

आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई में।

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

आयकर अपील सं./I.T.A. No. 2960/Mum/2016

(निर्धारण वर्ष / Assessment Year : 2011-12)

Soman Sun Citi, C/o Sun Soman Square Datar Block, Opp. Parijat Society, Shajahand Chowk, Agra Road, Kalyan (W)- 421301	बनाम/ v.	JT. CIT , Range-2, Kalyan
स्थायी लेखा सं./PAN : AADAS4737J		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri. Devendra Jain	
Revenue by :	Shri Rajat Mittal	

सुनवाई की तारीख / **Date of Hearing** : 01.08.2017

घोषणा की तारीख / **Date of Pronouncement** : 23.10.2017

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 2960/Mum/2016, is directed against the appellate order dated 16.02.2016 passed by learned Commissioner of Income Tax (Appeals)-3, Thane (hereinafter called "the CIT(A)"), for assessment year 2011-12, appellate proceedings had arisen before learned CIT(A) from the assessment order dated 25.03.2014 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

1. *The Ld. CIT (A) and the Ld. AO have completed the assessment without considering the facts & circumstances of the case, which is contrary to law and is against the principles of natural justice.*

2. Additions u/s. 69C for disallowing alleged bogus purchases aggregating Rs. 44,78,415/- :

a. *The Ld. CIT (A) and the Ld. AO have erred in facts and in law while disallowing alleged bogus purchases aggregating to Rs. 44,78,415/- u/s. 69C.*

b. *The Ld. CIT(A) and the Ld. AO have erred in invoking the provisions of sec. 69C which is triggered only in the case where the source of expenditure is not explained and not in respect of authenticity of such expenditure.*

c. *The Ld. CIT (A) and the Ld. AO ought to have taken cognizance of the fact that source of such expenditure is duly reflected in the books of accounts and accordingly there is no case of unaccounted expenditure envisaged u/s. 69C.*

d. *The Ld. CIT (A) and the Ld. AO have erred in facts and in law by ignoring various documentary evidences provided by the appellant firm in support of the genuineness of the said purchases.*

e. *The Ld. CIT (A) and the Ld. AO have erred in making the addition merely on the basis of third party statement without even affording any opportunity to cross verify.*

f. *The Ld.CIT (A) and the Ld. AO have erred in making assumptions and treating the affidavit filed by the suppliers with the Sales Tax Department, stating that they provide accommodations bills, to be a conclusive one.*

g. *The Ld. CIT (A) and the Ld. AO have erred in relying upon certain judicial pronouncements which are inapplicable, not relevant or clearly distinguishable.*

ALTERNATE GROUND

3. Alleged violation of provisions of Sec. 40A(3):

a. *The Ld. CIT (A) and the Ld. AO have also erred in law and in facts in alleging that there is contravention of the provisions of section 40A(3) of the Act, completely ignoring the fact that all the payments to the subject party were made by crossed account payee cheques through regular bank account of the appellant firm.*

b. *The Ld. CIT (A) and the Ld. AO have also erred in law and in facts in alleging that the appellant firm has received back cash from the subject party without bringing on record any independent evidence in support of the same.*

4. Additions u/s. 40(ba) for Interest of Rs. 83,97,919/- paid to partners:

a. *The Ld. CIT (A) and the Ld. AO has erred in law and in facts by disallowing a sum of Rs. 83,97,919/-, u/s. 40(ba) as Interest on capital paid to the partners of the Appellant Firm, ignoring the fact that the*

appellant firm is, in fact, a Partnership Firm registered with the Registrar of Firms, in terms of provisions of the Partnership Act, 1932.

b. The Ld. CIT (A) and Ld. AO ought to have appreciated that the appellant partnership firm is inadvertently allotted PAN as an AOP.

c. The Ld. CIT (A) and the Ld. AO ought to have considered that the said interest on capital, used exclusively for the appellant partnership firm's business, is otherwise also deductible u/s. 37.

