

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D" MUMBAI**

**BEFORE SHRI BR BASKARAN (ACCOUNTANT MEMBER) AND
SHRI RAJ KUMAR CHAUHAN (JUDICIAL MEMBER)**

**ITA Nos. 3842 & 3841/MUM/2023
Assessment Years: 2020-21 & 2021-22**

Rajesh Jain,
Flat No. 801, 'C' Wing, Central
Avenue COHS, D.D.B. Marg,
Mumbai Central,
Mumbai-400 008.

PAN NO. AADPJ 7455 P
Appellant

Vs.

DCIT, Central Circle-4(2),
19th floor, Air India Building,
Mumbai-400021.

Respondent

**ITA Nos. 3954, 3952, 3951 & 3950/MUM/2023
Assessment Years: 2018-19 to 2021-22**

DCIT, Central Circle-4(2), Central
Range-4 Pr. CIT (C)-2, Mumbai
19th floor, Air India Building,
Nariman Point
Mumbai-400021.

Appellant

Vs.

Rajesh Mafatlal Jain,
Flat No. 801, 'C' Wing, Central
Avenue COHS, D.D.B. Marg,
Mumbai Central,
Mumbai-400 008.

PAN NO. AADPJ 7455 P
Respondent

Assessee by : Mr. Rahul Hakani
Revenue by : Mrs. Sanyogita Nagpal, CIT-DR

Date of Hearing : 28/08/2024
Date of pronouncement : 26/11/2024



ORDER

PER BENCH:-

The revenue has filed appeals for AY 2018-19 to 2021-22 and the assessee has filed appeals for AY 2020-21 & 2021-22. All these appeals are directed against the common order dated 25-08-2023 passed by Ld CIT(A)-52, Mumbai. All these appeals were heard together and are being disposed of by this common order, for the sake of convenience.

2. The facts relating to the case are stated in brief. The assessee is running mobile accessories business under the trade name M/s Raj Telecom. The revenue carried out search and seizure operations in the hands of Rubberwala Group on 17.03.2021 and the assessee was also subjected to search u/s 132 of the Act. Consequently, the assessments of the years under consideration were completed in the hands of the assessee by the AO u/s 143(3) r.w.s 153A of the Act. The AO noticed from the search proceedings conducted in the Rubberwala group that they have sold shops in a commercial complex named “Platinum Mall” developed by them. It was also found that they have accepted cash outside the books from the buyers of the shops. The details thereof were found in possession of one of the staffs named Shri Imam Ansari. It was noticed that the assessee has booked 21 shops and a sum of Rs.5,21,01,155/- was found accepted in cash in respect of the above said shops. The year wise break-up of the cash payments received outside the books in respect of above said 21 shops by the seller are tabulated as under:-

Sr.No.	Financial Year	Assessment Year	Amount of Investment
1	2017-18	2018-19	1,67,25,100
2	2018-19	2019-20	1,87,62,150



3	2019-20	2020-21	89,75,155
4	2020-21	2021-22	76,38,750
		TOTAL	5,21,01,155

3. When enquired about the cash payments made outside the books for purchase of shops, the assessee denied the same. The AO, however, did not accept the contentions of the assessee. Accordingly, the AO made addition of the above said amounts in the hands of the assessee in the respective assessment years as unexplained investment u/s 69 of the Act.

4. In the appellate proceedings, the assessee submitted that he has purchased only one shop in his name, viz., Shop No.36 in the above said complex on 30-09-2019. It was submitted that the remaining shops have been purchased by other family members/persons and accordingly, it was contended that the AO could not have made addition in respect of properties purchased by others. The Ld CIT(A) was convinced with the above said contentions of the assessee. He held that the addition should be restricted only to the amount related to the shop purchased by the assessee.

5. The Ld CIT(A) noticed that the cash component noted against Shop No.36 purchased by the assessee was Rs.18,64,200/- and the shop has been purchased in the year relevant to AY 2020-21. Accordingly, he sustained addition to the extent of Rs.18,64,200/- in AY 2020-21 and deleted the remaining amount of additions made in that year. For similar reasons, the Ld CIT(A) deleted the additions made in AY 2018-19, 2019-20 and 2021-22.

6. Hence the revenue has filed appeals for all the four years challenging the relief granted by Ld CIT(A) on this issue in all the four years. The assessee has filed appeal for AY 2020-21 challenging the addition sustained by the AO. In



assessment year 2021-22, the AO has also made another addition relating to shortage of stock. The Ld CIT(A) granted partial relief by restricting the addition to the amount of profit. Both the parties are challenging the above said decision of Ld CIT(A) in AY 2021-22.

ASSESSMENT YEARS 2018-19 AND 2019-20: -

7. We shall first take up the appeals filed by the revenue for AYs 2018-19 and 2019-20. The assessing officer made addition of Rs.1,67,25,100/- and Rs.1,87,62,150/- respectively in AY 2018-19 and 2019-20. We noticed that the Ld CIT(A) has recorded a finding that the assessee did not purchase any shop in these two years. In these two years, the shops were purchased either by family members of the assessee or by others related to the assessee. It was noticed by Ld CIT(A) that all of them are independently assessed to tax. Accordingly, the Ld CIT(A) took the view that the assessee may have been a conduit (facilitator) in purchasing shops by these persons and also in making the cash payments. Accordingly, he held that the addition for unaccounted cash payments has to be made in the hands of the respective buyers only, since they have actually made the investments. Accordingly, the Ld CIT(A) deleted additions in both the years. The revenue is aggrieved.

8. We heard the parties on this issue and perused the record. Under the Income tax Act, income of a particular person has to be assessed in the hands of that person only, unless the Act provides otherwise. In case of unaccounted investment, the same is required to be assessed in the hands of the person who has made that investment. We notice that the Ld CIT(A) has followed the above said principles of taxation and accordingly expressed the view that the income tax has to be levied on right person, i.e, in the hands of the person who had actually made investment. We notice that the above said view taken by Ld



CIT(A) would get support from the decision rendered by Hon'ble Supreme Court in the case of ITO vs. Ch. Atchiah (219 ITR 239)(SC), wherein the Hon'ble Apex Court held as under:-

“.....We are of the opinion that under the present Act, the Income Tax Officer has no option like the one he had under the 1922 Act. He can, and he must, tax the right person and the right person alone. By "right person", we mean the person who is liable to be taxed, according to law, with respect to a particular income. The expression "wrong person" is obviously used as the opposite of the expression "right person". Merely because a wrong person is taxed with respect to a particular income, the Assessing Officer is not precluded from taxing the right person with respect to that income.”

In the instant case, there is no dispute with regard to the fact that the assessee has purchased only one shop and the remaining shops were purchased by different persons, who are assessed separately. It was not shown or proved that the assessee has actually funded those cash payments. Had it been shown so, then there is a possibility to assess the value of impugned investments in the hands of the assessee, which is not the case here. Hence, with regard to the unaccounted cash payments, if any, recorded against the shops purchased by those persons, the enquiry should be done with or action, if any, can be taken on those respective persons only. Accordingly, we agree with the view taken by Ld CIT(A) that the AO was not right in assessing those cash payments in the hands of the assessee. Accordingly, we are of the view that the Ld CIT(A) was justified in deleting the additions made in these two years.



9. The assessee has also raised a legal issue under Rule 27 of Appellate Tribunal Rules. The Ld A.R submitted that the information about alleged cash payments against purchase of shop was found in the search conducted in the case of Rubberwala group, i.e., those details were not found during the course of search conducted in the hands of the assessee. The assessments of AY 2018-19 and 2019-20 fall under the category of “unabated assessments”. Hence, as per the decision rendered by Hon’ble Supreme Court in the case of CIT vs. Abhisar Buildwell P Ltd (2023)(149 taxmann.com 399)(SC), the addition can be made in unabated assessment years only on the basis of incriminating material found during the course of search. Accordingly, it was submitted that the AO could not have made addition in these two years, since no incriminating material found in the search conducted in the hands of the assessee. The Ld A.R submitted that, in respect of material found during the course of search conducted in the hands of third parties, action can be taken by the AO u/s 153C of the Act, by following the procedure prescribed in that section. But the AO has not initiated assessment proceedings u/s 153C of the Act. Accordingly, the Ld A.R submitted that the impugned additions made in both the years are liable to be deleted on this legal ground, as the additions are not based on any incriminating material found during the course of search conducted in the hands of the assessee.

10. We heard Ld D.R and perused the record. Admittedly, the details relating to alleged cash payments were not found during the course of search conducted in the hands of the assessee. There is also no dispute that the assessment years 2018-19 and 2019-20 fall under the category of unabated assessment years. In the instant case, the assessments have been completed by the AO u/s 153A of the Act on the basis of search conducted in the hands of the assessee. Hence the AO could have made these additions in these two



years on the basis of incriminating material found from the assessee only and not on the basis of materials found with third parties. For materials found from third parties, the Act has prescribed separate procedures u/s 153C of the Act, which has not been done. Hence the decision rendered by Hon'ble Supreme Court in the case of Abhisar Buildwel (P) Ltd (supra) will apply to the facts of the present case. For the sake of convenience, we extract below the summarization of legal position made by Hon'ble Supreme Court in the above said case:-

“14. In view of the above and for the reasons stated above, it is concluded as under:

i) that in case of search under Section 132 or requisition under Section 132A, the AO assumes the jurisdiction for block assessment under section 153A;

ii) all pending assessments/reassessments shall stand abated;

iii) in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns;

and

iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under [Section 132A](#) of the Act, 1961. However, the completed/unabated assessments can be re-opened by



the AO in exercise of powers under [Sections 147/148](#) of the Act, subject to fulfilment of the conditions as envisaged/mentioned under [sections 147/148](#) of the Act and those powers are saved.”

11. In view of the foregoing discussions, we are of the view that the impugned additions made by the AO in AY 2018-19 and 2019-20 are liable to be deleted both on legal grounds and on merits. We order accordingly.

ASSESSMENT YEAR 2020-21: -

12. The appeal filed by the revenue for AY 2020-21 is with regard to the relief granted by Ld CIT(A) holding that the cash payments relating to the shops purchased by others cannot be assessed in the hands of the assessee. The decision rendered by us in AY 2018-19 and 2019-20 on an identical issue on merits in the earlier paragraphs would apply in this year also. Following the same, we affirm the order passed by Ld CIT(A) on this issue.

13. In the appeal filed by the assessee, the addition of alleged cash payment of Rs.18,64,200/- in respect of purchase of shop confirmed by Ld CIT(A) is being assailed.

14. We noticed earlier that the assessee had purchased a shop in the commercial premises developed by Rubberwala group. During the course of search conducted in their hands, incriminating documents containing details of cash collected on sale of various shops were found. The employee of Rubberwala group confirmed that the cash has been collected from the buyers of shops. However, the assessee denied payment of cash. However, the AO relied upon the materials found in the case of Rubberwala group and accordingly made addition of Rs.18,64,200/- in AY 2020-21. The Ld CIT(A) also confirmed the same.



15. The ld A.R submitted that the addition was made on the basis of third party statement and documents found from the premises of third party. As per the deposition made by the employee of Rubberwala group, the buyers were given a diary, in which, the details of cash received were acknowledged. The Ld A.R submitted the search officials did not find any such diary with the assessee during the course of search operation conducted in his hands. Hence the statement so given by the employee stands disproved. He submitted that the AO has simply relied upon third party statement without bringing any independent material to support the same. The AO also did not provide the opportunity of cross examination despite being asked by the assessee. Accordingly, by placing reliance on various case laws, the Ld A.R submitted that this addition should be deleted.

16. We heard Ld D.R and perused the record. We notice that the AO has made the addition on the basis of evidence found in the premises of third party and also on the basis of deposition made by the employee of the third party. No corroborative material was brought on record to support the statement so given, which is mandatory when the assessee denies any such payment. Further, the AO also did not provide opportunity of cross examination to the assessee, even after the said request was made by the assessee. Under these set of facts, we are of the view that the impugned addition of Rs.18,64,200/- cannot be sustained. In this regard, we may take support from the decision rendered by SMC bench of Mumbai Tribunal in the case of Naren Premchang Nagda vs. ITO (IT Appeal No.3265/Mum/2015 dated 08-07-2016), wherein an identical issue was decided as under:-

“5. I have heard the rival contentions in the light of the material placed on record. The facts are not in dispute. The issue is as to whether the addition made on the basis of paper seized in the case of search on the Siddhi Group



and not on the assessee and also on the basis of statement made by Shri Kantilal M Patel, the key person of Siddhi Group, is justifiable and in accordance with law. It is pertinent to mention that as per the record, the assessee has vehemently denied having made any cash payment of Rs.37 lakhs towards purchase of shop, over and above the price settled. In addition, in the case of "CIT V/s Lata Mangeshkar" (1974)(97 ITR 696)(Bom), relying on the evidence in the form of statement by two persons, to the effect that they had paid money in black to the assessee, as well as entries in the books belonging to them regarding the alleged payment, the AO made addition to the assessee's total income as income from "undisclosed sources". The Tribunal, having found that the evidence tendered suffered from serious infirmities, held that mere entries in accounts regarding payments to assessee were not sufficient to prove that assessee had received money in „black' for which, she did not issue a receipt. The additions were deleted. The Hon'ble High Court held that entries in day-book or ledger would be a corroborative piece of evidence and once direct evidence of persons having made payments in 'black' was disbelieved, no value could be attached to those entries. The Tribunal was, accordingly held justified in deleting the additions. In the present case, apart from the papers seized in the search conducted, not on the assessee, but on the Siddhi Group, and the statement of Shri Patel, who is a key person of the Siddhi Group and has nothing to do with the assessee, there is no evidence to implicate the assessee, so far as regards the alleged payment of Rs.37 lakhs over and above the credited amount. Merely, on this basis, in my considered opinion and in the light of the principle laid down in the case of "Lata Mangeshkar"(supra) the addition is unsustainable in law.

6. In the case of "Jitendrakumar Shantilal Sheth" (2014)(42 CCH0080)(Ahd.), information was received from DCIT, where the search and seizure operations were carried out in the case of M. M Stated that he had purchased land jointly with four other persons including the assessee at a consideration of Rs.20 lakhs. According to the AO, the consideration paid was of Rs.75 lakhs. The AO made the addition u/s 69 of the Act towards share of the assessee on account of money paid for purchase of the property. The Id. CIT(A) deleted the addition on the ground that M was not even clear on the exact quantum of consideration. The Tribunal held that the statement



of M was not supported by any evidence; that the AO did not make any attempt to confirm that such money was paid by the assessee; that mere statement of third party could not be made the basis for making the addition; that nothing was found on record to suggest that the assessee had made payment of on money in the investment in land. The facts of the present case are in para- materia with those in the case of "Jitendrakumar Shantilal Sheth" (supra). Here also, other than the foretasted evidence, nothing has been employed by the authorities below for making the addition and confirming the addition of alleged on money. In this regard, no evidence, worthwhile is brought on record regarding proof of any payment of on money by the assessee. Merely on the basis of the paper seized in the search conducted on the Siddhi Group, which is not connected with the assessee in any manner, and on the basis of the statement Mr.Patel, who had nothing to do with the assessee, in the absence of any evidence of payment of on money by the assessee, is unsustainable in law.

7. In the case of "Ram Prakash Patel" (2011)(142 TTJ 0069)(UO)(Indore), the assessee was the owner of the land to the extent of one half portion of 3.92 acres and one Tajendra Singh & Sons made investment of the impugned amount as a builder as per the agreement executed between the assessee and the builder. The addition was made as income from unexplained investment u/s 69 of the Act. The Tribunal held that there was not even an iota of evidence that the amount of Rs. 1.50 crore was invested by the assessee. Likewise, in the present case also, as discussed, in the absence of any evidence to the contrary, the assessee cannot be saddled of the liability to the addition wrongly made.

8. The other case laws cited on behalf of the assessee, as above, are also to the same effect. No decision to the contrary has been cited before me on behalf of the department. Therefore, keeping in view the above decisions, in the absence of any incriminating documentary material/ evidence found against the assessee to prove that the alleged investment of Rs.37 lakhs had been made by the assessee as on money, over and above, credited amount for purchase of the shop in question, I find that the addition made by the AO and confirmed by the Id. CIT(A) is unsupported and unsustainable in law. The same is accordingly deleted.



9. In the result, the appeal of the assessee is dismissed.”

17. We also notice that the AO did not provide opportunity to cross examine the persons from Rubberwala group, on whose statements the AO had placed reliance upon. The Hon’ble Supreme Court has held in the case of Andaman Timber Industries vs. Commissioner of Central Excise (2015)(62 taxmann.com 3)(SC) that not providing opportunity to cross examine is a serious flaw and it will make the order nullity, as it amounts to violation of principle of natural justice. We are of the view that the above said decision of Hon’ble Supreme Court shall apply to the facts of the present case.

18. The assessee has raised certain legal contentions with regard to the validity of assessment passed u/s 153A of the Act. According to the assessee, the AO should have initiated proceedings u/s 153C of the Act only for making the above said addition, since the impugned addition has been made on the basis of material found in the search conducted in the hands of third parties. We noticed earlier that the search has also been conducted in the hands of the assessee also and consequent thereto the proceedings u/s 153A of the Act have been initiated in the hands of the assessee. Further, the assessment of AYs 2020-21 and 2021-22 would fall under the category of “abated assessments”. The law is well settled now that, in the case of abated assessments, the AO is entitled to take into account all the materials, that is not only those materials that were unearthed during the course of search in the hands of the assessee, but also any other material that may come to his notice during the course of assessment proceedings. Hence, in our view, the AO was very much entitled to take into account the information obtained from the search conducted in the hands of Rubberwala group for these two years. Hence, there was no necessity to initiate proceedings u/s 153C of the Act. Accordingly, we are of the view that non-initiation of proceedings u/s 153C of the Act will not disentitle the AO to



consider those materials in an abated assessment years. Accordingly, we reject these legal grounds of the assessee.

19. In view of the foregoing discussions, we are of the view that the addition of Rs.18,64,200/- made by the AO cannot be sustained. Accordingly, we set aside the order passed by Ld CIT(A) and direct the AO to delete this addition.

ASSESSMENT YEAR 2021-22: -

20. The appeal filed by the revenue for AY 2021-22 is with regard to the relief granted by Ld CIT(A) holding that the cash payments relating to the shops purchased by others cannot be assessed in the hands of the assessee. The decision rendered by us in AY 2018-19 and 2019-20 on merits in the earlier paragraphs would apply in this year also. Following the same, we affirm the order passed by Ld CIT(A) on this issue.

21. The revenue has raised one more issue with regard to relief granted in respect of addition of shortage of stock. Since the assessee is also contesting the addition sustained by Ld CIT(A) on this issue, they are being disposed of together.

22. The facts relating to this issue are discussed in brief. During the course of search proceedings conducted on 17-03-2021, physical inventory of stock was taken at the premises of the assessee. The value of physical stock was determined at Rs.33,83,233/-, while the book stock was taken as Rs.1,05,06,534/-. Thus there was shortage in stock to the tune of Rs.71,23,301/-. The assessee explained that there was a fire at the commercial complex named "City Centre" in October, 2020, in which stocks of the assessee were destroyed in the fire. It was submitted that the effect of loss of stock was not incorporated in the books pending finalization of audit. It was



submitted that the assessee did not make any insurance claim, since the stocks were not insured. Hence, the assessee furnished following reconciliation statement to prove loss of stock in fire.

RAJ TELECOM

AS ON 16TH MARCH 2021

PARTICULARS	QUANTITY (Pcs)
Opening Stock	556641
Purchase during the year	134945
Less: Purchase return	400
Less: Sales during the year	493275
Add : Sales return	213
Less: Stock loss by Fire (22 nd Oct)	132874
Closing stock as on 16th March 2021	65250
As Per Panchanama Closing stock on 16 th March '21	64020
On Approval in Market	1230

However, the AO did not accept the above said reconciliation statement, since it contained details of quantity in pieces only and further, the findings made during the course of search were not related to it. Further, no evidence was submitted to show that these stocks were actually destroyed by fire. Accordingly, the AO presumed that the shortage of stock may represent the stocks sold outside the books. Accordingly, he made the addition of value of



entire value of shortage of stock amounting to Rs.71,23,301/- to the total income of the assessee treating as unaccounted sales.

23. The Ld CIT(A) also noticed that the assessee has not supported the reconciliation statement, that too containing quantity details only, with supporting evidences. Accordingly, he took the view that discrepancy in stock has not been properly explained by the assessee. Accordingly, the Ld CIT(A) held that the shortage of stock represented unaccounted sales only. However, the Ld CIT(A) held that the profit element alone can be brought to tax and not entire value of sales. Accordingly, the Ld CIT(A) adopted the gross profit rate of 4.48% (as adopted by him in the partnership firm M/s Raj Technology) and estimated the profit on shortage of stock at Rs.3,19,124/-. Accordingly, the Ld CIT(A) sustained the addition to that extent of Rs.3,19,124/- and directed the AO to delete the balance amount of addition. The revenue is aggrieved by the relief granted and the assessee is aggrieved by the addition sustained.

24. We heard the parties and perused the record. We notice that the assessee did not claim insurance on loss of stock due to fire, as the stocks were not insured. Hence proof by way of any third party evidence was not available with the assessee. Hence the assessee has prepared a reconciliation statement to support his claim of loss stock in fire. However, it is noticed the reconciliation statement contained quantity details and it was not supported by any evidence. We notice that the tax authorities have presumed that the shortage stock represented the stock sold outside the books. We notice that the view so taken by the tax authorities is also based on presumptions, i.e., they have also not brought on record to show that stocks have been sold outside the books.

25. Since the view taken by the tax authorities is based on presumptions only, it cannot be sustained. The only deficiency noted down by the tax



authorities is that the assessee has not supported the reconciliation statement with any evidence. We notice that the assessment order did not contain details as to how the value of book stock was arrived. From the observations made in the assessment order, we notice that the assessee has not given effect to the loss of stock by fire in accounts. This observation would show that the books of accounts available as on the date of search might be incomplete. It is not clear as to how the value of book stock was arrived at on the basis of incomplete accounts. Under these set of facts, we are of the view that this issue requires fresh examination. Accordingly, in the interest of natural justice, we opine that the assessee may be provided with one more opportunity to present its case on this issue properly before the AO. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of the AO to examine this issue afresh. We also direct the assessee to submit the information and explanations in support of his claim. After affording adequate opportunity of being heard to the assessee, the AO may take appropriate decision in accordance with law.

26. The assessee has also raised a legal ground regarding the validity of addition made on the basis of material found during the course of search conducted in the hands of the third parties. We have adjudicated this ground against the assessee in an earlier paragraph while adjudicating the appeal of the assessee filed for AY 2020-21. Following the decision taken therein, we reject the legal ground urged by the assessee.

27. In the result,

(a) the appeals filed by the revenue for AY 2018-19 to 2020-21 are dismissed.

(b) the appeal of the revenue for AY 2021-22 is treated as allowed.



(c) the appeal of the assessee for AY 2020-21 is partly allowed.

(d) the appeal of the assessee for AY 2021-22 is treated as allowed.

Order pronounced in the open Court on 26/11/2024.

Sd/-
(RAJ KUMAR CHAUHAN)
JUDICIAL MEMBER

Sd/-
(BR BASKARAN)
ACCOUNTANT MEMBER

Mumbai;
Dated: 26/11/2024
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai