



आयकर अपीलिय अधिकरण "डी" न्यायपीठ मुंबई में

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI**

श्री आर सी शर्मा, लेखा सदस्य एवं

श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष ।

**BEFORE SHRI R C SHARMA, ACCOUNTANT MEMBER
AND SHRI AMIT SHUKLA, JUDICIAL MEMBER**

ITA No. : 1458/Mum/2011

(Assessment year: 2004-05)

ITA No. : 1482/Mum/2011

(Assessment year: 2005-06)

ITA No. : 1483/Mum/2011

(Assessment year: 2006-07)

ITA No. : 1484/Mum/2011

(Assessment year: 2007-08)

राजू बी दोषी Raju B Doshi, C/102, Diamond Swati CHS, C D Bartiwala Marg, Juhu Lane Andheri (West), Mumbai -400 058 PAN: AABTR 9066 N	Vs	Asst. CIT -Cir -19(2), Mumbai
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)

ITA No. : 1032/Mum/2014

(Assessment year: 2004-05)

ITA No. : 1033/Mum/2014

(Assessment year: 2006-07)

ITA No. : 1034/Mum/2014

(Assessment year: 2007-08)

राजू बी दोषी Raju B Doshi, C/102, Diamond Swati CHS, C D Bartiwala Marg, Juhu Lane Andheri (West), Mumbai -400 058 PAN: AABTR 9066 N	Vs	Asst. CIT -Cir -19(2), Mumbai
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	श्री एच एन मोतिवाला Shri H N Motiwalla
Respondent by	:	श्री बी एस बिस्ट Shri B S Bist

सुनवाई की तारीख /Date of Hearing : 01-09-2016

घोषणा की तारीख /Date of Pronouncement : 30-09-2016

आदेश
ORDER

श्री अमित शुक्ला, न्या सः

PER AMIT SHUKLA, JM:

The first set of 4 appeals, i.e. ITA Nos. 1458, 1482, 1484 and 1483/Mum/2011 have been filed by the assessee against separate impugned orders of even date 01.11.2010 for the assessment years 2004-05, 2005-06 and 2007-08 and order dated 03.11.2010 for the assessment year 2006-07, passed by Ld. CIT (Appeals)-20 Mumbai for the quantum of assessment passed under section 143(3) r.w.s. 147 and 143(3) respectively. The second set of 3 appeals, i.e. ITA Nos. 1032, 1033 and 1034/Mum/2014 have been filed by the assessee against separate impugned orders of even date 04.11.2013 passed by ld. CIT(Appeals)-30, Mumbai in relation to the penalty proceedings under section 271(1)(c) for the assessment years 2004-05, 2006-07 and 2007-08. Since common issues are involved in all the appeals arising out of identical set of facts, therefore, same were heard together and are being disposed off by way of this consolidated order.

2. We will first take appeal for the assessment year 2006-07, wherein the main controversy and the facts have been dealt with which will have implications on the appeals for the other assessment years in dispute before us. In the grounds of appeal assessee has raised following grounds of appeal:-

- “1. *On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in upholding the addition of Rs.5,00,000/- without appreciating the fact that the said amount was gifted by his Father.*

2. *On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in upholding the disallowance of Rs.8,78,298/- out of transport expenses.*
3. *On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in upholding the disallowance of Rs.6,28,798/- being 25% of the total brokerage expenses, without appreciating the details submitted during the proceedings.*
4. *On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in confirming the addition of Rs.2,30,25,219/- as bogus credits, without appreciating the fact that these credits arose out of the cash deposits made out of the proceeds of cash sales.*
5. *On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in upholding the addition of Rs.2,30,25,219/- treating them as bogus credits, when he himself has considered part of these credits in the account of same parties appearing in previous assessment years 2004-05 and 2005-06 as sales proceeds and confirmed the addition to the extent of the gross profit thereon.*
6. *On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) ought to have appreciated that at the time of survey no physical stock was found whereas the stock as per the books was Rs.2,89.27,515/-. Thus it corroborates that the appellant made the sales of the stock out of books and therefore, should have accepted the contention of the appellant that the amount of Rs.2,30,25,219/- represents cash deposited out of cash sales of stock outside the books, and should not have uphold the addition as bogus credits.*
7. *The appellant craves the leave to add, amend, alter and/or delete any of the above grounds of appeal at or before the time of hearing”.*

3. At the outset, the Ld. Counsel for the assessee submitted that ground No.1 is not pressed, on which Ld. DR also does not have any objections; accordingly, the same is dismissed as not pressed.

4. Brief facts and background of the case are that, the assessee is Proprietor of C.R. Enterprises, which is mainly engaged in the business of wholesale trading in iron and steel. The original return of income was filed on 01.09.2006 declaring total income of Rs.4,18,331/-. Later on a survey action under section 133A was carried out at the business premises of the assessee by the Department on 17.01.2007, wherein assessee offered certain additional income. Aftermath of survey action, return of income was revised on 20.01.2007 declaring income of Rs.2,33,30,477/-. In the said return of income, the amounts standing in the balance sheet in the name of two creditors, M/s Shweta Travels and M/s Shweta Enterprises amounting to Rs.2,30,25,219/- was declared as income and the amount standing as credits in these accounts were transferred to the capital account of the assessee in his proprietary concern, C.R. Enterprises. A recasted capital account and recasted Balance sheet was filed along with the said revised return giving effect to the above declaration. However, later on the assessee took a turn around and filed a second revised return on 01.02.2007, revising the income at Rs.16,86,771/-. Now in the second revised return, the assessee had tried to cover up the credits of the above two creditors by claiming that, he had made cash sales outside the books to the extent of credit amounts appearing in the accounts of these two creditors which was introduced in their

accounts and from there it was brought in the books of account of the assessee as loan credit standing in the name of these two creditors. The assessee's explanation in other words was that amount of cash sales were deposited in the bank of the said two creditors and from there cheques were issued in the name of the proprietary concern of the assessee as loan. On the alleged cash sales of Rs.2,30,25,219/-, the assessee has applied GP rate of 6% and declared Rs.13,81,513/- as his income in the second revised return as against the additional income of Rs.2,30,35,219/- declared in the first revised return in addition to the income already disclosed in the original return of income. We will firstly take-up ground No.4, 5 and 6 wherein, this issue has been challenged by the assessee before us.

5. The Assessing Officer in the impugned assessment order has noted the following facts:-

“In the books of account the assessee had shown unsecured loans of Rs.2,24,75,219 in the name of M/s Sweta Enterprises and Rs.3,50,000/- in the name of M/s Sweta Travels as on 31-3-2006. The assessee has received the amounts from the Bank accounts standing in the name of these 2 concerns. These concerns were found to be of no means and the assessee was confronted during and after the Survey proceedings to prove the genuineness of these unsecured loans i.e. to establish the identity, capacity and credit-worthiness of these parties. The assessee was not able to prove the credit-worthiness of parties and therefore he admitted that he deposited the cash in the Bank accounts of these two concerns and in turn transferred the amount to the

Bank account of his proprietary concern. Accordingly he agreed that these unsecured loans are bogus and the amount standing in the names of these two parties is his own money and he declared the said amount as his income and the revised return was filed on 26-1-2007 wherein this amount was declared as his income. Not only the income was declared but the amount was also credited to his capital account and a revised capital account was also filed along with the said revised return. Subsequently, the assessee came out with another theory that the cash introduced in the name of these two parties was not his income but was the amount of cash sales made by him outside the books of accounts. It was explained that the said cash was deposited in the bank accounts of these 2 concerns and the amount in turn was brought back into assessee's books of accounts. He filed a second revised Return wherein the amount declared in the first revised return on account of these credits was replaced by a sum of Rs.13,81,51 3/- being 6% of Rs.2,30,25,219/- as net profit on account of the so-called cash sales outside the books of accounts. In the statement recorded on 5-12-2008 the assessee was asked to give name and addresses of the persons to whom the so-called cash sales were made. The assessee could not furnish the name of a single party, leave aside the address and other details of such parties, to whom such huge cash sales were claimed to have been made by the assessee. The assessee also could not furnish even an iota of documentary evidence in support of his claim of making huge cash sales outside the books. The relevant portion of the said sworn deposition is as follows:

"Q.3 Do you have any evidence in support of the claim

that the above amounts are from cash sales made outside your books of accounts?

Ans. Right now I don't have any evidence to support my stand but I can only say that out of cash sales made by me outside the books, I deposited cash in the bank account of M/s. Sweta Enterprises and M/s. Sweta Travels and from the said accounts money was transferred to my proprietary concern M/s.C.R. enterprises bank account by account payee cheques.

Q.4. Since how long & from when you have been making such cash sales outside the books of accounts?

Ans. I have done such cash sales outside the books of accounts only during F.Y.2003-04 to F.Y.2005-06. I have not done such cash sales either prior to f.Y.2003-04 nor after the F Y.2005-06.

Q.5 Apart from the above accounts of M/s. Sweta Enterprises & M/s. Sweta Travels, have such amounts been introduced in the names of any other person/ concern in any of the years, in your books of accounts ?

Ans. No. Such amounts have been introduced only In the names of M/s. Sweta Travels & M/s. Sweta Enterprises only and in no other name.

Q.6 So all the amounts introduced into your books of accounts for the F Ys 2003-04 to 2005-06 in the names of M/s. Sweta Travels & Al/s. Sweta Enterprises are out of such cash sales made outside the books of accounts only?

Ans. Yes. The amounts introduced in the said accounts are out of cash sales outside the books of accounts only.

Q.7 Who are the parties to whom you used to make such cash sales outside the books?

Ans: No. I do not have any such names of parties to whom I used to make such sales outside the books of accounts because they used to come from outside the station, from small villages and towns where nobody knows them and we here nobody know them. We always used to take advantage and deliver the material later.

Q.8 How did such parties used to take delivery of such cash purchases made by them from you?

Ans. They use their own transporter and they took delivery in the same truck or tempo, whatever it maybe.

Q.9 How long after you used to take advance from such parties, the delivery was used to be made by you?

Ans. The delivery used to be made immediately.

Q.10 Where did you used to make such delivery?

Ans. From our warehouse in Taloja.

Q-11 That means you never used to make such cash sales outside the books of account to parties figuring in your books of account?

Ans. No. Such cash sales outside the books of account were never made to any of the parties figuring in our books of accounts.

Even after the said statement, till date the assessee has not furnished any evidence to substantiate his claim of cash sales.

6. The Assessing Officer after considering the assessee's explanation and facts of the case held that, subsequent version of the assessee cannot be accepted as it is merely an afterthought, because the declaration of additional income was not only made during the course of survey operations but also by way of filing revised return *suo-motto* knowing fully that these credits are his own money and accordingly, he has credited these amount to his capital account. Thus, the assessee had consciously surrendered his bogus credit without any, coercion or force or under duress. No evidences whatsoever have been brought on record by the assessee to substantiate the claim of cash sales ever made by him. In the statement the assessee has merely stated that he had made cash sales only to the parties who came from nearby villages and towns. On this version the Assessing Officer observed that, how the people from small villages and town will come to Mumbai and will arrange the vehicles to carry out the goods back to their place, because there is no proof of any transport charges have been shown or debited for making the cash sales. Moreover, the assessee is wholesaler which means that

only regular retail traders would make the purchases from the wholesaler franchise and not the small parties from villages. The assessee himself had admitted that not a single transaction of cash sales outside the books was effected with any of the parties who are his regular customers. Moreover no evidence whatsoever was found during the course of survey that assessee indulged in cash sales to some other parties. No evidence of any cash receipts in any form was found nor were any names or addresses of the parties to whom sales were made given. The assessee now states that, cash sales made were exactly equal to the amount of credit of these two parties and the period of cash sales also coincides exactly with the period during which the cash was deposited in the bank account of these two parties. The assessee had also admitted that no cash sales were made outside the books of accounts either before or after the said period during which deposits were made in the accounts of the parties. He further observed, it is beyond the comprehension that if the accounted stock is sold by way of cash sales then why anybody would not show these cash sales in the regular books of account. Thus, the entire explanation given by the assessee is merely an after-thought and an eye wash to evade the taxes on the amount of admitted bogus credit in the names of the two parties. Accordingly, he held that, the income credited to the capital account on account of credits in the name of the two parties is to be treated as assessee's own income from unexplained sources. After referring to the decision of Hon'ble Supreme Court in the case Sumati Dayal vs. CIT, reported in 214 ITR 801, he made the addition of Rs.2,30,25,219/- on account of credits appearing in the name

of M/s Shweta Travels and M/s Shweta Enterprises which was subsequently credited to the capital account of the assessee and as declared in the first revised return.

7. The Ld. CIT(A) beside above facts, noted one very important fact in his conclusion that, on the date of survey i.e. 17.01.2007, stock of iron and steel as per the books of account was found to be recorded at Rs.2,89,27,515/-, however, no physical stock was found at the time of survey. He further observed that, in this case, the assessee had initially accepted that unsecured loans shown in the names of two parties are in fact his own income from undisclosed sources and has offered it as an income in the first revised return. It was only an afterthought that subsequently the assessee had change his version and came out with a new version of unaccounted cash sales and thereupon offered the GP rate of 6% which worked out to Rs.13,81,513/-. He upheld the finding of the Assessing Officer that assessee has not been able to substantiate or support his claim by any evidence that, he had made cash sales outside the books of account and the same cash has been deposited in the accounts of the two concerns. Accordingly, he confirmed the addition made by the Assessing Officer.

8. Before us, the Ld. Counsel for the assessee, Mr. H N Motiwalla, after narrating the background of the case, submitted that, at the time of survey neither any stock nor any cash was found. During the course of survey and from the statement one very important fact which is borne out especially from the reading of question No.11 is that, closing

stock as per the books of account as on the date of survey was Rs.2,89,27,515/-, however, no such physical stock was found. In answer to the said question, the assessee had stated that the stock recorded in the books of account must have been sold for which bills are not yet prepared. This *inter alia* means that, the stock as recorded in the books of account has been sold in cash which amount has been deposited in the bank account of the two parties from there it has been routed in the books of the assessee as loan liability in the names of these two parties reflected in the Balance sheet. Despite this fact, the assessee had offered to surrender the additional income shown in the name of these two parties aggregating to Rs.2,30,25,219/- as his own income. The entire amount credited could not be treated as income because it is arising out of cash sales of the same stock which has been found recorded in the books of account but not physically found at the time of survey. In such cases, the only allegation against the assessee would be that the same has been sold outside the books of account and profits must have been earned which has not been reflected in the books of accounts. Thus, at the most, only the gross profit rate can be applied. Here in this case, the gross profit rate ranged between 3.29% to 6.34%, therefore, gross profit rate of 6% should be applied. He further submitted that, the statement recorded under section 133A was not a sworn statement; therefore, it does not have any evidentiary value. In support, he relied upon the decision of Hon'ble Supreme Court in the case of CIT vs. S. Khader Khan and Sons reported in, [2012] 254 CTR 228 and decision of Hon'ble jurisdictional High Court in the case of Uttamchand Jain in ITA No.634 of 2009

order dated 2nd July, 2009. The assessee had filed an affidavit before CIT (A) retracting the statement given during the course of survey, the copy of which has been placed in the second paper book from pages 12 to 17. This affidavit has not been considered or rebutted by the department. Regarding stock found at Rs.2.89 crores, he submitted that, out of the same Rs.2.30 crores were sold in this year and Rs. 59 lakhs have been sold in the next year. Thus, he submitted that, only addition which can be made here in this case could be by applying the gross profit rate of on the cash sales and not for the entire amount.

9. Before us, Ld. DR submitted that, there is no finding that, stock has been certified by the Auditors in the audited accounts and it is also not clear, whether the unaccounted sales has actually been made is also not been proved or substantiated by the assessee. Here in this case dispute which had arisen was, whether the loan liability shown in the Balance sheet of the assessee, standing in the name of the two parties aggregating to Rs.2,30,30,25,219/- is genuine or not. The assessee was asked to explain the entry and genuineness of the loan appearing in the balance sheet which the assessee at the time of survey could not provide any answer or detail and admitted that these two loans liabilities are not verifiable; therefore, he is offering the same as his income from undisclosed sources over and above the regular income. This is clearly evident from the question No.16 and 17 of the Statement. Had it been the correct fact these loan entries are out of unaccounted cash sales, then assessee should have mentioned and clarified it at the time of

statement itself. The shortage of physical stock was found in the financial year 2006-07 (i.e. 17.01.2007) relevant to assessment year 2007-08, therefore, it cannot be presumed that the said stock was sold in the assessment year 2006-07. There is no evidence regarding cash sales as highlighted by the Assessing Officer and CIT (A). Thus, he strongly relied upon the order of the Assessing Officer and CIT (A).

10. We have heard the rival submissions, perused the relevant finding given in the impugned orders as well as material placed on record. From the facts as discussed above, the issue involved is, whether the amounts standing in the name of two creditors, i.e. M/s Shweta Travels and M/s Shweta Enterprises in the Balance sheet as on 31.03.2006 for the amounts aggregating to Rs.2,30,25,219/- is to be added as income of the assessee from undisclosed sources or the same is out of cash sales made outside the books of account on which only the gross profit rate is to be applied. First of all it is relevant to see the relevant questions and answers of the assessee as recorded during the course of survey. Question No.11 to Question No.14 reads as under:

Q.11 As stated above, the closing stock as per book as on date is Rs.2,89,27,515/-. Kindly explain this shortage of the stock.

Ans.:- The above stock must have been sold for which the bills are not yet prepared.

Q.12 Kindly give the details of the parties to whom such stocks were sold also state the method of execution of sale orders.

Ans.:- Sale orders are generally received on phone and there are no written orders as such, all the orders are generally verbal. Once the order is received, I give instructions to my staff at Taloja to despatch the

desired quantity to the respective party. For last 23 days I was not attending the office due to marriage in the family, therefore, bills are not prepared. As regards the details to whom the sales were made, the details are with my staff at Taloja only.

Qu.13. You were given the chance to update your records i.e. sales and purchase were allowed to be computed for the period for which the entries were not made to the books of account. Still the discrepancy in the stock to the tune of Rs.2,89,27,515/- was found. Our survey party could not locate any of your staff at Taloja nor any details of the party to whom sales were made could be given by the Manager of M/s. Jay Durga Steels Industries either. In the absence of the details of the party, please explain why it should not be treated as stock of the same amount were sold out of books and the profit earned thereon has not been duly reflected in the Books of Accounts.

Ans. Right now I am not in a position to answer your above queries.

Q. 14 During the last 3 years you have shown gross profit ranging from 3.29% to 6.32%. Adopting the gross profit ratio of 6% the gross profit earned on above mentioned sales comes to Rs. 17,35,651/-, which, has not yet been booked. Kindly explain why it should not be treated as your profit not so far booked.

Ans.:- I have no explanation to offer, however, in the absence of details I offer the same for taxation as my income of the current year over and above my regular

11. From the above statement, it is borne out that, *firstly*, in the books of account, there was closing stock of Rs.2,89,27,515/- on the date of survey, that is, 17th January, 2007 (falling in financial year 2006-07 relevant to the assessment year 2007-08), which was not physically found, that is, there was shortage of stock by that amount; *secondly*, the assessee had stated that the said stock must have been sold for which bills are not yet prepared; *thirdly*, when the authorized officers gave chance to the assessee to update the

records of sales and profits, the assessee was unable to clarify the queries of the authorized officers raised at that time; and *lastly*, since no explanation was offered by the assessee, therefore, gross profit on account of unaccounted sales of the alleged stock not found was contemplated to be added as income. Further, there were another set of questions asked specifically with regard to the unsecured loans appearing in the Balance sheet. In this regard relevant question and answers are reproduced hereunder:-

Q.16. As per the Balance sheet of M/s C.R. Enterprises as on 15.01.2007, there are unsecured loans of Rs.3,03,19,074/-, break-up of the same as per Trial Balance shows unsecured loans from M/s C.R. Trading amounting to Rs.36,34,004/-Shri Pankaj B. Doshi of Rs.13,10,923/-, from M/s. Sweta Enterprises of Rs.2,24,75,219/- and from M/s. Sweta Travels of Rs.5,20,000/-. It is stated that all the above mentioned three concerns are proprietary concerns of your brother Shri Pankaj B. Doshi. However, as per the I.T. returns filed of Shri Pankaj B. Doshi, he has not shown to have made any such advances to MIs. C. R. Enterprises. Kindly explain the anomaly.

Ans. :- The loans given by Pankaj Doshi my brother in his individual capacity of Rs. 13,10,923/- and loan given by his prop concern, M/s C.R. Trading are duly reflected in his personal balance sheet as on 31.3.2006. I am producing before you the copy of his personal balance sheet for verification and record. The personal balance sheets were not filed along with his return of income. As regards the loan of Rs.2,24,75,219/- from M/s Sweta Enterprises and loan of Rs.5,20,000/- from M/s Sweta Travels, I am not in a position to explain this anomaly in my books of account. However, to avoid litigation and to buy peace of mind, I state that these two loan liabilities are not verifiable/ genuine and therefore, I offer the same as my income over and above my regular income.

Q.17. I am showing you the audited Balance sheet as on 31/03/2006, wherein as well these two parties have shown aggregate loan of Rs.2,30,25,219/-. Do you mean to say these liabilities which are appearing for the

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Raju B Doshi

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and 06 other Group appeals

first time in A.Y. 2006-07 (F.Y. 2005-C were not genuine / not verifiable in that year as well?)

Ans.:- Yes, I confirm the same and please allow me to correct r above statement in answer to question No. 16. I of Rs.2,30,25,219/- as my income over and above my regular income already disclosed in my return of income for AY 2006-07.

Q. 21 Do you confirm having offered additional income over and above your regular income of Rs.2,30,25,219/- as non- verifiable loan liability for A.Y. 2006-07; and Rs.17,35,651/on account of Gross Profit earned on shortage of stock & Rs.7,50,000/- on account of unsupported expenses for A.Y. 2007-08.

Ans: I confirm the above mentioned additional income offered for A.Y.2006-07 and A.Y. 2007-08. I also promise and undertake to pay the due taxes thereon and as a positive intent on my part, I enclose herewith post dated cheques for tax payment computed at Rs.94,00,000/-. The details of which are as under:-

Date	Cheque No.	Cheque drawn on Kapol Co-op. Bank Ltd L J Branch (Amount)
03.02.2007	145610	4,00,000/-
10.02.2007	145601	10,00,000/-
17.02.2007	145602	10,00,000/-
24.02.2007	145603	10,00,000/-
03.03.2007	145604	10,00,000/-
10.03.2007	145605	10,00,000/-
17.03.2007	145606	10,00,000/-
22.03.2007	145607	10,00,000/-
24.03.2007	145608	10,00,000/-
27.03.2007	145609	10,00,000/-

Q. 22. Do you want to say anything else?

Ans :- I do not have to add anything further, but I would like to request that as I have voluntarily offered additional income over and above my regular income of A.Y.2006-07 and A.Y. 200708, co-operated with the proceedings of the Department and have undertaken to pay the taxes on the additional income so offered, I may please be spared from penalty proceeding.

From the above it is evident that, when at the time of survey assessee could not provide any explanation for the two loan liabilities, assessee offered to surrender as his income for

assessment year 2006-07. Not only that, the assessee had also offered separately income on account of gross profit on the shortage of stock found, which is evident from question No.21. In other words, the assessee had offered two types of incomes, firstly, on account of surrender of loan liability for sums aggregating to Rs.2,30,25,219/- for the assessment year 2006-07 and *secondly*, gross profit earned on shortage of stock in the assessment year 2007-08 as the shortage was found during the FY 2006-07. Post survey, the assessee did, acknowledge this fact and accordingly, filed the revised return wherein, this amount of Rs. 2,30,25,219/- was offered as an income. It was later on that the assessee came up with the explanation/version that, the shortage of stock which was found during the survey, (i.e., no physical stock was found) was in fact sold in cash outside the books and the whole proceeds of the said cash sales were deposited in the bank account of the two creditors from where the assessee had taken the loan. Therefore, the loan taken is proved from the source of the cash sales.

11. Before us, the contention of the Ld. Counsel is that, *firstly*, the statement recorded under section 133A does not have any evidentiary value and same has been rebutted by way of an affidavit and *secondly*, the factum of shortage of stock at the time of survey is actual and, therefore, the inference can be drawn that, the same have been sold outside the books and such sale proceeds was available with the assessee. Even if we agree with such a proposition that, the statement recorded in the course of survey does not have any binding or persuasive value or it cannot be reckoned as

evidence against the assessee, however, this proposition could be held valid for bald surrender without any corroborative material found at the time of survey. However on the facts of the present case it cannot be denied that the authorized officers have merely confronted the assessee about the factum of the liability appearing in the balance sheet of the assessee and required the assessee to prove the cash sales. When assessee could not explain the source of loan and also in addition could not prove the factum of cash sales, he offered to tax the amounts as his income. Not only that after the survey assessee filed his revised return wherein he declared this additional income and offered the same to tax. The facts which turn out from the statement recorded coupled with the attending facts at that time, the statement cannot be held to be incorrect or bald statement. Even if proceed with the fact that the part of statement making surrender made by the assessee is held to be not binding upon the assessee, but still the onus lies heavily upon the assessee, *firstly*, to prove that the loan liability shown in the Balance sheet is genuine or not and *secondly*, the source of the loan is on account of cash sales made outside the books from the alleged sale of stock found recorded in the books of accounts. This is more incumbent upon the assessee in the present case, because there is a time difference of several months from the date of cash sales which has been alleged to be made and the date on which the shortage was found. The cash deposits have been made in the present financial year from the alleged cash sales out of the shortage of stock which was found in the subsequent financial year. There is inherent incongruity in such an explanation. If the source of loan liability is on

account of cash sales in the bank account of the creditors, then at the first instance during the course of the assessment proceedings, the assessee should have given all the evidences as well as the confirmation from the creditors that the amount was deposited by the assessee in cash in their bank account and this is a bogus liability shown by the assessee in his books. The assessee had not filed the Balance sheets of these two entities, whether they are showing these loans on their asset side of their respective Balance sheets or not. The creditors have also not confirmed that they have shown fictitious loan and the source of their cheque amount of loan issued from their bank accounts is out of the unaccounted sales of the assessee which was deposited in their bank account. The co-relation between the cash sales and the loan liability shown in the Balance sheet has to be proven by the assessee. Even if we accept that cash sales were made outside the books of account out of the stock recorded in the books of account, then this fact alone does not justify the source of the loan shown in the Balance sheet unless parties who have given the loan accept that they were merely acting as conduit and accommodating the assessee for routing the cash sales of the assessee through their bank accounts and from there they have given cheque to the assessee. These are two separate transactions and if there is any live link nexus between the two transactions then same needs to be established by the assessee alone and onus is not upon the Revenue. More so, here in this case, when it has been admitted that cash sales is not the regular feature of assessee's trade, because as stated by the assessee, neither in the earlier years nor in the subsequent years there has been

any cash sales barring two financial years in which assessee is trying to justify the source of the loan. In case, it is found that there is a cash sale outside the books of account in this year out of the stock recorded in the books, then the addition which warrants in such circumstances can only be on account of gross profit which can be done by applying gross profit rate. However, the onus would be on assessee to link the cash sales made in this year out of the stock recorded in the books of account of subsequent financial year. Accordingly, in the interest of justice, and under the facts and circumstances of the case, we are of the opinion that this matter needs to be restored back to the file of the Assessing Officer before whom the assessee shall prove that the source of the loans from these two parties are from the cash sales which has been deposited in the creditors bank account and from there the amount has been routed to the assessee. The Assessing Officer should examine the bank accounts of the creditors and also their Balance sheets and income tax records. If required their statements can be recorded or he can call for their confirmation whether they have allowed their bank accounts to be used for the cash deposits made by the assessee out of cash sales over the period of time and how they have ultimately dealt with this amount in their accounts and income-tax records. Assessee would be at liberty to present its case and submit any documents or evidence to prove the source of loan and the cash sales. Accordingly, we are setting aside the impugned order and remanding back the issue to the file of the Assessing officer to decide afresh in light of our observations made above. Thus ground nos. 4, 5 & 6 are treated as allowed for statistical purposes.

12. In Ground No.2, the assessee has challenged disallowance of Rs.8,78,298/- out of transport charges.

13. The facts in brief, as discussed by the Assessing Officer are that, during the course of the statement recorded on 05.12.2008, specific question was asked by the assessee on the transport charges claimed, which is reproduced as under:-

“Q.19 Similarly in the ‘transport charges’ expenditure account in your ledger, an amount of Rs.12,12,185/- debited on 31.03.2006 through a journal entry. Do you have an documentary evidence in support of the same?”

Ans. I will verify and produce such evidence, if available within a few days’ time”.

In the course of the assessment proceedings, the assessee had submitted the copies of transport bills to the extent of Rs.5,29,805/- as against total expenses debited in the profit and loss account under this head at Rs.14,08,103/-. Accordingly, the Assessing Officer stated that the assessee has inflated the expenditure to the extent of Rs.8,78,298/- and accordingly, the disallowance of this amount was made. This has been confirmed by the Ld. CIT(A) also on the ground that, assessee could not produce the bills of transport charges.

14. Before us, the Ld. Counsel after drawing our attention to the details of transport charges given at pages 23 and 24 of the paper, submitted that, all the payments have been made through account payee cheques and wherever required, TDS

was also deducted. Thus, no disallowance can be made in such circumstances. He further drew our attention to the comparative chart of various expenses and submitted that, the transport charges in ratio to the sales turnover is 0.5% which is in consonance with the similar ratio of the earlier years. Thus, he submitted that, no disallowance should be made.

15. On the other hand, Ld. DR strongly relied upon the order of the Assessing Officer and CIT (A).

16. After considering the rival submissions and on perusal of the impugned orders and material placed on record, it is seen that, the revenue's case is that, assessee could only produce the bills relating to transport charges at Rs.5,29,085/- out of total expenses debited under this head at Rs.14,08,103/-. Now, on the perusal of the details given in the ledger account of Transport Charges, it is seen that, the payments have been made through account payee cheques to various transporters and it has also been contended that, TDS has also been deducted wherever it was required statutory. In such a situation, *prima facie* the expenses debited by the assessee cannot be held to be non-genuine, especially, when it is in consonance with the ratio and corresponds with overall sales turnover as compared to earlier years. Even if the assessee could not produce the bills for the entire expenses, the matter can be examined from the bank account, through which amount has been paid through cheque and also from the account of the transporters to whom the payment was made along with the TDS deducted.

In the interest of justice, we are of the opinion that this matter should be restored back to the file of the Assessing Officer to examine the payment through bank account and also by way of TDS certificate, wherever TDS has been deducted. If the amounts are otherwise verifiable, then the said expenditure needs to be allowed, especially keeping in line with the past history and also the ratio of transport expenses upon sales turnover. Thus, with this direction, ground No.2 is treated as party allowed for statistical purposes.

17. In ground No.3, the assessee has challenged the disallowance of Rs.5,26,798/- being 25% of the total brokerage expenses.

18. The Assessing Officer noted that, the assessee has debited a sum of Rs.25,15,190/- by way of journal entry on 31st March, 2006 on account of commission/brokerage payment. In absence of any documentary evidences filed by the assessee, he disallowed the expenditure @ 25%, which worked out to Rs.6,28,698/-. Even before the CIT(A), as noted in the appellate order, the assessee could not produce any proper evidence except for stating that, looking to the size of the business, such an amount of brokerage commission is justifiable or is reasonable. The Ld. CIT(A) confirmed the addition after observing and holding as under:-

“I have carefully gone through the assessment order, submissions made on behalf of the appellant and the facts of the case. Since the appellant could not produce

even single documentary evidence in respect of brokerage expenses, to my mind, the AO is quite justified in making the disallowance of 25% out of brokerage expenses. Therefore, the disallowance so made by the AO is accordingly confirmed. This ground of appeal is dismissed”.

19. Before us, the Ld. Counsel drew our attention to a copy of ledger account, wherein the names of the brokers along with the addresses have been given. It has also been stated that, the commission expenses were incurred in the earlier year as well as in this year also and the percentage of commission in ratio to the sales turnover is 1.03% as compared to 2.5% in the AY 2004-05 and 1.23% in AY 2005-06. Thus, he submitted that, no disallowance should be made.

21. On the other hand, Ld. DR strongly relied upon the order of the CIT(A) and submitted that, in absence of any evidence, such an expenditure cannot be allowed at all and under the facts and circumstances, 25% of the expenses disallowed by the Assessing Officer is far more reasonable.

22. After considering the rival submissions and on perusal of the impugned order and material on record, we find that *firstly*, the assessee had shown to have made payment to 20 persons on account of brokerage and commission. Out of these 20 persons, the PAN of only 3 persons have been mentioned and in respect of 5 persons, no address has been given. Ld. Counsel apart from contending that, similar commission payment has been made in the earlier years, no

other evidence and explanation have been given as to why and how the brokerage and commission has been paid to various parties, especially when, the entire amount has been debited in the books of account by way of 'journal entry' on the last date of accounting year, that is, on 31st March, 2006. Under these facts and circumstances, the ad-hoc disallowance made by the Assessing Officer and confirmed by the CIT(A) @ 25% is far too reasonable and, therefore, no interference is called for. Accordingly, ground No.3 is dismissed.

23. In the result, appeal of the assessee is partly allowed for statistical purposes.

24. Now we will take-up appeal for AY 2004-05 (ITA No.1458/Mum/2011), vide which following grounds have been raised:-

- “1. *On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in upholding the reopening of assessment u/s 147 of the Income-tax Act.*
2. *On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in upholding the addition of Rs.5,01,763/- on account of gross profit @ 6.32% on undisclosed sales of Rs.79,39,298/- (being cash deposits in the account of Sweta Enterprises and Sweta Travels treated as undisclosed sales) without appreciating the fact that the gross profit @ 6% on such accumulated deposits has already been offered by the appellant himself in the AY 2006-07, and therefore, it amounts to double taxation.*
3. *On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in upholding the addition of Rs.8,01,792/- being amount received as unsecured loan from **Pankaj B Doshi**, without appreciating the fact that the amounts*

represented opening balance since 2000-01 and there were no receipts during the year and that the appellant submitted all the details and confirmation.

4. *On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in confirming the addition on account of unsecured loan from **Pankit P. Doshi**, without appreciating the confirmations and complete details filed, without appreciating the fact that the amounts represented opening balance and there were no receipts during the year and that the appellant submitted all the details and confirmation.*
5. *The appellant craves the leave to add, amend, alter and/or delete any of the above grounds of appeal at or before the time of hearing”.*

25. So far as the validity of reopening under section 147, no arguments have been placed by the Ld. Counsel before us and accordingly, it is presumed that the legal issue relating to the validity of reopening is being not pressed. Accordingly, we are treating ground No.1 as not pressed.

26. In ground No.2, the assessee has challenged addition of Rs.5,01,763/- on account of gross profit rate @6.32% on undisclosed sales of Rs.79,78,298/-. It has been contended that, the addition of GP application is on account of cash deposits in the bank account of M/s. Sweta Enterprises and Sweta Travels, which in turn is on account of cash sales made by the assessee. Thus, this issue is similar to the issue which we have dealt upon and decided in the appeal for the assessment year 2006-07, wherein, we have set aside the issue of cash sales to the file of the Assessing Officer, to see the nexus whether the undisclosed sales made outside the books of account is the source of deposits and consequently loan shown by the assessee in the account of M/s Sweta

Enterprises and M/s Sweta Travels. If the Assessing Officer, finally comes to the conclusion that the undisclosed sales of the assessee is the source of the loan then only issue left would be application of gross profit rate on undisclosed sales. In assessment year 2006-07, the assessee had already offered that gross profit on account of unaccounted sales which has been offered to be taken @ 6% on the entire undisclosed sales. If that is so, then in this year no double addition should be made, that is, it should be only restricted to applying of GP rate on the undisclosed sales of balance amount falling in this year, i.e., Rs.79,39,298/-. With this direction, ground No.2 stands allowed for statistical purposes.

27. In ground No.3 and 4, the assessee has challenged addition of Rs.8,01,792/- being amount received as unsecured loan from M/s Pankaj V Doshi.

28. Before us, the Ld. Counsel submitted that the said addition cannot be made under section 68 in this year, because the amount of Rs.8,21,791/- is coming in the books of the assessee by way of opening balance from the earlier years and copy of account clearly shows that as on 1st April, 2003 there was opening balance of Rs.8,07,791/- therefore, such an addition cannot be made in this year.

29. Ld. DR while relying upon the order of the Ld. CIT(A) further stated that, assessee could not furnish any documentary evidences regarding the said loan during the course of the assessment proceedings, therefore, same needs to be confirmed for want of proper explanation and evidence.

30. After considering the relevant finding given in the impugned order as well as material placed on record, we find that, the contention of the Ld. Counsel is correct, because the copy of ledger account as confirmed by Shri Pankaj V Doshi clearly shows that, as on 1st April, 2003 there was an opening balance of Rs.8,07,791/- which was also the closing balance at the year ending 31st March, 2004. Thus, there is no fresh credit appearing in the books of account for the related previous year so as to attract the deeming provision of section 68. Accordingly, no addition can be made under section 68 in this year and thus, addition of Rs.8,07,791/- is hereby deleted.

31. In the result, appeal of the assessee is partly allowed for statistical purposes.

32. Now, we will take-up assessee's appeal for assessment year 2005-06 (In ITA No.1482/Mum/2011), vide which following grounds have been raised:-

- “1. On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in upholding the reopening of assessment u/s 147 of the Income-tax Act.
2. On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in upholding the addition of Rs.3,99,945/- on account of gross profit @ 4% on undisclosed sales of Rs.99,98,636/- (being cash deposits in the account of Sweta Enterprises and Sweta Travels treated as undisclosed sales) without appreciating the fact that the gross profit @ 6% on such accumulated deposits has already been offered by the appellant himself in the AY 2006-07, and therefore, it amounts to double taxation”.

33. In this year also, the validity of reopening also has not been challenged before us, accordingly, the same is dismissed as not pressed.

34. As regards, ground No.2, it has been admitted that, this ground is very similar to ground taken in AY 2004-05 and accordingly, the directions given therein will apply here also. Accordingly, in view of the finding given therein, ground No.2 is treated as allowed for statistical purposes.

35. In the result, appeal of the assessee is partly allowed for statistical purpose.

36. Now, we shall take-up appeal for AY 2007-08 (ITA No.1484/Mum/2011), vide which following grounds have been raised:-

“1. On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in upholding the addition of Rs.17,35,651/- on account of gross profit @ 6% on undisclosed sales of Rs.2,89,27,515/- as no physical stock was found on the day of survey) without appreciating the fact that the gross profit @ 6% on Rs.2,30,25,219/- being accumulated cash deposits in the account of Sweta Enterprises and Sweta Travels out of the cash sale of stock has already been offered by the appellant himself in the AY 2006-07 and balance has been already included in the sales as per Audited results for A.Y. 2007-08, and therefore, it amounts to double taxation.

2. *On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in upholding the addition of Rs.17,35,651/- (on Rs.2,89,27,515/-) when he himself has upheld the gross profits on the undisclosed cash sales deposited to the extent of Rs.79,39,298/- for AY 2004-05 Rs.99,98,636/- for AY 2005-06 in the account of Sweta Enterprises and Sweta Travels. Thus amounting to taxing thrice the same cash sales generated out of the stock sold and not found during the day of survey.*

3. *On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in upholding the addition of Rs.7,50,000/- on ad-hoc basis on account of unsupported expenses, without pinpointing any specific instance”.*

37. As regards issues raised in ground No.1 and 2, it is seen that, it is similar to the grounds raised in the earlier years and in view of our finding given therein, both the issues raised in these grounds are set aside to the file of the Assessing Officer to be decided in line with the decision taken in earlier years. Thus, ground No.1 and 2 are treated as allowed for statistical purposes.

38. As regards the addition of Rs.7,50,000/- on account of unsupported expenses, it is seen that, Assessing Officer in the assessment order had stated that, at the time of admission of additional income of Rs.7,50,000/- assessee in his statement recorded on oath, has been categorically

accepted that there are unrecorded expenditure. The relevant question is reproduced hereunder:-

“Q.20: Do you admit that many a time’s expenditure are booked without proper supporting documents?”

Ans: Yes, I admit that some of the expenses are not duly supported by bills and vouchers. However, to buy peace of mind and to avoid any litigation, I offer a sum of Rs.7,50,000/- as my additional income over and above my regular income of the current year relevant to AY 2007-08?”

Despite this surrender, the assessee had not offered this income in the return filed. Accordingly, Assessing Officer made the addition to the income of the assessee.

39. Before the Ld. CIT(A), the assessee’s case was that, the assessee was forced to declare sum of Rs.7,50,000/- towards unsupported expenses. That apart, during the course of the assessment proceedings, complete books of accounts were produced for verification and Assessing Officer has been unable to pinpoint any specific instance of unsupported expenditure, hence, such an addition cannot be sustained. The Ld. CIT(A) too confirmed the said addition on the ground that, assessee himself declared a sum of Rs.7,50,000/- on account of expenses not duly supported by bills and vouchers. (on his own whims and fancies with sole objective to buy peace of mind and to avoid any protracted litigation under the state of mind of indecisiveness).

40. After hearing both the parties and on perusal of the relevant finding given in the impugned orders, we find that, though assessee had made the surrender of Rs.7,50,000/-

towards unsupported expenses, however, during the course of survey or in the statement there is no reference to any material being confronted to the assessee, based on which the assessee was forced to or was cornered to offer the additional income or make the surrender. If the regular books of accounts have been maintained wherein no specific defect has been pointed out, then it was incumbent upon the Assessing Officer to examine the expenses debited in the books of account rather than simply going by the surrender made by the assessee in the statement during the survey sans any supporting document or material. Accordingly, we are remanding this matter to the file of the Assessing Officer to verify the overall expenditure debited and the trade result of the assessee along with overall expenditure claimed, if such an expenditure does not co-relate with any of the entries in the books of account or any other material or information on record, then no such ad-hoc addition can be made simply on the basis of income has been offered in the statement during the survey. The Assessing Officer shall examine this issue afresh after giving due and effective opportunity to the assessee. Accordingly, ground no.3 is treated as allowed for statistical purposes.

41. In the result, appeal of the assessee is treated for statistical purposes.

42. Now, we will take-up, assessee's appeal in relation to penalty proceedings under section 271(1)(c) for the assessment years 2004-05 and 2006-07 and 2007-08. In all the years, the assessee has mainly challenged the levy of

penalty on account of; *firstly*, addition of gross profit on unaccounted cash sales; *secondly*, addition of unaccounted credits appearing in the balance sheets; and *lastly*, disallowances of expenses.

43. For the assessment year 2004-05 (ITA No.1032/Mum/2014), the assessee has raised following grounds:-

“The grounds mentioned hereunder are without prejudice to one another:-

1) The Learned Commissioner of Income Tax (Appeals) erred in confirming the Penalty of Rs.8,60,000/- on the following additions:-

(a) Addition of Rs.5,01,763/- on account of Gross profit estimation on undisclosed sales.

(b) Addition of Rs.28,01,791/- on account of unexplained credits”.

44. At the outset, it is noticed that, both the issues have been set aside to the file of the Assessing Officer for fresh adjudication in the light of the directions given, therefore, penalty levied on the impugned addition arising out of present assessment order does not survive and same is directed to be deleted. At the time of fresh assessment, Assessing Officer may consider the initiation of penalty proceedings afresh if required in accordance with the provisions of the law and on the basis of the finding and explanation by the assessee in the course of the quantum proceedings. Accordingly, the present appeal of the assessee is allowed.

45. In the AY 2006-07 (ITA No.1033/Mum/2014), the assessee has raised following grounds:

“The grounds mentioned hereunder are without prejudice to one another:-

1) *The Learned Commissioner of Income Tax (Appeals) erred in confirming the Penalty of Rs.85,00,000/- on the following quantum additions:-*

(a) Addition of Rs.2,30,35,219/- on account of unexplained Cash Credits under section 69.

(b) Addition of Rs.5,00,000/- as unexplained credit u/s 68.

(c) Disallowance of Rs.8,78,248/- out of transport expenses.

(d) Adhoc disallowance of Rs.6,28,798/- being 25% of Brokerage and Commission.

2) *The Learned Commissioner of Income Tax (Appeals) erred in confirming penalty on the above addition without appreciating that the said transactions were already disclosed in its Books of Accounts and therefore there was no concealment or furnishing of inaccurate particulars”.*

46. So far as the issue relating to addition of Rs.2,30,35,219/- i.e., on account of unexplained cash credits, the same has been set aside to the file of the Assessing Officer for fresh adjudication in the light of the directions given by us herein above; therefore, impugned penalty arising out of the addition made in the present assessment order does not survive and accordingly, the same is directed to be deleted.

47. So far penalty on addition of Rs.5 lakhs, we find that in the quantum proceedings, the Ld. Counsel has not pressed this ground. Since penalty proceedings are separate and distinct from the quantum proceedings, therefore, same is

being adjudicated on the basis of facts and material on record as well as explanation of the assessee.

48. Brief facts are that, Assessing Officer from the perusal of the capital account of the assessee filed along with the return of income noted that, assessee has credited a sum of Rs.5 lakhs as gift received from his father. Relevant statement of the assessee on this point as given before the Assessing Officer reads as under:

“Q. It is from your capital account filed with the return of income that an amount of Rs.5 lacs is credited under the head ‘gift received from father’. Please explain the nature of such gift.

Ans: As stated in my letter dated 19.8.2008 filed before you on 21.8.2008 this represents the total commission payable to my father. Late Shri Banubhai Doshi was Rs.6,87,542/-. However, he expired on 06.03.2006 and therefore out of the total commission payable to him Rs.5 lacs was transferred to my account as gift received. This was after discussion with the family members and other legal heirs of Late Shri Banubhai Desai”.

He further observed that, assessee has not received any amount from father but it is only a book entry. The opening balance on account of brokerage payable as shown from his father’s account was at Rs.5,00,000/- and Rs.1,87,542/- which was credited to his father’s account as brokerage, taking the balance to Rs.6,87,542/-. The assessee has duly debited the brokerage expenses in the P&L Account and credited the amount to his father’s account. Now, in this year,

the assessee has debited Rs. 5 lakhs to his father's account and credited to his capital account as a 'gift' received during the year. The Assessing Officer held that, it is a case of mere cessation of trading liability created on account of brokerage, which was claimed as expenses in the profit and loss account. Thus, cessation of liability to this extent was taxed as assessee's income.

49. The Ld. CIT(A), too had confirmed the said addition.

50. After hearing both the parties and on perusal of the impugned orders, it is seen that, the assessee had contended that, assessee's father late, Shri Banubhai Doshi used to attend marketing activity of the assessee and total commission payable to him as per books of account was Rs.6,87,542/-. On 06.03.2006, his father had expired and accordingly, the assessee had transferred the said amount due to him as "gift". However, such an amount which was on account of trading activity and expenditure was also claimed in the profit & loss account and such an amount has been returned back, then same in fact has to be reckoned as cessation of a trading liability only. For a gift, there has to be a conscious decision and intent of giving of the gift by the 'donor' without consideration to the 'donee'. Here, main ingredient of "gift" is absent and hence it cannot be reckoned as "gift" *per se*. However, on the plain reading of the impugned orders as passed by the Assessing Officer and the CIT(A) in the penalty proceedings, we find that there is no independent application of mind qua penalty proceedings except for relying on the finding in quantum proceedings nor

assessee's explanation has been considered. Accordingly, in the interest of justice, we feel this matter should be restored back to the file of the Assessing Officer to consider the explanation of the assessee and also to examine the preponderance of probability of such an explanation. With this direction, the matter is set aside to the file of the Assessing Officer.

51. As regards the levy of penalty on account of disallowance of transport expenses, we have already held in the quantum proceedings that the payments for transport charges have been made/paid through account payee cheques on which TDS has been deducted wherever applicable. In view of this fact, there cannot be a case of furnishing of any inaccurate particulars or concealment of income, therefore, penalty levied on such disallowance is hereby deleted.

52. Coming to the ad-hoc disallowance of Rs.6,28,798/- being 25% of brokerage and commission, though in the quantum proceedings, we have confirmed the said brokerage commission, however, looking to the fact that in assessee's business commission has been paid in the earlier years also therefore, looking to the past history, the payment of brokerage and commission cannot be held to be new fact. At least based on preponderance of probability and that similar expenditure have been incurred in the earlier years also, there cannot be the case of penalty. Not only that, it is seen that, the ratio of brokerage and commission with total sales is the same or rather it is less as compared to the earlier years.

Thus, the factum of brokerage and commission expenditure cannot be ruled out. Since it is an ad-hoc disallowance, therefore, no penalty can be levied either for concealment of income or furnishing of inaccurate particulars, accordingly, the penalty levied on this score stands deleted.

53. In the result, appeal of the assessee is partly allowed.

54. Now, we will deal with assessment year 2007-08 (ITA No.1034/Mum/2014), vide which following grounds have been raised:-

“The grounds mentioned hereunder are without prejudice to one another:-

1) The Learned Commissioner of Income Tax (Appeals) erred in confirming the Penalty of Rs.8,60,000/- on the following additions:-

(a) Addition of Rs.17,35,651/- on account of Gross profit estimation on undisclosed sales.

(b) Disallowance of Rs.7,60,000/- on account of unsupported expenses”.

55. As regards the levy of penalty on account of gross profit estimation and unsecured loans, we have already set aside this matter to the file of the Assessing Officer for fresh adjudication in the light of the directions as given in AY 2004-05 while deciding identical issue therein. Accordingly, penalty arising out from the present assessment order is deleted. The Assessing Officer may in the course of the set aside proceeding consider the initiation of penalty in accordance with the law after considering the material facts,

explanation and finding given in the set aside proceedings. Accordingly, penalty levied on addition of Rs.17,35,651/- on account of GP estimation is deleted.

56. So far as the disallowance of Rs.7,50,000/- on account of unsupported expenses, in view of our finding given in the quantum proceedings, whereby, the matter has been set aside to the file of the Assessing Officer for verification, the penalty levied on this addition does not have any legs to stand and accordingly, the same is directed to be deleted. Accordingly, the appeal is allowed.

57. To sum-up:

Quantum proceedings:

Assessee's appeals in ITA No.1458, 1482 and 1483 of 2011; for AYs 2004-05; 2005-06 and 2006-07 respectively stands partly allowed for statistical purposes and whereas Assessee's appeal for AY 2007-08 in ITA No. 1484 of 2011 the same stands allowed for statistical purpose; whereas in the

Penalty proceedings:

Assessee's appeal in ITA No.1032, 1034 of 2014 for AYs 2004-05 and 2007-08 stands allowed whereas Assessee's appeal for AY 2006-07 in ITA No.1033 of 2014 the same stands partly allowed.

राजू बी दोषी
Raju B Doshi
ITA 1483/Mum/2011
and 06 other Group appeals

Order pronounced in the open court on 30th September,
2016.

Sd/-
(आर सी शर्मा)
लेखा सदस्य
(R C SHARMA)
ACCOUNTANT MEMBER

Sd/-
(अमित शुक्ला)
न्याईक सदस्य
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai, Date: 30th September, 2016.

प्रति/Copy to:-

- 1) अपीलार्थी /The Appellant.
- 2) प्रत्यर्थी /The Respondent.
- 3) The CIT(A)-30 , Mumbai.
- 4) The CIT –City-19, Mumbai
- 5) विभागीय प्रतिनिधि “डी”, आयकर अपीलीय अधिकरण, मुंबई/
The D.R. “D” Bench, Mumbai.
- 6) गार्ड फाईल \
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उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, मुंबई
Dy./Asstt. Registrar
I.T.A.T., Mumbai

*चव्हान व.नि.स

*Chavan, Sr.PS