RELIEF CLAIMED

1. The appellant firm be allowed to claim purchases aggregating to Rs.44,78,415/-.

2. The appellant firm be allowed to claim Interest paid to partners aggregating to Rs. 83,97,919/-."

3. The assessee is an AOP carrying on business of construction of residential flats/commercial units. The assessee has shown purchases of Rs.2,98,75,700/- during the year and on perusal of purchases it was observed by the A.O that the assessee had,inter-alia, made purchases from following parties:-

Name of party	TIN No	Amount	133(6) sent
Hemal Enterprises	27090261071	Rs 3,51,454/-.	Unserved
Navkar Corporation	27810662837 V	Rs 25,25 390/-	Unserved
Om Sai Enterprises	27370739127 V	Rs.16,01 571/-	Unserved
Total amount		RS.44 78,415/-	

3.2 The AO observed that M/s Navkar Corporation and Om Sai Enterprises are in the list of bogus purchase dealers circulated by the Maharashtra Sales Tax Authorities . The AO issued notices u/s. 133(6) to the above three mentioned parties at the addresses furnished by the assessee but the said notices u/s 133(6) returned unserved . The A.O asked assessee to furnish latest addresses of these three parties and also to produce these three parties before the AO with their books of accounts , bills and vouchers. The assessee failed to furnish their latest addresses and also failed to produce these three parties before the AO for verification . The assessee also did not furnish any confirmation from the said parties before the AO. The AO also observed that Sales Tax Registration of these two parties namely M/s Navkar Corporation and M/s Om Sai Enterprises who appeared in the list of hawala

dealers prepared by Maharashtra Sales Tax Authorities were cancelled by the Sales Tax Authorities. The assessee only filed copy of the purchase bills and ledger account of the party. The assessee also claimed that payments had been made through banking channel. The assessee did not also furnish octroi receipts, lorry receipts or site gate pass/site stock register copy showing the movement of goods from the above parties to the assessee's site. It was observed by the AO that Shri Ashwin P Mehta proprietor of M/s Navkar Corporation in his statement recorded before Sales Tax Authorities had stated that he has not done any business and that only accommodation bills were being provided by his concern. It was unearthed by Sales Tax authorities during search that said Mr Ashwin P Mehta has floated large number of concerns including Navkar Corporation and Om Sai Enterprises and even cheque books of various concerns were found during search operations conducted by sales tax authorities. It was stated by Mr Ashwin P Mehta that he used to issue paper bills without physically supplying any material and he used to return cash against cheques received from purchasing parties after deducting his commission @5% and cash was handed over to Rajubhai who was paid monthly salary of Rs. 5000/- .It is observed by the A.O that Maharashtra Sales Tax Department had conducted investigation in the case of several dealers and beneficiaries and such investigations had unearthed a fraudulent racket involving many hawala dealers and beneficiaries and in the statement recorded by Sales Tax Authorities they have admitted the fact that the transaction are not genuine. It was also observed by the AO that purchase bills submitted by the assessee did not contain details such as lorry number, order date , challan number, date of removal of goods, mode of transport, the signature of the person at site who has received the goods or gate pass entry number. These hawala entry operators have also admitted before the sales tax authorities by furnishing an affidavit that they have only issued paper bills and no material was physically supplied by them .

3.3 The assessee explained that the material purchased from Om Sai Enterprises and Navkar Corporation were utilized in construction business of the assessee. The copies of bill, ledger account of the above parties and copy of bank statement evidencing the payments were filed by the assessee . The assessee submitted that material was duly purchased and used for

construction purposes and payments were made by account payee cheque. It was observed by the A.O that the assessee has not submitted lorry receipts, gate pass receipts , stock register and site stock register evidencing receipt of goods at site. The AO also observed from the bank statements of Om Sai Enterprises that person who was operating bank account was one Mr Abhishek Khanna while Mr. Ashwin Mehta was shown as proprietor of the said concern Om Sai Enterprises with Sales Tax Authorities. The said bank account was closed on 31-07-2010. The perusal of bank statements for 1-4-2010 to 31-03-2011 of Navkar Corporation and Om Sai Enterprises revealed that lot of cheques were cleared in their bank accounts which immediately after clearing , the funds were withdrawn in cash or transferred to other accounts in the same bank which bank accounts were also of hawala dealers declared by sales tax authorities. The A.O. relied upon the decision of ITAT, Delhi in the case of DCIT v. Phoolwati Devi (2000) 314 ITR ATI Delhi and decision of Hon'ble Supreme Court in the case of Sumati Dayal v. CIT (1995) 214 ITR 801(SC) and the AO concluded that Navkar Corporation and Om Sai Enterprises have not supplied any material to the assessee nor do they have any infrastructure or capacity to supply material and these concerns are only existing on papers and supplying bills without supplying any material. The A.O concluded that these purchases as are reflected in the said bills from Navkar Corporation and Om Sai Enterprises to the tune of Rs. 41,26,961/- were made by the assessee from other parties from the grey market by making payment in cash , while cheque were issued by the assessee in favour of Navkar Corporation and Om Sai Enterprises which were returned back by the said concerns to the assessee in the form of cash which is evidenced from the bank statement of the said concerns. Thus , the A.O. concluded that there is a violation of section 40A(3) as purchases had been made in cash and also there is a infringement of Section of 69C wherein these are bogus purchases and are unexplained expenditure which led to addition of Rs.41,26,961/- with respect to purchases from Navkar Corporation and Om Sai Enterprises which was added to the income of the assessee u/s 69C and in alternate additions of Rs. 41,26,961/- were made by the AO u/s 40A(3), vide assessment order dated 25-03-2014 passed by the AO u/s 143(3).

