

आयकर अपीलीय अधिकरण "H" न्यायपीठ मुंबई में।

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

**BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 4466/Mum/2016

(निर्धारण वर्ष / Assessment Year : 2010-11)

Sanjeev Amritlal Chheda, T-6, Seksaria Industrial Estate, S.V. Road, Malad (West), Mumbai - 400 064.	बनाम/ v.	Income Tax Officer Ward 30(3)(2), C13, Room No. 610, 6 th floor, Pratyakshkar Bhavan, Bandra (East), Mumbai.400 051.
स्थायी लेखा सं./PAN : AABPC8631Q		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by :	Shri Haresh P. Shah
Revenue by :	Shri B.S. Bist, D.R.

सुनवाई की तारीख / **Date of Hearing** : 09-03-2017

घोषणा की तारीख / **Date of Pronouncement** : 30-03-2017

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 4466/Mum/2016, is directed against the appellate order dated 29th April, 2016 passed by the learned Commissioner of Income Tax (Appeals)- 41, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2010-11, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 18th February, 2015 passed by learned Assessing Officer (Hereinafter called "the AO") u/s 143(3) r.w.s. 147 of the Income-tax Act, 1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called “the tribunal”) read as under:-

“1. The Ld.CIT CA) erred in confirming addition of Rs. 6,00,329 stating that disallowance comes to 30.78 % of Purchase claimed (i.e. Rs. 19,50,220) hence found to be reasonable & hence sustained.

1.1 WITHOUT PREJUDICE TO THE ABOVE, the Ld. CIT (A) failed to appreciate that AO has estimated G.P @ 24.19 against declared G.P @ 18.69 without any basis i.e. adhoc addition.

1.2 WITHOUT PREJUDICE TO THE ABOVE, the Ld. CIT CA) failed to appreciate that AO has applied GP to entire sales of Rs. 1,09,13,994 for addition purpose.

1.3 WITHOUT PREJUDICE TO THE ABOVE, the Ld.CIT (A) failed to consider the G.P earlier years which were as under :-

A.Y.	GP	N.P.	Sales (Rs)
2010-11	18.69%	8.33%	1,09,13,994
2009-10	20.12%	8.58%	96,08,861
2008-09	14.02%	6.87%	1,15,27,694”

3. Brief facts of the case are that the assessee is an individual carrying on the business of trading and manufacturing of electrical goods and labour job in the name of M/s Sanjeev Enterprises. Information was received by the AO from the office of the DGIT(Inv), Mumbai that the assessee was involved in taking accommodation entries from the hawala dealers listed by Maharashtra Sales Tax Department. On the basis of information received, the A.O. came to know that assessee was involved in bogus/non-genuine purchases from the following party to the extent of Rs. 19,50,220/- during financial year 2009-10.

<u>Name</u>	<u>PAN</u>	<u>F.Y.</u>	<u>Transaction Amt.</u>
Disha Enterprises	AACPG3702H	2009-10	19,50,220

Total Amt

19,50,220

Based upon the information received from the Sales Tax Department, the case was reopened by AO u/s 147 of the Act after recording the reasons . Notice dated 19-03-2014 was issued by AO u/s 148 of 1961 Act. It is pertinent to mention here that the return of income was filed by the assessee on 28th September, 2010 and the same was processed u/s 143(1) of the Act and no scrutiny assessment was initially framed by Revenue u/s 143(3) r.w.s 143(2) of 1961 Act. The assessments have been reopened within a period of 4 years from the end of the assessment year. In order to verify genuineness of purchases made by the assessee, notice u/s 133(6) of the Act was issued by the AO to the said party namely Disha Enterprises calling for quantitative details of sales made, copy of ledger account of the assessee, copy of bank statements etc. . However, the notice issued by the AO to Disha Enterprises u/s 133(6) of the Act was returned un-served by the postal authorities with the remark “not known”. The A.O. observed that as per the information available with the Revenue and also as per information received from the Sales Tax Department, M/s Disha Enterprises is only providing accommodation entries without doing any actual business. The name of said party also appeared in the official website of the Sales Tax Department as non-genuine dealer and also VAT registration was cancelled by the Sales Tax Department. The assessee was asked to produce the party with the books of account, stocks register, lorry receipt along with delivery challans, and also evidences to prove the utilization of material and the mode of payment for purchase and copy of bank statement etc. . The assessee express inability to produce the said party namely Disha Enterprises as the matter was claimed to be 3-4 years old. The assessee submitted that the he is a small manufacturer and it was not possible to maintain the quantitative details of raw materials and finished goods. The assessee however submitted copy of ledger, purchase bills and evidence of bank payments.

The A.O. observed that the onus is on the assessee to prove along with evidences that what the assessee had stated in his books of account was true and genuine. No quantitative details of raw material and finished goods were submitted before the A.O. and the party was also not produced before the AO, were the observations of the AO. The AO also observed that the assessee also failed to produce lorry receipt for purchase of goods from this party, inward register and stock register . Thus, in view of the above stated reasons, the AO held that the genuineness of the purchase transactions could not be proved by the assessee . The A.O. observed that the name of the said party also appears in the list of VAT cancelled dealers and also in the list of non-genuine dealers. The A.O. observed that although the payment for the purchases from the alleged hawala dealers were made by way of cheque by the assessee but the cheques were deposited in the bank accounts of the alleged hawala dealers who had already confessed before the Sales Tax Authorities that they have done no genuine sales. Thus, the A.O. was not satisfied about the correctness of the books of account of the assessee and he invoked the provisions of section 145(3) of the Act and rejected the books of account. The A.O. relied upon the decision of the Tribunal in the case of Sh. Kishan Malpani in ITA No. 1045/JP/1997 (ITAT, Jaipur) and the decision of Hon'ble Supreme Court in the case of M/s Kachwala Gems, No. 1779/2005. The AO observed that the assessee had shown GP of 18.69% of turnover and on the basis of the forgoing discussion, the A.O. enhanced the GP by estimating the same to be 24.19% of the total turnover, vide assessment order dated 18.02.2015 passed by the AO u/s 143(3) r.w.s. 147 of 1961 Act.

4. Aggrieved by the assessment order dated 18.02.2015 passed by the A.O. u/s 143(3) r.w.s. 147 of 1961 Act, the assessee carried the matter before the Id. CIT(A) who confirmed the additions made the A.O. by relying upon the decision in the case of Vijay Proteins Ltd. v. CIT [2015] 58 taxmann.com 44

(Guj) and CIT v. Simit P. Sheth [2013] 356 ITR 451 (Guj.). The ld. CIT(A) observed that the assessee has purchased material from some other sources, hence, profit earned was much higher than the normal GP ratio. The ld. CIT(A) observed that total disallowance of Rs. 6,00,329/- had been made by the A.O. on bogus purchases of Rs. 19,50,220/-, hence, the disallowance comes to 30.78% of bogus purchases which was found to be reasonable and learned CIT(A) sustained the same, vide appellate order dated 29-04-2016.

5. Aggrieved by the appellate order dated 29-04-2016 passed by ld. CIT(A) , the assessee filed an appeal before the Tribunal.

6. The ld. Counsel for the assessee submitted that the assessee has purchased material from one M/s Disha Enterprises for an amount of Rs. 19,50,220/-. He submitted that the assessee is a small manufacturer and trading in electrical goods and labour jobs. It was submitted by learned counsel for assessee that material was purchased from this party Disha Enterprises to the tune of Rs. 19,50,220/- which was used as raw material in manufacturing of electrical goods.. The name of the party is appearing in the list of hawala accommodation bills dealers as per the Sales Tax Department website. The assessee could not produce the party before the A.O. because of lapse of time. The books of account were rejected by the A.O. u/s 145(3) of 1961 Act and GP was estimated at 24.19% of the total turnover wherein addition has been made to the tune of Rs. 6,00,329/- by the AO towards bogus purchases, which was confirmed by learned CIT(A) wherein disallowance to the tune of Rs. 6,00,329/- made by the AO was retained by learned CIT(A) by holding that the said disallowance comes to 30.78% of said purchases of Rs.19,50,220/-.

7. The ld. D.R. supported the appellate orders of the ld. CIT(A) .

8. We have considered rival contentions and also perused the material available on record. We have observed that the assessee is an individual carrying on the business of trading and manufacturing of electrical goods and labour job in the name of M/s Sanjeev Enterprises. The A.O. received information from the office of the DGIT(Inv), Mumbai and also from Maharashtra Sales Tax Department about the assessee being involved in taking accommodation entries from one of the listed hawala dealer namely Disha Enterprises who is alleged to be engaged in proving bogus bills without supplying actual material . The AO observed that the assessee has allegedly purchased raw material of Rs. 19,50,220/- from said party Disha Enterprises during relevant previous year which was in the nature of accommodation entry being hawala transactions. The said Disha Enterprises had given an affidavit before Maharashtra Sales Tax Authorities accepting that they were engaged in providing bogus accommodation entries which are in nature of hawala transactions wherein only bogus bills are issued without supplying actual material. The said dealer Disha Enterprises registration with VAT department was also cancelled by Maharashtra Sales Tax Authorities as the said dealer namely Disha Enterprises was engaged in providing bogus hawala/accommodation entries. The case of the assessee was reopened by the AO u/s 147 of 1961 Act and notices dated 19-03-2014 u/s 148 of 1961 Act were issued by the AO to the assessee which was within a period of four years from the end of the relevant assessment year. The return of income originally filed by the assessee on 28-09-2010 was processed by Revenue u/s 143(1) of 1961 Act and the same was not scrutinized by revenue u/s 143(3) r.w.s.143(2) of 1961 Act. The assessee has not raised any ground before us challenging reopening of assessment u/s 147/148 of 1961 Act. The AO issued notice u/s 133(6) of 1961 Act to the said party Disha Enterprises but the said notice returned un-served by postal authorities with remark 'Not Known'. The assessee was asked to produce the said party namely Disha Enterprises but

the assessee could not produce the said party on the grounds that now 3-4 years have elapsed and hence assessee could not produce the said party. The assessee was asked by the AO to prove genuineness of purchase transactions and the assessee provided ledger copy, bank statement and purchase bills to support its contentions . The assessee could not produce stock register, inward register and lorry receipts in evidence of having actually received raw material to the tune of Rs. 19,50,220/- from the said party Disha Enterprises, despite being asked by the AO. The assessee could not submit quantitative reconciliation of stock to prove that raw material procured by the assessee from the said party Disha Enterprises to the tune of Rs. 19,50,220/- was infact purchased by the assessee and the same was duly consumed for production of finished goods which are recorded in its books of accounts. The allegation of the Revenue based on information received from Maharashtra Sales Tax Department which is duly supported by an affidavit of Disha Enterprises is that the said party does not deal in any material but only supply bogus bills which are in the nature of accommodation bills wherein no material is actually supplied but only bogus bills are issued by Disha Enterprises . As we have seen above , the assessee failed to produce the party as well failed to submit crucial documents/evidences such as inward register, lorry receipt, stock register , quantitative reconciliations etc to substantiate that purchases to the tune of Rs.19,50,220/- alleged to be made from Disha Enterprises are genuine. These are information which are especially in the knowledge of the assessee and the onus is on the assessee to prove that purchases are genuine as these purchases are recorded in the books of accounts of the assessee. Section 106 of Indian Evidence Act ,1872 clearly stipulates as under:

“106. Burden of proving fact especially within knowledge

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(a)****

(b) A is charged with traveling on a railway without a ticket. The burden of proving that he had a ticket is on him.”

The assessee was not able to discharge burden cast u/s 106 of 1872 Act as the assessee did not produce stock registers, inward registers, lorry receipts and quantitative reconciliation of stock to prove that the material was in-fact received and was actually consumed by the assessee to produce electrical goods which are declared and disclosed in the return of income filed with the Revenue. The said material was stated to be raw material meant for manufacturing of electrical goods is an admitted position. The right of cross examination is not absolute. The assessee has to first discharge its primary onus cast under law and if the same stood duly discharged which is not rebutted by authorities , but despite that then also the authorities proceed to put assessee to prejudice solely relying on the basis of incriminating statement recorded of third party at the back of the assessee, then certainly the right to cross examination the said third party whose incriminating statement recorded at the back of the assessee is relied upon by authorities to prejudice the assessee will become absolute. But in the instant case , primary onus cast on the assessee itself did not stood discharged by the assessee as discussed above. The assessee could not prove the genuineness of the raw material purchased by the assessee from Disha Enterprises and its consumption for manufacturing electrical goods. On the facts and circumstances of the case , the AO rejected the books of accounts u/s 145(3) of 1961 Act and applied GP ratio of 24.19% to the entire turnover of the assessee which led to addition of Rs. 6,00,329/- . The learned CIT(A) retained the addition of Rs. 6,00,329/- but held that the additions comes to 30.78% of the alleged purchases of Rs.19,50,220/- from Disha Enterprises which was

held to be reasonable by learned CIT(A) and also learned CIT(A) upheld the manner of arriving of the addition by learned AO which was justified by learned CIT(A) to be one of the alternative method to arrive at disallowances on account of alleged bogus purchases . We have not to lose sight that the assessee is a manufacturer and the said material is stated to be purchased by the assessee as raw material for manufacturing electrical goods. No quantitative reconciliation of stock is submitted by the assessee to prove consumption of said material for the purposes of manufacturing electrical goods. We are of the view that keeping in view facts and circumstances of the case as discussed above, the AO rightly invoked Section 145(3) of 1961 Act by holding that books of account cannot be relied upon to compute correct profit as per mandate of 1961 Act to bring the same to tax as the AO was not satisfied as to correctness of the accounts in view of incriminating evidence received by the AO from DGIT(Inv.) and Maharashtra Sales Tax Authorities duly also supported by an affidavit by Disha Enterprises as well by non discharge of primary onus by the assessee. The assessee also could not produce the party before the AO and notices sent by the AO u/s 133(6) of 1961 Act to Disha Enterprises returned un-served by postal authorities. In such circumstances ,GP ratio needs to be estimated which definitely involved some estimation/guess work but the said estimation/guess work should be fair , honest and rational keeping in view factual matrix of the case and cannot be arbitrarily applied at the discretion of authorities . Reference is drawn to decision of Hon'ble Supreme Court in the case of Kachwala Gems v. JCIT (2007) 288 ITR 10(SC) , wherein Hon'ble Lordships held as under :

“4. The facts of the case are in a short compass. The appellant-assessee deals in precious and semi-precious stones. In the course of assessment, the Assessing Officer noticed the following defects in the books of account of the assessee :

"1. The assessee has not maintained and kept any quantitative details/stock register for the goods traded in by the assessee.

2. There is no evidence on record or document to verify the basis of the valuation of the closing stock shown by the assessee. The assessee is not able to prepare such details even with the help of books of account maintained, purchase bills & Sale Invoices.

3. Provisions of section 145(3) are clearly attracted in this case.

4. The genuineness of purchases to the extent of Rs. 42 lakhs (approx.) is not proved without any doubt.

5. The GP rate declared by the assessee at 13.49 per cent during the assessment year is not a match to the result declared by the itself in the previous assessment years.

6. M/s. **Gem** Plaza, engaged in local sales of similar goods declared voluntarily rate of 35 per cent in its assessment for the assessment year 1997-98.

7. M/s. Dhadda Exports, another assessee dealing in same items, but doing export business declared GP rate of 43.8 per cent (even without considering the value of export incentives) in assessment year 1997-98."

5. Thereafter, the books of account of the assessee were rejected by the Assessing Officer and he resorted to best judgment assessment under section 144 of the Income-tax Act. The Assessing Officer in the assessment order mentioned some comparable cases and was of the view that the case of the assessee is more or less having similar facts as that of M/s. **Gem** Plaza where the Gross Profit has been taken as 35.48 per cent. The Assessing Officer estimated the Gross Profit of the assessee as 40 per cent.

6. The Assessing Officer further held that the assessee has shown bogus purchases in order to reduce the Gross Profits.

7. In appeal, the Commissioner of Income-tax (Appeals) upheld most of the findings of the Assessing Officer, but reduced the Gross Profit from 40 per cent to 35 per cent.

8. In further appeal, the Tribunal had given further relief to the assessee and reduced the Gross Profit rate to 30 per cent.

9. The counsel for the assessee has submitted before us that the income-tax authorities wrongly held that appellant has shown bogus purchases, and the books of account were wrongly rejected.

10. In our opinion, whether there were bogus purchases or not, is a finding of fact, and we cannot interfere with the same in this appeal. As regards the rejection of the books of account, cogent reasons have been given by the income-tax authorities for doing so, and we see no reason to take a different view.

11. It is well-settled that in a best judgment assessment, there is always a certain degree of guess work. No doubt the authorities concerned should try to make an honest and fair estimate of the income even in a best judgment assessment, and should not act totally arbitrarily, but there is necessarily some amount of guess work involved in a best judgment assessment, and it is the assessee himself who is to blame as he did not submit proper accounts. In our opinion, there was no arbitrariness in the present case on the part of the income-tax authorities. Thus, there is no force in this appeal, and it is dismissed accordingly. No costs.”

The AO in the instant case did not made any industry comparisons to arrive at fair , honest and rational estimation of GP ratio rather applied GP ratio of 24.19% on total turnover. The AO stated that as per market trend and circumstances of the case, GP ratio on total turnover is estimated at 24.19% on total turnover but what are those market trends and circumstances which led him to apply GP ratio of 24.19% on total turnover is not brought on record by the AO as it is not a speaking order so far as GP estimation is concerned as no industry comparables are brought on record by the authorities below nor any rational comparability vis-à-vis preceding years GP ratio are brought on record. We could have set aside this appeal back to the file of the AO for de-novo determination of the issue under appeal but keeping in view smallness of the additions , we are not inclined to relegate assessee back to face ordeal of second round of litigation involving costs and time and also the authorities below cannot have second round of litigation to plug their deficiencies. The assessee earned GP ratio of 18.69% on total turnover in the relevant previous year of which books of accounts were rejected u/s 145(3) of 1961 Act, while in the immediately preceding year i.e. assessment year 2009-10, it earned GP ratio of 20.11% on total turnover. As per facts emanating from records before us , there is no allegation that similar purchases were made by the assessee in the immediately preceding year from Disha Enterprises. There is also no allegation by the Revenue that the purchases

made by the assessee from other dealers in relevant previous year under appeal before tribunal is from alleged entry operators. In our considered view and based on facts and circumstances of the case as discussed by us in details above, end of justice will be met in this case if GP ratio of 22% on total turnover is estimated in the instant case. The said GP ratio at higher rate of 22% on total turnover is applied by us because of failure of the assessee to come forward to discharge primary onus cast upon him as detailed above for which assessee is to be blamed. Further, keeping in view that in the immediately preceding year, the turnover of the assessee was Rs. 96.09 lacs and GP ratio was 20.11% on total turnover, while in the relevant previous year under appeal before us the turnover declared by the assessee shot up to Rs. 109.14 lacs while GP ratio has fallen to 18.69% of total turnover which in the midst of afore-stated un-rebutted allegation against the assessee and non discharge of primary onus, the declared lower GP ratio of 18.69% in the instant previous year under appeal cannot be accepted. Thus, in nut-shell we are inclined to adopt GP ratio of 22% on total turnover in the instant case which in our considered view is fair, reasonable and rational keeping in view factual matrix of the case. The assessee gets part relief. We order accordingly.

9. In the result, appeal filed by the assessee in ITA No. 4466/Mum/2016 for assessment year 2010-11 is partly allowed in terms indicated above.

Order pronounced in the open court on 30th March, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक: 30-03-2017 को की गई ।

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 30-03-2017

व.नि.स./ R.K., Ex. Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai H" Bench
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai