आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'सी', मुंबई ।

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

BEFORE SHRI R.C.SHARMA, AM
&
SHRI AMARJIT SINGH, JM

आयकर अपील सं./**ITA No.5193/Mum/2014**

(**निर्धारण वर्ष /** Assessment Year :2011-2012)

ACIT-25(2), Mumbai	Vs.	Shri Pratap Uttam Purohit, Plot No.106, Gorai Gaurav Society, Borivali(West), Mumbai-400092
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AHCPP 6451 F**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

AND

आयकर अपील सं./**ITA No.1021/Mum/2015**

(**निर्धारण वर्ष /** Assessment Year :2011-2012)

Shri Pratap Uttam Purohit, Plot No.106, Gorai Gaurav Society, Borivali(West), Mumbai-400092	Vs.	ACIT-25(2), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AHCPP 6451 F**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

निर्धारिती **की ओर से** /Assessee by : Shri R.A.Dhyani

राजस्व **की ओर से** /Revenue by : Shri Sanjay Kapadia

सुनवाई की तारीख **/ Date of Hearing : 18/08/2016**

घोषणा की तारीख**/Date of Pronouncement : 04/11/2016**

आदेश / O R D E R

***PER R.C.SHARMA (A.M)*:**

These are the cross appeals filed by the revenue and assessee against the order of CIT(A), Mumbai, for the assessment year 2011-2012.

2. In appeal of the assessee, there is a delay of 188 days. The assessee has filed an affidavit explaining the reasons for aforesaid delay.

After going through the reasonings given by the assessee for condonation of delay, we found that there was reasonable cause for delay in filing the appeal. Accordingly, in the substantial interest of justice we condone the delay of 188 days in filing the appeal by the assessee and the appeal is heard on merits.

2. Rival contentions have been heard and record perused. Facts in brief are that the assessee is an individual and proprietor of M/s Dev Engineers engaged in Civil Construction work. During the year the AO was in receipt of information from the sales Tax Department that the following 10 parties from whom the assessee had purchased material were suspected to be only engaged in providing accommodation entries.

Sr.No.	Name of the party	Amount
1	Nirmal Trading Co.	1,15,425/-
2	Vani Enterprises	5,23,404/-
3	Gadadhar Trading Co.	5,06,025/-
4	Linion Tradelink	5,15,616/-
5	Arihant Sales Corporation	6,65,738/-
6	Ashar Impex	7,16,070/-
7	A.K.Traders	9,33,818/-
8	Banjara Enterprises	9,69,727/-
9	Classic Enterprises	36,45,205/-
10	Vijami Impex	6,49,204/-
	Total	92,40,232/-

3. With regard to the genuineness of the purchase, the AO did not accept the contention of assessee on the ground that :

(i) The contention that the payment are made by account payee cheque is not a fail safe method of substantiating the assessee's claim as is already accepted by the persons whose statement, deposition or affidavit that cash is returned after deducting commission/brokerage once cheque is realized.

(ii) The assessee could not produce delivery challan, lorry receipt, the mode of transport of goods, evidence of payment of octroi (if any) stock register etc. for all the purchases from the alleged suppliers in support of its claim that purchases are genuinely made from these parties.

4. For similar purchases AO also added a sum of Rs.2,33,36,015/-. By the impugned order the CIT(A) deleted the addition in respect of purchases of Rs.2,33,36,015/- by observing that this purchase was already offered as income by the assessee in the assessment year 2012-13 in respect of purchases of Rs.92,40,232/-, the CIT(A) upheld the addition of 15% of profit element on such purchases which works out to be Rs.13,86,035/-, The precise observation of CIT(A) is as under:-

> *5.1 I have gone through the submissions of the appellant. While the grounds of appeal are two separate grounds dealing with addition of Rs.92,40,232/- and addition of Rs.2,33,36,015/-, during the course of appeal the appellant has filed common statement since the addition in both grounds is on account of non genuine purchases u/s.69C. The issues are being adjudicated separately since the facts of the case are slightly different in both the issues even though the main issue is regarding non genuine purchases.*
>
> *On ground No.1, the AO has made the addition on the ground that the appellant could not produce delivery challans, lorry receipts, the mode of 'transport of goods, evidence of payment of octori, stock register etc. and that the notices could not be served to the suppliers at the given addresses. As shall be detailed in adjudication' on ground 2 in the case of the appellant the Survey was carried out on 27-02-2011 and the appellant has himself accepted that with respect to 71 parties (the 10 parties on which the addition in ground No.l is being adjudicated are not apart of these 71 parties) only accommodation entries were being taken and he has accepted the modus operandi being followed by him by way of generation of inflationary bills. It is a separate matter that the appellant has also stated that the said cash generated through this process was ploughed back into the business of the company in a way or not. Therefore, getting back to the issue of addition of Rs.92,40,232/-; the explanation being given by the appellant during the course of appeal is that he is a contractor without monetary limit with Government/Semi Government and that he follows a process in which there is 3rd party check of the amount of work executed using the material supplied at the site. However, it also remains a fact that the appellant has himself during the course of Survey accepted that he follows the modus operandi of generating cash by using system of bogus bills. During the course of assessment and during the appeal the appellant has given detailed manner of working, however, he has not specifically been able to discharge the entire onus rebutting his own statement made during the course of survey regarding his modus operandi. In light of these findings of*

the Sales Tax Department and further follow up by the AO assumes significance. However, giving due credit to the fact that the appellant has also accepted in the same statement that he ploughed back the cash so generated into the business itself it is fair to decide that only profit element on this component should be brought to tax and it is decided that the profit of the appellant should be taken at 15%. It may be pointed out that the AO on his part has also not found conclusive evidence that the bogus bills used of such parties actually resulted in entire cash being siphoned out of the business of the appellant. The decision is taken relying on the decision of the Hon'ble Gujarat High Court in the case of CIT vs. Simit P. Sheth (2013) 356 ITR 451(Guj). Therefore taking the ratio from the case of Smit P. Sheth it is decided that 15% of the profit element of Rs.92,40,232/- i.e. Rs. 13,86,035/- is to be upheld as addition on this and the appellant gets a relief of Rs.78,S4,197/-.

5.2. On the second ground of appeal it is seen from the submission made by the appellant and the contentions of the AO that with respect to 71 parties which have been accepted during the course of Survey by the appellant as having been used to purchase accommodation entries, the appellant has already made the surrender in terms of adding to his additional income during the assessment year 2012-13 and has duly paid the tax on that. This part features on page 12 of the statement by the appellant during the course of Survey. Therefore, in light of that the contention of the appellant is accepted that the same income cannot be brought to tax twice and appellant gets relief to the extent of RS.2,33,36,015/."

5. Against the above order of CIT(A), assessee and revenue are in appeals before us.

6. We have considered rival contentions and found that for the impugned assessment year total purchases from alleged MVAT parties were to the tune of Rs. 2,33,36,015/-. Pursuant to survey action on 27/02/2011, while recording the statement the assessee himself has offered these purchases as his income for A.Y. 2012-13, as he was unable to explain the same at the time of survey. The authorized officer at that time aggregated the purchases made from alleged MVAT parties and took the disclosure of Rs. 20Crs in the AY 2012-13. The assessee has also offered the said sum of Rs. 20Crs as his income for AY 2012-13. A

categorical finding has been recorded by CIT(A) to the effect that impugned purchase of Rs.2,33,36,015/- was offered as income by the assessee in the assessment year 2012-2013. This finding of CIT(A) has not been controverted by learned DR by bringing any positive material on record. Since the assessee bonafidely offered the income of Rs. 20Crs in AY 2012-13 and also paid the due tax along with interest thereon, taxing the same in the impugned year will amount to double taxation of the same income. Accordingly, we do not find any infirmity in the order of CIT(A) for deleting the said addition.

7. With regard to purchases of Rs.92,40,232/-, the CIT(A) has upheld addition of 15% amounting to Rs.13,86,035/- being profit element embedded in such purchases.

8. The assessee is in further appeal before us against the addition of Rs.13,86,035/- as upheld by the CIT(A). From the record, we found that with regard to these purchases, what is to be seen is utilisation of goods purchased which has been proved by assessee by providing all the details. From the record we found that the during year under consideration, assessee had sales of Rs.1,01,88,39,392/- on which assessee has declared gross profit of Rs.17,79,05,770/- . Thus, assessee has declared gross profit rate of 17.46%. However, in the assessment year 2009-2010 and 2010-2011, the gross profit rate so declared by assessee was 8.60% and 10.64% respectfully. Thus, it is very much clear that during the year consideration, assessee has declared much better gross profit rate of 17.46% as compared to the earlier years, therefore, making further addition of 15% on such purchase appear to be very unreasonable.

Thus, keeping in view the gross profit rate so declared by the assessee during the year under consideration, we upheld the addition of 2% on such purchases in place of 15% as upheld by CIT(A). We direct accordingly.

9. In the result, appeal of the revenue is dismissed, whereas the appeal of the assessee is allowed in part.

Order pronounced in the open court on this 04/11/ 2016.

Sd/-	sd/-
AMARJIT SINGH	**R.C.SHARMA**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated 04/11/2016

Karuna/Sr.P.S.

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

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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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