3.4 Further with respect to purchases from the third party Hemal Enterprises wherein purchases to the tune of Rs. 3,51,454/- were made by the assessee, the notices issued by the AO u/s 133(6) to the said party returned unserved. The assessee did not produce said party before the AO. The assessee did not file any confirmation from the said party nor could file the latest address of the said party. The assessee also did not file delivery challans nor lorry receipts were filed to show movement of goods. The AO treated the said purchase of Rs. 3,51,454/- as non genuine purchases and the same were added to the income of the assessee as bogus purchases, vide assessment order dated 25-03-2014 passed by the AO u/s 143(3) .

3.5 On perusal of the Profit and Loss account , it was observed by the AO that the assessee has paid interest of Rs.83,97,919/- to the members of AOP. The AO observed that that the assessee in an AOP consisting of three members namely M/s. Marudhra Builder 50% share, Citi Buildcon Pvt. Ltd. 25% share, and M/s. Soman & Associate 25% share. Since assessee has paid interest to its members, the assessee was asked to explain the same by the AO in the light of restrictions as are contained in Section 40(ba) . The assessee submitted that the assessee is AOP/Joint Venture firm and the members are two partnership firms viz. Soman & Associates, Marudhra Builder and a private limited company namely Citi Buildcon Pvt. Ltd. . It was submitted that the interest paid to the said partners have been offered for tax by the partners firms/company and hence it was prayed by the assessee that deduction of interest on capital should be allowed. It was submitted that interest is paid on investment which was expended wholly and exclusively for business purposes and also allowable as business expenses.

3.6 The A.O relied upon the provision of section 40 and held that assessee is an AOP and interest paid to member of an AOP is not allowable deduction while arriving at profit and gain of business or profession keeping in view provisions of Section 40(ba). It was observed by the AO that Section 40 is applicable notwithstanding anything to the contrary contained in the provisions of section 30 to 38 and hence interest of Rs.83,97,919/- paid by the assessee to its members were disallowed by the AO and added back to

the income of the assessee keeping in view the provision of Section 40 (ba). The A.O observed that M/s. Marudhra Builders has filed a loss return of Rs.4,46,981/- , M/s. Soman & Associates has shown an income of Rs.4,72,729/- and Citi Buildcon Pvt. Ltd has shown an income of only Rs.20,78,000/- . Thus , it was observed by the AO that only an amount of Rs. 25,50,000/- was effectively offered for taxation as against exempt income of Rs. 83,97,919/- claimed by the assessee towards interest paid to its members, which led to the disallowance of entire interest of Rs.83,97,919/- which was brought to tax by the AO at maximum marginal rate as one of the member of AOP was a private limited company chargeable to tax at maximum marginal rate, vide assessment order dated 25-03-2014 passed by the AO u/s 143(3) .

4. Aggrieved by the assessment order dated 25-03-2014 passed by the AO u/s 143(3), the assessee filed first appeal before learned CIT(A

4.2 The assessee reiterated its submissions before learned CIT(A) as were made before the AO. The learned CIT(A) observed that the assessee did not prove the consumption/utilization of material. It was also observed by learned CIT(A) that the assessee also failed to produce stock register, transportation bills, delivery challans, inward stock register , outward stock register and confirmations from the parties to prove the genuineness of the purchases. It was also observed by learned CIT(A) that information received from Maharashtra Sales Tax authorities incriminates assessee as these two parties namely Navkar Corporation and Om Sai Enterprises were declared as hawala dealers by Maharashtra Sales Tax department after investigations and the assessee has allegedly purchased from these parties wherein bogus bills were issued by these parties without supplying any material. These parties have infact confessed before sales tax authorities that they have merely issued bogus accommodation bills without supplying any material. The sales tax registration of these parties also stood cancelled by Maharashtra Sales Tax authorities. The assessee has also failed to produce these parties before the AO/CIT(A). The assessee has also failed to furnish site gate pass receipts of material at work site to prove the movement of goods. The learned CIT(A) confirmed 100% disallowance of unverifiable

purchases from hawala dealers in the hands of the assessee wherein assessment order of the AO was upheld.

4.3 With respect to the second issue concerning payment of interest of Rs. 83,97,919/- to its members, learned CIT(A) also dismissed the appeal of the assessee by upholding assessment order of the A.O. keeping in view provision of section 40(ba) of the Act, vide appellate order dated 16-02-2016 passed by learned CIT(A).

5. Aggrieved by the appellate order dated 16-02-2016 passed by learned CIT(A) , the assessee filed an appeal before the tribunal .

5.1 The Ld. Counsel for the assessee submitted that assessee is engaged in the construction business . It was submitted that the assessee has made total purchases to the tune of Rs.2,98,75,700/- , out of which purchases to the tune of Rs.44,78,415/- were held to be bogus purchases from the following three parties.

Name of party	TIN No	Amount	133(6) sent
Hemal Enterprises	27090261071	Rs 3,51,454/-.	Unservd
Navkar Corporation	27810662837 V	Rs 25,25 390-	Unservd
Om Sai Enterprises	27370739127 V	Rs.16,01 571/	Unservd
Total amount		RS.44 78415/-	

The learned counsel for the assessee submitted that the payments were made to these parties against purchases effected from them through account payee cheque . It was submitted that delivery challans / lorry receipts could not be produced before the authorities below. It was submitted that notices u/s. 133(6) were issued by the AO which could not be served on these three parties as they are not traceable . It was submitted that the assessee is not in a position to produce these parties as they are not traceable. It was submitted that the A.O. added entire amount of bogus purchases to the tune of Rs. 44.78 lacs u/s. 69C which was confirmed by learned CIT(A). It was submitted that onus is on the A.O to prove that these are bogus purchases . It was submitted that Revenue is relying on statement of these parties which were recorded at the back of the assessee by sales tax authorities and

opportunity of cross examination has not been granted to the assessee. It was submitted that even copy of statement recorded of the said bogus dealers before the Sale Tax Authorities were not provided to the assessee . It was submitted that no consumption/utilisation record was kept by the assessee of the material purchased. it was also submitted that no stock register has been maintained nor consumption record were maintained. It was submitted that profits of the assessee has fallen during the impugned assessment year wherein GP ratio was 6.33% as against GP ratio of 9.12% and 18.2% for assessment year 2010-11 and 2009-10 respectively. The learned counsel for the assessee drew our attention to the page no 8 to 9 of the learned CIT(A) orders and submitted that the assessee has specifically asked for cross examination of these parties which was not granted . He relied upon the decision of Hon'ble Supreme Court in the case of Andaman Timber Industries v. CCE in civil appeal no. 4228 of 2006 , wherein Hon'ble Supreme Court has held that not allowing cross examination of the witness by the adjudicating authority wherein the statement of the witness was made basis of the order is a serious flaw which makes the order nullity. It was submitted that assessee should be given opportunity to cross examine these parties and he relied upon the decision of tribunal in the case of Ratnagiri Stainless Pvt. Ltd. v. ITO in ITA no. 4463/Mum/2016 . The assessee also relied upon decision of Hon'ble Supreme Court in the case of Kishinchand Chellaram v. CIT (1980) 125 ITR 713(SC). It was submitted that copy of statement/affidavit furnished by these hawala dealers before sales tax authorities have not been provided to the assessee. It is submitted that these are evidences collected at the back of the assessee of the trird parties and it cannot be used against the assessee without confronting the same to the assessee.

5.2 With respect to the second issue , the learned counsel for the assessee submitted copy of supplementary partnership deed dated 22.09.2008 as an additional evidences which is placed in the file. An affidavit dated 29-07-2017 is also filed by the assessee duly executed by Mr. Kishore Soman that there was a supplementary partnership deed dated 22-09-2008(pb/page15-19) which was executed but the same could not be produced before the authorities below and instead JV deed dated 12-09-2008 was only submitted. It was claimed that the assessee is a partnership firm and not

AOP. The learned counsel for the assessee also submitted copy of acknowledgement of application with Registrar of firms and also copy of correspondence with the registrar of firms which are placed in paper book 20-25 as an additional evidences. Prayer was made before us to admit all these additional evidences as it is claimed that these additional evidences goes to the root of the matter for adjudicating the issue on merits . It was submitted that these additional evidences were not before the A.O and learned CIT(A). It was submitted that these additional evidences be admitted and matter may be restored to the file of the AO for verification and then the issue can be adjudicated by the AO de-novo on merits. The learned counsel for the assessee relied upon decision of ITAT Patna in Abhay Kumar Shroff v. ITO reported in (1997) 63 ITD 144(Pat.)(TM).

6. The Ld. D.R on the other hand submitted that the assessee has not proved consumption/utilization of the material which is allegedly purchased from these bogus dealers . It was submitted delivery of material and movement of material to the assessee place is also not proved . It was submitted that no stock records were produced. The learned DR relied upon the decision of Hon'ble Supreme Court in the case of N.K Proteins Limited v. DCIT reported in 2017-TIOL-23-SC-IT . The learned DR also relied upon decision of Hon'ble Rajasthan High Court in the case of CIT v. Carpet Mahal in DB ITA No. 170/2009.

6.2 On the second issue , the Ld. DR submitted that additional documents submitted by the assessee as an additional evidences need to be verified and matter may be set aside and restored to the AO for necessary verifications and enquiry before adjudication on merits.

7. We have heard rival contentions and perused the material on record including case laws relied upon by rival parties. We have observed that the assessee is in construction business. The assessee has purchased material to the tune of Rs.2.98 crore during the previous year relevant to the impugned assessment year , out of which material of value of Rs. 44.78 lac was allegedly purchased from three parties listed below:-

Name of party	TIN No	Amount	133(6) sent
Hemal Enterprises	27090261071	Rs 3,51,454/-.	Unserviced

Navkar Corporation	27810662837 V	Rs 25,25 390-	Unservd
Om Sai Enterprises	27370739127 V	Rs.16,01 571/	Unservd
Total amount		RS.44 78415/-	

The AO issued notices u/s 133(6) to these three parties which returned unserved. The assessee also could not produce these parties before the authorities below. The assessee was directed by the AO to give the latest addresses which assessee could not give. The assessee also could not produce confirmations from these three parties. The assessee, however, produced purchase bills and also evidence of making payment to these three parties by cheque through banking channel. The purchase bills so submitted by the assessee, however, did not contain any details such as lorry number, order date, challan number, date of removal of goods, mode of transport, the signature of the person at site who has received the goods or gate pass entry number. The two parties namely Navkar Corporation and Om Sai Enterprises are listed as hawala dealers by Maharashtra Sales Tax Department and their sales tax registration was cancelled by Maharashtra Sales Tax authorities. The Maharashtra Sales tax authorities during search operations recorded their statements wherein these parties stated that that they are only issuing bogus purchase bills on papers without supplying any physical material. The said parties have also given affidavits before sales tax authorities confirming that they are merely accommodation entry providers and issues only paper bills without supplying any material. It was unearthed by Sales Tax authorities during search that said Mr Ashwin P Mehta has floated large number of concerns including Navkar Corporation and Om Sai Enterprises and even cheque books of various concerns were found during search operations conducted by sales tax authorities. It was stated by Mr Ashwin P Mehta that he used to issue paper bills without physically supplying any material and he used to return cash against cheques received from purchasing parties after deducting his commission @5% and cash was handed over to Rajubhai who was paid monthly salary of Rs. 5000/-. It was also revealed from the bank statements of Om Sai Enterprises that person who was operating bank account was one Mr Abhishek Khanna while Mr. Ashwin Mehta was shown as proprietor of the said concern Om Sai Enterprises with Sales Tax Authorities. The said bank account was closed on 31-07-2010. The perusal of bank statements for 1-4-

2010 to 31-03-2011 of Navkar Corporation and Om Sai Enterprises revealed that lot of cheques were cleared in their bank accounts which immediately after clearing , the funds were withdrawn in cash or transferred to other accounts in the same bank which bank accounts were also of hawala dealers declared by sales tax authorities. The assessee did not produce stock register nor the assessee could prove utilisation/consumption of material for construction activities. The assessee also could not prove delivery of material to the assessee site as no delivery challans nor lorry receipt/octroi receipts were produced. The site stock register/site gate pass where the material was consumed was also not produced. The profitability of the assessee has also significantly fallen to GP ratio of 6.33% during previous year relevant to the impugned assessment year from 9.12% in AY 2010-11 and 18.2% in AY 2009-10 . Under these circumstances , additions have been made of 100% of bogus purchases by the A.O which stood confirmed by learned CIT(A). The assessee is aggrieved that the statements/affidavits of these alleged hawala dealers which were recorded at the back of the assessee were utilised by Revenue to cause prejudice to the assessee without confronting the assessee with the copies of the said statements/affidavits , and also cross examination of these alleged bogus dealers were not allowed to the assessee by Revenue. The right of cross examination is not absolute. If we eschew the statement/affidavit of hawala dealers from record, the primary onus which lay on the assessee to prove the genuineness of the purchases and also to prove consumption/utilization of the material was not discharged by the assessee . The purchases of the material are in the books of the assessee wherein the assessee is claiming the same as deduction from the income and assessee has to discharge onus of proving that the purchases are genuine and the material was infact utilised/consumed for construction business of the assessee which assessee failed to do so in the instant case keeping in view factual matrix of the case as is emerging from records. The assessee could not produce the parties before the A.O nor were the notices issued by the AO u/s. 133(6) were served on the these three purchasing parties. The assessee could not produce latest addresses of these three purchasing parties to enable AO to make necessary enquiry, investigation and verifications with respect to the alleged purchases made from these parties. The assessee did not maintain stock register/site stock records nor was movement of stock proved by the assessee as no delivery challans, lorry

receipts nor octroi receipts , site stock register/gate passes were produced. The assessee has not proved utilization / consumption of material for its construction business. The assessee also could not produce movement of material to its place from supplier as no delivery challans/ lorry receipt /octroi receipts could be produced. The profitability of the assessee has also significantly fallen in the impugned year vis-a-vis preceding years which the assessee could not explain/justify reasons for such significant fall. Thus, even if statements/affidavits of the these alleged hawala dealers are discarded/eschewed from records, the assessee could not prove genuineness of the purchases and its utilisation/consumption for the assessee's construction business and there is a sufficient material on record to fasten tax liability on the assessee. Under these circumstances , we have observed that the authorities below have taken a plausible view of disallowing 100% of bogus purchases as genuineness of the purchases as also consumption/utilization of material is not proved. The view of the authorities below is supported by decision of Hon'ble Supreme Court in the case of N.K Protein Ltd. (supra). In these circumstances , we are of the considered view that no prejudice is caused to the assessee by non granting of opportunity of cross examination by the authorities below as right of cross examination is not absolute as in the instant case even primary onus that fell on the assessee did not stood discharged. Had assessee discharged its primary onus, but still the authorities proceed to prejudice assessee based solely on the incriminating statements/affidavits of third parties recorded at the back of the assessee, the right of the assessee to cross examine these third parties will become absolute. It is not a case that the authorities below have merely/solely relied on the statement/affidavit of third parties namely hawala dealers recorded at the back of the assessee to cause prejudice to the assessee rather primary onus that lay on the assessee was not discharged by the assessee . Thus we uphold/sustain the orders of learned CIT(A) in which we donot find any infirmity , which we confirm/sustain . The assessee fails in this ground. We order accordingly.

7.2. Next ground is with regard to disallowance of interest of Rs. 83,97,919/- paid to the members of AOP by invoking provisions of Section 40(ba). The assessee has now filed an additional evidences by way of supplementary partnership deed dated 22.09.2008(pb/page 15-19) amending original JV

agreement dated 12-09-2008 and it is now claimed that the status of the assessee is of the partnership firm and not AOP . The assessee has also filed correspondence with registrar of firms , which are all placed in paper book filed with the tribunal(page 22-25/pb). These documents needs verification by the authorities below and we are inclined to set aside and restore this issue to the file of the AO for necessary verification and enquiry before adjudicating denovo on merits in set aside proceedings after giving an opportunity of being heard to the assessee in accordance with principles of natural justice in accordance with law. One peculiar facts we have observed that the supplementary partnership deed is dated 22.09.2008 modifying J.V agreement dated 12.09.2008 . The stamp paper used for aforesaid supplementary partnership deed are issued by treasury on 28-04-2008 ,while the original J.V agreement was executed on a stamp paper issued by treasury on 02.09.2008. The A.O shall verify this aspect and its genuineness as to why old stamp papers which were issued by treasury even prior to the execution of JV agreement were used by the assessee for modifying original JV agreement to execute supplementary partnership deed. We order accordingly.

8. In the result appeal of the assessee in ITA No.2960/Mum/2016 for assessment year 2011-12 is partly allowed for statistical purposes.

Order pronounced in the open court on 23.10.2017

आदेश की घोषणा खुले न्यायालय में दिनांक: 23.10.2017 को की गई ।

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 23.10.2017

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench, E
6. Master File

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BY ORDER

**DY/ASSTT. REGISTRAR
ITAT, MUMBAI**