

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C': NEW DELHI**

**BEFORE SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
and
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

**ITA Nos.2005, 2006, 2007 & 2008/DEL/2024
(Assessment Years : 2018-19, 2019-20, 2020-21 & 2021-22)**

K.K. Spun India Limited,
C/o Kapil Goel, Advocate,
F-26/1245, Sector 7, Rohini,
Delhi – 110 085.

vs.

DCIT,
Central Circle 2,
New Delhi.

(PAN : AACCK7334A)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Kapil Goel, Advocate

REVENUE BY : Shri Dayainder Singh Sidhu, CIT DR

Date of Hearing : 23.10.2024

Date of Order : 03.01.2025

ORDER

PER S.RIFAUR RAHMAN,AM:

1. The assessee has filed four appeals against the separate orders of Id. Commissioner of Income-tax (Appeals)-23, New Delhi (hereinafter referred to as 'Id. CIT (A)') all dated 05.01.2024 for Assessment Years 2018-19, 2019-20, 2020-21 & 2021-22.
2. Since the issues are common and the appeals are connected, hence the same are heard together and being disposed off by this common order. We take up the AY 2018-19 as lead case to adjudicate the issues under consideration.

3. Brief facts of the case are, assessee filed its original return of income on 31.10.2018 declaring and income of Rs.31,47,95,220/-. Search & seizure and survey operations undertaken under section 132\133A of the Income Tax Act 1961 (in short 'the Act') were conducted on 23.03.2021 and ON subsequent date in the case of assessee along with the other cases of KK Spun and other group of cases at various residential and business premises. The cases were centralised in Central Circle- 02, New Delhi.
4. A notice under section 153A of the Act was issued on 10.11.2021 requiring the assessee to file its return of income. In response the assessee filed its return of income for the year under consideration declaring total income as disclosed in the original return of income. The Assessing Officer issued notice under section 143 (2) and 142 (1) of the Act. The assessing officer observed that several notices were issued to the assessee but due to partial compliance on the part of the assessee, he has no option but to complete the assessment on the basis of material evidences gathered during the post assessment proceedings.
5. Based on the above observation, Assessing Officer considered the documents found during the course of search proceedings and on examination of Annexure-A12, various incriminating evidences were found, this is the printout from the pen drive found during the search at the premises which contained various excel sheet showing receipts and

payment of cash and cheques/RTGS. He observed that this data was maintained by Shri Shailender Goyal, who was the accounts person and key cash handler of the group. He observed that on analysis of the above, it shows that the assessee has booked in genuine purchases and sales from various parties. The statement of Shri Shailendra Goyal was also recorded on oath under section 132 (4) of the Act, in which he has admitted that assessee has arranged entries to inflate books of accounts and no actual business activities were carried out. He has reproduced the relevant statement at paragraph 5.2 of the order. Further he observed that during the course of search proceedings, Shri Himanshu Gupta, Managing Director of the assessee was recorded, in which he has clearly stated that they have arranged these entries to inflate books of accounts. Based on the above, Assessing Officer has analysed the purchases from Ashok Sharaf, at para 5, similarly purchases from Shri Sakshasat Jain and Kundanlal Kedarnath were also analysed and reproduced in the order. He quantified the purchases/expenses booked by the assessee in their books of account and the assessee was confronted the above issue by issuing show cause notice. In response assessee submitted that all these parties were supplying raw materials and regularly complying to the GST on regular basis. Without there being any raw material, the assessee would not have achieved the sales. It was also submitted that none of these

parties were enquired independently by the Revenue.

6. Similarly, based on the information found in the pen drive, transactions of sales to Raman Brij-F were verified and it was alleged that assessee has given cash payment to them and to APCO Infratech Private Limited. It was also alleged that the assessee group has received RTGS in its various bank accounts. When the assessee was confronted to explain why commission earned on providing bogus sales to them for providing bogus entries to the assessee should not be added that to return income in this assessment year. In response, the assessee objected to the same and denied the allegations. Further it was submitted that no enquiry was made from these parties and there exist hardly any evidences against the assessee in the matter of cash payments and bogus sales.
7. After considering the submissions and material available on record, the assessing officer rejected the submissions of the assessee and observed that the details contained in annexures A-12 are relating to cash flow against the ingenuine sales and purchases. The cheque transactions contained in the annexures are tallying with the books of accounts maintained by the assessee. Further he observed that the movement of cash is also evidenced by the WhatsApp chats found in the mobile phones of Shri Shailendra Goyal and Shri Himanshu Gupta. The above said employees not only accepted the ingenuine transactions but also

explained the modus operandi thereof. He rejected the contention of the assessee that all the transactions are GST compliant and no evasions were reported. The mismatch between the sales \ purchases reported in show cause notice and the cash trial found during the search and the purchases constituted major raw material consumed by assessee. In this regard, AO referred to the alternate submissions made by assessee, accordingly, the Assessing Officer reproduced the same in the order at para number 5.8.4.

For the sake of clarity it is reproduced below :-

“5.8.4ALTERNATIVE SUBMISSIONS REGARDING ISSUES MENTIONED ABOVE AND RELATING TO ALLEGED BOGUS PURCHASES AND SALES AS PER THE SCN – ASSUMING THAT ALLEGATIONS THEREIN ARE CORRECT - (THE BELOW SUBMISSIONS ARE ONLY THE NATURAL CONSEQUENCES OF SUCH AN ASSUMPTION AS TAKEN BY THE REVENUE AND ARE NOE SUBMISSIONS ARE ONLY THE NATURAL ADMISSIONS BY THE ASSESSEE)

In this regard, without prejudice to the earlier submission submitted as under:

In the SCN it has been proposed that all the alleged bogus purchases should be disallowed along with commission expenses. However, at the same breath the bogus sale has been alleged against bogus purchases consideration. In such a situation, only commission income has been assumed against such sales, which has been proposed to be added while not touching the Sale at all. Such an approach would lead to accounting fallacy and would not be correct due to the following reasons:

- a. When it is alleged that sales are bogus then the correct profits can-not be determined without removing sales such from consideration. It is as much true as with bogus purchases. If for determination of the correct profits*

exclusion of bogus purchases is necessary, then removal of the sales is also equally necessary.

- b. There can be no sale without making purchase. If purchases are treated as bogus then as a corollary the respective sale would also be bogus.*
- c. Even in the statements claimed by the revenue as correct it is clearly mentioned that the transactions of sale and purchase were for inflating books.*
- d. As per the seized document relied by the revenue and the excel sheet prints 9annex A -12), the transactions are clearly establishing rotation of same funds.*
- e. The sale and purchase in the case are 2 legs of the same transactions. One cannot be ignored at the cost of another.*
- f. If the approach, as suggested in the SCN is adopted it would lead to dichotomy viz a viz reality of life . The GP chart of assessee is attached herewith. It may please be seen that barring from market fluctuations and year to year business expense variations, the GP and NP had remained range bound. The general trade margin may also please be compared apart from the internal assessed and audited margins as stated above. Now, if the proposed disallowances on account of purchases are done on standalone basis, ignoring sale the same would result in incongruency and impossibility.*
- g. A list of alleged bogus purchase and sale is attached herewith (on the basis of SCN, figures being corrected along with corroborating documents).*
- h. If bogus sale is alleged, then it is not possible to make the sale without any purchase. The purchase in such a case should also be bogus to balance the figures since there can be no bogus purchase against actual sale in the given circumstances of the case as explained below.*
- i. Thus, the real picture would then be obtained only after*

exclusion of both sale and purchase.

