

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI "C" BENCH : MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SHRI SUNIL KUMAR SINGH, JUDICIAL MEMBER

| ITA No. | A.Y. | Appellant | Respondent |
|----------------|-------------|--|---|
| 1709/Mum/2024 | 2013-14 | DCIT (CC)-2(3), Room No. 803, 8 th Floor, Old CGO Building Annexe, M.K. Road, Mumbai | Classic Marble Co. Pvt. Ltd., 15, Subhash Nagar, Bhandup Village Road, Bhandup W, Mumbai PAN: AADCC3249H |
| 1705/Mum/2024 | 2014-15 | | |
| 1722/Mum/2024 | 2015-16 | | |
| 1720/Mum/2024 | 2016-17 | | |
| 1718/Mum/2024 | 2017-18 | | |
| 1717/Mum/2024 | 2018-19 | | |
| 1715/Mum/2024 | 2019-20 | | |
| 1701/Mum/2024 | 2020-21 | | |

Assessee by : Mr. Neelkanth Khandelwal, CA
Revenue by : Ms. Madhu Malati Ghosh, CIT-DR

Date of Hearing : 24/06/2024
Date of Pronouncement : 23/09/2024

ORDER

PER BENCH :

The Revenue has filed these appeals for the AYs. 2013-14 to 2020-21 challenging the orders passed by the learned Commissioner of Income Tax (Appeals), Central Circle-2(3), Mumbai (in short 'Ld.CIT(A)'). The issues contested in these appeals are identical in nature and hence, they are being disposed of by this common order.

2. The common issue contested by the revenue in all the years relate to the relief granted by the Ld.CIT(A) in respect of disallowance of labour charges claimed by the assessee. In AY.2019-20, the assessee is contesting the relief granted in respect of addition relating to alleged unaccounted cash sales.

Classic Marble Co. Pvt. Ltd.,

3. The facts relating to the appeals are stated in brief. The assessee company is engaged in the business of import of rough marble blocks, marble slabs, granite slabs and tiles. It is also engaged in the business of manufacture of artificial marble and power generation. The Revenue carried out search and seizure operation u/s. 132 of the Income Tax Act, 1961 ('the Act') in the hands of the assessee on 14-02-2019. The residential premises of key persons of the assessee were also covered u/s. 132 of the Act. Survey actions were also conducted u/s. 133A of the Act in the hands of related cases.

4. During the course of search/survey operations, it was noticed that the assessee has paid labour charges to the following three concerns:

| Name of the party | Name of the proprietor (S/Shri) |
|------------------------------|------------------------------------|
| a) Varun Enterprises | Hitesh V. Patel (HUF) |
| b) Siddi Vinayak Enterprises | MehulkumarSomabhaimvada |
| c) Maruti Associates | Amit Dinesh Chandra Joshi |

The aggregate amount of payments made to these three persons during all the years under consideration are tabulated below:

| Labour expenses | A.Y. 2013-14 | A.Y. 2014-15 | A.Y. 2015-16 | A.Y. 2016-17 | A.Y. 2017-18 | A.Y. 2018-19 | A.Y. 2019-20 | A.Y. 2020-21 |
|--|-----------------|-----------------|------------------|------------------|------------------|-----------------|-----------------|-----------------|
| Varun Enterprises [HITESH V Patel (HUF)] | 18425407 | 17727847 | 21990325 | 21990325 | 23133210 | 53608356 | 7870313 | 89855971 |
| Siddhi Vinayak Enterprises (MEHUL KUMAR SOMABHAI MEVADA) | | 4982695 | 40887150 | 46881503 | 50040856 | 18037651 | Nil | Nil |
| Maruti Associates (SMIT DINESHCH ANDRA JOSHI) | | 5226847 | 37397994 | 42090212 | 47269804 | 16481055 | Nil | Nil |
| TOTAL | 18425407 | 27937389 | 100275469 | 112075863 | 120443870 | 88127062 | 78703136 | 89855971 |

4.1. The AO noticed that a statement was taken from Shri Hitesh V. Patel u/s 131 of the Act, wherein he had admitted before the search authorities that he has not supplied labour to the assessee-company. It was noticed that he was holding the Power of Attorney of other two concerns also, viz., M/s. Siddi Vinayak Enterprises and M/s. Maruti Associates also. He admitted that these persons never visited the premises and actual supply of labour does not happen from his premises. It was further noticed that the above said two concerns belong to the relatives of the Accountant of the assessee-company. It was also noticed that the bank accounts of above said two concerns and filing of their ITRs were also managed by the assessee-company. Shri Hitesh V. Patel also admitted that he has just signed the documents and cheques for the above said two concerns. The search team also found black documents signed by Shri Hitesh V Patel. He admitted that the cheques received from the assessee-company were realised and cash was returned back to the assessee company. He also admitted that he was getting a commission @ 5% of the total payments for signing documents/cheques. The officials also found that these three concerns operate with a single staff only. On the basis of the statement given by Shri Hitesh V Patel, the AO came to the conclusion that the assessee herein is controlling the operations of the above said three concerns.

4.2. The AO confronted the statement recorded from Shri Hitesh V Patel with the director Shri Amit Shah. But he pleaded ignorance with the facts revealed by Shri Hitesh Patel, as he is not in charge of labour department.

4.3. In view of the above, the AO issued notice u/s 142(1) of the Act asking the assessee to furnish complete details of labour/sub-contractor payments along with documentary evidences. The assessee

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also duly replied to the above said notice and furnished the details called for. The AO called for bank account details of two labourers named Shri Dhaval Kumar V Johnny Sersingh Amliar by issuing notice u/s 133(6) of the Act. On analysis of those bank accounts, the AO noticed that they were receiving salaries from more than one concern. Further, one of the labourers has made meagre withdrawals. Accordingly, the AO came to the conclusion that they have only lent their names and were not doing actual work.

5. Before the AO, the assessee requested for cross-examination of Shri Hitesh V. Patel. The AO provided the said opportunity to the assessee and cross-examination was done by Shri Bala Krishna Jhaveri, Advocate on behalf of the director of the assessee. The AO also recorded a statement from Shri Hitesh V. Patel on oath on that day. According to the AO, Shri Hitesh Patel could not furnish any document to prove the genuineness of labour supply and further, during cross examination nothing was established to prove genuineness of labour supply. Accordingly, the AO entertained the view that M/s. Varun Enterprises, the proprietary concern of Shri Hitesh V Patel did not supply labour. The AO also called for explanations from the assessee and the assessee also furnished details called for. M/s Varun Enterprises also furnished affidavits obtained from many labourers to prove the factum of supply of labour. The AO noticed that all the affidavits have been obtained on two dates only. The attendance register copies were also furnished to the AO, but the name of M/s Varun Enterprises was not seen on that register. In view of the various discrepancies noticed by him, the AO came to the conclusion that the payments made to M/s Varun Enterprises, the proprietary concern of Shri Hitesh V Patel is not genuine.

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6. The AO also recorded statement on oath from the proprietors of M/s. Siddi Vinayak Enterprises and M/s. Maruti Associates. He noticed that both the persons have started their proprietary concerns in the month of January, 2014 and discontinued the business in the month of June, 2017. Both of them had same address. Further, they have given Power of Attorney to Shri Hitesh V. Patel. During the course of survey operation, the letter head of M/s. Siddi Vinayak Enterprises was also found at the premises of the assessee. According to the AO, both these persons did not explain as to why the Power of Attorney was given to Shri Hitesh V. Patel. The AO also noticed that these two persons have supplied man power to the assessee only and not to any other concern. Before the AO, they furnished affidavits of some of the labourers, who were supplied to the assessee-company. However, the AO expressed the doubt as to how these two persons were able to contact those labourers after expiry of four years from the date of discontinuance of the business. In addition to the above documents, both the persons furnished a copy of document titled as 'Visit Note', dt. 01-02-2021 issued by the Enforcement Officer, Regional Office, Employees Provident Fund Organisation, Vapi, wherein the above said enforcement officer has conducted inspection of labour records with regard to supply of labourers to the assessee herein. Accordingly, it was submitted that the factum of supply of labour cannot be doubted with. The AO noticed that the above said document was counter signed by the proprietors of the respective concerns. According to the AO, these persons should not have signed those documents, when they had already given power of attorney to Shri Hitesh V Patel. The AO also noticed that both the persons have stated before the AO that they are living now in Rajasthan. In view of their present residence, the AO expressed doubt as to how these two persons were available on the date of visit of Enforcement official of PF department. In view of the above deficiencies/defects, the AO came to the conclusion that these two

concerns also have not supplied man power and consequently, the labour charges paid to these two concerns were also not genuine.

7. Accordingly, the AO disallowed the labour charges paid to these three concerns in all the years, as tabulated in the table above.

8. In the appellate proceedings, Ld.CIT(A) deleted these additions in all the years. Hence, the Revenue has filed these appeals.

9. We heard rival contentions and perused the record. From the discussions made by the AO, we notice that the AO has primarily relied upon on surrounding circumstances, preponderance of probabilities and other deficiencies noticed by him to arrive at the conclusion that the labour charges claimed to have been paid to the above said three concerns are not genuine. We notice that the Ld CIT(A) has passed a detailed order, analyzing the facts surrounding the issue, referring to various documents furnished by the assessee evidencing genuineness of payment of labour charges and explaining as to why the disallowance made by the AO is not sustainable. Accordingly, we prefer to extract below the operative portion of order passed by Ld.CIT(A) on this issue:-

“8.4 Perusal of above statements of Sh. Hitesh Patel clearly reveals that he has retracted his statement given u/s 133A of the Act. Further, Sh. Hitesh V. Patel was not re-examined during the proceedings. It is also noted that Sh. Hitesh Patel was asked to appear before AO on 08.02.2021 through a summon dated 04.02.2021 and AO asked to produce complete details related to his affairs with M/s CMCPPL however, Sh. Patel has submitted only part details on the day of cross examination. Sh. Patel has filed detailed reply on 01.03.2021. I have taken note of the documents submitted by Hitesh Patel during assessment proceedings while deciding the appeals in his cases before me. I have also gone through the statements of Sh. Mehul Mevada and Sh. Smit Dineshchandra Joshi recorded during the assessment proceedings on 08.02.2021. Both of these contractors have given similar statements wherein they confirmed their association with M/s CMCPPL and with Mr. Hitesh Patel.

8.5 The appellant has also filed the following evidence in the course of the assessment proceedings and also in the paper book filed in the present proceedings:

- a. Copies of the agreements with the three labour contractors.
- b. Copies of all invoices raised by the labour contractors along with the ledger accounts of the respective labour contractor and copy of the bank statements.
- c. Note on the business activities of the appellant company.
- d. Details of electricity expenses for A.Y. 2016-17.
- e. Details of workmen compensation policy taken for A.Y. 2016-17 for the labourers.
- f. Details of expenses incurred for accommodation / rent, uniforms, tea, coffee, food and medicines for A.Y. 2016-17 which shows that the basic needs of the labourers was taken care of by the assessee company.
- g. Detailed note on manufacturing processes and involvement of manpower / labourers in different types of processes for natural marble and artificial marble.
- h. Photographs of various processes like unloading of natural marble blocks, block dressing process, block fibre and pasting, block cutting into slabs, etc. which show that the labourers were employed.
- i. The invoices of VE, MA & SW for the month of April, 2015 and copies of muster roll (attendance register) of VE, MA & SVE for the month of June, 2015 and of SW and MA for the month of April, 2015; copies of sample invoices of SVE & MA for the month of April, 2015.
- j. Labour work summary for the month of April, 2015 along with details of job work done by various labourers for the month of April, 2015.
- k. Copies of the Salary Register and In& Out Register of VE for the month of April, 2015 and copies of Salary and Attendance register of SW for the month of April, 2015.
- l. Copies of the challans of Provident Fund for the month of April, 2015 along with the confirmation of payment thereof.
- m. Visit Reports of the Officer of Employee's Provident Fund Department.
 - n. Details of electricity charges of the residential quarters wherein the labourers were residing.
- o. Bill dated 1st January, 2016 for purchase of groceries for preparing the food for the labourers.
- p. Bill of Shri Shreeji Hospital dated 1st December, 2015 received by CMCPPL for the treatment of Mr. Mangesh Sahani who is one of the labourers, working in the factory premises.
- q. Bills of M/s. K. D. Parmar dated 19th June, 2015 for purchase of production staff uniforms and office staff uniforms.
- r. Copies of certificates of registration of VE under Shop and Establishment Act in Form C, Labour License in Form VI,

- Employees Provident Fund, Profession tax, Service tax in Form ST-2, GST Act in Form REG-6 and PAN Card.*
- s. *Copies of certificate of MA & SVE under Shop and Establishment Act in Form C, certificate of Labour License in Form VI, Service tax registration in Form ST-2, and PAN Card.*
 - t. *Confirmation of accounts of VE, MA & SVE in the books of the assessee company for the year ended 31-3-2016.*
 - u. *Affidavit of Ms. Juhi Patel sworn before the Public Notary.*
 - v. *KYC details of 1016 labourers working at the premises of CMCPL along with their addresses, PAN/Election Card, UAN, Aadhar Card.*
 - w. *Affidavits of 561 labourers working at the premises of CMCPL through the aforesaid three contractors.*
- x. *Details of salary or wages paid to three labourers along with their bank statements who are referred to in the assessment orders.*
- y. *Details of power and fuel expenses incurred in the manufacturing units of CMCPL for the months of April, 2015 to March, 2016.*
- z. *Statement of production of finished goods for the months of April, 2015 to March, 2016.*

8.6 *These details give sufficient support to the claim of appellant that Sh. Hitesh Patel was not only working as man power supplier to the M/s CMCPL but to other clients also. These details are neither disputed during the assessment proceedings nor any adverse findings have been brought on the record. Further, the observation of the AO that money received from M/s CMCPL is encashed within one day or two has also found answer in following reply of Mr. Hitesh Patel:*

"Q11. How do you pay your salary to the employees of Varun Enterprises who are employed in Classic Marble?"

Ans. *All the employees who go to Classic Marble, their attendance is recorded at the gate of the Classic Marble by the HR department and at the end of every week I carry the document of that attendance and record the same on my computer. Thus, the attendance of the whole month is recorded. Later HR of Classic marble gives me the monthly record of all the employee names and how many days they have worked at Classic Marble. After I get these details, I make a salary sheet on the computer in my office and hand over the same to the HR team of Classic Marble. Then the HR team of Classic Marble cross checks the same and confirms the same by email. After getting the information, I make my bill for that month to Classic Marble and in that bill, I add the employee's PF contribution on the month's total salary, 5% Service charges and GST and send it to Classic Marble.*

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After that Classic Marble pays the bill amount to me through RTGS directly to my bank account, after the amount is deposited in my bank account, I pay the monthly salary to my employees through NEFT in their bank account. I would like to point out that since December 2016 the salary is being paid directly to their bank account. Before December 2016 I used to pay the salaries of all my employees in cash in the presence of the HR and accounts' department of Classic marble and I used to take the signatures of the employees on the salary sheet while making the payment of salary."

8.7 It is also a standard practice in such industries where man power is supplied by third party. The bill is raised as per attendance certified by both the parties and labour payment is released based on total man hour supplied. The labour contractor makes the payments to labourers after receiving the same from the vendee. Further, it is noted that payments in cash has been discontinued with after December 2016 and amounts are credited by vendor to labourers account. This fact is also inferred from the AO's observations made regarding certain peculiarities in bank accounts of labourers namely Dhavalkumar Vasudev bhai Jani and Shersing Amliyar.

8.8 It is also noted by me that the said practice is also reflected in the statement of Sh. Jitendra Sharma, accountant in M/s CMCPL:

Q.12 Furthermore, I am showing you the Q.9 to Q15 of the statement on oath recorded by Shri. Hitesh Patel (M/s. Varun Enterprises), recorded u/s 131 of the IT Act, 1961 on 14.02.2019. In the said statement, he deposed that he has not supplied any labours to M/s. Classic Marble Company Pvt. Ltd., at Survey No.286, Unit-3, Village Naroli, Near Naroli Check Post, Silvassa - 396 230, UT of Dadra & Nagar Haveli. And I only maintain documentation like bank payment / cash payment, PF payment as per the data provide by M/s. Classic Marble Company Pvt. Ltd., Further, Shri. Hitesh V. Patel stated that he received 5% commission on total value of laborers charges paid by the company for providing laborers on paper. Please comments on the same.

Ans. Sir, I do not have any knowledge in this regard, Sir, as per direction given by the Management, I receive cash from Shri Hitesh Patel.

Q.13 Please state who is giving you direction regarding receipt of cash from Shri Hitesh Patel.

Ans. Sir, Shri Nitish Joshi used to give direction regarding receipt of cash payment from Shri Hitesh Patel.

Q.14 Please state who are the labour contractors for the contractual work for the company M/s. Classic Marble Company Pvt. Ltd., at Survey No.286, Unit-3, Village Naroli, Near Naroli Check Post, Silvassa - 396 230, UT of Dadra & Nagar Haveli.

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Ans. Sir, the labour contractors for the company for contractual work for M/s. Classic Marble Company Pvt, Ltd, Unit-3 at Survey No.286, Unit-3, Village Naroli, Near Naroli Check Post, Silvassa - 396 230, UT of Dadra 3r, Nagar Haveli is M/s. Varun Enterprise .

Q.15 Is M/s. Classic Marble Company Pvt. Ltd. dealing with any cash transactions with M/s, Varun Enterprise (Prop: M/s. Hitesh V. Patel (HUF), karta of said HUF)?

Ans. As per my best knowledge there is no any direct cash transaction with IVI/s Varun Enterprises with Mis Classic Marble Co, Pvt. Ltd

Q.16 Please produce the list of labour contractual charges received from Shri. Hitesh V. Patel in cash for the period from 2011-12 to 2018-19.

Ans. Sir, I am submitting, the copy of labour charges received from Shri. Hitesh V. Patel for the period from 2011-12 to 2018-19 to whom I distributed wages in cash on behalf of Shri Hitesh V. Patel (Proprietor of M/s Varun Enterprises). (The details submitted by Shri. Jitendra Sharma is attached as Annexure -A page no. 1).

Q.17 Please state what did you do with the cash received from shri Hitesh Patel.

Ans. Sir, I used to give cash to labours due for their salaries.

8.9 The above statement draws the clear picture of transactions carried out between M/s CMCPL and labour contractors. AO has used only part of it in his assessment order for arriving at conclusion that M/s Varun Enterprise and others were operating as entry provider for bogus expenses to M/s CMCPL.

8.10 Further, the director of the company has also not accepted the statement of Sh. Hitesh Patel. Moreover, Sh. Patel has retracted his statement and in cross examination during assessment proceedings, he confirmed his retraction and submitted the details as mentioned above.

8.11 I have also noted that PF inspector visited the appellant and labour contractors' premises on various dates and conducted the spot verification of ESI/PF compliance of labour employed. His report is categorical as far as number of total labour employed and compliance of PF Act are concerned. The PF visit note referred to by the AO in the assessment order is reproduced below:

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8.12 The above visit notes of the officer acting under the Provident Fund Act proves that the contractors i.e. Varun Enterprises, Maruti Associates and Siddhivinayak Enterprises have been supplying labour to the appellant company and maintaining labour records which are also verified by enforcement officer of Provident Fund Act.

The visit note issued on 26th July, 2017 records that the contracts with Siddhivinayak Enterprises and Maruti Associates were terminated w.e.f 30th June, 2017. This fact has also been recorded by the AO in assessment order.

8.13 I have also gone through the statement of Ms. Juhi Patel, an employee of the appellant. This statement too, was recorded during the course of survey. It is noted that her answers are very specific to the question raised before her. She has denied to be involved in any labour supplying work and she mentioned that she has not seen any labour in her office. It is correct also since she was looking after PF compliance work and labourers would not visit the main office of the appellant. Further, she has stated in statement that she was working for last two years with M/s Varun Enterprise and by that time the other two labour contractors viz. M/s Sidhi Vinayak Enterprise and M/s Maruti Associates had already closed their offices, so her reply was correct as far as these two labour contractors are concerned. In view of these recorded facts, no negative inference can be drawn from her statement.

8.14 During the course of assessment proceedings, appellant has submitted affidavits from 561 labourers employed by appellant. The AO has also considered the bank statements of few labourers for arriving at a conclusion that the labour charges received by labour contractor from CMCPL are non-genuine. I have gone through the details submitted by the appellant in his paper book and points raised by the AO in his order:

(a) In case of Mr. Shersing Amliyar, AO has noted that he has utilized only Rs.398/- for the month of Sept' 2019 whereas his account has been credited thrice in the month of October 2019. AO has concluded that this is a case to inflate the expenses for M/s CMCPL. Appellant has submitted that he withdrew his entire outstanding amount as on 16.08.2019 in cash and therefore might not have needed money for the month of September' 2019. Further, in the month of October, he received payments against salary, overtime and bonus. The details submitted in paper book support appellant's version on this account.

(b) In case of Dhaval Jani, AO has observed that he has been given amount from one Vidhi Industries also and received multiple credits in a month, he concluded that payments made to him are not proper and with a purpose to inflate expenses for appellant. Appellant has responded that this labourer joined its organisation only in July 2019 and his first salary was given in August 2019, he was granted an education loan of Rs. 20000/- for his ward. he was on the rolls of Varun Enterprise till June 2019 and never received salary from M/s CMCPL. It appears that before joining Varun Enterprise, he would have worked with Vidhi Industries.

8.15 The points observed by AO in these cases are just his observations and not confronted with appellant during assessment proceedings and cannot be termed as adverse findings against appellant. Even otherwise, most of these observations stand explained with the same set of documents.

8.16 I find that the aforesaid documents submitted during assessment proceedings, enable the appellant to discharge the initial onus cast upon it under the provisions of the Act. The AO ought to have considered the genuineness of aforesaid documents and rebutted the contents thereof to disprove the claim of the appellant. Perusal of the documents reveal that while some of them are basic documents in the form of business/tax registration certificates which establish identities of the entities; certain other documents viz. attendance register, payment made to workers and their vouchers, bank statements, affidavits of labourers are more specific and support the case of the appellant. Further, the visit report of enforcement officer under PF and ESIC law goes on to establish the fact that the labour contractors were supplying the labours to the appellant. The aforesaid visit report being issued by a statutory authority more so dealing with labour law itself could not be disregarded without assigning any reasons.

8.17 The most essential reason therefore, for the AO to arrive at the conclusion that the labour income was not genuine, is the statement of Shri. Hitesh Patel. The said statement was recorded on 14.02.2019 during the course of survey u/s. 133A of the Act. The appellant has submitted that the said statement of Shri. Hitesh Patel has been retracted by him and copy of affidavit in this regard have been furnished by the appellant within reasonable period of first statement. Further, after retraction through affidavit, Sh. Hiten Patel was examined and cross-examined during assessment proceeding also. In both the statements- examination in chief and cross examination on 08.02.2021, Sh. Patel has been consistent with his version of affairs with M/s CMCPL. He categorically accepted that he had supplied labourers to the appellant company who were on his pay roll in the previous years relevant to the A.Ys. 2013-14 to 2019-20. He had explained how the labourers of M/s Varun Enterprises were paid labour charges which were received from the appellant. He confirmed that he was doing compliance work under the Provident Fund Act for the appellant company and also for M/s Maruti Associates and M/s Siddhivinayak Enterprises. He has submitted the details which remain to be controverted with any meaningful adverse findings. Under such facts, the entire action of AO rests on admission of Mr. Hitesh Patel during his examination/s. 133A of the Act on 14.02.2019.

8.18 During the course of assessment proceedings as well as appellate proceedings, appellant has given details related to workflow and production process. This is evident that production

process requires sufficient manpower. It has also submitted other corroborative details like electricity expenses, workman compensation policy payments, expenses incurred for accommodation, canteen, food, uniform and medical for the staff & labourers clearly point that appellant was employing sufficient labour for its production process. The comparative chart for labour expenses incurred against the total turnover for the period under consideration is as under:

(Here Ld CIT(A) has expressed the view that the gross profit rate after disallowing labour charges would work out to be unreasonable. Thereafter, the Ld CIT(A) has referred to certain decisions, which lay down the principle that the additions could not be made on the basis of retracted statements)

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8.24 Analyzing the facts of the present case on the aforesaid parameters, I find as under:

- (a) The statement made by Shri. Hitesh Patel in the course of survey was not supported by way of any evidences impounded by the search / survey team at the premises of either at CMCPL or at the three labour contractors' premises.*
- (b) The statement of Shri. Hitesh Patel was recorded on 14.02.2019 u/s 133A of ,theAcI and the same was retracted by him on 11.03.2019. The said statement has been retracted by way of a sworn affidavit.*
- (c) The appellant has brought on record positive evidences in the form of various documents as narrated herein above to establish the fact that his statement was erroneous.*
- (d) Shri. Hitesh Patel has appeared before the AO on 08.02.2021 in the course of assessment proceedings and clarified his statement in examination in chief and cross examination, denying the earlier statement recorded on 14.02.2019 in the course of survey which has not been rebutted by AO.*

8.25 It is also learnt that, on same set of facts, AO has not only disallowed the labour expenses to the appellant but also add the 5% commission amount received by labour contractors over and above the income returned by them. Two of these contractors have challenged the order before Hon'ble Mumbai ITAT. Hon'ble Tribunal has decided the appeals in favour of appellants in following appeals through common order:

- Shri. MehulkumarSohambhaiMevada vs. DCIT Central Circle-2(3), Mumbai [ITA 826 - 830/Mum/2023] and;*
- Slut Smit Dineshchandra Joshi vs. DCIT Central Circle -2(3), Mumbai [ITA 749 - 753/Mum/202.3]*

8.26 Upon detailed perusal of the above orders of Hon'ble Mumbai ITAT, it is observed that the above two cases are based on the same facts as that of appellant. These two appellants were also providing labour to the M/s CMCPL and same case was made out against them. Further, in these two cases also, the Assessing Officer had rejected the accounts of the assessee based on the statement of Shri. Hitesh Patel. Further, similar to the appellant, both these appellants have also submitted various documentary evidences to prove the genuineness of their business. In the said case, the Hon'ble Mumbai ITAT has deleted the addition after consideration of facts:

"10. We notice that the assessee during the course of assessment had submitted several documentary evidences before the Assessing Officer (list extracted in the earlier part of this order) which have not been perused by the assessing officer and has not recorded and contrary finding out of these documentary evidences. We further notice that Shri Hitesh Patel had retracted on 14.02.2019 During the course of hearing, the bench asked the learned AR to submit the audited financial statement of the assessee pertaining to the relevant assessment year. On perusal of said statements we noticed that the assessee account are subjected to tax audit u/s 44AB of the Act and on further perusal of form 3CD, we noticed that the assessee is deducting provident fund from the labour charges paid and the same is duly remitted to the Provident Fund Account. It is also noticed that the labour charges and provident fund contribution are fully reimbursed by CMCPL and hence, the only income arising to the assessee is from service charges at 5%. In this regard, it is relevant to note that the assessing officer while making addition while applying 5% has considered the gross labour charges including the service charges which have already been offered to tax by the assessee and accordingly we find merit in the submission of learned AR that there is a double charge towards service charges to this extent

18. The above note evidences the fact that the assessee has been maintaining various records with regard to the labour supply and same is being verified by the enforcement officer. Considering these facts and circumstances of the case, we are of the view that the assessing officer is not correct. In holding that assessee is not engaged in the business of supply of labour contract to CMCPL without bringing any contrary finding on record. The only basis for the assessing officer to make addition is the statement recorded from Mfr. Hitesh Patel and the assessing officer had not carried out any independent verification of the various documents submitted by the assessee. In view of these discussion and after perusing the evidences of record, we hold that the action of assessing officer in making addition applying 5% of

gross receipt is not tenable. We accordingly delete the addition made by assessing officer."

8.27 In nutshell, all three contractors have confirmed their identities and genuineness of their business transactions are established by documents submitted, statements made during assessment proceedings as well as field inspection of PF authorities in the course of the assessment proceedings which have been overlooked by the Ld. A.O and remained uncontroverted though the same are contemporaneous evidence which go to the root of the issue raised in the assessment order. Hon'ble ITAT Mumbai, therefore, on same set of facts has allowed the appeals in above quoted cases of contractors.

8.28 I, therefore, hold that the addition of non genuinelabour expenses u/s 37 of the Act is unwarranted and deleted accordingly. These grounds of appeal are allowed."

10. We notice that the Ld CIT(A) has examined all the deficiencies that were pointed out by the AO in order to disallow the claim of labour charges and concluded that they do not survive in view of the evidences furnished by the assessee. Accordingly, the Ld.CIT(A) has held that the assessee has proved the genuineness of payment of labour charges and hence there was no sufficient reason to disbelieve the claim and disallow the same. Accordingly, in the facts and circumstances of the case, we find that the reasoning given by the Ld.CIT(A) and the decision taken by him are justifiable. Before us, the revenue could not furnish any material to show the perversity, if any, in the order passed by Ld.CIT(A) not they could furnish any material to contradict findings given by him on the basis of materials that were furnished before the AO. Accordingly, we confirm the order passed by Ld.CIT(A) on this issue in all the years under consideration.

11. The Revenue has raised one more issue in AY 2019-20, which is related to the deletion of the addition pertaining to alleged cash sales. In this year, the AO made addition of Rs.1,47,21,196/- treating the same as unaccounted cash sales. The AO arrived at this conclusion on

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the basis of statement taken from certain employees and also one whats app message. The AO took the view that the assessee has received only a portion of invoice amount by way of cheque and the balance amount has been received in cash. Accordingly, he collated the above said amount of disallowance on the basis of sales made to certain parties.

12. However, the assessee demonstrated before Ld CIT(A) that it did not carry out any unaccounted cash sales. With regard to whats app message, it was submitted that the same was proforma invoice only. A detailed submission with regard to each of the customer referred by the AO was made before Ld CIT(A). Accordingly, the Ld CIT(A) was convinced with the submissions made by the assessee and deleted the above said disallowance. The observations made by Ld CIT(A) in this regard are extracted below:-

"35.1 It is noted that AO has mentioned statements of Sh. Alpesh Trivedi and Haresh Kumar Purohit, the salesmen at appellant's factory premises. They mentioned about cash sales in the company. Further, a WhatsApp message was retrieved from phone of Sh. Haresh Kumar Purohit wherein an invoice and figures in cash and cheques are mentioned. The salesman and one other employee accepted that cash is accepted against sales but for smaller retail sales. Moreover, Sh. Purohit has mentioned that invoice mentioned in WhatsApp message is proforma invoice. Message also contains the text 'Kindly send revised quote'. This also supports the statement of Sh. Purohit that this is a proforma invoice.

35.2 The statements so recorded and screenshot of WhatsApp message was confronted with Director Sh. Amit Shah. He replied as under:

"Q38. In response to Q.16 of the statement of Shri Dashrath K Patel recorded u/s 132(4) of the Income tax Act, 1961, he has stated that he has dislocated the cash counting machine under the apprehension of the action of Income tax and he has also accepted that cash counting machine is used to count the cash received from Silvasa factory, Unit-1 through angadia. Please explain.

Ans. Sir, I am not aware of any cash coming and if anything is coming then it is getting deposited in the bank.

Q.39. In response to the Q.19 of the statement mentioned above, he has stated that he gets message from Shri Arvind Shah and Shri Rushin Mehta, the cash is collected from angadia, Shri Babulal Kantilal and cash is handed over to Shri Popatlal Shah, who is your uncle. Please explain.

Ans. Sir, I am not aware of any such transactions and I (M7) hearing the name of Babulal Kantilal for the first time.

Q.1. In response to the Q.22 to 24 of the statement mentioned above, he has stated that cash transactions are unaccounted cash transactions, which are not reported in the books of accounts and these transactions are executed on the directions of Shri Amit M. Shah. And he also stated that he receives total cash of Rs. 80 lacs to Rs. 1 crore in a month. Please explain.

Ans. Sir, this is not true No such amounts are received by me.

I am showing you the statement of sales manager at Silvasa Unit-I, Shri Haresh Kumar Purohit, who has stated in response to Q.37 that in the case of sales made to Shri C.Manishbhai Nagpur, the cash accepted was Rs. 1,50,000/-and balance amount of Rs. 12,56,466/- was also received in cash. Please explain.

Ans. Sir, I am not aware of any such transaction. No cash has been received.

Q42. In response to Q35 of the statement of Shri Haresh Kumar Purohit recorded u/s 132(4) of the Income tax Act, 1961, he has stated that the rates finalized by him with customers are reduced by 30% to 50% by Shri Jignesh Desai (General Manager at Silvasa Unit-1). Please justify this much discount and also explain that it is not unaccounted cash component of the sales.

Ans. Sir. There is a lot of discount given to customers as the market being very competitive and again discounts need to be given for the inferior quality material as well as cracked and unshaped material for which discount goes upto 50% and there is no unaccounted cash involved in the sales.

Q.49. I am showing you the response to the Q17 and 18 in the statement of Shri Rushin Mehta recorded u/s 132(4) of the Income tax Act, 1961 during the search proceedings. Please comment.

Ans: Sir, I am not aware of such kind of transactions of any unaccounted cash. Whatever cash is taken, has been deposited in the bank.

Q.51. I am showing you the response to the Q.20 in the statement of Shri Rushin Mehta recorded u/s 132(4) of the Income tax Act, 1961 during the search proceedings. In reply, Shri Rushin Mehta has explained that the cash and the cheque component of any transaction at Silvasa are decided by Shri Jignesh Desai with your confirmation. Please comment.

Ans. Sir, wherever any customer wants to take any discount, my team talks to me over phone and I give them the approval over phone only for the same accordingly. There is no unaccounted cash component that is involved.

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Q54. I am showing you the response to the Q. 39 to 44 in the statement of Shri Rushin Mehta recorded u/s 132(4) of the Income tax Act, 1961 during the search proceedings. Please comment.

Ans. Sir. I don't know what this excel statement is all about and I am not aware of any cash transactions involved in this. This excel sheet is 10 years old."

35.3 It is clear that company has accepted cash against sales and recorded the same in books of accounts. Appellant has submitted details related to cash sales as under:

| <i>Month of FY 2018-19</i> | <i>Cash Receipts</i> |
|----------------------------|---------------------------|
| <i>April</i> | <i>30,36,562</i> |
| <i>May</i> | <i>9,22,180</i> |
| <i>June</i> | <i>14,80,994</i> |
| <i>July</i> | <i>22,25,923</i> |
| <i>August</i> | <i>21,42,287</i> |
| <i>September</i> | <i>15,56,306</i> |
| <i>October</i> | <i>12,42,525</i> |
| <i>November</i> | <i>6,90,353</i> |
| <i>December</i> | <i>19,70,247</i> |
| <i>January</i> | <i>24,19,701</i> |
| <i>February</i> | <i>21,86,771</i> |
| <i>March</i> | <i>29,91,206</i> |
| <i>Total</i> | <i>2,28,85,055</i> |

Similarly, appellant company has submitted total cash receipts in the years under search assessment:

| AY | Amount (in Cr) |
|--------------|-----------------------|
| 2013-14 | 24.27 |
| 2014-15 | 34.57 |
| 2015-16 | 36.92 |
| 2016-17 | 32.59 |
| 2017-18 | 17.17 |
| 2018-19 | 2.66 |
| 2019-2020 | 2.28 |
| Total | 150.48 |

35.4 The instance of unrecorded or unaccounted cash sales were not found in entire search. It appears that WhatsApp messages mentioned in order are communications among sales team wherein quotes are floated against sales and then after discount etc, sales are finalized. AO has assumed that all these instances are of unaccounted cash sales on the basis of these messages. Further, it appears from the assessment order that the WhatsApp chats retrieved from the mobiles of Mr. Ramkrishna Swamy and Mr. Haresh Purohit are out of context as they do not contain the complete trail of the conversation. As the entire conversation has not been taken in its entirety, they do not portray the correct picture and hence these messages cannot be termed as incriminatory on their own without any corroborative findings.

35.5 The appellant company has also submitted the detailed explanations of all the parties referred to in the table given in para no. 9.7 of assessment order along with confirmations of the parties, bank details, PAN no., etc. to show that all the transactions carried out with those parties were recorded in the books of the appellant company which are not controverted.

35.6 Secondly, it appears from the list that many entries are repetitive in nature e.g Sr. no 4&5 are in the name of Shri R. Selvaraj. Sr no. 15,16 & 17 are against JD A/c and Sr.no 6,10 & 13 are for Mohan V Patel. It is not clear whether they pertain to same transactions or are different transactions. Further, AO has mentioned amount in fourth column of the table in para 9.7 of assessment order as 'Amount of bill according to bills or sheets', however, as per submission of the appellant even the bill amounts are not matching in 18 out of 21 cases narrated therein. In cases of R. Selvaraj and Mohan V Patel, the second instance of sales are neither confirmed by the purchasers nor recorded by the appellant as sales. The confirmations filed by the appellant are also support the figures reflected by appellant as sales in its books of account. The entire state of affairs gives credence to appellant submission that these are preliminary recordings by sales team and nothing to do with unaccounted cash sales.

35.7 It is also noted that AO has attempted to support his claim through one print out of SAP data wherein price variation has been noted and inferred that such variation can be linked to unaccounted cash acceptance by the appellant. This page was confronted with Managing Director of the appellant company:

Q.61. 1 am showing you certain printouts taken from SAP data containing pages 1 to 156 having data related to sales during F.Y. 2018-19 during the search proceedings. The same is annexed herewith as Annexure-17 of the seized material. Please go through the same and

explain why the same quality of the marble has been: Saki to different customers at different rates with huge variation.

Ans: Sir, marble is sold keeping in mind a lot of criteria. In itself one block, there are 1.5 slabs extra first choice quality, some are normal and some are with a lot of defects. So, itself from one block, all the slabs cannot be sold at one price, even though it is coming from the same block/lot. Apart from this, it depends upon size of the slabs, big and small arc regular or irregular shape. Due to irregular shape, a lot of wastage comes out for the client. If there are cracks and filings, then there is also a lot of variation in the selling price. _again, it depends upon the quantum of the order and the type of other material, which is sold along with all the quantity. Even prices are depending upon different thickness also.

Q.62. In reference to your answer to Q.61, please prove the difference of each invoice of sales with the respective blocks and concerned defects found in the all the sub qualities of the marble and also state where you mention or record this variation of quality defects.

Ans: Sir, it is impossible to detect all quality defects as marble being completely natural has already been mentioned earlier in the answer to Q no 61. All the prices are determined during the actual sale when the client actually comes and physically check the slabs and depending upon all the defects/quality, the price is determined all the slabs selected by a particular client. So, there is bound to have variation in price, even though the material is same and it is from the same block. I don't mention in each sale invoice the defect as every client has different perception of detecting the quality of marble.

It can be seen that appellant company has never denied that it was not doing cash sales but accounting the same as it is a prevalent business practice, as can be seen from the annual cash sales data supplied by appellant company.

*35.8 The appellant company through its letters requested the A.O. to furnish the copies of the statements recorded in the search and relied upon by him, workings of the alleged unaccounted sales party-wise and the seized material retrieved from the WhatsApp chats these were not furnished to the appellant by the A.O. No opportunity to cross examine the aforesaid witnesses of the A.O. was given to the appellant company in spite of request made by the appellant. The Hon'ble Allahabad High Court in the case of **Gargi Din Jwalaprasad v. CIT (96 ITR 97)** held that the elementary principle of natural justice is that the assessee should have 'knowledge of the material that is going to be used against him so that he may be able to meet it. The proceedings were vitiated by violation of the principles of natural justice. In the case of **Andaman Timber Industries v. Commissioner of Central Excise (Supra)** the Supreme Court held that not allowing the assessee to cross examine the witness is a serious flaw which makes the order nullity. The A.O. did not take into consideration the statement of the Managing Director recorded at the time of the search*

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wherein he had stated that there were no unaccounted cash sales. Secondly, the A.O. did not consider the reply of the appellant that before a sale is effected many estimates are given to a customer to meet his different set of selections proposed which are tentative and therefore, the basic price is given without including GST because GST is always over and above the price. When a final estimate is given on the basis of the agreed price and quantity, GST is included.

*35.9 The Hon'ble ITAT, Delhi Bench, in Designers **Point (I) Pvt. Ltd. vs. ACIT** and the ITAT, Mumbai Bench, in **ACIT vs. Katrina Rosemary Turcotte** held that WhatsApp chats have no evidentiary value in absence of other corroborative material and in absence of any direct and clinching evidence.*

*35.10 I have carefully gone through the submissions of the appellant in respect of the addition of Rs.1,47,21,196/- and also the evidence adduced by it for each of the additions. I have not found anything which can lead one to disbelieve the explanation and evidence adduced by the appellant in respect of each of the 21 additions aggregating to Rs.1,47,21,196/-. I, therefore, see no reason to confirm the addition of Rs.1,47,21,196/- and hence the addition of Rs.1,47,21,196/- is **deleted.**"*

13. We notice that the Ld.CIT(A) has noticed that the deficiencies that were pointed out by the AO in order to make addition towards unaccounted cash sales are not factually correct, meaning thereby the AO has made this addition on surmises and conjectures. Accordingly, the Ld.CIT(A) has deleted this addition. Before us, no material was placed to controvert the factual findings given by the Ld.CIT(A). Accordingly, we confirm the order(s) passed by Ld.CIT(A) on this issue.

14. In the result, all the appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 23-09-2024

Sd/-
[SUNIL KUMAR SINGH]
JUDICIAL MEMBER

Sd/-
[B.R. BASKARAN]
ACCOUNTANT MEMBER

Mumbai, Dated: 23-09-2024

TNMM

Classic Marble Co. Pvt. Ltd.,

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT concerned
- 4) The D.R, "C" Bench, Mumbai
- 5) Guard file

By Order

Dy./Asst. Registrar
I.T.A.T, Mumbai