commission paid to various parties for business purposes.*
- 2. The CIT (A) on facts and circumstances, erred in confirming the addition of Rs. 1,72,05,172/- without appreciating the documents and information such as bank statements, TDS details, return of income copies, address etc. produced by the assessee.*
- 3. On facts and circumstances of the case and in law Ld. CIT (A) was not justified in confirming the addition of Rs. 1,72,05,172/- on the basis of the remand report from Ld. Assessing Officer which deviates from the principle of Natural Justice*
- 4. On facts and circumstances of the case and in law Ld. CIT(A) was not justified in confirming the addition of Rs. 1,32,47,672/- being a commission paid on the ground that no return of income of concerned parties provided by the assessee even though*

*the nature of services details were provided during the assessment proceedings and appellate proceedings.*

*5. On facts and circumstances of the case and in law Ld. CIT (A) failed to appreciate that commissions were paid by account payee cheque and erred in confirming the addition of Rs. 1,72,05,172/-*

*6. On facts and circumstances of the case and in law Ld. CIT (A) was not justified in confirming the addition of commission expenses of Rs. 1,72,05,172/- ignoring facts that none of the parties had rejected receipts of commission.*

*7. the appellant craves leave to add, alter, amend, modify/delete, or to substitute any or all of the above Grounds of Appeal at the time of hearing of the appeal with the permission of the Hon'ble Appellate Tribunal."*

### **ITA No. 5070/Mum/2016 (A.Y.2008-09)**

*"The following grounds are taken without prejudice to each other -*

*1. The Id. CIT (A) erred in confirming the addition of Rs. 7,99,48,953/- being commission paid to various parties for business purposes.*

*2. The CIT (A) on facts and circumstances, erred in confirming the addition of Rs.7,99,48,953/- without appreciating the documents and information such as bank statements, TDS details, return of income copies, address etc. produced by the assessee.*

*3. On facts and circumstances of the case and in law Ld. CIT (A) was not justified in confirming the addition of Rs.7,99,48,953/- on the basis of the remand report from Ld. Assessing Officer which deviates from the principle of Natural Justice*

*4. On facts and circumstances of the case and in law Ld. CIT(A) was not justified in confirming the addition of Rs.7,99,48,953/- being commission paid on the ground that no return of income of concerned parties provided by the assessee even though the nature of services details provided during the assessment proceedings and appellate proceedings.*

*5. On facts and circumstances of the case and in law Ld. CIT (A) failed to appreciate that commissions were paid by account payee cheque and erred in confirming the addition of Rs. 7,99,48,953/-*

*6. On facts and circumstances of the case and in law Ld. CIT (A) was not justified in confirming the addition of commission expenses of Rs. 7,99,48,953/- ignoring facts that any party had not rejected receipts of commission.*

7. On the facts and circumstances of the case and in law, the Ld.CIT (A) was not justified in confirming the addition of sundry creditors amounting to Rs.1, 87, 86,628/-, only on the basis that confirmation letters were not submitted by the assessee when all the creditors had been squared off in the subsequent year by making payment by crossed account payee cheques, the details of which were submitted during the assessment and appeal proceedings.

8. On the facts and circumstances of the case and in law, the Ld. CIT(A) was not justified in confirming the addition of sundry creditors amounting to Rs.1,87,86,628/-when the same assessing officer had completed the assessment for all the subsequent years when the creditors' balance came to zero."

### **ITA No. 5071/Mum/2016(A.Y.2009-10)**

*"The following grounds are taken without prejudice to each other -*

1. *the Id. CIT (A) erred in confirming the addition of Rs.4, 09, 71,686/- being commission paid to various parties for business purposes.*

2. *The CIT (A) on facts and circumstances, erred in confirming the addition of Rs. 4,09,71,686/- without appreciating the documents and information such as bank statements, TDS details, return of income copies, address etc. produced by the assessee.*

3. *On facts and circumstances of the case and in law Ld. CIT(A) was not justified in confirming the addition of Rs. 4,09,71,686/- on the basis of the remand report from Ld. Assessing Officer which deviates from the principle of Natural Justice.*

4. *On facts and circumstances of the case and in law Ld. CIT(A) was not justified in confirming the addition of Rs. 4,09,71,686/- being a commission paid on the ground that no return of income of concerned parties provided by the assessee even though the nature of services and other details provided during the assessment proceedings and appellate proceedings.*

5. *On facts and circumstances of the case and in law Ld. CIT(A) failed to appreciate that commissions were paid by account payee cheque and erred in confirming the addition of Rs. 4,09,71,686/-*

6. *On facts and circumstances of the case and in law Ld. CIT(A) was not justified in confirming the addition of commission expenses of Rs. 4,09,71,686/- ignoring facts that none of the parties had rejected the receipts of commission."*

### **ITA No. 5072/Mum/2016(A.Y.2010-11)**

*“The following grounds are taken without prejudice to each other.*

- 1. The Id. CIT (A) erred in confirming the addition of Rs.28, 70,000/- being commission paid to various parties for business purposes.*
- 2. The CIT (A) on facts and circumstances, erred in confirming the addition of Rs. 28,70,000/- without appreciating the documents and information such as bank statements, TDS details, return of income copies, address etc. produced by the assessee.*
- 3. On facts and circumstances of the case and in law Ld. CIT (A) was not justified in confirming the addition of Rs. 28,70,000/- on the basis of the remand report from Ld. Assessing Officer which deviates from the principle of Natural Justice*
- 4. On facts and circumstances of the case and in law Ld. CIT (A) was not justified in confirming the addition of Rs. 28,70,000/- being commission paid on the ground that no return of income of concerned parties was provided by the assessee even though the nature of services details provided during the assessment proceedings and appellate proceedings.*
- 5. On facts and circumstances of the case and in law Ld. CIT (A) failed to appreciate that commissions were paid by account payee cheque and erred in confirming the addition of Rs. 28, 70,000/-*
- 6. On facts and circumstances of the case and in law Ld. CIT (A) was not justified in confirming the addition of commission expenses of Rs. 28,70,000/- ignoring facts that none of the parties had rejected the receipts of commission.”*

**ITA No. 5073/Mum/2016(A.Y.2011-12)**

*“The following grounds are taken without prejudice to each other -*

- 1. The Id. CIT (A) erred in confirming the addition of Rs.9, 59,295/- being commission paid to various parties for business purposes.*
- 2. The CIT (A) on facts and circumstances, erred in confirming the addition of Rs. 9,59,295/- without appreciating the documents and information such as bank statements, TDS details, return of income copies, address etc. produced by the assessee.*
- 3. On facts and circumstances of the case and in law Ld. CIT(A) was not justified in confirming the addition of Rs. 9,59,295/- on the basis of the remand report from Ld. Assessing Officer which deviates from the principle of Natural Justice*

4. *On facts and circumstances of the case and in law Ld. CIT(A) was not justified in confirming the addition of Rs. 9,59,295/- being a commission paid on the ground that no return of income of concerned parties provided by the assessee even though the nature of services details provided during the assessment proceedings and appellate proceedings.*

5. *On facts and circumstances of the case and in law Ld. CIT(A) failed to appreciate that commissions were paid by account payee cheque and erred in confirming the addition of Rs. 9,59,295/-*

6. *On facts and circumstances of the case and in law Ld. CIT (A) was not justified in confirming the addition of commission expenses of Rs. 9, 59,295/- ignoring the facts that none of the parties had rejected the receipts of commission."*

### **ITA No. 5067/Mum/2016 (A.Y.2012-13)**

"The following grounds are taken without prejudice to each other -

1. On facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming / disallowance of entire expenses debited to the profit and loss account of Rs. 8,45,461/-.
2. The Id. CIT (A) erred in confirming the addition of Rs.3, 99,717/- being unexplained jewelery.
3. The Id. CIT (A) erred in confirming the addition of Rs.30,000/- under chapter VI-A.
4. The appellant craves leave to add, alter, amend, modify/delete, or to substitute any or all of the above Grounds of Appeal at the time of hearing of the appeal with the permission of the Hon'ble Appellate Tribunal."

### **Revenue's Appeal:**

### **ITA No. 5119/Mum/2016(A.Y.2008-09)**

1. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in granting relief of Rs 3,61,20,000/- out of the entire commission payment of Rs 11,60,68,953/- disallowed by AO without taking into consideration the fact that the agreement entered into by the assessee with these parties is 'silent' on the quantum of 'remuneration' to be paid to these said parties and there is neither clarification regarding the roles and responsibilities of the said parties nor any clarity on the rate of commission paid?"*

2. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in giving relief of Rs 3,61,20,000/-without appreciating the fact that Ld. CIT(A) has in his order also held that the assessee furnished invalid affidavits in support of her claim and the same are not in conformity with the requirements of order XIX Rule 3 of the code of civil Procedure and hence do not hold any probative value and, therefore, do not satisfy the claimed transaction?"*

3. *"Whether on the facts and in the circumstances of the case and law, the Ld. CIT (A) is right in giving relief of Rs 3, 61, 20,000/-without taking into consideration the fact that no concrete or cogent evidence has been produced to demonstrate that the rate of commission prevailing in the market exceeded 25% of the purchase cost reasonable and within the limit of commercial expediency?"*

2. The brief facts of the case are that there are a total of six appeals by the assessee, i.e. from A.Y. 2007-08 to 2012-13 and one cross-appeal by the department for A.Y. 2008-09. The assessee worked with the State Bank of India as an officer from 1984 to 2005 and then took VRS from the Bank and started her own business of real estate aggregation from A.Y. 2007-08 onwards. The assessee was assigned the job of procuring more than 1,500 acres of land for the IRB group for their township projects near Lonavala.

3. The assessee had procured about 1,200 acres of land at village Taje & Pimploli (within the Lonavala area) for a subsidiary of the IRB group i.e. M/s. Aryan Infrastructure Investment Pvt. Ltd. For this aggregation of plots/land the assessee was entitled to receive Rs. 10 Lacs per acre for plain land and Rs. 6.5 Lacs per acre for hill slope type of land, irrespective of the purchase price and expenses incurred by the assessee vide agreement dated: 7<sup>th</sup> March 2007.

4. There was a search action on the IRB group on 21.07.2011 u/s. 132 of the Act and the assessee was also covered in this search action as a connected party. There was no declaration of undisclosed income made by the assessee and

seizure of cash was there on the premises of the assessee except the jewellery valued at Rs. 10,26,333/-. **All the returns up to A.Y. 2010-11 were filed by the assessee within the due dates much before the date of search action. Year-wise adjudication of appeals is being done chronologically in this order.** For the sake of clarity on the issue and being the 1<sup>st</sup> Year under consideration we started with A.Y. 2007-08 as under:

**ITA No. 5069/Mum/2016, A.Y. 2007-08**

5. The assessee filed her return of income on 22.10.2007 and declared a total income of Rs. 6, 18, 71,620/-. The case of the assessee was assessed u/s. 143(3) of the Act and income was assessed at Rs. 6, 19, 64,510/- vide order dated: 31.11.2009. Subsequently, consequent to the search case of the assessee was centralized and a notice u/s. 153A of the Act was issued. In response to this notice, the assessee filed a letter dated: 29.12.2011 requesting to treat the original return filed, as the return filed in response to notice u/s. 153A of the Act. However, subsequently, the assessee filed a return u/s. 153A of the Act on 26.06.2012. Assessment of the assessee was completed u/s. 143(3) r.w.s. 153A of the Act vide order dated: 28.03.2014 on a total income of Rs. 8, 79, 84,510/-.

6. The assessee being aggrieved with this order preferred an appeal before the Ld. CIT (A)-53, Mumbai, who in turn partly allowed the appeal of the assessee, i.e. relief of Rs. 88,14,830/- on account of commission paid and Rs. 18,577/- on account of depreciation on the motor car. Assessee being further aggrieved with this order preferred the present appeal before us and there is no appeal by the revenue in this year against the order of the Ld. CIT (A). We have gone through the order of AO, Order of the Ld. CIT (A) and submission of the assessee along

with grounds raised before us. It is observed that the assessee during the year under consideration paid a commission of Rs. 2, 60, 20,002/- to various parties, who supported the assessee in carrying her job as aggregator of land from various farmers/landowners smoothly and effectively. The job assigned to these people includes collection of revenue records, MAPS and demarcations of land, conducting land surveys, liasoning with farmers and land owners etc. The assessee agreed primarily with 5 parties who were assigned the work, i.e. Sh. Chandrakant Mohite, Mr. Mansingh Rao, Mr. Appa Saheb Patil, Mr. Sanjeev Savargaonkar, Mr. Ketan Janardhan Latkar and Mr. Abhijit Acchut Datar and sum of Rs. around 1.63 Crores were paid to these 5 persons only out of a total commission payment of Rs. 2.60 Crores.

7. We have gone through the financials of the assessee filed vide pages 63 to 69 of the paper book for the year under consideration. It is observed that nowhere in the financials it is shown land as purchase, sale or inventory, which establishes that the assessee was only instrumental in aggregating the land on behalf of the main party, i.e. M/s. Aryan Infrastructure Investment Pvt. Ltd. (AIPL). AIPL against the cost of land received of Rs. 8,66,79,527/- + stamp duty expenses of Rs. 17,78,465/- (Total Rs. 8,84,57,722/-) paid Rs. 17,77,75,864/- to the assessee. In that case, it is an unchallenged fact that the assessee received almost 100% as remuneration for the job assigned to her and certainly, there must be difficulties involved in this, otherwise builders as a community used to have their resources and expertise to carry out the job and none of the prudent businessman will pay such a high ratio of remuneration on any job. Whereas, the assessee paid only 14% of the total revenue to the people involved in the whole

process as mentioned (supra). **The numerator and denominator to work out the percentage have to be the same. Total revenue received by the assessee has to be the denominator for the calculation of the percentage and not the cost of land shown by the assessee.**

8. It is further observed that the assessee has not claimed any other professional or salary expenses in her profit & loss account. To carry such a gigantic task, certainly, without a team, she can't deliver the assignment. The revenue declared by the assessee as commission for aggregating the land from hundreds of farmers is not under challenge, the percentage of exorbitant remuneration received by the assessee, i.e. 100% of the goods delivered have also been accepted by the revenue and the percentage of commission claimed by the assessee against what percentage she received is not very exceptional. The Assessee has declared a handsome amount of income in her return and certainly, as she is dealing with a class of people, who were not so educated and organized, in that situation an overall picture of the case has to be considered. Nowhere, it is placed on record by the revenue that whatever revenue the assessee declared has not been allowed as an expense to the main party, i.e. AIPL. The accounting picture of the assessee will certainly, fetch certain features from the books of accounts of the main party, i.e. AIPL.

9. We observed that the Assessing Officer had not compared the reasonableness of payment concerning the fair market value of services provided by the assessee vis-à-vis outside parties. The assessee furnished the confirmations along with the ITR acknowledgements in respect of Mr. Sanjeev Savargaonkar, Mr. Ketan Janardhan, Mr. Abhijeet Achhut Datar and Mr. Chandrakant Mohite

expired. The assessee submitted the details of payments of commission along with the PAN No. of the payees on 29-08-2013. **The assessee herself requested to issue summons u/s. 131 of the Act to the parties involved as she was facing difficulty in producing those people for verification before the AO.** The partial relief is given by the Ld. CIT (A) confirms that he understands the nature of the transaction and also the percentage involved. Further, if the assessee has given commission to others for assisting her in land aggregation in the past and has been accepted, then such a payment cannot be held to be non-genuine. It is also not the case that any of the parties are related. In such kind of activity on a large scale of aggregation of land from various farmers, it cannot be denied that the assessee might have done this through various influential local agents, especially when there is no cost of salary of employees for this job.

10. Here it is pertinent to mention that earlier also the case of the assessee was assessed u/s. 143(3) of the Act and there was no disallowance on this count. Now, the prime question before us is whether, simply because there is a search and cases of the assessee is re-opened by virtue of section 153A of the Act, will it change the facts of the case earlier analysed and discussed in the regular assessment and that is too there is no material found during the search that supports another stand taken by the AO in assessment proceedings carried out afresh. In our opinion, in absence of any fresh evidence, order passed u/s. 143(3) r.w.s. 153A of the Act is nothing but a change in opinion and that is not permissible at all in law.

11. In a matter before Hon'ble Apex Court in the case of **[1978] 115 ITR 149 (SC) CIT v. Edward Keventer (P.) Ltd.** it was observed by the Hon'ble Bench as under:

*"The annual turnover of the assessee during the assessment years in question ranged between Rs. 23,66,000 to Rs. 30,86,000 and the assessee had two producing centres, and also several other distributing centres. And despite this huge annual turnover and larger number of centres to look after and supervise, the assessee incurred a total expenditure of not more than Rs. 5,000 per month at the head office and this expenditure of about Rs. 5,000 per month was inclusive of the remuneration and commission paid to the four directors and the personal assistant. It was impossible to say in the circumstances that the remuneration and commission paid to the four directors and the personal assistant was excessive or unreasonable. The total remuneration and commission paid was in neighbourhood of Rs. 4,500 per month which meant that other office expenditure by way of salary to employees and other staff was only about Rs. 500 per month. This would clearly show that the four directors and the personal assistant were attending to the business of the assessee and, in fact, this was clearly borne out from the material produced on behalf of the assessee in the proceedings before the tax authorities. The payment of remuneration and commission to the four directors and the personal assistant could not in the circumstances, be said to be excessive or unreasonable so as to warrant disallowance of any amount out of it by the ITO under section 10(4A)."*

*"Section 10(4A) casts a duty and confers the power on the Income-tax Officer not to allow any deduction in respect of any remuneration or benefit or amenity to any director or any person who has a*

*substantial interest in the company, as contemplated in the said section, if the Income-tax Officer is of the opinion that any such allowance is excessive or unreasonable, having regard to the legitimate business needs of the company and the benefit derived by or accruing to it there from. It is to be noted, as the section itself expressly mentions, that this power can be exercised by the Income-tax Officer, in the matter of computation of the profits and gains of the company, notwithstanding the provisions contained in section 10(2), which must necessarily include section 10(2) (xv). This section contains substantive provision and is not merely clarificatory in nature. This section clearly contemplates that even if the requirements of section 10(2) including the necessary requirements under section 10(2)(xv) are satisfied, the Income-tax Officer is enjoined not to make any allowance in respect of any expenditure which may come within the mischief of section 10(4A). In other words, even if the qualitative characteristics of section 10(2)(xv) justify any item of expenditure as wholly and exclusively laid for the business of the company, the Income-tax Officer is enjoined and empowered to consider the reasonableness or otherwise of the quantum or the amount expended on the item, if the item of expenditure comes within the purview of section 10(4A) and the Income-tax Officer is not to allow the entire amount so spent, if the provisions of section 10(4A) are attracted and the sum spent comes within the mischief of the said provisions. The Income-tax Officer must, however, consider the entire position dispassionately and objectively and from the view-point of a prudent businessman. The Income-tax Officer must appreciate that section 10(4A) is not to be applied capriciously as a matter of routine and he must realise that the said section is to be applied judiciously and can only be applied, if*

*the necessary conditions of the said section are satisfied. The opinion of the Income-tax Officer as to the reasonableness or otherwise of the amount spent must not be arbitrary and is not to be the subjective and prejudiced opinion of an officer interested in collecting more revenue. The opinion as to the reasonableness or otherwise of the amount spent must be formed,; having regard to the legitimate business needs of the company and the benefit derived by the company or accruing to the company from the said sum expended. The said section 10(4A) itself, while conferring the necessary powers on the Income-tax Officer, places two limitations in the matter of exercise of the power and the said sections enjoin the Income-tax Officer to take into consideration in exercising the power, (1) the legitimate business needs of the company, and (2) the benefit derived by or accruing to the company in forming any opinion as to the reasonableness or otherwise of the amount spent. The legitimate business needs of the company must be judged from the viewpoint of the company itself and must be viewed from the point of view of a prudent businessman. It is not for the Income-tax Officer to dictate what the business needs of the company should be and he is only to judge the legitimacy of the business needs of the company from the point of view of a prudent businessman. The benefit derived or accruing to the company must also be considered from the angle of a prudent businessman. The term "benefit" to a company in relation to its business, it must be remembered, has a very wide connotation and may not necessarily be capable of being accurately measured in terms of pound, shillings and pence in all cases. Both these aspects have to be considered judiciously, dispassionately without any bias of any kind from the view-point of a reasonable and honest person in business."*

14. We have considered the law laid down above by the Hon'ble Apex Court and observed that the facts of the case and the ratio decided (supra) are identical. Respectfully, following the same, we find that the case of the assessee was already assessed in scrutiny before the search and then AO examined the business model of the assessee and consequential revenue and expenses also. All the relevant material was already on record. This unchallenged fact can't be disturbed merely because there was a search on the assessee later on. Assessment finalized earlier can be disturbed only when something incriminating in nature is found during the search operations against the assessee. In addition to this assessee, herself requested and offered before the AO to call the parties concerned u/s—131 of the Act for verification and statement purposes.

15. Given the above discussion on facts and law, we are of the clear view that the action of AO is not sustainable as the same falls in the category of change of opinion, as there is no corroborative evidence gathered between the original assessment and assessment u/s. 143(3) r.w.s. 153A of the Act. Considering the facts and material before us, we do not find the order of AO sustainable in law and directed the AO to delete the addition made on account of the commission paid.

**16. In the result, an appeal of the assessee is allowed and AO is directed to delete the addition sustained after the order of Ld. CIT (A) to the extent of Rs. 1,72,05,172/- as commission paid.**

**ITA No. 5070/Mum/2016 (A.Y.2008-09)**

17. This year of appeal is also part of the block period starting from assessment year 2007-08 to 2011-12. For this year, the assessee filed her return of income under section 139(1) on 29/09/2008 declaring total income at Rs. 6,64,09,720/-. The case of the assessee was assessed under section 143(3) of the Act at a figure of Rs. 13, 26, 55,530/-. Subsequently, consequent to the search case of the assessee was centralized and a notice u/s. 153A of the Act was issued. In response to this notice, the assessee filed a letter dated: 29.12.2011 requesting to treat the original return filed, as the return filed in response to notice u/s. 153A of the Act. However, subsequently, the assessee filed a return u/s. 153A of the Act on 26.06.2012. Assessment of the assessee was completed u/s. 143(3) r.w.s. 153A of the Act vide order dated: 28.03.2014 on a total income of Rs. 22,70,37,892/-.

18. Ground Nos. 1-6 pertains to the addition confirmed on account of commission amounting to Rs. 7,99,48,953/-. The facts of the case are similar to what in A.Y. 2007-08, discussed and adjudicated (supra). Relying on the above order, wherein facts of the case and applicable discussed in detail, we do not see any difference in the modus operandi of the assessee for this year also. The facts of this year are rather on a better footing as compared to the A.Y. 2007-08, as the assessee has furnished complete bank statements, T.D.S. deducted on commission details, ITR copies and address etc.

19. Once T.D.S. details are there in the possession of the department, AO/Ld. CIT(A) can easily verify the status of the recipients and appropriate action, if required can be taken against them, instead of adding back the same in the hands of the assessee on whims and fancies. The Assessee is a resident of Pune and her

case is centralized in Central Circle, Mumbai. It is beyond our understanding when the assessee herself is requesting and offering issuance of summons u/s. 131 of the Act and department have full-fledged infrastructure at Pune, why are they insisting the assessee produce the parties for statement and confirmation of various other details? The department itself can commission the enquiry as contemplated in section 131 of the Act.

20. In addition to this, it is observed that there was a murder of a social worker in the area where the assessee and her associates were working and the matter was being investigated by the C.B.I. It is observed that the name of the assessee and her husband were also there in the C.B.I. enquiry, in such circumstances it's a common phenomenon, that persons involved will not turn up for various information the assessee is trying to gather to satisfy the revenue authorities. In that situation, especially when the assessee herself requested for commission u/s. 131 of the Act, revenue is duty-bound to accept the request of the assessee. In the given situation, in our considered view, the addition made by the AO and partly confirmed by the Ld. CIT(A) is not sustainable in law.

21. In such type of facts of the matter where the assessee is based at some other station and assessment proceedings were being carried out at some other station and that is too where enquiry is to be done with less literate village people, local authorities should be involved to bring the facts on record. Otherwise, the possibility of conjectures and surmises can't be ruled out and the same can't be the basis of such a huge addition. Now as the matter pertains to A.Y. 2008-09, i.e. almost 16 years have elapsed, if we direct the matter back to

the file of AO, practically it is impossible to do this exercise again and certainly assessee will harass and suffer with the whole process again, which do not justify our decision to restore the matter to the file of AO. **Asa result, Ground Nos. 1-6 raised by the assessee are allowed and an addition to the tune of Rs. 7,99,48,953/- is deleted.**

22. Ground Nos. 7-8 pertains to the addition on account of sundry creditors amounting to Rs. 1,87,86,628/-. During the year under consideration, the assessee has shown sundry creditors of Rs. 1,79,76,056/- and the amount payable to M/s. AIPL at Rs. 5,67,17,200/-. The assessee was maintaining her books of accounts on a mercantile basis of accounting. The assessee provided a list of sundry creditors and ledger accounts of M/s. AIPL. It is submitted by the assessee that as she is following the mercantile basis of accounting all the expenses and incomes were accounted for based on accrual basis. It is explained that in the process of land aggregation, full payment to the farmers was not made till the sale deed was executed with M/s. AIPL and the balance amount payable to the farmers were shown as sundry creditors in the balance sheet.

23. It is further submitted that the assessee had paid off all the creditors in the subsequent years and the balance as of 31.03.2011 was only Rs. 50,150/-. It is also submitted by the assessee that she offered unclaimed sundry creditors in A.Y.s 2010-11 and 2011-12 through the profit & loss account u/s. 41 of the Act. The facts discussed (supra) are not under challenge by the department, rather accepting the same assessment orders that were passed for A.Y.s 2010-11 and 2011-12. Now another question which arises for our consideration is whether

trade creditors can be considered u/s. 68 of the Act or not. As the assessee herself is declaring unclaimed sundry creditors u/s. 41 of the Act and the fact is not under challenge that sundry creditors are on account of purchase of land and not on account of any loan/deposit or capital received, wherein section 68 of the Act can be attracted.