3.2 *If the alleged excel sheets print outs and the inferences of the department in that regard are assumed to be correct, then it would transpire that the alleged cash received from alleged bogus purchases has moved to the alleged bogus sales either directly or through various other means like Aditya or Anand. This would also establish a correlation between such purchases and sale.”*

8. After considering the above submissions, the Assessing Officer observed that from the records, it is clearly established that the assessee has engaged in ingenuine sales and purchases during the year. The Annexure A-12 established that the cash generated from purchases has gone to various parties, majorly to those where ingenuine sales are alleged. And analysis of GDP chart submitted by the assessee also clearly establishes that despite the above transactions, the assessee has shown a consistent GP ratio ranging between 28% to 31%. The purpose of entering into bogus sales and purchases being inflation of books was duly determined at the time of search. The information contained in the annexure relating to transaction of sales, purchases and commission received and paid clearly establishes that the data submitted by the assessee and duly verifiable from the GST portal, the ingenuine sale amount is almost equal to the ingenuine purchases. He observed that considering the facts, it is concluded that the assessee has engaged into ingenuine transactions. Therefore, in order to determine the true income which can be done only

by ignoring such transactions from the consideration, accordingly he determined the commission from the alleged bogus parties relating to purchases and sales to the extent of Rs.1,33,87,740/-and made the above addition to the total income declared by the assessee in the return of income. Therefore, he assessed the total income under section 153A of the Act at Rs.32,81,82,960/-.

9. Aggrieved, the assessee preferred an appeal before the Id. CIT(A)-23, New Delhi – 110 055. The assessee submitted detailed submissions and also raised jurisdictional issues relating to initiation and completion of assessment under section 153A of the Act and also on merits. Ld. CIT(A), after considering the submissions, dismissed the grounds on jurisdictional issues and proceeded to adjudicate only on merits.
10. On merits, he considered the detailed submissions made by the assessee and reproduced the same in his order at page 8 to 10 and he observed that the assessee could not explain a single transaction and could not point out any defect in the conclusion drawn by the Assessing Officer. The assessee could not furnish any document or evidence which can substantiate that during assessment proceedings, any cross examination was requested. Further he observed that seized documents were recovered from the employees and their statements and modus operandi clearly establish that no cross examination of them was required. Based on the

seized material and evidences correlate with the books of accounts of the assessee and the trail of transactions, it clearly establishes that these transactions are ingenuine and commission received and paid by them are proved beyond doubt. Accordingly, he dismissed the grounds raised by the assessee. Further, he dismissed all the grounds raised by the assessee including the issue of approval granted under section 153D of the Act.

11. Aggrieved with the above order, Assessee is in appeal before us raising following grounds of appeal:

“1. INVALID APPROVAL U/S 153D: That impugned assessment order passed u/s 153A/143(3) of 1961 Act (dated 23.05.2022) and further impugned first appeal order passed u/s 250 of 1961 Act (dated 05.01.2024) are both invalid and deserve to be quashed in toto because they are founded and based on invalid and unlawful so called "approval" u/s 153D of 1961 Act (dated 23.05.2022);

2. INADMISSIBLE ELECTRONIC EVIDENCE (SEC 65B) AND CBDT DIGITAL EVIDENCE MANUAL VIOLATED: That impugned assessment order passed u/s 153A/143(3) of 1961 Act (dated 23.05.2022) and further impugned first appeal order passed u/s 250 of 1961 Act (dated 05.01.2024) are both invalid and deserve to be quashed in toto because entire assessment /additions admittedly being based on purported "electronic" evidence but there is no valid /adequate compliance to sec 65B of Indian evidence act and Digital Evidence Investigation Manual issued by CBDT is flouted completely; so impugned assessment /first appeal order are to be quashed /set aside;

3. TOTAL LACK OF APPLICATION OF MIND AND ARBITRARINESS : That impugned assessment order passed u/s 153A/143(3) of 1961 Act (dated 23.05.2022) and further impugned first appeal order passed u/s 250 of 1961 Act (dated 05.01.2024) are both invalid and deserve to be quashed in toto as there is total lack of application of mind and arbitrariness at all stages as evident from cursory look to impugned orders;

4. TOTAL VIOLATION OF PRINCIPLE OF NATURAL JUSTICE: That impugned assessment order passed was 153A/143(3) of 1961 Act (dated 23.05.2022) and further impugned first appeal order passed u/s 250 of 1961 Act (dated 05.01.2024) are both invalid and deserve to be quashed in toto as there is complete violation of principle of natural

justice (e.g lack of valid show cause notice /scn during asst. as per binding CBDT instructions) so impugned assessment /first appeal order are to be quashed /set aside;

5. **TOTAL LACK OF CORROBORATION VIS A VIS MATERIAL USED:** *That impugned assessment order passed u/s 153A/143 (3) of 1961 Act (dated 23.05.2022) and further impugned first appeal order passed u/s 250 of 1961 Act (dated 05.01.2024) are both invalid and deserve to be quashed in toto as there is total lack of corroboration via a vis alleged material used against the assessee, so impugned assessment /first appeal order are to be quashed /set aside;*

6. **TOTAL LACK OF INDEPENDENT INQUIRY:** *That impugned assessment order passed us 153A/143(3) of 1961 Act (dated 23.05.2022) and further impugned first appeal order passed ws 250 of 1961 Act (dated 05.01.2024) are both invalid and deserve to be quashed in toto as there is total lack of independent inquiry on part of Ld AO/CIT-A vis a vis impugned additions made, so impugned assessment /first appeal order are to be quashed /set aside:*

7. **ENTIRE ASST. APPEAL ORDER BASED ON MERE CONJECTURE AND SURMISES:** *That impugned assessment order passed u/s 153A/143(3) of 1961 Act (dated 23.05.2022) and further impugned first appeal order passed u/s 250 of 1961 Act (dated 05.01.2024) are both invalid and deserve to be quashed in toto as entire assessment /impugned additions are made on basis of mere conjecture , surmises and guesswork only , that too without any valid invocation of sec 145(3) (book results never doubted) sans which entire asst. is jurisdictionally flawed;*

8. **PERVERSE CIT-A REASONING:** *That impugned assessment order passed u/s 153A/143(3) of 1961 Act (dated 23.05.2022) and further impugned first appeal order passed u/s 250 of 1961 Act (dated 05.01.2024) are both invalid and deserve to be quashed in toto in so far impugned additions are concerned which are Sustained by ld cit-a on basis of totally perverse "reasoning"*

