



IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

ITA no.192/Mum./2012
(Assessment Year : 2009-10)

Shri Ravindra B. Upalekar
Room no.79, BBD Chawl no.120
Delisle Road, Mumbai 400 018
PAN - AARPU1851E

..... Appellant

v/s

Income Tax Officer
Ward-18(1)(3), Mumbai

..... Respondent

ITA no.4949/Mum./2012
(Assessment Year : 2009-10)

Income Tax Officer
Ward-18(1)(3), Mumbai

..... Appellant

v/s

Shri Ravindra B. Upalekar
Room no.79, BBD Chawl no.120
Delisle Road, Mumbai 400 018
PAN - AARPU1851E

..... Respondent

Cross Objection no.78/Mum./2016
(Arising out of ITA no.4949/Mum./2012)
(Assessment Year : 2009-10)

Shri Ravindra B. Upalekar
Room no.79, BBD Chawl no.120
Delisle Road, Mumbai 400 018
PAN - AARPU1851E

..... Cross Objector
(Original Respondent)

v/s

Income Tax Officer
Ward-18(1)(3), Mumbai

..... Respondent
(Original Appellant)

Assessee by : Shri Prakash Jhunjhunwala
Revenue by : Shri A.K. Srivastava

Date of Hearing - 19.05.2016

Date of Order - 27.05.2016

ORDER**PER SAKTIJIT DEY, J.M.**

The cross appeals by Department and assessee and the cross objection by the assessee are directed against common order dated 25th May 2012, passed by the learned Commissioner (Appeals)-29, Mumbai, for the assessment year 2009-10.

2. For the purpose of record, it is necessary to mention, the cross objection was filed by the assessee on 18th May 2016 and was not originally listed for hearing. However, since it arises out of the order passed by the learned Commissioner (Appeals) under challenge in the cross appeals and further the grounds raised in the cross objection are materially identical to the grounds raised in the appeal of the assessee, the cross objection was taken up for hearing on the consent of both the parties.

3. At the very outset, the learned Authorised Representative submitted a letter dated 19th May 2016, seeking permission to withdraw the appeal and cross objection filed by the assessee. The contents of the said letter are as under:-

"To

19/5/2016

Hon'ble ITAT
"D" Bench
Mumbai

Shri Ravindra B. Upalekar

Respected Sir,

*Re: Withdrawal of assessee's appeal and cross objection
ITA no.192/Mum./2013 and 78/Mum./2016*

*Your honours are requested to permit the withdrawal of the assessee's
appeal and cross objection.*

Thanking you,

*Yours faithfully,
Sd/-
(Authorised Representative)
Prakash Jhunjhunwala
M.no.047460"*

4. The learned Departmental Representative has no objection for withdrawal of the appeal and the cross objection by the assessee.
5. In view of the aforesaid, we dismiss the cross objection (C.O. no.78/Mum./2015) and appeal by the assessee (ITA no.92/Mum./2013) as withdrawn.
6. As far as Revenue's appeal being ITA no.4949/Mum./2012, is concerned, the effective grounds raised are as under:-

"1. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in restricting the addition on account of estimation of profit at 0.5% as against 5% done by the A.O.

2. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in deleting the addition of ₹ 8,95,22,222 made on account of unexplained outstanding balances of creditors as assessee had failed to provide the identity, creditworthiness and genuineness of the transaction during the assessment proceedings.

3. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) failed to appreciate that the details collected by him in respect to sundry creditors should have

been remanded to the A.O. for verification as such details were not available to the A.O. during the assessment proceedings."

7. In ground no.1, the Department has challenged the decision of the learned Commissioner (Appeals) in estimating the profit on the sales @ 0.5%.

8. Brief facts are, assessee an individual claimed to be engaged in the business of polished diamonds, rough diamond, precious and semi-precious stones, gold and silver. For the assessment year, under consideration, assessee filed his return of income on 30th September 2009, declaring total income of ₹ 1,77,610, which included income from business also. During the assessment proceedings, the Assessing Officer on verifying the bank statement of the assessee noticed that there was huge cash withdrawal and deposits. Entertaining doubt with regard to such withdrawals and deposits, the Assessing Officer issued summons to the assessee requiring his appearance to explain. In response to the summons issued, the assessee appeared and a statement was recorded from him. From the statement of the assessee, the Assessing Officer found that at the instance of another person Shri Ashok Jain, assessee was carrying out the transaction as namelender. As stated by the Assessing Officer, even the Chartered Accountant appearing for the assessee also confirmed the facts stated by the assessee in the statement recorded under section 131. He

stated, even assessee's books of account were audited at the instance of Shri Ashok Jain. Thus, from the statement recorded under section 131, from the assessee, the Assessing Officer inferred, the assessee was never engaged in any business activities but some other person was carrying on the business by utilising the name of the assessee. In other words, the assessee was a benami of another person. The Assessing Officer, therefore, was of the view that the book results of the assessee cannot be accepted and have to be rejected in terms of section 145(3) and income has to be estimated. The Assessing Officer observed, as per the Profit & Loss account forming part of the tax audit report, the total sales effected by the assessee during the year was ₹ 76,01,11,881. He observed, in spite of such huge volume of turnover, neither there was any opening stock nor closing stock which according to the Assessing Officer indicates that the assessee was used by another person for issuing accommodation bills to various persons. So, on the aforesaid basis, the Assessing Officer proceeded to estimate the profit @ 5% on the total sales disclosed by the assessee and worked out the profit at ₹ 3,85,05,594. Being aggrieved of the addition made on account of estimation of profit, assessee preferred appeal before the first appellate authority.

9. The learned Commissioner (Appeals), after considering the submissions of the assessee vis-a-vis the facts and material on record

found that as per the enquiry conducted by the Assessing Officer himself, assessee was found to be a mere nomenclature of Shri Ashok Jain. That being the case, logically, no addition could have been made at the hands of the assessee. He observed, though, the Assessing Officer inferred that the assessee was actually issuing accommodation bills at the instance of Shri Ashok Jain, but no enquiry was made with Shri Ashok Jain. He observed, if it was found by the Assessing Officer that the assessee was merely a benamidar without any actual business activity how an income can be estimated at the hands of the assessee. However, considering the fact that the assessee had not pleaded before him to tax the income in the hands of Shri Ashok Jain, learned Commissioner (Appeals) proceeded to examine the reasonableness of rate of profit adopted by the Assessing Officer. He observed, assessee in the course of assessment proceedings had furnished various details as under:—

- "a. Partywise details of purchase along with their address*
- b. Partywise details of sales along with their address*
- c. Quantitative details of traded goods*
- d. Sample copies of purchase bills*
- e. Comparitative chart of gross profit and net profit*
- f. Audited Balance sheet as on 31/03/2009*

10. He noted, the Assessing Officer after verifying the details submitted by the assessee, did not point out any specific discrepancy or defect in these information. Therefore, in his view, the net profit

rate of 5% adopted by the assessee was not reasonable. The learned Commissioner (Appeals) observed, the assessee as per the capital account has a balance of ₹ 4,68,803 only and there are no fixed asset. The entire current assets being loans and advances are matched by current liabilities. There is no closing stock which indicates that the transactions are apparently accommodation entries or circular entries. The learned Commissioner (Appeals) observed, in response to the notices issued under section 133(6), to verify the current liability of the concerned parties it was found from the information supplied by those parties that they are existing entity with regular PAN and were having huge turnover. All those parties have also certified transactions with the assessee and the balance tallied with the ledger produced by the assessee which, to certain extent, proves that the entries are accommodation bills. He also took note of the fact that in the earlier year also, assessee had disclosed similar sales and purchases and shown profit @ 0.02% to 0.19%. The learned Commissioner (Appeals) also found that the assessee is a man of small means and resides in a chawl. He receives nominal income of ₹ 5,000 per month given by his mentor Shri Ashok Jain. On over all consideration of these facts, the learned Commissioner (Appeals) was of the view that estimation of net profit @ 0.5% would be reasonable. Accordingly, he quantified the addition at ₹ 38,00,559.

11. Learned Departmental Representative submitted, when the assessee was found to be involved in unscrupulous/dishonest activities of providing accommodation bills as a benamidar, the learned Commissioner (Appeals) was not justified in reducing the net profit rate to 0.5% thereby giving a premium to the dishonesty of the assessee. He submitted, though, there is no basis shown by the Assessing Officer while adopting net profit rate of 5% similarly learned Commissioner (Appeals) has also not shown the basis for reducing it to 0.5%. He, therefore, submitted the estimation of net profit @ 5% made by the Assessing Officer should be restored.

12. Learned Authorised Representative on the other hand submitted, when the Assessing Officer himself admits that the entire business transaction shown by the assessee is as a name lender of Shri Ashok Jain, and actually no business activity was carried on but only accommodation bills were issued, there is no reason why income should be assessed at the hands of the assessee. He submitted, in any case of the matter, in the preceding assessment years also, assessee's income from business was estimated at a considerably lower rate of 0.03%. In this context, he drew the attention of the Bench to the assessment order passed under section 143(3) for the assessment

year 2008–09. He, therefore, submitted there is no reason to interfere with the order of the learned Commissioner (Appeals).

13. We have considered the submissions of the parties and perused the material available on record. As is evident from the facts on record, the Assessing Officer was convinced that the entire business activity of the assessee is as benamidar of Shri Ashok Jain. He has also found, the assessee was providing accommodation bills. In other words, the assessee was not involved in any business transaction. Therefore, logically assessee could not have derived any profit from a non-existent business, that too, when it was carried on as a name lender. The assessee at best would have been paid some amount by the person behind the entire activity for lending his name. Moreover, as found by the learned Commissioner (Appeals) as per information received in pursuance to enquiry made under section 133(6) with the parties to whom the assessee claimed to have sold goods, all of them are not only existing entities but are having PAN and all of them confirmed of having transacted with the assessee. It is also found that one of the parties is a listed company. The learned Commissioner (Appeals) also found that the assessee is of a man of small mean and in fact an employee of Shri Ashok Jain. That being the case, in our view, 5% net profit rate adopted by the Assessing Officer for a non-existent business is on a very higher side. Moreover, it is observed by

us in assessee's own case for assessment year 2008-09, the Assessing Officer has estimated the net profit from the very same business at 0.03%. Taking that as an indicator, in our view, the estimation of profit @ 0.5% by the learned Commissioner (Appeals) is reasonable, hence, calls for no interference. Accordingly, upholding the order of the learned Commissioner (Appeals) on the issue, we dismiss ground no.1, raised by the Department.

14. Grounds no.2 and 3, raised by the Department are on common issue of deletion of addition of ₹ 8,95,22,222, made on account of unexplained outstanding balance of creditors.

15. Brief facts are, during the assessment proceedings, the Assessing Officer on verifying the balance sheet found that as on 31st March 2009, outstanding balance in respect of four creditors of Mumbai and Surat were shown at ₹ 8,95,22,222. Though, in response to the query raised by the Assessing Officer to prove the creditors, the assessee furnished various details like bank statement, confirmation letters from the creditors, but the Assessing Officer ignoring those evidences treated the outstanding balance appearing in the name of creditors as unexplained cash credit under section 68 of the Act for the reason that identity and creditworthiness of creditors and genuineness of transaction could not be proved by the assessee by producing the

creditors. Accordingly, he added back the amount to ₹ 8,95,22,222. Being aggrieved of such addition, assessee challenged the same in an appeal preferred before the learned Commissioner (Appeals).

16. In the course of hearing, the learned Commissioner (Appeals) on verification of material on record, found that though the assessee had produced confirmation letters and other supporting evidences to prove the genuineness of the creditors but the Assessing Officer did not carry out any investigation to verify genuineness of the transactions in spite of the fact the address and other details of creditors were available on record. Therefore to verify the genuineness of the transaction, the learned Commissioner (Appeals) exercising power under section 133(6) of the Act, called upon the creditors to furnish the following information.

"(i) Your account balance in the books of Ravindra B. Upalekar is pending before the undersigned for adjudication. In the balance sheet of Shri Ravindra B. Upalekar as on 31/03/2009. The nature of transaction done for the period 01/04/2008 to 31/03/2009;

(ii) Copy of your ledger account to the mentioned appellant for the same period.

(iii) The details of payment received by you in relation to credit amount outstanding;

(iv) Your PAN and designation of Assessing Officer

v) Copy of I.T. Acknowledgement / Balance sheet."

17. As observed by the learned Commissioner (Appeals), in response to the notice issued under section 133(6), all the four creditors furnished requisite information and also confirmed the transaction and their outstanding balance. On verifying the details submitted by the creditors, he found that they are matching with the details furnished by the assessee. In fact, it was found by the learned Commissioner (Appeals) in respect of some of the creditors even assessments have been completed under section 143(3) by the jurisdictional Assessing Officers. He found all the creditors are not only having PAN but are regular income tax assesseees and filing their return of income. They also confirmed their account with the assessee and furnished bank statement reflecting cheque received and paid entries. Thus, after verification of the information submitted, learned Commissioner (Appeals) having found that the concerned parties are not only existing entities but have also confirmed their transaction with the assessee deleted the addition made by the Assessing Officer.

18. Learned Departmental Representative objecting to the deletion of addition made by the Assessing Officer submitted, in the course of assessment proceedings, the assessee did not produced any evidence to prove the identity and creditworthiness of creditors and genuineness of the transaction, therefore, the Assessing Officer was justified in inferring that the credits are unexplained in terms of section 68. He

submitted, learned Commissioner (Appeals) though independently conducted enquiry by issuing notices under section 133(6) and obtained information from the creditors, on the basis of which he deleted the addition, he did not thought it fit to send these evidences on remand to the Assessing Officer for verification and his comment. Therefore, without allowing an opportunity to the Assessing Officer to verify evidences brought on record which were not before the Assessing Officer, the deletion of addition was not proper. He, therefore, submitted that the matter may be restored back to the file of the Assessing Officer for deciding afresh after verifying the evidence brought on record.

19. Learned Authorised Representative on the other hand, contesting the claim of the learned Departmental Representative submitted, in the course of assessment proceeding itself the assessee had furnished all evidences including the confirmation letters from the creditors before the Assessing Officer. Only for the reason that the assessee was not able to produce the creditors before him the Assessing Officer had made addition under section 68. Learned Authorised Representative submitted, in the course of proceeding before the learned Commissioner (Appeals), the assessee had not produced even a single piece of fresh evidence. The learned Commissioner (Appeals) after verifying the materials already available on record before the

Assessing Officer having felt that further information is required before coming to a just conclusion has issued notices under section 133(6) and obtained necessary information from the creditors and only after evaluating such information brought on record, he has deleted the addition having found that not only the creditors are identifiable but they have also confirmed the transactions by producing their books of account and bank statement. Learned Authorised Representative submitted, as the assessee has not produced any additional evidence there was no necessity on the part of the learned Commissioner (Appeals) to call for a remand report from the Assessing Officer. Learned Authorised Representative drawing our attention to provisions contained under section 251 of the Act and rule 46A of I.T. Rules submitted, the learned Commissioner (Appeals) is empowered under the aforesaid provisions to conduct enquiry and obtain information if it is necessary for the purpose of disposal of the appeal. He submitted, the information obtained having clearly revealed / proved that the creditors are genuine he has rightly deleted the addition. He, therefore, submitted no inference is called for.

20. We have considered the submissions of the parties and perused the material available on record. As is evident from discussion made in Para-2.1 of the impugned assessment order, in the course of assessment proceedings, the assessee did submit various details of the

creditors including bank statements, confirmation letters, details of loans, etc., to prove the genuineness of the credit appearing on 31st March 2009. It is also evident from the conclusion drawn by the Assessing Officer in Para-4 of the assessment order, the balance appearing in the name of creditors amounting to ₹ 8,95,22,222 was treated as unexplained cash credit under section 68 only for the reason that the creditors were not produced before the Assessing Officer. The Assessing Officer has not pointed out any specific deficiency either in the confirmation letter or any other documents submitted by the assessee before him. As could be seen, in the course proceedings before him, the learned Commissioner (Appeals) to further verify the genuineness of assessee's claim in respect of the creditors issued notices under section 133(6) to all the four creditors seeking various details as noted elsewhere in our order. It is also undisputed that in response to the notice issued under section 133(6) the four creditors again confirmed their transactions with the assessee and the outstanding balance appearing in the books of the assessee. In fact, as per the information obtained by the learned Commissioner (Appeals) in pursuance to notice issued under section 133(6), all of them are income tax assessee with regular PAN and are filing their income tax returns regularly. Apart from confirming their account in assessee's books of account, the individual bank statement of the

concerned creditors also reflected payment received through cheque. Therefore, upon consideration of the evidence brought on record, it was clear that the creditors were genuine. Now the grievance of the Department before us is learned Commissioner (Appeals) should not have deleted the addition on the basis of information obtained by him under section 133(6) without calling for a remand report from the Assessing Officer. We do not find merit in the aforesaid contention of the learned Departmental Representative. It is evident on record that the assessee has not furnished any additional evidence before the learned Commissioner (Appeals). The assessee made its submissions before the learned Commissioner (Appeals) only on the basis of documentary evidence already furnished before the Assessing Officer. The learned Commissioner (Appeals) after perusing the evidences brought on record felt it necessary to conduct enquiry himself to ascertain the genuineness of the creditors and accordingly issued notices under section 133(6) of the Act seeking further information on the credit from the concerned creditors. After obtaining necessary information from the creditors, the learned Commissioner (Appeals) examined the same and drew his own conclusion. We do not find any irregularity or illegality in the aforesaid action of the learned Commissioner (Appeals). As per the scheme of the I.T. Act, the learned Commissioner (Appeals) has co-terminus power of the

Assessing Officer. On a perusal of the powers of the learned Commissioner (Appeals) as conferred under section 251 of the Act, it is noticed that the learned Commissioner (Appeals) while disposing of an appeal against an order of assessment has the power to confirm, reduce, enhance, or annul the assessment. Therefore, while in session of the appeal the entire assessment order is open for scrutiny before the learned Commissioner (Appeals). He has the power not only to examine the issue which are subject matter of grounds of appeal raised by the assessee but also can look into the issues which were overlooked by the Assessing Officer and which may result in enhancement of an assessment. As per Explanation to section 251, while disposing of an appeal, the first appellate authority may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, irrespective of the fact whether such matter was raised before him by the assessee or not. Sub-rule (1), (2) and (3) of rule 46A of the I.T. Rules, puts restriction on the assessee as far as production of additional evidence before the first appellate authority is concerned. It puts a condition that no additional evidence can be admitted without fulfilling the condition of sub-rule (1) and (2). Similarly, sub-rule (3), provides for an opportunity to be granted to the Assessing Officer to examine the additional evidence and offer his comments. However, sub-rule (4) of Rule 46A, makes it

clear that the conditions imposed under sub-rule (1)(2) and (3) in respect of furnishing of additional evidence by the assessee would not apply or affect the power of the first appellate authority to direct the production of any document or examination of any witness for enabling him to dispose of the appeal. Thus, sub-rule (4) of rule 46A, r/w Explanation to section 251 makes it clear that Commissioner (Appeals) has unfettered power to conduct enquiry independently for effective disposal of an appeal relating to an assessment order or penalty. Therefore, if in the course appellate proceedings, the learned Commissioner (Appeals) felt it necessary to conduct enquiry himself and obtain information for enabling him to dispose off the appeal, in our view, no fault can be found with such procedure adopted by the learned Commissioner (Appeals). A reading of the statutory provisions referred to above makes it clear that not only the learned Commissioner (Appeals) is empowered to conduct such enquiry for obtaining information but there is also no need for him to confront the same to the Assessing Officer. Therefore, in our view, the learned Commissioner (Appeals) was not required to obtain a remand report from the Assessing Officer on the basis of information obtained by him under section 133(6) before deciding the issue. Moreover, the learned Commissioner (Appeals) after examining the evidence brought on record having found that the creditors appearing in assessee's books

are genuine there was no logic in again remanding the matter to the Assessing Officer. In the aforesaid facts and circumstances, we do not see any reason to interfere with the order of the learned Commissioner (Appeals) in deleting the addition made under section 68 of the Act. Grounds no.2 and 3 are dismissed.

21. In the result, assessee's appeal and cross objection as well as Revenue's appeal are dismissed.

Order pronounced in the open Court on 27.05.2016

Sd/-
RAMIT KOCHAR
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 27.05.2016

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Dy./Asstt. Registrar)
ITAT, Mumbai