

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "E" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA.No.4709/Del./2017
Assessment Year 2013-2014

Shri Deepak Mittal, Delhi. C/o. M/s. RRA Tax India, D-28, South Extension, Part-1, New Delhi-110049. PAN AISPM6139J	VS	The Asst. Commissioner of Income Tax, Circle – 60 (1), New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri R.S. Singhvi, C.A. and Shri Satyajeet Goel, C.A.
For Revenue :	Ms. Shefali Swroop, CIT-D.R.

Date of Hearing :	13.03.2018
Date of Pronouncement :	23.03.2018

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by assessee has been directed against the order of the Ld. CIT(A)-19, New Delhi, Dated 26th June, 2017, for the A.Y. 2013-2014.

2. The facts of the case are that the assessee filed return of income declaring income at Rs.22,52,471/-. The assessee is

an individual and engaged in the business of trading/
Distribution of ITC Products under the name and style of M/s.
DK Enterprises. On verification of the P & L A/c, audited report
and books of account of the assessee, it was noticed that
assessee had made huge payments to M/s. Hanuman Traders
in cash. The assessee was requested to produce ledger account
of the party. The A.O. noted that assessee has made cash
payments to this party and required to assessee to explain why
the same should not be disallowed under section 40A(3) of the
I.T. Act, 1961. The assessee, in his reply, submitted that copy
of the audited accounts are filed to show sundry creditors in a
sum of Rs.1.79 crore in the balance sheet in respect of one M/s.
Hanuman Traders who will is the dealer of the assessee and
having the transaction with the party as a normal accounting
practice and deals in ITC Products and wheat floor (Aatta) and
same was sold/purchased in cash to wholesale dealers to
approach the assessee and having the credit amount of Rs.1.58
crores as on 31st March, 2013 and one M/s. Garg Cloths House
shown a sum of Rs.14 lakhs and remaining balance as creditors

of M/s. ITC Limited. The assessee did not produce the copy of the ledger account. Therefore, assessee was asked to produce the party M/s. Hanuman Traders and also produce purchase register, sale register and copy of the ledger of ITC Limited. The assessee explained that assessee is not in contact with M/s. Hanuman Traders and that they have left the business. The Inspector was deputed to make enquiries at the address of M/s. Hanuman Traders. The enquiry report of the Inspector stated that *"firm was not existing/available at the given address"*. The assessee was confronted with these facts. Summons were issued under section 131 to the assessee to appear personally. The assessee appeared and produced purchase and sale ledger. It was noticed that name of M/s. Hanuman Traders did not exist in purchase and sale ledger. The statement of assessee were recorded under section 131 on 28th March, 2016. The relevant portion of the statement are reproduced in the assessment order in which assessee was confronted that payments in cash have been made to M/s. Hanuman Traders of Rs.6,92,25,000/- The assessee explained that it is not recorded in the books of

account as purchase and stated that it is undisclosed part of his trading activities. It was also stated that sale from purchases are not recorded in the books of account. The assessee further explained that some purchases of unbranded Aatta were made which were sold in next year and assessee offered the same for taxation. The A.O, therefore, noted that assessee has confessed in his statement that he has neither shown the purchases of unbranded Aatta purchased from M/s. Hanuman Traders in his books of account nor has shown the corresponding sales in his books of account. The profit earned out of these transactions have not been accounted by the assessee in his books of account. The assessee in his statement further submitted that purchases and sales made of the product so shown in the name of M/s. Hanuman Traders, are not accounted in the books of account and same may be taxed. The assessee offered the same amount for taxation and submitted that he has also incurred expenses relating to purchase and sales made, therefore, requested that gross profit on the sale may be taxed @ 8%. The A.O, therefore, noted that since purchases and sales of

unbranded Aatta was not disclosed in the books of account, therefore, books of account of the assessee are not reliable and the same were accordingly, rejected under section 145(3) of the I.T. Act. The A.O. reproduced the letter of the assessee in which it is confirmed that additional turnover was made of Rs.7,55,15,150/- without claiming expenses, on which, profit rate of 8% was surrendered for taxation in a sum of Rs.60,41,212/-. The A.O. rejected the explanation of assessee that he was acting as an agent of M/s. Hanuman Traders because no such documentary evidence was produced. The A.O. noted that assessee has paid Rs.6,92,25,000/- in cash and received Rs.7,55,15,150/- in cash, which, a Commission Agent will not receive it. The A.O. re-casted Trading, P & L A/c and made the addition on account of net profit of Rs.4,14,44,156/-

2.1. The A.O. in view of the above findings also noted that since cash payments of purchases are made in a sum of Rs.6,92,25,000 to M/s. Hanuman Traders, therefore, Section 40A(3) is applicable. In the absence of any plausible

explanation, the addition of Rs.6,92,25,000/- was made under section 40A(3) of the I.T. Act, 1961.

2.2. The A.O. also noted that since cash payments are made to M/s. Hanuman Traders for purchase and identity and existence of M/s. Hanuman Traders is not established and an amount of Rs.6,31,90,150/- is shown as receipt in cash, therefore, it was considered as unexplained credit under section 68 of the I.T. Act, but, no separate addition was made of this amount because the addition under section 40A(3) has already been made.

3. The assessee challenged both the above additions before the Ld. CIT(A). The Ld. CIT(A) confirmed the rejection of the books of account under section 145(3) of the I.T. Act. In respect of re-casting of the P & L A/c, the Ld. CIT(A) did not agree with the findings of the A.O. It is noted that since the account of M/s. Hanuman Traders reflect only cash sales, debits in account do not necessarily reflect the amount of purchases. This is more so, in view of the fact that assessee has

neither maintained nor given any stock tally in respect of the quantity purchases or sold. The assessee stated that there was a receipt of material which had not been sold and for which payment might not have been made. In any case, payment shown in the account might not be bill or bill payment but payments made on adhoc basis. A.O. however, added the entire debit side totaling to Rs.6,92,25,000/- as undisclosed purchase and sales have been re-casted by adding the entire credit side of Rs.8,50,30,150/- and outstanding balance of Rs.1,58,05,150/-, thereby, increasing the sales by Rs.10,08,35,300/-. Ld. CIT(A), therefore, noted that A.O. is not correct in his approach to recast the P & L A/c. Since, credit side do not reflect the sales, but, it has opening credit balance of Rs.95,15,000/-. The sales, if any, reflected in the above account could only be to the tune of Rs.7,55,15,150/- for the year. The outstanding payable balance could not have been added to increase amount of sales. Therefore, apparently, there is a mistake in recasting of the P & L A/c, if the version of the assessee that ledger account of M/s. Hanuman Traders reflect

the entire purchase and sales is accepted, the profit out of the same would be to the tune of Rs.62,90,150/- (sales Rs.7,55,15,150 (-) purchases Rs.6,92,25,000/-). The Ld. CIT(A) instead of addition of net profit of Rs.4,14,44,156/-, restricted the addition of net profit to Rs.62,90,150/-.

4. The Ld. CIT(A), as regards disallowance under section 40A(3) of the I.T. Act, noted that assessee violated these provisions for making cash payments. Accordingly, confirmed the addition of Rs.6,92,25,000/-. This ground of appeal of assessee was dismissed.

4.1. The Ld. CIT(A), as regards addition under section 68 of the I.T. Act, which the A.O. did not make separate addition of Rs.6,31,90,150/- on account of disallowance made under section 40A(3) of the I.T. Act, noted that assessee has stated that he was purchased unbranded Aatta from M/s. Hanuman Traders and selling the same. The assessee is a Trader and Distributor of ITC for branded Aatta. The assessee did not produce M/s. Hanuman Traders as well as did not produce

sufficient material to prove his identity. The assessee despite giving opportunities has not been able to adduce any iota of evidence that there was any entity like M/s. Hanuman Traders, which had the capacity to supply goods over Rs.6.50 crores on credit to assessee. There is no evidence as to the receipt or dispatch of the goods. Entire sales have been made in cash. There is no evidence that cash so credited in the cash book reflects any sale proceeds of any material. These unexplained cash credits in cash book which had been allegedly posted to so-called M/s. Hanuman Traders remain unexplained. The peak thereof, comes to Rs.7,12,15,150/- as on 10th January, 2013, even ignoring the opening balance of Rs.95,15,000/-. The Ld. CIT(A), therefore, noted that assessee has not been able to substantiate the explanation that the money so deposited in the books of account reflected the sales of unbranded Aatta. The assessee failed to prove existence of this party. The Ld. CIT(A), therefore, made the addition of Rs.7,12,15,150/- under section 68 of the I.T. Act.

5. We have heard the Learned Representatives of both the parties and perused the material available on record.

6. The assessee raised additional ground of appeal challenging the validity of the assessment proceedings on account of jurisdiction of the A.O. Learned Counsel for the Assessee, however, after brief arguments, did not press the additional ground for admission in view of provisions contained in Section 124(3) and 127(3) of the I.T. Act. In view of the submission of the Learned Counsel for the Assessee, the additional ground of appeal of assessee is rejected.

7. Learned Counsel for the Assessee, during the course of arguments, did not press Ground Nos. 1, 2, 7 and 8 with regard to rejection of the books of account under section 145(3) of the I.T. Act and estimating the net profit of assessee at Rs.62,90,150/-. These grounds of appeal of the assessee are accordingly, dismissed as not pressed.

8. The assessee on ground Nos. 3 and 4, challenged the disallowance of Rs.6,92,25,000/- under section 40A(3) of the

I.T. Act on account of purchases made in cash from M/s. Hanuman Traders. On ground Nos. 5 and 6, the assessee challenged the addition of Rs.7,12,15,150/- made by Ld. CIT(A), though the A.O. did not make separate addition of Rs.6,31,19,150/- under section 68 of the I.T. Act on account of peak credit.

9. Learned Counsel for the Assessee submitted that assessee explained before A.O. that transaction of sale of unbranded Aatta purchased from M/s. Hanuman Traders were made outside the books of account and offered the amount for taxation by applying the profit rate of 8% on unrecorded sales. The A.O. also noted in the assessment order that purchase of unbranded Aatta from M/s. Hanuman Traders and corresponding sales have not been shown in the books of account The A.O. accordingly, rejected the books of account under section 145(3) of the I.T. Act. He has submitted that when books of account of the assessee are not reliable and rejected, the A.O. is not justified in making the disallowance under

section 40A(3) of the I.T. Act. He has further submitted that there is no evidence on record to prove assessee made any investment in unrecorded purchases or that assessee received any amount from M/s. Hanuman Traders so as to consider the addition under section 68 of the I.T. Act. He has submitted that Ld. CIT(A) has merely recorded order sheet entry on 8th June, 2017, but has not been given any specific notice for making enhancement to the assessed income, which A.O. has not made. He has submitted that there is no basis for making both the additions against the assessee. He has submitted that where A.O. and Ld. CIT(A) rejected the books of account of the assessee and ultimately, estimated gross profit on suppressed sales, he could not make separate addition on account of unexplained investment, undisclosed income etc., and also cannot make disallowance of expenses under section 40A(3) of the I.T. Act. In support of his contention, he has relied upon the decisions in the case of CIT, Belgaum vs. Bahubali Neminath Muttin (2016) 72 taxman.com 139 (Karnataka) (HC), CIT, Ludhiana vs. Santosh Jain (2008) 296 ITR 324 (P & H) (HC), CIT vs. Banwari

Lal Bansidhar (1998) 229 ITR 229 (All.) (HC), Indwell Construction vs. CIT (1998) 232 ITR 776 (A.P.) (HC), CIT vs. Aggarwal Engg. Co. (2008) 302 ITR 246 (P & H), CIT vs. President Industries (2002) 258 ITR 654 (Guj.), CIT vs. M/s. Hind Agro Industries, ITAT, Chandigarh Bench and ITO vs. Nardev Kumar Gupta (2013) 22 ITR (Tribu.) 273 (Jaipur).

10. On the other hand, Ld. D.R. relied upon the orders of the authorities below and submitted that assessee failed to prove the identity of M/s. Hanuman Traders and that assessee violated Section 40A(3) of the I.T. Act because cash payments have been made to M/s. Hanuman Traders, therefore, both additions have to be confirmed.

11. We have considered the rival contentions. The Honble Gujrat High Court in the case of CIT vs. President Industries (2002) 258 ITR 654 (Guj.) held as under :

“In the course of survey conducted in the premises of the assessee, excise records found, which disclosed godown sales not disclosed in the books of account of the assessee.

The Assessing Officer made the addition of the undisclosed income of the entire sale proceeds thereof.

The Commissioner (Appeals) affirmed the addition but the Appellate Tribunal found that there was no material to indicate that the assessee made investments outside the books of account to make alleged sales and held that entire sale proceeds could not have been added as undisclosed income of the assessee but the addition could be only of the profits embedded in the sales. The Tribunal having declined to state a case, the Department applied to the High Court for an order calling for a reference;

Held, dismissing the application for reference, that the amount of sales could not represent the income of the assessee who had not disclosed the sales. The sales only represented the price received by the seller of the goods; only the realisation of excess over the cost incurred could form part of the profit included in the consideration for the sales. Since, there was no finding to the effect that

investment by way of incurring the cost in acquiring the goods which were sold had been made by the assessee and that that investment was also not disclosed, only the excess over the cost incurred could be treated as profit.”

12. The Honble Gujrat High Court following its earlier Judgment in the case of President Industries (supra), in the case of CIT vs. Samir Synthetics Mill (2010) 326 ITR 410 (Guj.), held as under :

“In the course of a search by the Excise Department in the premises of the assessee, it was found that the production of man-made fabrics was suppressed and only a small part thereof was shown in the excise register. The assessee could not reconcile the production, sales and the closing stock despite opportunity given by the Assessing Officer and addition in respect of unaccounted sales was made by the Assessing Officer. The Commissioner (Appeals) found that the assessee failed to explain the suppression of production of fabrics and also held that

any addition that was to be made was not in respect of the sale consideration but only in respect of the profit. The Commissioner (Appeals) reduced the addition made by the Assessing Officer. The Tribunal concurred with the Commissioner (Appeals) as it found that there was no evidence on record to prove that the assessee had claimed all the expenses in the profit and loss account. On appeal:

Held, dismissing the appeals, that in view of the concurrent findings of fact by the Commissioner (Appeals) and the Tribunal that the reduced addition was just and equitable on account of papers found during the search, there was no merit in the appeals.”

13. The Hon'ble Allahabad High Court in the case of CIT vs. Banwari Lal Banshidhar (1998) 229 ITR 229 (Alld.) (HC) held as under :

“Held affirming the decision of the Tribunal, that no disallowance could be made in view of the provisions of section 40A(3) read with rule 6DD(j) of the Income-tax Rules,

1962, as no deduction was allowed to and claimed by the assessee. When the gross profit rate was applied, that would take care of everything and there was no need for the Assessing Officer to make scrutiny of the amount incurred on the purchases made by the assessee.”

14. Considering the facts of the case in the light of the above decisions and decisions relied upon by Learned Counsel for the Assessee, we are of the view that both the additions cannot be sustained. The A.O. during the course of assessment proceedings found that assessee has made purchases and sales outside the books of account of unbranded Aatta. The A.O. noted that name of M/s. Hanuman Traders did not exist in purchase or sale ledger. The A.O. after recording the statement of the assessee found that assessee has confessed that he has neither shown the purchases of unbranded Aatta purchased from M/s. Hanuman Traders in the books of account nor has shown corresponding sales in his books of account. The profit earned out of these transactions, has not been accounted by the

assessee in the books of account. The assessee offered the amount for taxation i.e., profit out of these transactions @ 8% in a sum of Rs.60,41,212/-. The A.O. accordingly, rejected the books of account of the assessee under section 145(3) of the I.T. Act and after recasting the Trading & P & L A/c, made the addition of Rs.4.14 crores on account of additional profit. The Ld. CIT(A), correctly noted that entire sales could not be profit of the assessee and that re-casting of the Trading & P & L A/c by the A.O. is not proper as per law. The Ld. CIT(A) has taken the purchases and sales in the appellate order and the difference of the same was taken as undisclosed profit of the assessee in a sum of Rs.62,91,150/- which is almost same as offered by assessee @ 8% of undisclosed turnover. The assessee did not challenge the rejection of the books of account under section 145(3) and the addition made by Ld. CIT(A) above to the profit of the assessee. There is no challenge to these findings of the Ld. CIT(A) by the Department in the Departmental appeal because filing of Departmental Appeal not reported by Ld. CIT-D.R. Learned Counsel for the Assessee relied upon several

decisions of different High Courts in which it was held that *“when A.O. rejected the books of account of the assessee and applied gross profit rate on suppressed sales, A.O. cannot make separate addition on account of unexplained investment, undisclosed income and even the provisions of Section 40A(3) could not be invoked.”*

14.1. One of the decision of Hon’ble Allahabad High Court in the case of CIT vs. Banwari Lal Banshidhar (1998) 229 ITR 229 (Alld.) (HC) as reproduced above along with Judgments of Hon’ble Gujrat High Court in the case of President Industries and CIT vs. Samir Synthetics Mill (supra), the authorities below have also not found any material to indicate that assessee made investments outside the books of account to make the sales. The entire sales could not represent income of the assessee, on which, Ld. CIT(A), has already given a finding to add the profit only on such unrecorded sales. When books of account of the assessee are not reliable and rejected by the authorities below under section 145(3) of the I.T. Act and there is no challenge to

these findings of the authorities below, there is no reason for the authorities below to rely upon the same books of account for the purpose of making addition under section 40A(3) of the I.T. Act as well as to make addition of peak under section 68 of the I.T. Act. The A.O. noted in his findings that M/s. Hanuman Traders did not exist in purchase and sale ledger and existence of the same have not been proved. The Inspector also gave report to the same effect that M/s. Hanuman Traders do not exist at the given address. These facts clearly show that whatever entries are relied upon by the authorities below from the books of account, are contrary to the findings of the authorities below because non-existent party would not come to pay any amount to the assessee. Therefore, there is no question of considering the unrecorded amount recorded in the books of account of the assessee, so as to make the addition under section 68 of the I.T. Act. The A.O. did not make addition under section 68 of the I.T. Act separately because the addition is already made under section 40A(3) of the I.T. Act. The Ld. CIT(A) did not give any specific notice to assessee for

enhancement of income under section 68 of the I.T. Act because he has merely recorded entry of 8th June, 2017 without confronting the facts for making addition of peak credit. The Ld. CIT(A) forgot to consider that if he wanted to make addition on account of peak credit on account of M/s. Hanuman Traders, whether theory of peak credit would apply in the case of the assessee ? For considering the issue of peak credit, the authorities below have to laid-out the foundation that it was unaccounted money of the assessee having both debit and credit which assessee did not agree. It could not be taken into consideration for making such addition under section 68 of the I.T. Act in the hands of the assessee for making any alleged transaction with M/s. Hanuman Traders, which, according to the authorities below, did not exist and that no such entries appear in the books of account of the assessee. Even if, some entries appeared in the books of account of the assessee regarding M/s. Hanuman Traders, according to the findings of the authorities below, such books of account of the assessee are not reliable. Therefore, the authorities below cannot rely upon

the same entries in books of account for the purpose of making the addition of the nature of peak against the assessee. Thus, there is no justification for the authorities below to make addition of Rs.6,92,25,000/- under section 40A(3) of the I.T. Act and addition of Rs.7,12,15,150/- under section 68 of the I.T. Act. In view of the above discussion, we set aside the orders of the authorities below and delete both these additions. Ground Nos. 3 to 6 of the appeal of assessee are allowed.

15. In the result, appeal of the assessee is partly allowed as indicated above.

Order pronounced in the open Court.

Sd/-
(L.P. SAHU)
ACCOUNTANT MEMBER
Delhi, Dated 23rd March, 2018
VBP/-

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'E' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.