

आयकर अपीलीय अधिकरण, "एच" खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL, MUMBAI-"H", BENCH
 सर्वश्री राजेन्द्र, लेखा सदस्य एवं संदीप गोसाई, न्यायिक सदस्य
Before S/Sh. Rajendra, Accountant Member & Sandeep Gosain, Judicial Member
आयकर अपील सं./ITA No.4547/Mum/2014 निर्धारण वर्ष/Assessment Year-2009-10

Shri Hiralal Chunilal Jain Room No.46, 3rd Floor, J.M.Compound, 42/46, Vithaldas Building, 3 rd Bhoiwada, Mumbai-400 002. PAN No.AETPJ 8664 G	v/s.	Income tax Officer Ward 14(1)(4) Room No.203, Earnest House Nariman Point, Near NCPA Mumbai-400 021.
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आयकर अपील सं./ITA No.2545/Mum/2014 निर्धारण वर्ष/Assessment Year-2010-11

Income tax Officer Ward 14(1)(4) Mumbai-400 021.	v/s.	Shri Hiralal Chunilal Jain Mumbai-400 002.
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आयकर अपील सं./ITA No.1275/Mum/2014 निर्धारण वर्ष/Assessment Year-2010-11

Shri Hiralal Chunilal Jain Mumbai-400 002.	v/s.	Income tax Officer Ward 14(1)(4), Mumbai-21.
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(अपीलार्थी / Assessee)

(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/ Assessee by : Sh. Satish Mody-AR

राजस्व की ओर से/ Revenue by : Ms. Kusum Bansal-DR

सुनवाई की तारीख/ Date of Hearing : 23- 11 -2015

घोषणा की तारीख / Date of Pronouncement : 01.01.2016

आयकर अधिनियम, 1961 की धारा 254(1) के अन्तर्गत आदेश

Order u/s.254(1) of the Income-tax Act, 1961 (Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order 23.05.2014 of CIT(A)-25, Mumbai the assessee has filed the appeal for the Assessment Year (AY.) 2009-10. The assessee and the Assessing Officer (AO) have filed cross appeals for the next AY. by challenging the order of the CIT-A, dated 22.01.2014. The details of filing of returns etc. can be summarised as under:

AY.	ROI filed on	Returned income	Assessment date	Assessed income
2009-10	30.09.2009	Rs.3,77,140/-	25/09/2013	Rs.10,98,880/-
2010-11	01.10.2010	Rs.4,11,851/-	15/03/2013	Rs.28,01,910/-

ITA No.4547/Mum/2014, AY.-2009-10:

2. Assessee, an individual is proprietor of M/s. Divya Alloys and is engaged in business of resellers of ferrous and non ferrous metals. Effective ground of appeal is about an addition of Rs. 1,44,348/-. During the assessment proceedings, the AO found that the assessee had purchased goods worth Rs. 7.21 lakhs Shiv Sagar Steel (India), that the name of Shiv Sagar was appearing in the list of bogus parties forwarded by the sales tax authorities, that the name of the assessee was appearing as a beneficiary in the list. The AO directed the assessee to produce the party from

whom he had claimed to have purchased goods. However, the supplier was not produced by the assessee. Summons issued to Shiv Sagar could not be served on the given address. The AO held the purchase transaction bogus and treated the entire purchase (Rs.7.21 lakhs) as unexplained expenditure u/s.69C of the Act.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him, it was argued that the AO had relied upon the information supplied by the investigation wing of the Sales Tax Department (STD), that the AO had not supplied the copy of the statement of Shiv Sagar recorded by the STD, that the assessee was not allowed to cross examine Shiv Sagar, that the assessee had discharged his obligation by submitting details of purchases, sales, bank transactions, that stock register was produced before the AO, that there was no evidence that payments for the so called bogus purchase had come back to the assessee, that all purchases and sales were recorded in the books of accounts, that quantitative details were maintained by the assessee with regard to purchase and sales, that the AO had accepted the sales.

After considering the submissions of the assessee and the assessment order, the FAA held that STD had treated the suppliers of goods as suspicious dealers, that they had paid VAT, that during the investigation the suppliers had admitted that they had issued accommodation bills, that the assessee had not produced the party, that he might have purchased the goods from grey market, that he might have taken accommodation bills, that addition could be made at certain percentage of GP/NP or at an ad hoc amount. Finally, he held that an addition of 20% of the purchase would be justified in order to fulfill the gap difference of GP for the alleged purchase as well to plug any leakage of revenue.

4. Before us, the Authorised Representative (AR) contended that partial addition confirmed by the FAA was not justifiable, that the AO had not granted cross examination of the party, that even a copy of the statement was not provided wherein the allegation against the assessee were made by the alleged suppliers, that all the purchases and sales were recorded in the books of accounts, that the assessee was a reseller, that the NP was 1.7%, that the GP was about 7%, that the FAA had ignored those vital facts while upholding the partial addition. He relied upon the cases of Rajeev Kalathil (67SOT52), Tristar Jewellery (ITA/8292/Mum/2011 dated 31.07.2015-AY.2006-07) and Nikunj Eximp Enterprises Pvt.Ltd. (372ITR619). Departmental Representative (DR) supported the order of the FAA.

5. We have heard the rival submissions and perused the material before us. We find that the AO had received information from the investigation wing of STD, Maharashtra that the assessee was one of the beneficiaries of accommodation entries, that Shiv Sagar the supplier of the goods was one of the entities who had admitted to have bogus bills, that the assessee had asked for cross examination of the supplier but same was not given, that the AO had not supplied the copy of the statements of Shiv Sagar to the assessee, that in the books of accounts of the assessee all the purchases and sales were recorded, that payments were made through banking channels, that the AO had made addition of entire purchases u/s.69 of the Act, that the FAA had reduced it to 20%. It is a fact that the AO had not rejected the sales of the assessee and the assessee was maintaining the quantitative details and stock register. In our opinion, once the sales are accepted as genuine or not doubted the AO cannot reject the entire purchase. In the case of Nikunj Eximp (supra) the Hon'ble Bombay High Court has held if sales were not doubted by the AO and copies of bank statement showing entries of payment through account payee cheques to the suppliers, copies of invoices for purchases and a stock statement, i.e. stock reconciliation statement are filed

purchased could not be rejected. In the case of Rajeev Kalathil (supra) the Tribunal has held as under:

“2.4. We find that AO had made the addition as one of the supplier was declared a hawala dealer by the VAT Department. We agree that it was a good starting point for making further investigation and take it to logical end. But, he left the job at initial point itself. Suspicion of highest degree cannot take place of evidence. He could have called for the details of the bank accounts of the suppliers to find out as whether there was any immediate cash withdrawal from their account. We find that no such exercise was done.”

In the present case also the AO had made the addition on the basis of information received from the Sales tax department, but, he did not make any independent inquiry. He did not follow the principles of natural justice before making the addition. The FAA had reduced the addition to 20%, but he has not given any justification except stating that same was done to plug the probable leakage revenue. Considering the peculiar facts and circumstances of the case, we are reversing the order of the FAA. Effective ground of appeal is decided in favour of the assessee. First three grounds of appeal are about

ITA No.2545/Mum/2014-AY.-2010-11:

6. First three grounds of appeal are about disallowance made under conveyance expenses/office expenses/travelling expenses, telephone expenses and warehouse/godown rent. During the assessment proceedings the AO found that the assessee had debited various expenses to its P&L account namely conveyance expenses (Rs.96,582/-), office expenses (Rs.49,486/-), staff welfare expenses (Rs.64,882/-), sundry expenses (Rs.52,465/-) and travelling expenses (Rs.56,480/-). He asked the assessee to substantiate with supporting bill/vouchers and to prove that expenses were incurred wholly and exclusively for business purposes. On verification of details filed by the assessee, the AO found that expenses were not supported by proper bill/vouchers, that certain expenses were incurred through self made vouchers, that almost all the expenses were paid in cash for which only self-made vouchers were prepared. He held that personal element embedded in those heads of expenditure could not be ruled out for want of itinerary/log book etc. Therefore, he disallowed a sum of Rs.1.59 lacs (being 50% of the total expenditure or Rs.3.19 lacs) and added back to the total income of the assessee. He found that he debited telephone expenses of Rs.61,073/- in the P&L Account. On verification from the ledger account the AO found that an expenditure of Rs.51,799/- was paid in cash without any supporting evidence or documents, that assessee had produced only self made vouchers. He held that cash payment under the head telephone expenses amounting to Rs.51,799/- was a bogus expense and had to be disallowed.