9. **SEC 28 AND SEC 69C MECHANICALLY INVOKED FOR IMPUGNED ADDITIONS:** *That impugned assessment order passed u/s 153A/143(3) of 1961 Act (dated 23.05.2022) and further impugned first appeal order passed u/s 250 of 1961 Act (dated 05.01.2024) are both invalid and deserve to be quashed in toto as provisions of sec 28 and sec 69C have been perfunctorily and mechanically invoked without any application of mind vis a vis respective /impugned additions; so impugned assessment /first appeal order are to be quashed /set aside;*

PRAYER (RELIEF SOUGHT):

- A) *TO QUASH THE IMPUGNED ASSESSMENT FRAMED BY LD AO U/S 153A/143(3) FOR WANT OF VALID APPROVAL U/S 153D; AND SO HELD IMPUGNED FIRST APPEAL /CIT-A ORDER U/S 250 IS ALSO INVALID*
- B) *TO QUASH/SET ASIDE THE IMPUGNED ASSESSMENT FRAMED US 153A/143(3)) AND LD CIT-A ORDER IN TOTO FOR MULTIPLE "FATAL" /SHINING INFIRMITIES :*
- C) *TO DELETE ALL THE IMPUGNED ADDITIONS U/S 28 AND SEC 69C AND TO RESTORE THE RETURNED INCOME;*
- D) *ANY OTHER APPROPRIATE /SUITABLE RELIEF AS DEEMED FIT IN FACTS AND CIRCUMSTANCES OF THE CASE."*

12. At the time of hearing, ld. AR for the assessee submitted as under:

1. Assessee is engaged in business of RCC Concrete Products like Pipes, manholes etc.
2. Assessee was subjected to search u/s 132 on 23.03.2021.
3. Assessee case was centralized u/s 127 on 30.07.2021.
4. Assessee is regularly filing ITR u/s 139 for all years under consideration , chart 1 is referred below:

CHART 1

<i>AY</i>	<i>SALES DISCLOSED IN AUDITED P&L A/C</i>	<i>PURCHASES DISCLOSED IN AUDITED P&L A/C</i>	<i>NET PROFIT</i>	<i>ITR FILED ON WITH RETURNED INCOME</i>
2018-2019	4,01,03,39,533	2,69,99,39,389	29,92,85,032 (7.46%)	31,47,95,220 (31.10.2018)
2019-2020	4,31,63,10,162	2,88,80,61,035	30,43,12,367 (7.05%)	30,43,12,368 (26.10.2019)
2020-2021	5,99,56,17,675	4,68,22,72,751	33,02,53,502 (5.51%)	31,13,54,080 (27.03.2021)
2021-2022	3,38,51,56,289	1,66,01,97,642	1,20,51,259 (0.36%)	236,78,070 (28.02.2022)

5. Assessee case was assessed vide impugned orders passed u/s 153A/143(3) after issue of notice u/s 153A on 10/11/2021 & 143(2) notice on 10.03.2022 with following broad details/additions:

CHART 2

<i>AY</i>	<i>ADDITION U/S 28 (ALLEGED UNACCOUTE</i>	<i>ADDITION U/S 69C (ALELGED</i>	<i>OTHER DISALLOWAN CE</i>	<i>ADDITION U/S 69A (LOAN</i>	<i>TOTAL ADDITIONS &</i>
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	<i>D COMMISSION EARNED</i>	<i>COMMISSION PAID</i>	<i>& ADDITIONAL U/S 69C</i>	<i>REPAYMENT AND INTEREST U/S 69C</i>	<i>FINAL ASSESSED INCOME</i>
2018-2019	53,57,894	73,98,305	631,541		133,87,740 TI: 32,81,92,960
2019-2020	500,27,078	788,17,542	---	118,88,000 (interest u/s 69C)	14,07,32,620 TI: 47,55,19,440
2020-2021	402,94,778	390,43,873	744,105 (69C) Unexplained expenditure on hawala transaction 493,90,968 (disallowance of MISC expenses)	125,71,360 (interest u/s 69C)	14,20,45,084 TI: 37,40,60,513
2021-2022	507,10,326	167,99,109	28,03,950 (69C) Unexplained expenditure on hawala transaction 10,10,289 (ON a/c of commission paid/recd on bogus sale/purchase) 14,31,000 (unexplained expenditure) 291,30,185 (disallowance of misc expenses)	30,70,67,000 (repayment of loans) 861,42,020 (interest u/s 69C)	49,50,93,879 TI: 51,87,71,949

6. Further relevant factual position of dates of 153D forwarding and final approval and final impugned asst order passed u/s 153A/143(3) with corresponding position in CIT -A impugned order is as below:

CHART 3

AY	DATE OF FORWARDING OF DRAFT ORDERS (LETTER OF AO SEEKING APPROVAL U/S 153D)	FINAL APPROVAL U/S 153D	IMPUGNED ASST. ORDER	CIT-A order
2018-2019	23.05.2022	23.05.2022	23.05.2022 sec 153a/143(3)	05.01.2024 (PARA 30 TO 36 PAGE 10/11)
2019-2020	23.05.2022	23.05.2022	23.05.2022 Sec 153A/143(3)	05.01.2024 PARA 30 TO 36 PAGE 9/10
2020-2021	23.05.2022	23.05.2022	23.05.2022 Sec 153A/143(3)	05.01.2024 PARA 30 TO 36 PAGE 10/11)
2021-2022	26.09.2022	30.09.2022	30.09.2022 Sec 153A/143(3)	05.01.2024 PARA 34 TO 39 PAGE 12/13

7. *Striking aspects of impugned asst u/s 153A/first appeal order(s):*

- 7.1 *That Ld AO has inferred that assessee is INFLATING his BOOKS by ingenuine sales and purchases (sustained/upheld by ld cita);*
- 7.2 *That Ld AO has no where doubted much less rejected assessee audited trading results that is never sec 145(3) is invoked by ld AO/CITA (also not invoked by ld cita vide his coterminous powers)*
- 7.3 *That Ld AO has accepted returned income which in turn is based on P&L account /sales/purchases declared by assessee and same is never tinkered*
- 7.4 *That entire case of revenue is based on one PEN DRIVE found from one Mr Shailendra Goyal*
- 7.5 *That admittedly no certificate u/s 65B is placed at any stage qua above PEN drive;*
- 7.6 *That admittedly no independent inquiry is made during asst from any other person from whom assessee is ALLEGEDLY receiving stated commission and paying commission and with whom assessee has got CASH loans and to whom interest is paid (not a single notice u/s 133(6)/131 is issued); This itself is a fatal flaw as apparently entire asst is made on dictate /direction of investigation wing (appraisal report); (fatal impact of not making independent inquiry at end of Ld AO is to be considered)*
- 7.7 *That admittedly no hidden /unaccounted asset is found during extensive search owned by assessee;*

- 7.8 *That admittedly no benefit of NETTING and telescoping is given to assessee (as a matter of alternate/consequential relief due to assessee) vis a vis RETURNED INCOME;*
- 7.9 *That That Ld AO has made following main additions:*
- a) *That assessee is alleged to be earning UNACCOUNTED commission qua stated GENUINE SALES*
 - b) *That assessee is alleged to be paying UNACCOUNTED commission qua stated GENUINE PURCHASES*
 - c) *That assessee is alleged to be making unaccounted expenses u/s 69C (purchases)*
 - d) *That assessee is alleged to paying UNACCOUNTED Interest and ALLEGED REPAYMENT on stated LOANS recd in CASH*

8. **ON SERIOUS IMPORTANCE OF VALID AND JUST TAX ASSESSMENT, reference is made to recent three judge bench decision of hon'ble apex court in case of UOI vs RAJEEV BANSAL case 2024 INSC 754**

“Although the power to levy taxes is plenary, it is subject to certain well-defined limitations. Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. A taxing statute must be valid and conform to other provisions of the Constitution. Article 265 makes a distinction between “levy” and “collection.” The expression “levy” has a wider connotation. It includes both the imposition of a tax as well as assessment. A taxing statute must be valid and conform to other provisions of the Constitution.

23. Thomas Cooley describes assessment as the most important of all the proceedings in taxation. He further describes the necessity of assessment thus: *“An assessment, when taxes are to be levied upon a valuation, is obviously indispensable. It is required as the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities. The assessment is, therefore, the most important of all the proceedings in taxation, and the provisions to insure its accomplishing its office are commonly very full and particular. If there is no valid assessment, a tax on sale of lands is a nullity. A want of assessment is not a mere irregularity remedied by a curative statute. On the other hand, no assessment is necessary where the statute itself prescribes the amount to be paid, and this can be recovered by suit. For instance, where a statute imposes a tax at a specified rate upon bank deposits, no other assessment other than that made by the statute itself is necessary.”*

9. **Short issue which arises is whether impugned asst and Id cit-a orders can be sustained in given /admitted facts?**
10. **Our submissions in brief:**

- 10.1 APPARENT AND SERIOUS CONTRADICTION IN APPROACH OF LD AO/CIT-A:** That firstly there is serious and fundamental CONTRADICTION in approach of Ld AO/CIT-A which shows total lack of application of mind at all stages on part of Ld AO/sanctioning authority 153D/ Ld CITA: In all these years under consideration , Ld AO has given clear finding that assessee has INFLATED the figures in the books of accounts and booked ingenuine sales and purchases on which additions are made in these years u/s 28 (qua alleged commission earned on ingenuine sales booked) and sec 69C (qua alleged commission paid on ingenuine purchases). The serious and fundamental error which has been done by Ld AO and not addressed by approving authority and which goes to ROOT of the matter is when assessee all sales/purchases as recorded in books (forming part of audited P&L account) is accepted and same is no where doubted /disturbed u/s 145(3) (refer income computation last para of asst order starting from returned income), then how can assessee be alleged to have EARNED commission on ingenuine sales and PAID commission on ingenuine purchases . that is there is SERIOUS AND APPARENT contradiction in AO's approach to make such incongruous additions which has no where been addressed at end of approving authority u/s 153D. If revenue case is assessee is INFLATING figures can revenue rely on very same books/returned income which is classical case of non application of mind.

Impact of CONTRADICTION is FATAL and DISPLAYS TOTAL ARBITRARINESS AND LACK OF APPLICATION OF MIND.

- 10.2 APROBATE AND REPROBATE :** That secondly revenue has to ***consequentially*** reduce returned income if case against assessee is INFLATING BOOKS /INGENUINE SALES/PURCHASES as revenue can not approve and reprobate ;

Reference is made to latin maxim *Qui approbate non reprobate* He who approbates does not `reprobate, Mumbai International Airport (P) Ltd. v. Golden Chariot Airport, (2010) 10 SCC 422 Hon'ble apex court in case of UOI vs Murugesan 2022 2 SCC 525 APPROBATE AND REPROBATE.

26. *These phrases are borrowed from the Scott's law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approve and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit*

of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party. We have already dealt with the provisions of the [Contract Act](#) concerning the conduct of a party, and his presumption of knowledge while confirming an offer through his acceptance unconditionally.

27. We would like to quote the following judgments for better appreciation and understanding of the said principle:

- [Nagubai Ammal v. B. Shama Rao](#), 1956 SCR 451:

*“But it is argued by Sri Krishnaswami Ayyangar that as the proceedings in OS. No. 92 of 1938-39 are relied on as barring the plea that the decree and sale in OS. No. 100 of 1919-20 are not collusive, not on the ground of res judicata or estoppel but on the principle that a person cannot both approbate and reprobate, it is immaterial that the present appellants were not parties thereto, and the decision in *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Company Ltd.* [(1921) 2 KB 608], and in particular, the observations of Scrutton, LJ, at page 611 were quoted in support of this position. There, the facts were that an agent delivered goods to the customer contrary to the instructions of the principal, who thereafter filed a suit against the purchaser for price of goods and obtained a decree. Not having obtained satisfaction, the principal next filed a suit against the agent for damages on the ground of negligence and breach of duty. It was held that such an action was barred. The ground of the decision is that when on the same facts, a person has the right to claim one of two reliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief. The principle was thus stated by Bankes, L.J.:*

“Having elected to treat the delivery to him as an authorised delivery they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act”. The observations of Scrutton, LJ on which the appellants rely are as follows:

*“A plaintiff is not permitted to ‘approbate and reprobate’. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election — namely, that no party can accept and reject the same instrument: *Ker v. Wauchope* [(1819) 1 Bli 1, 21] : *Douglas-Menzies v. Umphelby* [(1908) AC 224, 232] . The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he*

could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction”.

It is clear from the above observations that the maxim that a person cannot ‘approbate and reprobate’ is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The law is thus stated in Halsbury’s Laws of England, Vol. XIII, p. 464, para 512:

“On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (e.g. payment of costs), be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it”.

- [State of Punjab v. Dhanjit Singh Sandhu](#), (2014) 15 SCC 144:

“22. The doctrine of “approbate and reprobate” is only a species of estoppel, it implies only to the conduct of parties. As in the case of estoppel it cannot operate against the provisions of a statute. (Vide CIT v. V. MR. P. Firm Muar [CIT v. V. MR. P. Firm Muar, AIR 1965 SC 1216]).

23. It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground.

(Vide Maharashtra SRTC v. Balwant Regular Motor Service [Maharashtra SRTC v. Balwant Regular Motor Service, AIR 1969 SC 329] .) In R.N. Gosain v. Yashpal Dhir [R.N.

Gosain v. Yashpal Dhir, (1992) 4 SCC 683] this Court has observed as under: (SCC pp. 687-88, para 10) “10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that ‘a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage’.”

25. The Supreme Court in [Rajasthan State Industrial Development and Investment Corpn. v. Diamond and Gem Development Corpn. Ltd.](#) [Rajasthan State Industrial Development and Investment Corpn. v. Diamond and Gem Development Corpn. Ltd., (2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153] , made an observation that a party cannot be permitted to “blow hot and cold”, “fast and loose” or “approbate and reprobate”. Where one knowingly accepts the benefits of a contract or

conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.

26. It is evident that the doctrine of election is based on the rule of estoppel, the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when he has to speak, from asserting a right which he would have otherwise had.” • *Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd.*, (2013) 5 SCC 470:

“I. Approbate and reprobate

15. A party cannot be permitted to “blow hot-blow cold”, “fast and loose” or “approbate and reprobate”. Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience. [*Vide Nagubai Ammal v. B. Shama Rao* [AIR 1956 SC 593] , *CIT v. V. MR. P. Firm Muar* [AIR 1965 SC 1216] , *Ramesh Chandra Sankla v. Vikram Cement* [(2008) 14 SCC 58 : (2009) 1 SCC (L&S) 706 : AIR 2009 SC 713] , *Pradeep Oil Corpn. v. MCD* [(2011) 5 SCC 270 : (2011) 2 SCC (Civ) 712 : AIR 2011 SC 1869] , *Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd.* [(2011) 10 SCC 420 : (2012) 3 SCC (Civ) 685] and *V. Chandrasekaran v. Administrative Officer* [(2012) 12 SCC 133 : (2013) 2 SCC (Civ) 136 : JT (2012) 9 SC 260] .]

16. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had.””

- 10.3 **NETTING BENEFIT**: That thirdly even benefit of netting inter se between commission earned and commission paid is not given which shows total lack of application of mind;
- 10.4 **TOTAL LACK OF INDEPENDENT INQUIRY** :That fourthly no independent inquiry is made at end of Ld AO during the asst from any single person with whom stated unaccounted transactions are

entered by assessee which shows ABIDICATION of duty on part of Ld AO and same is fatal to the impugned asst

ON INEPENDNET WORD MEANING IN PRESNET CONTEXT of INDEPENDENT INQUIRY AND INDEPENDENT APPLICATION OF MIND ON PART OF LD AO,REFERENCE IS MADE TO Hon'ble apex court decision in case of FULESHWAR GOPE vs UOI2024 INSC 718

“35. The meaning of the word independent, as is well understood, is that the act, or as in this case, evaluation is made in a way which is lone standing or which does not rely on any other factor, such as previous consideration or evaluation by another authority, to arrive at its conclusion.

35.1 The Cambridge dictionary defines the word independent to mean: –

“not influenced or controlled in any way by other people, events, or things”

35.2 The Merriam Webster dictionary defines the word independent as:-

“1: not dependent: such as a (1): not subject to control by others ; (2): not affiliated with a larger controlling unit

b (1): not requiring or relying on something else : not contingent; (2): not looking to others for one's opinions or for guidance in conduct; (3): not bound by or committed to a political party

c (1): not requiring or relying on others (as for care or livelihood); (2): being enough to free one from the necessity of working for a living d: showing a desire for freedom”

35.3 The Black's Law Dictionary defines:

“INDEPENDENT. Not dependent; not subject to control, restriction, modification, or limitation from a given outside source.”Independence, which is the state of being independent would also be instructive in our understanding.

“INDEPENDENCE. The state or condition of being free from dependence, subjection, or control. A state of perfect irresponsibility. Political independence is the attribute of a nation or state which is entirely autonomous, and not subject to the government, control, or dictation of any exterior power.”

10.5 ABDICATION CASE: That fifthly entire asst is made ostensibly on dictate and direction of investigation wing (appraisal report)which vitiates the impugned asst; reference is made to

- i) *hon'ble apex court in case of hon'ble apex court three judge bench in epochal case of Dr. Premachandran Keezhoth and Another ... Appellant(s); Versus Chancellor Kannur University and Others ... Respondent(s).2023 SCC OnLine SC 1592*
- ii) **HON'BLE DELHI HIGH COURT IN CASE OF ACME HEERGARH POWERTECH PRIVATE LIMITED VS CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS & ANR Judgment pronounced on: 06 May 2024 "ON ISSUE OF ABIDICATION AS PER ADMINISTRATIVE LAW;** "118. We find ourselves unable to uphold the validity of the impugned Instruction bearing in mind the well settled precepts of administrative law and which abhor abdication of an independent decision making power as well as a quasi-judicial authority being compelled to act under the dictates of a superior authority. Wade and Forsyth in their seminal work on Administrative Law³⁸ explain the legal position as follows: - —Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative —Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative. The subject of abdication is more lucidly explained in De Smith's Judicial Review³⁹ in the following words: - "Acting under dictation An authority entrusted with a discretion must not, in the purported exercise of its discretion, act under the dictation of another body or person..... Where a minister entertaining a planning appeal dismissed the appeal purely on the strength of policy objections entertained by another minister, it was held that his decision had to be quashed because he had, in effect, surrendered his discretion to another minister. Authorities directly entrusted with statutory discretions, be they executive officers or members of distinct tribunals, are usually entertained and are often obliged to take into considerations of public policy, and in some contexts the policy of a minister or of the Government as a whole may be a relevant factor in weighing those considerations; but this will not absolve them from

their duty to exercise their personal judgment in individual cases, unless explicitly statutory provision has been made for them to be given binding instructions by a superior, or (possibly) unless the cumulative effect of the subject-matter and their hierarchical subordination (in the case of civil servants and local government officers) make it clear that it is constitutionally proper for them to receive and obey instructions conveyed in the proper manner and form.¶ 119. The aspect of abdication of discretion was succinctly explained by the Supreme Court in *Anirudhsinghji Karansinhji Jadeja* in the following terms: - —11. The case against the appellants originally was registered on 19-3-1995 under the Arms Act. The DSP did not give any prior approval on his own to record any information about the commission of an offence under TADA. On the contrary, he made a report to the Additional Chief Secretary and asked for permission to proceed under TADA. Why? Was it because he was reluctant to exercise jurisdiction vested in him by the provision of Section 20-A(1)? This is a case of power conferred upon one authority being really exercised by another. If a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If the discretion is exercised under the direction or in compliance with some higher authority's instruction, then it will be a case of failure to exercise discretion altogether. In other words, the discretion vested in the DSP in this case by Section 20-A(1) was not exercised by the DSP at all. 12. Reference may be made in this connection to *Commr. of Police v. Gordhandas Bhanji* [1951 SCC 1088 : 1952 SCR 135 : AIR 1952 SC 16] , in which the action of Commissioner of Police in cancelling the permission granted to the respondent for construction of cinema in Greater Bombay at the behest of the State Government was not upheld, as the rules concerned had conferred this power on the Commissioner, because of which it was stated that the Commissioner was bound to bear his own independent and unfettered judgment and decide the matter for himself, instead of forwarding an order which another authority had purported to pass.¶ “Since the directive of the Board binds the licensing authorities, the exercise of calling upon the petitioners to show cause is essentially rendered otiose and a mere formality”

iii) **HON’BLE CHATTISGARH HIGH COURT IN CASE OF 1. Deputy Commissioner of Income Tax (Assessment) Special Range Bhilai District Durg Chhattisgarh. --- Appellant Versus 1. Surendra Kumar Jain (Dead) Through Legal Heirs 2024:CGHC:25811-DB Judgment delivered on 18-07 – 2024 ITA No. 6 of 2005 ON IMPUGNED REOPENING U/S 147/148 AND ASSESSMENT CARRIED OUT ON BASIS OF DICTATES OF DDIT(INV) AND WITHOUT INDEPENDENT APPLICATION OF MIND HEAD NOTE FRAMED BY HON’BLE HIGH COURT**

(1) In democracy like ours every authority may, however high should function within four corners of law because the rule of law requires

that all the machinery of state must function according to mandate of statute;

(2) Statutory authority cannot permit its decision to be influenced by dictation of superior as same would amount to surrendering of discretion

(3) General power of superintendence must be distinguished from the interference in the adjudication process.

(4) The true test of bias is not whether the judge is actually biased or not, but whether there is a real danger of bias from view point of fair minded and informed observer.

10.6 STATUS IN HANDS OF OTHER TRANACTING PARTY;

UNKNOWN: That sixthly there is no clue as to what is status of asst in hands of other transacting party (like so called cash lender and commission giver and commission receiver and expense recipient u/s69C) sans which entire exercise is one sided and can not be legally justified (REFERENCE IS MADE TO HON'BLE APEX COURT DICTUM IN CASE OF ORISSA CORP 159 ITR 78 & RECENT DETAILED HON'BLE BOMBAY HIGH COURT DECISION IN CASE OF Principal Commissioner of Income-tax-1 Vs. SVD Resins &Plastics (P.) Ltd[2024] 166 taxmann.com 242 (Bombay); Hon'ble BOMBAY HIGH COURT DECISION IN CASE OF GAURAV TRIYUGI SINGH VS ITO (2020) 423 ITR 531; refer fatal impact of "admitted" not making independent inquiry u/s 133(6)/131: ; Hon'ble Allahabad high court decision in case of Kehsarwanisheetalya vs CIT (2020) 315 CTR 815; Hon'ble Allahabad high court decision in case of CIT vs jauharimalgoel (2008) 296 ITR 263; Hon'ble Calcutta high court decision in case of CIT vs Chandela trading co ltd (2015) 372 ITR 232; Hon'ble rajasthan high court decision in case of cit vs jai kumarbakliwal (2015) 372 ITR 232; Hon'ble P&H high court decision in case of CIT vs Varinder Rawlley (2014) 366 ITR 232; Hon'ble Gujarat high court decision in case of CIT vs Chankaya developers 2013 SCC OnLine Guj 4036); also refer:PCIT (Central)-1 vs. Adamine Constructions P. Ltd., [2018] 99 taxmann.com 44 (Delhi)for A.Y. 2009-10 – SLP filed by the Revenue was dismissed by the Hon'ble SC in PCIT (Central)-1 vs. Adamine Constructions P. Ltd., [2018] 99 taxmann.com 45 (SC); PCIT v. Himachal Fibers Ltd. (2018) 259 Taxman 4 (Delhi) (HC) Editorial: SLP of revenue is dismissed ;PCIT v. Himachal Fibers Ltd. (2018) 259 Taxman 3 (SC)

10.7 DUTY TO MAKE JUST ASSESSMENT :That revenue is supposed to make just TAX assessment which is apparently not done in extant case. reference is made to Hon'ble Madras high court in case of Sree Venkateswara Educational Trust vs The Income Tax Officer,

T.C.A.Nos.168 and 169 of 2020 (02.09.2024)

“21. At the same time, the appellant/assessee cannot be denied all the legitimate deductions that would have been available, if the returns were filed either as a “Regular Assessee” or as an “Association of Person”. 22. The purpose of assessment is to recover just tax and not subject an assessee to unjust tax by holding that no return was filed either as a “Regular Assessee” or as an “Association of Person” merely because revised return was not filed under Section 139(4) of the Act, within a time specified under Section 134 of the Act. 23. The last date for filing the returns under Section 139(4) of the Act would have expired on 31.03.2015 which was just few days before the return was processed on 12.03.2015 under Section 143(1) of the Act.

24. The Hon'ble Supreme Court in **Formica India Division, Bombay, Burma Trading Corporation Limited Vs. Collector of Central Excise and others**, 1995 Supp (3) SCC 552/1995 (77) ELT 511, had held as under:-

“When it was found that they were liable to pay duty on the intermediary product and had not paid the same, but had paid the duty on the end product, they could not ordinarily have complied with the requirements of Rule 56A. Once the Tribunal took the view that they were liable to pay duty on the intermediary product and they would have been entitled to the benefit of the notification had they met with the requirement of Rule 56A, the proper course was to permit them to do so rather than denying to them the benefit on the technical ground that the point of time when they could have done so had elapsed and they could not be permitted to comply with Rule 56A after that stage had passed. We are, therefore, of the opinion that the appellants should be permitted to avail of the benefit of the notification by complying at this stage with Rule 56A to the satisfaction of the Department.”

25. In our view also, if assessments are to be completed, deductions and applicable exemptions that are otherwise available to an assessee ought to have been extended by the Assessing Officer to an assessee before finalizing the assessment. Since the appellant/assessee was not entitled to exemption as a Trust under Sections 11, 12 and 12A of the Act in absence of registration under the Act as it stood Section 12AA of the Act, the benefit of other deductions under the Act ought to have been given. The Assessing Officer is not expected to act mechanically to confirm the liability to fasten an unjust tax liability on an assessee.”

11. **Hon'ble Madras high court in case of M.Kumarasamy vs ITO 03.09.2024 T.C.A.No.998 of 2015**

At the time of admission of this Tax Case Appeal, the following substantial questions of law was framed for being answered:-

“Whether the Tribunal is correct in law in sustaining the assessment of agricultural income reported as unexplained income based on the enquiry report of the Income Tax Inspector which report was not provided to the appellant for rebuttal, proving and establishing the gross violation of the principles of natural justice as well as the perversity/misdirection in the decision rendered in relation thereto?”