**24. [2005] 144 TAXMAN 872 (ORI.)Aurobindo Sanitary Storesv. CIT,** wherein the Hon'ble High Court observed as under:

*“So far as the issue relating to addition of Rs. 2,70,421 as inflated liabilities under section 69, read with section 68 was concerned, it was clear from the order of assessment passed by the Assessing Officer, for the assessment year 1989-90 that it was not the case of the department that any sum was found credited in the books of the assessee maintained for the previous year relevant to the assessment year 1989-90 and the appellant had not offered any explanation for such false or bogus credit in the books of account. The case of the department, on the other hand, was that whereas in the party ledgers of the assessee for the previous year relevant to the assessment year 1989-90, a sum of Rs. 2,66,612.60 paise had been shown on account of sundry creditors, in the balance sheet that had been filed by the assessee in response to the letter of the Assessing Officer at the time of the original assessment a sum of Rs. 5,47,684.71 paise had been shown on the account of sundry creditors. Hence, section 68 was not at all attractive and could not be applied. The Assessing Officer had in fact not applied section 68 and had applied only section 69. [Para 12]*

*For applying section 69, the Assessing Officer must first come to a finding that the assessee has made investments which are not recorded in the books of account and thereafter call for an explanation from the assessee about the nature and source of the investments and if he finds that no such explanation is furnished by the assessee or the explanation offered by him is not satisfactory, he can treat the value of the investments to be the income of the assessee of the financial year in which he has made the investments. It appeared from the impugned assessment order that the Assessing Officer had sought to come to a finding that the appellant had during*

*the financial year 1988-89 previous to the assessment year 1989-90 made an investment to the tune of Rs. 2,70,421 only on the basis of the differences in the figure of liabilities towards sundry creditors shown in the party ledgers seized from the custody of the said partner of the assessee and the figure of liabilities towards sundry creditors in the balance sheet filed by the assessee at the time of original assessment. The assessment order showed that the Assessing Officer had come to conclusion that the assessee had made an investment of Rs. 2,70,421 during the financial year 1988-89 previous to the assessment year 1989-90 only on an analysis of different figures of assets and liabilities taken from the balance sheet and the party ledgers and not on the basis of any material or information that the assessee had in fact made an investment of Rs. 2,70,421 in some form or the other such as immovable and movable assets which were not recorded in the books of the assessee, the source and nature which the assessee had failed to explain to the satisfaction of the Assessing Officer. The addition of Rs. 2,70,421 made by the Tribunal was not correct because section 69 by a deeming provision provides for treating an unexplained investment made by an assessee during a financial year to be income of the assessee of the financial year for the purpose of assessment and unless the requirements of the section 69 are strictly satisfied by a finding by the Assessing Officer on relevant materials that the assessee had actually made some unexplained investments in stock-in-trade during the financial year 1988-89 to the tune of Rs. 2,70,421, section 69 could not be applied to treat the said sum of Rs. 2,70,421 as income of the assessee for the assessment year 1989-90. In the facts and circumstances of the case, therefore, the addition of Rs. 2,70,421 by applying section 69 was not legal and justified. [Para 13]"*

25. Respectfully, following the decision of the Hon'ble High Court, it can be safely concluded that no addition u/s. 68 of the Act can be made in case of trade creditors. As far as the authenticity of the same is concerned, it is duly accepted by the revenue in succeeding years where either the assessee made the payments to the farmers/landowners or offered the same by crediting the profit & loss account. A similar, view has been taken by the coordinate bench in the case of **[2011] 16 taxmann.com 262 (Del.)DCIT v.Divine International as under:**

*“It remains an admitted position that the trading results have been accepted and there is no dispute on the trading results as on date. Also, neither the sales, nor the purchases made by the assessee are in dispute. The dispute is limited to the verification of the creditors. The explanation of the assessee is that in view of the record having been destroyed in the fire, it is not in a position to get these outstanding creditors verified and that these were of petty karigars engaged in doing work for the assessee pertaining to a very old period. [Para 17]*

*It is also important to note that as per the balance sheet, the assessee had an outstanding liability of sundry creditors of Rs. 37,99,907 and at the same time, it had made advances to the suppliers of Rs. 24,45,951, sundry debtors of Rs. 19,37,520 and closing stock of Rs. 39,25,000. This clearly demonstrates that on the one hand the assessee has liability towards these creditors and on the other hand it has assets in the form of advances to suppliers, debtors, stock, etc. Had these creditors being not genuine, the assessee could have squared up or not shown these advances to suppliers, etc. Accordingly, the overall circumstances also do not suggest that any adverse inference should be drawn against the assessee. Further, as per the provisions of section 68, it is not mandatory that in case the assessee fails to satisfy the Assessing Officer about the outstanding credits, the same are mandatorily required to be added as income of the assessee. [Para 18]*

*This view has also been upheld by the Supreme Court in the case of 'CIT v. Smt. P.K. Noorjahan' [1999] 237 ITR 570/103 Taxman 382 (SC). The Assessing Officer has to take into account the overall facts. Accordingly, in the case of the assessee the overall facts need to be considered. The amount outstanding being credit on account of purchases which have been exported by the assessee, it is not mandatory that in the absence of verification of the creditors, the same need to be added statutorily. [Para 19]*

*In the case of the assessee, these creditors represent the outstanding amount on account of the purchases. There can be three alternative allegations against the assessee. One can be that these credits represent the credit for earlier years. If that is the case, no addition can be made in this year under section 68. The second allegation can be that these credits represent the purchases for which payments have been made by the assessee during the year itself. If this is so, the onus will be on the department to establish that the assessee has made payment to these creditors. This is not even the allegation of the Assessing Officer, much less his case against the assessee. The third allegation can be that these credits do not represent the purchases which have been made by the assessee. The implication of this will be that the purchases debited in the*

*trading account are not genuine to that extent and, accordingly, that the trading account is not correct. However, through the assessment order, it is evident that the trading results have been accepted. Despite this, for the sake of analysis, if it is considered that the assessee has failed to prove the genuineness of the creditors and, consequently, the purchases to that extent are not genuine, then the declared gross profit of Rs. 32,16,564 will get further enhanced by Rs. 37,99,907, i.e., a GP of Rs. 70,16,471 on a total turnover of Rs. 2,51,55,930 giving an exorbitant gross profit rate of 27.89 per cent, which is not the case. It is also important to note that the assessee is in the business of exports and its entire income is exempt. There is, as such, no reason for the assessee to suppress the profit as its income. [Para 20]*

*Taking into consideration the above facts of the assessee, it is a fit case not to make any addition by invoking the deeming fiction of section 68 in respect of the sundry creditors, despite the fact that the assessee could not supply the addresses of these creditors. All the facts and circumstances of the case, including that of the destruction of books of account, old period, petty karigars, advances to the suppliers, debtors and the closing stock, and particularly the fact that all these creditors have been paid off in the subsequent year and the return for that year has been accepted by the department clearly show that in the case of the assessee, it is not necessary to add these creditors. [Para 21]"*

26. The Facts discussed above and that of the assessee are similar, the books of the assessee were not under challenge and revenue and expenses were duly accepted by the department in addition to the fact that the assessee squared off the account in succeeding years/ offered for tax u/s. 41 of the Act. Keeping in view the above discussion on facts and law, we are not inclined with the view taken by the AO and Ld. CIT(A). **In the result ground nos. 7-8 raised by the assessee is allowed and an addition on this count amounting to Rs. 1,87,86,628/- is deleted.**

27. This year of appeal is also part of the block period starting from assessment year 2007-08 to 2012-13. For this year, the assessee filed her return of income under section 139(1) on 30/09/2009 declaring total income at Rs. 1,84,36,580/-. The case of the assessee was assessed under section 143(3) of the Act. Subsequently, consequent to the search case of the assessee was centralized and a notice u/s. 153A of the Act was issued. In response to this notice, the assessee filed a letter dated: 29.12.2011 requesting to treat the original return filed, as the return filed in response to notice u/s. 153A of the Act. However, subsequently, the assessee filed a return u/s. 153A of the Act on 26.06.2012. Assessment of the assessee was completed u/s. 143(3) r.w.s. 153A of the Act vide order dated: 28.03.2014 on a total income of Rs. 6,73,70,040/-.

28. Ground Nos. 1-6 pertains to the addition confirmed on account of commission amounting to Rs. 7,99,48,953/-. The facts of the case are similar to what in A.Y.s 2007-08 and 2008-09, discussed and adjudicated (supra). Relying on the above orders, wherein facts of the case and applicable discussed in detail, we do not see any difference in the modus operandi of the assessee for this year also. The facts of this year are rather on a better footing as compared to the A.Y. 2007-08, as the assessee has furnished complete bank statements, T.D.S. deducted on commission details, ITR copies and address etc.

29. As the facts and law applicable in the case of the assessee are similar for the whole block period of five years and the issue involved in this has already been discussed in length and adjudicated (supra), we do not see any requirement to discuss all the facts and law applicable again. **In light of the above decisions of**

**this bench, our decision (supra) will apply mutatis mutandis to this year also. In the result ground nos. 1-6 are allowed and AO is directed to delete the addition made and sustained by the Ld. CIT(A) to the extent of Rs. 4,09,71,686/-.**

**ITA No. 5072/Mum/2016(A.Y.2010-11)**

30. As the facts and law applicable in the case of the assessee are similar for the whole block period of five years and the issue involved in this has already been discussed in length and adjudicated (supra), we do not see any requirement to discuss all the facts and law applicable again. **In light of the above decisions of this bench, our decision (supra) will apply mutatis mutandis to this year also. In the result ground nos. 1-6 are allowed and AO is directed to delete the addition made and sustained by the Ld. CIT(A) to the extent of Rs. 28,70,000/-.**

**ITA No. 5073/Mum/2016 (A.Y.2011-12)**

31. As the facts and law applicable in the case of the assessee are similar for the whole block period of five years and the issue involved in this has already been discussed in length and adjudicated (supra), we do not see any requirement to discuss all the facts and law applicable again. **In light of the above decisions of this bench, our decision (supra) will apply mutatis mutandis to this year also. In the result ground nos. 1-6 are allowed and AO is directed to delete the addition made and sustained by the Ld. CIT(A) to the extent of Rs. 9,59,295/-.**

**ITA No. 5067/Mum/2016 (A.Y.2012-13)**

32. This year of appeal is not a part of the block period starting from assessment year 2007-08 to 2011-12. For this year, the assessee filed her return of income under section 139(1) on 30/03/2013 declaring total income at Rs. 41,505/-. Assessment of the assessee was completed u/s. 144 of the Act vide order dated: 28.03.2014 on a total income of Rs. 11, 67,840/-. The assessee being aggrieved with this order of AO preferred an appeal before the Ld. CIT (A), who in turn allowed the appeal of the assessee partly. The assessee being further aggrieved preferred the present appeal before us.

33. We have gone through the order of AO passed u/s. 144 of the Act; Order of the Ld. CIT (A) passed u/s. 250 of the Act and submissions of the assessee along with grounds of appeal raised before us. The Assessee raised total three effective grounds before us. Ground wise discussion and adjudication will be carried out in our order as under:

34. Ground No. 1 pertains to disallowance of entire expenses debited to profit & loss account amounting to Rs. 8,45,461/-. The assessment of the assessee was completed u/s. 144 of the Act and later on during the appellate proceedings before the Ld. CIT (A); assessee participated in the process of determination of income. The assessee has claimed a business loss of Rs. 8, 18,064/- after set-off of Rs. 27,397/- received as business income. AO taxed this amount of interest under the head income from other sources and disallowed the whole loss of Rs. 8, 45,461/- under the head business for want of evidences of the same.

35. In addition to this, fact is on record that assessee filed her return belatedly on 30.03.2013. In that case before going into the merits of the case otherwise, it is settled position of law that in case of return filed belatedly loss under the head business (other than depreciation loss) can't be carried forward. We have gone through the records and observed that total loss to the assessee consist of depreciation loss amounting to Rs. 4, 24,433/- and rest of the amount Rs. 4, 21,028/- pertains business expense incurred other than depreciation loss. **In that case assessee is entitled to carry forward only depreciation loss of Rs. 4, 24,433/- and rest of the loss after set off the interest income of Rs. 27,397/- can't be carry forward. In the result Ground No. raised by the assessee is partly allowed.**

36. The 2<sup>nd</sup> ground of appeal pertains to addition on account of unexplained jewelry amounting to Rs. 10, 26,333/-, which is ultimately reduced to Rs. 3, 99,717/- by the Ld. CIT (A). It is observed that the assessee and her family including her Mother-In-Law owned total jewelry of 1868 Grams. Out of this 1,868 Grams, 163.67 was diamond jewelry. The Assessee explained 884.33 grams of gold jewelry and total diamond jewelry acquired after 1998. Balance jewelry assessee was not able to substantiate with bills as the same was acquired between the dates of marriage till 1998 weight around 820 grams.

37. The Ld. CIT (A) rightly relied upon the circular no. 1916 dated: 11.05.1994 and allowed 1,200 grams of jewelry as explained. This 1,200 grams includes the jewelry already explained by the assessee, whereas as per this circular, which is benevolent in nature and assumed the jewelry explained without any supporting

also. In this assessee's argument is that benefit of this circular should be applied for unexplained jewelry only and not on both the explained as well as unexplained jewelry. We have gone through the circular mentioned (supra) and find force in the arguments of the assessee. When assessee explained a part of jewelry, certainly she does not require any support from circular. Reliance on circular is required only in case where she is not in a position and a benevolent circular is there to support her on certain presumptions in favor of assessee. In that case unexplained jewelry is well within the limit of 1,200 grams as provided in circular no. 1916 mentioned (supra). **In the result, we agreed with the arguments of the assessee and ground no. 2 raised by the assessee is allowed and AO is directed to delete the addition of Rs. 3,99,717/-.**

38. Ground No. 3 pertains to claim of deduction against deposit in PPF account of the assessee and her son amounting to Rs. 70,000/- and Rs. 30,000/- respectively. The Ld. CIT (A) in his order allowed deduction of Rs. 70,000/- deposited by assessee in her own account and denied the deduction of Rs. 30,000/- deposited in the account of her major son. We have gone through the then section 80C of the Act and found any payment to PPF by the assessee to her account, account of spouse and children, shall be eligible for deduction. There is no mention of minor or major child, hence in absence of any specific restriction we agreed with the argument of the assessee that deposit by her in her son's account is also eligible for deduction u/s. 80C. **In the result ground no. 3 raised by the assessee is allowed and AO is directed to give benefit on whole deposit of Rs. 1, 00,000/-**

**Revenue's Appeal:****ITA No. 5119/Mum/2016(A.Y.2008-09)**

39. This appeal of revenue is filed against the order of Ld. CIT(A), wherein a relief of Rs. 3,61,20,000/- was granted to the assessee on account of an addition made of Rs. 11,60,68,953/- against the payment claim under the head of the commission by the assessee. As in this year, all the relevant facts and applicable law have already been discussed in the appeal filed by the assessee (supra) and it is held that overall, in all the years commission paid by the assessee is genuine. **In the light of above we are not inclined to interfere in the decision of the Ld. CIT(A), hence grounds raised by the revenue are dismissed.**

40. **In nutshell ITA No. 5069/Mum/2016 (A.Y.2007-08) fully allowed;  
ITA No. 5070/Mum/2016 (A.Y.2008-09) fully allowed;  
ITA No. 5071/Mum/2016 (A.Y.2009-10) fully allowed;  
ITA No. 5072/Mum/2016 (A.Y.2010-11) fully allowed;  
ITA No. 5073/Mum/2016 (A.Y.2011-12) fully allowed;  
ITA No. 5067/Mum/2016 (A.Y.2012-13) partly allowed and  
ITA No. 5119/Mum/2016 (A.Y.2008-09) dismissed.**

Order pronounced in the open court on 15<sup>th</sup> day of April 2024.

Sd/-

(AMIT SHUKLA)  
JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 15/04/2024

*Dhananjay, Sr. PS*

Sd/-

(GAGAN GOYAL)  
ACCOUNTANT MEMBER

**Copy of the Order forwarded to:**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
**ITAT, Mumbai**