

आयकर अपीलीय अधिकरण, 'एक-सदस्य' न्यायपीठ, मुंबई।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "SMC", MUMBAI**

**श्री जोगिन्दर सिंह, न्यायिक सदस्य, के समक्ष
Before Shri Joginder Singh, Judicial Member,**

**ITA No.4686/Mum/2015
Assessment Year: 2007-08**

Income Tax Officer-32(1)(2), Room No.204, Bldg. No. C-11, Pratyakshakar Bhavan, Bandra Kurla Complex, Bandra (East), Mumbai-400051	बनाम/ Vs.	Shri Ashish P. Shah, 44, Radhashyam Apartment Behind Burfiwala Lane, Andheri(W), Mumbai-400058
राजस्व / Revenue		निर्धारिती / Assessee
P.A. No. ANZPS9797E		

राजस्व की ओर से / Revenue by	Ms. Mahua Sarkar -DR
निर्धारिती की ओर से / Assessee by	None

सुनवाई की तारीख / Date of Hearing	31/08/2016
आदेश की तारीख / Date of Order:	01/09/2016

आदेश / O R D E R

The Revenue is aggrieved by the impugned order dated 15/06/2015 of the Ld. First Appellate Authority, Mumbai. The only ground raised pertains to deleting the addition of Rs.30,17,415/- without appreciating the fact that the said transactions do not find mention in the auditor's report and the confirmation received from the parties were replies only and not with respect to squaring up of loan.

2. During hearing, the ld. DR, Ms. Mahua Sarkar, defended the addition made by the Assessing Officer by contending that the relief was granted by the First Appellate Authority without considering the factual matrix and even the transactions do not find mention in the report of the auditor.

2.1. On the other hand, none was present for the assessee in spite of issuance of registered AD notice issued to the assessee. The assessee neither presented himself nor moved adjournment petition. It seems that the assessee is not interested to pursue the appeal filed by the Revenue, therefore, I have no option but to proceed ex-parte, qua the assessee, and tend to dispose of this appeal on the basis of material available on record.

2.2. I have considered the submissions of Ld. DR and perused the material available on record. The facts, in brief, are that the assessee is running a proprietary business in the

name of Mittal Transport, which he undertakes as a sub-contractor for supplying building materials. The assessee showed to have made purchases from three parties namely Tushar Ruparel Prop. M/s Forum Traders, Ms. Neelima Ruparel, Prop. M/s Nilam Enterprises and M/s V.S. K. Enterprises. The assessee also made certain other transactions from these parties. A Show cause notice was issued to the assessee to which the assessee claimed that the said squared up loans were taken by the assessee from these parties. From the Auditor's report, it was noticed that no such loans were squared up/taken by the assessee. In response to notices u/s 133(6) of the Act, the Id. Assessing Officer got the confirmation from these parties but merely on this technical flaw, addition was made.

2.3. On appeal, before the Ld. Commissioner of Income Tax (Appeal), the addition was deleted. The relevant finding of the Ld. Commissioner of Income Tax (Appeal) is reproduced hereunder for ready reference:-

"I have gone through the facts of the case. It is a fact that the appellant is a building material supplier and has purchase transactions with the 3 parties which are M/s.Tusar Ruparel (HUF), Prop. M/s. Foram Traders, Ms. Neenma Ruparel Prop. M/s Neeram Enterprises and M/s.Tushar Ruparel, Prop.VSK Enterprises. In the bank statement of the assessee, there are further transactions of receipts and payments back to the said 3 parties over and above the purchases that has been declared in ,the books of accounts. The A.D. has held that since the said transactions being loans taken and given back is not mentioned in the tax audit report, then the same would constitute also as business transaction and has, thereby calculated the profit @ 8% of the total receipt and brought the same to tax.

While it is a fact that the said square off of loan does not find mention in the tax audit report and to that extent the tax audit report is defective/incomplete, it also however remains a fact that the 3 persons. have confirmed the said transactions to being the nature of loans given and (received back during the year . It is not the-case of the A.O. that the said money has been advanced by these 3 persons or repaid back by the appellant from any unaccounted sources and neither is it the case of the A.D. that there is a differential of even a penny in what the appellant has repaid as said amounts. Therefore, in light of only the fact that the said transactions do not find mention in the auditor's report, rejecting the books of accounts and thereby estimating income would be presumptive logic not borne by the facts and circumstances of the case. Therefore, in light of this observation the addition made by the A.D. by treating the said ,amount as pertaining to business turnover is hereby deleted. The appellant gets relief of Rs.30,17,145/-.”

If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld. respective counsel, if kept in juxtaposition and analyzed, it is noticed that the assessee duly entered into loan transactions with these parties and also filed loan confirmations that to in response to notices issued u/s 133(6) of the Act to the respective party. No evidence was produced on record on the basis of which, these can be treated as sales. No new material was brought on record evidencing that any income has escaped. The ld. Assessing Officer has made the addition merely on the basis of non-mentioning of these loans in the auditor's report. However, the auditor himself gave in writing stating that there was inadvertent error on his part and the loans were in fact in existence. Considering the factual matrix and the decision in

CIT vs The Simbhaoli Sugar Mills Ltd. 2011-TIOL-293(Del.), the Hon'ble Delhi High Court held that reopening on the basis of opinion formed by the auditor cannot be said to be valid as it amounts to change of opinion. I have perused the facts very carefully and found no infirmity in the impugned order, therefore, the stand of the Ld. Commissioner of Income Tax (Appeal) is affirmed.

Finally, the appeal of the Revenue is dismissed.

This order was pronounced in the open in the presence of ld. DR at the conclusion of the hearing on 31/08/2015.

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 01/09/2016

Shekhar, P.S/निजी सचिव

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai