

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ 'बी', मुंबई ।

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

सर्वश्री जोगिन्दर सिंह, न्यायिक सदस्य एवं श्री आर.सी.शर्मा, लेखा सदस्य

BEFORE SHRI JOGINDER SINGH, JM

&

SHRI R.C.SHARMA, AM

आयकर अपील सं./ITA Nos.4154&4155/Mum/2010

ITA Nos.4374/Mum/12 ITA No.57 to 61/Mum/2012

(निर्धारण वर्ष / Assessment Years :2002-03, 2007-08, 2009-10,2003-04 to 2006-07&2008-09)

M/s Mohammad Haji Adam & Co., 84, Sheriff Devji Street (Chakla Street), Mumbai-400003	Vs.	ITO-13(1)-3, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCC 5459 M		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

AND

आयकर अपील सं./ITA Nos.5436&5437/Mum/2010

ITA Nos.4960/Mum/2012 ITA Nos.35&37/Mum/2012

ITA Nos.43 to 45/Mum/2012

(निर्धारण वर्ष / Assessment Years :2002-03, 2007-08, 2009-10, 2004-05, 2008-09, 2006-07,2003-04)

ITO-13(1)-3, Mumbai	Vs.	M/s Mohammad Haji Adam & Co., 84, Sheriff Devji Street (Chakla Street), Mumbai-400003
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCC 5459 M		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से /Revenue by : Shri M.Rajan

**निर्धारिती की ओर से /Assessee by : Shri Prakash Pandit
& Mrs. Prachi Pandit**

सुनवाई की तारीख / Date of Hearing : 25th August, 2015

घोषणा की तारीख/Date of Pronouncement 28-10-2015

आदेश / O R D E R**PER BENCH**

These are the cross appeals filed by the assessee and revenue against the order of CIT(A)-16, Mumbai dated 29-2-2012, for the assessment years 2002-03, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09 & 2009-10, respectively, in the matter of order passed under Section 143(3) r.w.s.147 of the I.T. Act.

2. Common grounds have been taken in all the years under consideration, therefore, all the appeals were heard and are now decided by this consolidated order.

3. At the outset Id. AR did not press the ground raised with regard to validity and reopening u/s.147 of the Act, accordingly, grounds No.1 & 2 in assessee's appeal are dismissed as not pressed.

4. Rival contentions have been heard and record perused. Facts in brief are that the assessee is a trader in cotton and man-made fabrics on retails as well as semi wholesale basis and mainly deals in suiting and shirting materials. As the facts and circumstances are same in all the years, we are taking Assessment Year 2002-03 as a lead year for deciding the controversy. In the assessment year 2002-03, the assessee has shown purchases of Rs.3.25 crores. Sales of Rs.3.93 crores and arrived at G.P. of Rs.59.45 lacs i.e. 15.11% and N.P.of Rs.6.83 lacs i.e. 1.73% whereas in last year G.P. was of 13.47%. The case was reopened u/s.147 of the Act and notice u/s.148 dtd.23.3.2009 was issued with the prior approval of the Addl. Commissioner of Income-tax, Rg.13(1),

Mumbai vide his approval letter dtd. 23.3.2009 and duly served on assessee.

5. During the course of assessment u/s.143(3) r.w.s.147 of the Act, the AO observed that as per information received from another AO, the assessee alleged to have made purchases from a concern, which is issuing only hawala bills. The AO further observed that survey operation u/s.133A of the Act was carried out by the ITO in the following group concerns on 13.02.2009 & 14.02.2009

- a) Shri Rakeshkumar Gupta Prop. Of M/s Manoj Mills
- b) Smt. Hema R. Gupta Prop. M/s Shree Ram Sales & Synthetics
- c) Shri Mohit R.Gupta Prop. m/s Ashta Silk Industries.