Similarly, he found that assessee had claimed warehouse expenses of Rs.96,000/-, that the expenses were paid in cash without any supporting documentary evidences. He directed the assessee to furnish the address of warehouse and copy of lease and license agreement for the warehouse, mode of payment and name of the person to whom the warehouse charges were paid. The assessee did not furnish the name and the address of the party to whom the expenses, amounting to Rs.96,000/- were paid in cash. Therefore, the AO disallowed the expenditure and added the same to the income of the assessee.

7. Aggrieved by the order of the AO, the assessee preferred an appeal before the FAA. Before him, it was submitted that conveyance expenses (Rs.96,582/-) had been incurred by the assessee as well as the employees and the persons connected with the business for travelling, the expenses were to be paid in cash, that the disallowance made by AO @ 50% was very high, that office

expense of (Rs.49,486/-) included maintenance items, sweeping charges, the payments were made in cash, that the staff welfare expenses were incurred for tea, coffee cold drink etc., that sundry expenses of (Rs.52,465/-) included general repairs, repairs to furniture and similar expenses, travelling expenses of (Rs.56,480/-) were incurred for travelling outside Mumbai for business purposes, that the disallowance made by the AO was on higher side. With regard to telephone expenses the assessee argued that it included payment of tata indicom telephone and included payment of mobile bill of employees, that the expenses were incurred for business it was further submitted that warehouse expenses were paid in cash. Assessee furnished a copy of leave and license agreement. The FAA called for Remand Report (RR) from the AO.

After considering the assessment order, remand report and the submissions of the assessee, the FAA held that the contention of the assessee about various expenses, (Rs1.59lacs) could not be accepted, that he had not produced any supporting documents to substantiate its claim, that except a copy of ledger account the assessee had not produced even a single documentary evidence, that he had not given party-wise breakup of expenses, that in place of travelling expenses the assessee should have travelling tickets etc, that the assessee was operating his business activities from his residential premises and did not have any separate office, that during the assessment proceeding he had furnished details of only one employee, that he had not paid salary to any one, that the assessee was not maintaining any office premises for its employees, that expenses incurred on conveyance and office maintenance and staff welfare could not be justified. With regard to the Leave and License agreement, the FAA held that agreement was entered in to between Sardar Trading Co. and one Premaram D Vishnoi, that the assessee had no relation with Premaram D Vishnoi, that the assessee had not filed documentary evidence to prove the genuineness of payment of warehousing charges, that claim of the assessee that Premaram D Vishnoi allowed him to use the warehouse was without any basis. Finally, he upheld the order of the AO with regard to the expenses disallowed under various heads.

8. Before us, the Authorised Representative (AR) contended that the disallowances were on higher side. Departmental Representative (DR) supported the order of the FAA.

8.1 We have heard the rival submissions and perused the material before us. We find that the expenses incurred under five heads namely conveyance, office expense staff welfare expenses sundry expenses and travelling expenses had been incurred in cash, that assessee had not produced supporting documentary evidence before the AO/FAA to justify the claim, that the FAA had given a categorical finding of fact that the assessee was running his business from his residence, that he had not employed any person, that no evidence was produced regarding travelling by the person of the assessee outside Mumbai, that the AR was not able to controvert the findings given by the FAA. In these circumstances, in our opinion, the order of the FAA does not suffer from any legal infirmity with regard to those five items.

As far as telephone expenses are concerned we would like to mention that the AO had partially allowed the expenditure claimed by the assessee and had disallowed the remaining amount as the assessee had not produced supporting evidences. In these circumstances, we are of the opinion that order of the FAA does not need any interference from our side.

We further find that the assessee had claimed that warehousing charges were paid in pursuance of an agreement, that the FAA had analysed the said agreement and had reached the conclusion that the assessee had no connection with that agreement. As the assessee had not proved that he had paid the warehousing charges therefore, the FAA rightly upheld the disallowance. For

claiming deduction u/s.37(1) of the Act the assessee has to lead evidences in his support-he has to produce documentary evidence to prove that expend was actually incurred and was incurred wholly and exclusively for the purpose of business in the case of Ramanand Sagar (256 ITR 134)the Hon'ble Bombay High Court has held that the burden of proof is on the assessee to establish beyond doubt that the expenditure is solely incurred for the purpose of business.In the case before us,the incurring of expenditure disallowed by AO and upheld by the FAA itself is not proved.Thus,the assessee has failed the first test itself.In short,confirming the order of the FAA, we decide Gr.No.1-3 against the assessee.

9.Second effective ground(Ground of Appeal 4-5) is about addition of Rs.3.00 lacs on being capital introduced by the aa.During the asstt proceedings,the AO found that the assessee had introduced capital amounting to Rs.3.00 lacs in its proprietary firm, that he had not furnished cash flow statement to substantiate its claim.The AO added the said amount as income from his undisclosed sources u/s.68 of the Act.

10.Before the FAA,during the appellate proceedings the assessee stated that he was maintaining his personal books of account apart from the business book of proprietary firm.The assessee produced his personal books including cash book and the Balance-sheet before him and claimed that he had surplus money in his own personal account.The FAA called for a RR from the AO. In his report the AO mentioned that the assessee had opening balance of rs.3.84 lakhs as per the passbook, that out of Rs.3.84 lacs a sum of Rs.3.00 lacs was transferred to the capital account of Divya Alloys,that the matter could be decided on merits.The FAA,after considering the available material,held that the Balance-sheet was never furnished with the department, the explanation of the aa was not satisfactory.Finally, he upheld the addition made by AO.

11.During the course of hearing before us,the AR contended that the assessee had filed cash flow statement,that the personal balance-sheet of the assessee showed that he had sufficient funds,that no inquiries were made in that regard.DR left the issue to the discretion of the Bench.

We have heard the rival submissions and have perused the material before us.We find that the assessee had filed the cash flow statement and the balance sheet in his support,that the FAA had not analysed the documents properly,that availability of cash was prima facie established.In our opinion,it requires further investigation.Therefore,in the interest of justice we are remitting back the issue to the file of the AO for fresh adjudication,who will decide the matter afresh after affording a reasonable opportunity of hearing to the assessee.Grounds no.4-5 are decided in favour of the assessee,in part.

12.Next ground of appeal deals with addition of Rs.2.10 lakhs on account of bogus purchase. During the course of assessment proceedings,the AO found that the assessee had purchased goods worth Rs.10.50 lakhs from Valiant Steel Engineering Co.,that the name of that company was appearing in the list of the STD of Maharashtra Government.He made the addition of said amount on the same lines on which addition was made for earlierAY.In the appellate proceedings,the FAA reduced the addition to Rs.2.10 lakhs.

13.Before us,the AR and the DR reiterated the argument that were made for AY.2009-10. Following our order for the earlier AY.,we delete the partial addition retained by the FAA. Effective ground no.3 is decided in favour of the assessee.

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14.Only ground of appeal filed by the AO is about deletion of addition made by him under the head bogus purchases.As stated earlier,the AO had added Rs.10.50 lakhs to the income of the assessee for the year under appeal and FAA had reduced it to Rs.2.10 lakhs.We have deleted the addition made under the head bogus purchases while deciding the appeals filed by the assessee for both the AY.s.So,deciding the effective ground of appeal against the AO,we uphold the partial deletion made by the FAA.

As a result,appeal filed by the assessee for the AY.2009-10 stands allowed and appeal for the AY.2010-11 is partly allowed.Appeal filed by the AO is dismissed.

फलतः निर्धारिती द्वारा दाखिल की गई अपील नि.व.2009-10 की अपील मंजूर की जाती है और नि.व.2010-11 की अपील अपील अंशतः मंजूर की जाती है.निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है

Order pronounced in the open court on 1st January, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 01 जनवरी, 2016 को की गई।

Sd/-

Sd/-

(संदीप गोसांई/Sandeep Gosain)

(राजेन्द्र / Rajendra)

न्यायिक सदस्य/Judicial Member

लेखा सदस्य/Accountant Member

मुंबई Mumbai, दिनांक Date: 01.01.2016

व.नि.स./Jy.Sr.PS.

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

1. Assessee /अपीलार्थी
2. Respondent /प्रत्यर्थी
- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
5. DR “ E” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि के खंडपीठ,आ.अ.अधि.मुंबई
6. Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.