11. *We have considered the submissions made by the learned counsel for the appellant and the learned counsel for the respondent. In this case, the Department has disbelieved the letter of the person who had given a statement in favour of the appellant without subjecting the said person to any cross examination.*

12. *Therefore, the substantial question of law to be answered in this appeal is whether a statement of a person who had given a statement in favour of the appellant can be disbelieved and discredited long after it was given without cross examination of the said person by a mere reliance on an enquiry Report of the Income Tax Officer based on information gathered by the Income Tax Officer from the Village Headman.*

13. *The evidence which department has gathered is long after the felling of trees and sale by the appellant by placing reliance on the statement of the Village Headman. The statement of the Village Headman can at best only corroborate the stand which department based on evidence, if there were other compelling evidence.*

14. *It was incumbent on the part of the Income Tax Department to have summoned the said Mr.Thangasamy of Alangudi Taluk, Pudukottai District and verified and confirmed whether the said person had indeed given the statement which was produced by the Appellant and if so whether the statement given by the said person was true or not.*

15. *Although the department is governed by preponderance of probability and not by strict rules of evidence, yet it was incumbent to have secured the presence of the said person. They should have cross examined him before disbelieving the statement. Therefore, an issuance of summon to Mr.Thangasamy who had given statement by the Income Tax department is not sufficient.*

16. *The Income Tax department should have secured the presence of Mr.Thangasamy to answer to the summons and should have confronted him and contradicted the content of the statement of Mr.Thangasamy produced by the appellant by way of cross examination.*

17. *Therefore, without cross examination, the statement of Mr.Thangasamy can neither be disbelieved nor disregarded. The statement of Mr.Thangasamy cannot be therefore discredited. If*

Mr.Thangasamy had refused to co-operate, the Income Tax Department was not without remedy under the provisions of the Income Tax Act, 1961 to secure his presence.

18. *Since this exercise was not done, the demand confirmed vide order passed under Section 144(A) of the Income Tax Act, 1961 dated 28.12.2011 which view was affirmed by the Assessing Officer vide order dated 29.12.2011 passed under Section 143(3) of the Income Tax Act, 1961 and by the Commissioner of Income Tax (Appeals) vide order dated 12.11.2013 and by the Income Tax Appellate Tribunal vide order dated 20.06.2014 are liable to be interfered as unsustainable.*

19. *We are therefore of the view, the succeeding orders passed against the appellant in so far as the addition of **Rs.22,00,000** under Section 69A of the Income Tax Act, 1961 as unexplained credit/unexplained money of the appellant are incorrect and are liable to the set aside. the substantial questions of law framed by us is answered in favour of the appellant assessee and against the Income Tax Appellate Tribunal.*

9.8 ON TELESCOPING BENEFIT: *The benefit of telescoping has been approved in Principal Commissioner of Income-tax v. AliasgarAnvaraliVarteji reported in [2018] 96 taxmann.com 231 (Gujarat) wherein it was held that, when the entire unaccounted income discovered during the search was included in the overall disclosure, and the negative balance in the books of account was due to payments made from this unaccounted income, the assessee should not be denied the benefit of telescoping of the initial disclosure. It was held : 3. We have heard Mrs. Mauna Bhatt, learned advocate appearing on behalf of the revenue. At the outset, it is required to be noted that the learned Assessing Officer made the addition of Rs. 2,27,86,693/- on account of peak of negative cash in the books of account. However, the assessee explained the same and submitted that such negative balance was on account of payment made out of the unaccounted income, and therefore, it was submitted that when the entire unaccounted income found during the search was offered as a part of the overall disclosure, the same cannot be added in the total income as undisclosed investment. It is required to be noted that the learned Tribunal has rightly observed that such negative balance was made on unaccounted income and when necessary entries were made in the books of account, it is bound to result in negative cash balance. We are in complete agreement with the view taken by the learned Tribunal. Considering the aforesaid facts and circumstances of the case and more particularly when the entire unaccounted income, which was found during the search, was offered as part of overall disclosure, learned Tribunal has rightly held that the assessee shall be entitled to the benefit of telescoping of negative cash balance against*

the disclosure made. Under the circumstances, the learned Tribunal has rightly allowed the assessee the benefit of telescoping the original disclosure made against the negative balance in the books of accounts. No substantial question of law arises. Under the circumstances, present Tax Appeal deserves to be dismissed ...”

9.9 ON FAIRNESS IN TAX ASST. :On aspect of apparent malafide (legal malice) in admitted facts of instant case on part of Ld AO (based on glaring and patent contradiction and errors on part of Ld AO) leading to invalidity of impugned asst in toto , reference is made to recent hon’ble Bombay high court decision in case of M/s Soremartec S. A., Luxembourg vs The State of Maharashtra2024:BHC-AS:41233-DB in context of VAT assessment has held as under

“39. In R S Garg vs State of UP & Ors.6, the Hon’ble Supreme Court explained the differences between “malice in law” and “malice in fact”. Any action resorted to for an unauthorized purpose would constitute malice in law. The Court explained that ‘malice’ in its legal sense means malice such as may be assumed for a wrongful act done intentionally but without just cause or excuse or for one of the reasonable or probable causes. The term ‘malice on fact’ would come within the purview of such a definition. Even, however, in the absence of any malicious intention, the principle of malice in law can be invoked as has been described by Viscount Haldane in Shearer Vs Shields in the following terms:-

“A person who inflicts in injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently.”

40. The principle has also been narrated briefly in S RVentakram Vs Union of India⁷ in the following terms:-

“Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.”

41. The impugned assessment order is vitiated by legal malafides. Though the interest of revenue is vital, such interest cannot override considerations of probity and fairness in tax governance. A fair tax regime where no assessee is harassed is equally crucial

59. The facts in the present case are much more egregious than those before the Hon’ble Supreme Court. Any indulgence by way of

remand would not only reward the respondents with an enhanced limitation period to complete the FY 2013-2014 assessment proceedings but embolden unscrupulous tax officials to manipulate orders or otherwise mistreat the assesseees.”

9.10 On sec 69A qua stated /alleged CASH loan repayment and stated interest payment u/s 69C, it is submitted that firstly there is no clarity as to who is this LENDER receiving stated interest from assessee sans which entire addition is invalid and secondly entire addition is made on basis of conjecture and surmise and thirdly sec 69A has no role qua stated loan repayment because assessee is never found to be owner of any money /valuable article etc which is sine qua non for invoking sec 69A – reference is made to hon’ble SC decision in case of DN Singh case 454 ITR 595 and BHC in case of PCIT Shri Parvez Mohammad Hussain Ghaswalaothers and Indore bench ITAT M/s. Nakoda Realities (22,04.2024).

10 Humble Prayer: Impugned assessment orders of Ld AO and first appeal order may please be accordingly quashed/set aside.”

13. On the other hand, ld. DR for the Revenue brought to our notice relevant facts on the record and in particular, he brought to our notice findings of the Assessing Officer at para number 5.7 of the order. He submitted that the facts in this case are very clear from the material found during the search and the respective employees have accepted the ingenuine transactions and also explained the modus operandi. Therefore, he relied on the findings of lower authorities.
14. Considered the rival submissions and material placed on record. We observed from the record that during the search proceedings, certain documents were found in the form of pen drive and the details contained therein show the transactions of purchase and sales including certain cash transactions between certain parties, the details of the transactions are already reproduced in the assessment order. In corroboration with the

information available with the assessing officer, the employees including Managing Director of the assessee have accepted the transactions contained in the Annexure A-2, also explained the modus operandi, even though in the post search proceedings, assessee has denied the same, the Assessing Officer came to the conclusion that the purchases and sales recorded in the books are ingenuine. After carefully considering the facts on record, we observed that assessee has declared and filed its return of income by declaring total sales and relevant purchases declared the gross profit in the years under consideration in the range of 28% to 31%. Taking que from the findings of the assessing officer, he gave a clear finding that the purchases and sales declared by assessee to the extent of information found in the annexure A-2 are non-genuine and with that finding, he proceeded to add only the commission income presumed to have been paid and received by the assessee without disturbing the financial results declared by the assessee. In our considered view, the Assessing Officer should have either rejected the books of account and determined the actual profit earned by the assessee. He chose to proceed with the result declared by the assessee in their return of income and also proceeded to make the presumed commission income which assessee must have paid and received. It is quite contradicting to the detailed findings made by the Assessing Officer based on the material found

during search. On careful consideration of the facts on record, we observed that Assessing Officer in one way makes a big finding that the transactions of purchase and sales booked by the assessee are bogus and he accepts to retain the financial results and at the same breath, he rejects the contentions of the assessee to make addition on the commissions may have received or paid by the assessee which in fact assessee has not claimed anywhere in their books of account. The Revenue cannot approbate and reprobate at the same time.

15. In case, we proceed to accept the findings of the Assessing Officer, we may have to remove the alleged bogus purchases and sales from the financial records maintained by the assessee. If that be the case, the returned income to the extent of gross profit earned in those transactions will have to be removed. Therefore, the returned income to the extent of 7.46% of the alleged sales has to be reduced. In the normal cases of bogus purchases, we are directing AO to make addition on Gross Profit not on the basis of Net Profit or returned income. If that be the case, strictly speaking, we may have to reduce the gross profit from the financial results or returned income declared by the assessee i.e., average of 28% to 31%.
16. We are not able to understand that the AO has retained the returned income as per the ROI and also made the commission income on top of

the returned income. Strictly speaking he has to determine the actual income earned by the assessee not on the basis of presumption. In that case, he has to rework the actual income earned by the assessee. As discussed above, the AO may have to reduce the bogus purchases and sales to the extent it is booked in the financial statements and must have added the commission income which is the payment presumed to have been made. The net result would have been lesser than the returned income.

17. The concept of what approbate and reprobate is settled in the following case by the Hon'ble Supreme Court as under:-

[“Nagubai Ammal v. B. Shama Rao, 1956 SCR 451:](#)

“It is clear from the above observations that the maxim that a person cannot ‘approbate and reprobate’ is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The law is thus stated in Halsbury’s Laws of England, Vol. XIII, p. 464, para 512:

“On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (e.g. payment of costs), be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it”.

[State of Punjab v. Dhanjit Singh Sandhu, \(2014\) 15 SCC 144:](#)

“22. The doctrine of “approbate and reprobate” is only a species of estoppel, it implies only to the conduct of parties. As in the case of estoppel it cannot operate against the provisions of a statute. (Vide CIT v. V. MR. P. Firm Muar [CIT v. V. MR. P. Firm Muar, AIR 1965 SC 1216]).

23. *It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground.*

(Vide Maharashtra SRTC v. Balwant Regular Motor Service [Maharashtra SRTC v. Balwant Regular Motor Service, AIR 1969 SC 329] .) In R.N. Gosain v. Yashpal Dhir [R.N.

Gosain v. Yashpal Dhir, (1992) 4 SCC 683] this Court has observed as under: (SCC pp. 687-88, para 10) “10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that ‘a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage’.”

25. *The Supreme Court in Rajasthan State Industrial Development and Investment Corpn. v. Diamond and Gem Development Corpn. Ltd. [Rajasthan State Industrial Development and Investment Corpn. v. Diamond and Gem Development Corpn. Ltd., (2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153] , made an observation that a party cannot be permitted to “blow hot and cold”, “fast and loose” or “approbate and reprobate”. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.*

26. *It is evident that the doctrine of election is based on the rule of estoppel, the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when he has to speak, from asserting a right which he would have otherwise had.” • Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd., (2013) 5 SCC 470:*

“I. Approbate and reprobate

15. *A party cannot be permitted to “blow hot-blow cold”, “fast and loose” or “approbate and reprobate”. Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience. [Vide Nagubai Ammal v. B. Shama Rao [AIR 1956 SC 593] , CIT v. V. MR. P. Firm Muar [AIR 1965 SC 1216] , Ramesh Chandra Sankla v. Vikram Cement [(2008) 14 SCC 58 : (2009) 1 SCC (L&S) 706 : AIR 2009 SC 713] , Pradeep Oil*

Corpn. v. MCD [(2011) 5 SCC 270 : (2011) 2 SCC (Civ) 712 : AIR 2011 SC 1869] , Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd. [(2011) 10 SCC 420 : (2012) 3 SCC (Civ) 685] and V. Chandrasekaran v. Administrative Officer [(2012) 12 SCC 133 : (2013) 2 SCC (Civ) 136 : JT (2012) 9 SC 260] .]

16. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had.”

18. Considering the above ratios, we are of the view that the AO has already proved that the purchases and sales as bogus based on the material found during the search and has already chose to treat them as bogus and cannot play hot and cold. As discussed above, he has to determine the actual income earned by the assessee and can charge to tax only the actual returned income. It is allowed to make penalties as per the law and cannot presume or make additional income as the income of the assessee without their being actually earned by the assessee. It is different if the AO has not come to conclusion that the transactions are not genuine. Therefore, after considering the factual matrix on this case, we are of the view that the gross taxable income cannot be less than the returned income filed by the assessee u/s 139(1) of the Act. In our view, the addition made by the Assessing Officer of commission and the elimination of bogus purchases and sales will reduce the taxable income. Therefore, we are inclined to delete the additions made by the Assessing Officer. In the result, ground

no.7 raised by the assessee is allowed.

19. We are refrain from adjudicating the other grounds of appeal which include jurisdictional issues raised, at this stage we keep them open.
20. In the result, this appeal being ITA No.2005/Del/2024 for AY 2018-19 filed by the assessee is partly allowed.
21. With regard to appeals for AYs 2019-20 to 2021-22, since the facts are exactly similar to AY 2018-19 our above findings in AY 2018-19 are applicable *mutatis mutandis* in AYs 2019-20 to 2021-22. Accordingly, the appeals being ITA Nos.2006 to 2008/Del/2024 for AYs 2019-20 to 2021-22 filed by the assessee are partly allowed.
22. To sum up : all the appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 3rd January, 2025.

**Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER**

**sd/-
(S.RIFAUR RAHMAN)
ACCOUNTANT MEMBER**

Dated: 03.01.2025

TS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR: ITAT

**ASSISTANT REGISTRAR
ITAT, NEW DELHI**