During the course of Survey Action, it was found that the above group concerns are exclusively engaged in the activities of issuing accommodation (sales) bills to the required parties. In the Statement recorded on oath of the Proprietors of above Concerns, they have confirmed that they are exclusively engaged in the activities of issuing accommodation sales bills for the past 9 years and that they did not have any trading activities from the year 2000 onwards and earning 1 % commission on the amount of accommodation sales bills issued. As per AO the business modus operandi of these group concerns was issuing accommodation (sales) bills to the required parties, collect cheque from the party concerned, deposit the same into their bank account, transfer the amount to another bank account (opened and kept by the above so-called parties in various fictitious names) and then withdraw cash from the said bank to be handed over to their 'customers' after deducting their

commission. From the documents impounded during the course of survey in the above cases, and also from the details of purchases submitted by the assessee during the course of assessment proceedings, it is ascertained that during the previous year relevant to A.Yr. 2002-03, the assessee had availed accommodation bills (sales bills) from the above assesseees for the following amounts:-

1. M/s. Manoj Mills	Rs. 5,52,666/-
2. M/s. Astha Silk Industries	Rs. 12,81,449/-
3. M/s. Shree Ram Sales & Synthetics	Rs. 11,06,968-
Total	Rs. 29,41,083/-

6. Since these are only accommodation bills to the extent of Rs. 29.41,083/-, the AO held that assessee's purchases are inflated to that extent and profit is suppressed accordingly. Since, purchases to the extent of Rs.29.41,083/- are bogus and inflated, AO added back the same to total income as computed in the return of income.

7. By the impugned order the CIT(A) upheld the addition of GP of 1.93% on the disputed amount of purchases of Rs.29,41,083/- to cover possible leakage. In addition to it, the CIT(A) made adhoc addition of Rs.3lakhs. The precise observation of the CIT(A) are as under :-

"3.2(a) I have gone through the assessment order as well as the submissions given by the assessee and it is seen that in this case sales are identifiable and quantitative tally is available on record. The alleged bogus purchases, are based on the statement and the assessment record of the third party, the said persons were not made available for cross examination nor the material found from the third party was made available to the assessee. Also, before the A. O. the said three parties have confirmed that they had sold the goods to the assessee.

The following facts in this case deserve special mention :-

(i) There was a survey at the premises of one Mr. Rakeshkumar Gupta proprietor of Manoj Silk Mills, Mrs. Herna Gupta, proprietress

Shree Ram Sales & Synthetics and Mr. Mohit Gupta the proprietor of Astha Silk Industries.

(ii) During the course of survey – all the above mentioned 3 persons stated, in their statements on oath that they were only giving accommodation entries - the payments received from parties by cheques were deposited. in bank and on encashment of cheques, the same was returned to the persons, minus the commission.

(iii) Thus, there was no actual sale of cloth/goods to these parties in question.

(iv) AD based upon above has treated the entire purchases as unexplained and added back Rs. 29,41,083/- to the income of the appellant.

(v) Subsequently, all the above mentioned 3 persons have filed affidavits stating that as far as appellant is concerned these persons actually made the sales to the appellant.

(vi) Appellant has successfully shown that the very items shown to be purchased from these 3 concerns - and law disputed have actually been sold by the appellant to other persons/retailers and this fact has been brought on record by the appellant - even during the course of assessment proceedings - letter dt. 25/2/2010 and this fact remains uncontroverted even now as of date.

(vii) The AO has observed in para 19(c) (iii) of the assessment order itself that appellant must have purchased goods from open market, outside the books of account and to cover up the said purchases, obtained hawala bills. Hence, this clearly shows that there are purchases by the appellant - although now disputed and its consequent sales - which has been offered for taxation by the appellant.

3.2(b) The above facts clearly show that the AO could not have treated the entire purchases of Rs. 29,41,083/- as unexplained when AO has observed in para 19(c)(iii) of the assessment order itself that these purchases could possibly have been made outside the book for then the 'peak investment' and circulation of the same will have to be considered and benefit of same given to the appellant - which has not been done by AO.

3.2(c) Further, the Ld. Counsel for the appellant controverts the above alternative of 'peak investment' and circulation of same by stating that in his case all the payments have been made by cheques and all the goods are fully accounted for and merely because the other parties viz. Mr. Rakeshkumar Gupta proprietor of Manoj Silk Mills, Mrs. Hema Gupta, proprietress Shree Ram Sales & Synthetics and Mr. Mohit Gupta the proprietor of Astha Silk Industries have stated during the course of survey that they have not supplied the cloth/goods cannot result/become the basis of disallowance in appellant's case - unilateral uncorroborated evidence - CBI Vs S. C. Shukla 3 SCC 410 (1998) (SC).

The issue to be decided is that in such cases where one party denies making the sales whereas the other party affirming of having received the goods and of having made the payments by cheque and subsequently of having sold the same, very items to 3rd parties and booking these sales as income - can the entire purchases be added back as unexplained or duly an ad-hoc addition, if at all, be made to cover the leakages.

3.2(d) In my opinion, keeping in view the totality of facts and circumstances of the case it is clear that although the purchases have been disputed by Mr. Rakeshkumar Gupta proprietor of Manoj Silk Mills, Mrs. Hema Gupta, proprietress Shree Ram Sales & synthetics and Mr. Mohit Gupta the proprietor of Astha Sillk Industries but then the appellant has sold these very items and booked the sales as in come offered the same for taxation the only addition to be made can be for possible leakages - relating to purchases - as they have become the subject matter of dispute - whether appellant In fact purchases them from M/s one Mr. Rakeshkumar Gupta proprietor of Manoj Silk Mills, Mrs. Hema Gupta, proprietress Shree Ram Sales & Synthetics and Mr. Mohit Gupta the' proprietor of Astha Silk Industries or from some other parties - from the open market and then effected the sales.

3.2(e) The total figure of such purchases during the year under consideration is Rs.29,41,083/- (stated by appellant to be Rs. 15,90,154/-) and in my opinion an ad-hoc addition of Rs. 3 Lakhs will serve the purpose because in this case as held by the AO in para 23 page 21 of the order all the cheques issued by the appellant to the 3 parties (Mr. Rakeshkurnar Gupta proprietor of Manoj Silk Mills, Mrs. Hema Gupta, proprietress Shree Ram Sales & Synthetics and Mr: Mohit Gupta the proprietor of Astha silk Industries) have been encashed after a period of 12 to 17 months - para 19(b) page 15 of the assessment-order and as stated by these parties in their statement on oath they were encashing these cheques and returning the money to the appellant and only keeping the commission margin with them, so appellant cannot be given the benefit of the fact that the purchases even if made from the open market were from explained funds and payments being by cheques no addition can be made on this account. This has been done by the Hon'ble ITAT in the following cases of (i) Shanti Kumar Chordia Vs ACIT ITAT Jaipur 'A' Bench 128 IfJ (JP) 708 and (ii) ITO Vs Sunsteel, Hon'ble ITAT Ahmedabad 'B' Bench 92 TTJ (Ad) 1126. A!so, the difference in GP rate on goods sold - for which purchases are not disputed and goods sold on which purchases are disputed, will also need to be added back and which is as follows :-

GP as per books on undisputed purchase	15.11%
GP only on sales relating to purchases from 3 parties - Mr. Rakeshkumar Gupta proprietor of Manoj Silk fvills, Mrs. Hema . Gupta, proprietress Shree Ram Sales &	13.18%

*Synthetics and Mr. Mohit Gupta the proprietor
of Astha Silk Industries*

Hence, the difference of 15.11%- 13.18% which comes to 1.93% should be the GP addition relating to the disputed purchases of Rs. 29,41,083/- (stated by appellant to be Rs. 15,90,154/- only - which AO will verify) to account for the possible leakages and which AO is directed to add back to the returned income of the appellant, after the above verification and therefore the addition of Rs. 29,41,083/- is restricted to the adhoc disallowance made by me in para 3.2(e) of Rs. 3 Lakhs and the GP additional of 1.93% of the disputed purchases of Rs. 29,41,083/15,90,154 (to be verified by AO)."

8. Against the above order of CIT(A), both assessee and revenue are in appeal before us.

9. The assessee is aggrieved for the adhoc addition made by the CIT(A) as well as GP addition sustained by the CIT(A), whereas the revenue is aggrieved for deleting the addition made by the AO on account of bogus purchases.

10. We have considered rival contentions, carefully gone through the orders of the authorities below and also deliberated on the judicial pronouncements referred by the lower authorities in their respective orders as well as cited by Id. AR and Id. DR during the course of hearing before us. From the record we found that additions were made by the AO in respect of purchases made from three parties, which were found to be engaged in issuing bogus bills without any actual purchase and sale of goods. From the purchase details submitted by the assessee, we found that assessee has shown purchases made from the three group concerns in the A.Y.2002-03, such as M/s. Manoj Mills, M/s. Astha Silk Industries and M/s. Shree Ram Sales & Synthetics amounting to Rs. 29,41,083/-. During the Survey Action conducted by the ITO 14-3 (2), Mumbai, in the

premises of these parties, it was found that they are indulging in issuing accommodation (sales) bills and no transaction of any goods, which is confirmed in the statement recorded of the main person, Shri Rakeshkumar Gupta u/s. 133A and later on re-affirmed on oath in the statement recorded u/s. 131 of the Act. on 23.2.2009. There were no documents/details in the possession of the said group concerns to prove the trading in cloth by the said group concerns, such as details of goods/stocks; proof for the use of transport for carrying the goods in any of the years; use of godown/factory/warehouse to store the goods for the supply; any documents which supports the purchases made by the said group concerns for the supply to customers - in absence of all these verifiable documents to substantiate the claim of purchases, these are not actual purchases, especially, when the said group concerns have disclosed their modus operandi of business that they issue only accommodation bills and get commission on that and in order to co-relate the sales bills issued, the purchase bills are prepared by themselves by getting the bill books printed in various fictitious firms. In view of the above, the AO concluded that the assessee has availed accommodation bills for an amount of Rs. 2941083/- . The AO further observed that the modus operandi of the said group concerns are that they issue accommodation bills and receives cheque payments. On realization, cash is withdrawn either from the disclosed concerns or from fictitious purchase concerns' account operated by the Group and handed over to the customers - seller parties (assessee and others) after deducting

commission. There was neither any real purchase nor sales but merely issuing of hawala sales bills. Accordingly, the AO made addition of Rs.29,41,083/- in respect of these three parties on account of accommodation bills. The CIT(A) has dealt with the quantitative details of purchase and sales and recorded a finding to the effect that assessee had sold the goods out of the purchase so made, thus, quantitatively there is no difference. So far as these three suppliers are concerned, the CIT(A) accepted the AO's contention that these are bogus suppliers. However, keeping in view the quantitative purchase and sales undertaken by the assessee, wherein the department has accepted the sales, there is no reason to decline the purchases because without purchases there cannot be sales. Under these circumstances, there is no justification for adding the entire amount of purchases in assessee's income. The CIT(A) has even though deleted the purchases but has made an adhoc addition of 10% of the purchase amount. The CIT(A) has also directed the AO to uphold the addition to the extent of difference between GP as per books of account on undisputed purchases and the GP on sales relating to purchases from these three parties. However, no justification has been given by the CIT(A) for upholding the adhoc addition of 10% of the purchase, insofar as quantitative tally of purchase and sales were not in dispute. Accordingly, we direct the AO to delete the adhoc addition of 10% made on the amount of bogus purchases. However, we upheld the addition to the extent of difference in GP as per books of account on undisputed purchase as compared to the GP on the sales relating to the

purchases from three parties. Accordingly, we direct the AO to calculate the GP on the undisputed purchase vis-à-vis GP in respect of purchase made from these parties and, if the AO finds that the GP disclosed in respect of purchases from these three parties is lower than the GP disclosed in respect of other undisputed purchase, addition should be made to that extent only. We direct accordingly.

11. As the facts and circumstances in all the years under consideration are same, following the above reasoning, we direct the AO to uphold the addition only to the extent of difference in GP as discussed above.

12. In the result, appeals of the revenue are dismissed, whereas appeals of the assessee are allowed in part, in terms indicated hereinabove.

Order pronounced in the open court on this 28/10/2015.

आदेश की घोषणा खुले न्यायालय में दिनांक: 28/10/2015 को की गई ।

Sd/-

(जोगिन्दर सिंह)
(JOGINDER SINGH)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 28/10/2015

प्र.कु.मि/pkm, नि.स/ PS

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

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

सत्यापित प्रति //True Copy//

Sd/-

(आर.सी.शर्मा)
(R.C.SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai