

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI**

**BEFORE SHRI ABY T VARKEY, JM &
MS PADMAVATHY S, AM**

**I.T.A. No. 5107/Mum/2015
(Assessment Year: 2018-19)**

M/s B Narayan Associates 9, Gautam Arcade, Raut Road, Kopri Colony, Thane (W) - 400603 PAN : AAEFB6082B	Vs.	CIT(A)-1, Room No. 29, A-Wing, 6 th Floor, Ashar IT Park, Road No. 16-Z, Wagle Indl. Estate, Thane-400604.
Appellant)	:	Respondent)

Appellant/Assessee by : Shri Rajesh Athavale, CA
Revenue/Respondent by : Shri Ashok Kumar Ambastha,
Sr. DR

Date of Hearing : 15.02.2024
Date of Pronouncement : 22.02.2024

ORDER

Per Padmavathy S, AM:

This appeal is against the order of the Commissioner of Income Tax (Appeals)-1, Thane [for short 'the CIT(A)] dated 28.08.2015 for the AY 2010-11. The assessee raised the following grounds of appeal:

“1.1 On the facts and circumstances of the case the learned A.O. has erred in making the addition of Rs. 1,25.62,972/- on account of Bogus purchases.

1.2 On the facts and circumstances of the case the learned A.O. has erred in making the addition of Rs. 1,25,629/- on account of commission @ 1% of the bogus purchase.

1.3 On the facts and circumstances of the case the learned A.O. has erred in relying on statements, affidavits and Inspectors reports etc. gathered by the Sales Tax Department based on which he has confirmed the additions without giving an opportunity to cross examine these witnesses.

1.4 On the facts and circumstances of the case the learned A.O. has also relied on the visit of the Inspector of the particular ward of the Income Tax Department without giving us an opportunity to cross examine him or submit our say on the said visit.

1.5 On the facts and circumstances of the case the learned A.O. has brushed aside all the evidences produced before him during the course of Assessment Proceedings including:

- a. The Contracts entered into with the Sub Contractors, the photographs of the constructed toilet blocks.*
- b. Evidences regarding visits and checking done by the Municipal Corporations offices before releasing the payment.*
- c. The Tendering process followed by the Municipal Corporations.*
- d. The severe Competition issues when business has to be procured via the tendering process.*
- e. The Comparative profitability chart of previous years of the assessee.*
- f. The Assessment orders of previous scrutiny Assessments & the Hon'ble Tribunals orders submitted to enable the learned A.O. to draw a fair conclusion.*
- g. The procedure followed by the sales tax department in publishing the names in the Hawala list and the disclaimer made by the sales tax department.*

1.6 On the facts and circumstances of the case the learned A.O. has erred on relying on the statement of the Accountant, recorded during the course of the Survey conducted on 10/03/2011, and trying to corroborate it with the accounts.”

2. The assessee is a partnership firm carrying on the business as civil contractors at Thane. The assessee is a registered contractor for various Government and Semi-government Agencies. During the year under consideration the assessee has executed contracts for constructing public and community toilet blocks in the slums of Mumbai. The assessee filed a return of income for AY

2010-11 on 14.10.2010 declaring a total income of Rs. 1,51,66,320/- against a total revenue of Rs. 25,22,31,244/-. The case was selected for scrutiny and statutory notices were duly served on the assessee. The AO during the course of hearing called on the assessee to furnish various details with regard to the business carried on by the assessee such as audit report, statement of accounts, bank statements etc. The AO noticed that there was a survey carried out in the case of the assessee on 10.03.2021 and statements under section 131 of the Income Tax Act, 1961 (the Act) were recorded from Shri Narayan Das Bhatia, partner and Ms. Isha Majalkar, Accountant of the assessee. The AO further noticed that the Accountant while answering one of the questions raised with regard to certain noting made by the Accountant had replied stating that the profits of the assessee to the extent of Rs. 1.3 crores was not to be declared in the return of income for the AY 2010-11. The AO also noticed that the assessee had trade creditor outstanding from five parties to the tune of Rs. 1,25,62,972/- and that these creditors during the investigation conducted by Sales Tax Department have given sworn statements that they are entry providers without actual supply of materials. The AO linked these two facts to hold that the amount as stated by the Accountant as profits to be suppressed is coming out of the purchases made from the above parties which are bogus in nature and accordingly made an addition of the entire purchases as income in the hands of the assessee. The AO also added 1% of the alleged bogus purchases towards commission which the entry provider usually charge.

3. Aggrieved the assessee filed further appeal before the CIT(A). Before the CIT(A) the assessee submitted that the purchases from the above parties are genuine and to substantiate the same the assessee filed the below table with the

turnover, Net Profit etc. for the last five years including the year under consideration.

Financial Year	Turnover (I)	Net profit (before depreciation & partners remuneration (II))	% of Net profit (III) = (II) / (I)	Total purchases (IV)	Steel purchases (V)	Steel purchase as a % of total purchases (VI)=(V) / (IV)
2007-08	4,89,14,275	29,05,567	6%	1,63,87,023	7,47,512	43%
2008-09	10,98,73,559	52,48,907	5%	1,40,60,717	61,33,597	44%
2009-10	25,22,31,243	1,65,69,378	7%	2,89,38,543	1,29,03,508	45%
2010-11	12,47,87,767	79,10,042	6%	66,29,186	16,23,590	24%
2011-12	9,83,79,405	72,34,500	7%	45,34,116	2,91,378	6%

F.Y	Turnover	Book Profit (Before Partners remuneration)	% of T.O.
2009-10	25,22,31,244	1,59,66,319	6.33%
2008-09	10,98,73,560	50,49,641	4.60%
2007-08	4,89,14,275	26,75,365	5.47%
2006-07	1,91,36,917	8,07,503	4.22%
2005-06	1,49,06,881	2,99,041	2.01%

4. The CIT(A) after perusing the details filed by the assessee upheld the addition made by the AO. The relevant findings of the CIT(A) are extracted below

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“18. I have carefully considered the appellant's submissions, observations of the AO in the assessment order and the facts of the case. The appellant had shown purchases from five parties amounting to Rs. 1,25,62,972/- All these parties were appearing in the list of Hawala operators available on the website of the Maharashtra Sales-tax Department. The appellant had filed only copies of purchase bills and copy of its bank account to show that the payments to all these parties had been made through banking channels. No transportation bills, octroi charges or delivery challans were available with the appellant to establish the genuineness of the purchases. The AO got inquiries conducted through his Inspector, who reported that none of these parties existed at the addresses mentioned. A survey w/s. 133A of the I.T. Act, was carried out at the premises of the appellant on 10.03.2011. During the course of survey several incriminating

documents were found and impounded. One of the documents, which is a bound register and labeled as "instructions for finalization of accounts" revealed the modus operandi adopted by the appellant to manipulate its profits for the year under consideration. On page No. 21 & 37 of this register various entries were recorded, according to which the details of actual profit resulting to the appellant as per books of account were recorded. It was recorded what amount of profit the appellant wanted to declare in its return of income and what was the amount of adjustment required to arrive at the figure of profit to be declared. The detailed reference has already been made to these entries in the preceding paragraphs. These entries were recorded by one Ms. Isha Majalkar, who was working with the appellant as its employee. In her statement recorded during the course of survey, she admitted that these entries pertained to the financial year 2009-10 relevant to assessment year under consideration. Explaining the nature of these entries, it was submitted by her that though the actual profit as per books of accounts after meeting cash expenses was Rs. 2.80 crores, however, only 1.5 crore was intended to be declared in the Return of income. The balance amount of Rs. 1.3 crores was the figure of the adjustment required to be made. On another page i.e. page no. 21, the figure of adjustment required to be made was mentioned at Rs. 1.25 crores. These figures correspond with the bills obtained from the Hawala dealers from whom the total purchases have been shown at Rs. 1,25,62,972/-. The Return of income has also been filed at Rs. 1,51,66,320/- whereas the income intended to be declared was mentioned at Rs. 1.50 crores. Thus, all the entries recorded by the employee Ms. Isha Majalkar, her detailed admission in her statement and the matching of the figures in the Return of income filed leave no doubt at all that the appellant had obtained bills amounting to Rs. 1,25,62,972/- from five Hawala operators for showing less profits as against the actual profits. The appellant's reliance on the judgements of the Hon'ble Kerala High Court in the case of Paul Mathews & Sons and Hon'ble Supreme Court in the case of S. Khader Khan Son are not applicable to the appellant's case. It was held in those judgements as under-

CIT vs S Khader Khan Son, 300 ITR 157 (Madras)

From the foregoing discussion, the following principles can be culled out:

(1) An admission is an extremely important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect and that the assessee should be given a proper opportunity to show that the books of account do not correctly disclose the correct state of facts, vide decision of the apex court in Pulkngode Rubber Produce Co. Ltd. v. State of Kerala [1973] 21 ITR 18:

(ii) In contradistinction to the power under section 133A, section 132(4) of the Income-tax Act enables the authorized officer to examine a person on oath

and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income-tax Act is not given my evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide Paul Mathews and Sons v. CIT (2003) 263. ITB 101

(Ker.):

(ii) The expression "such other materials or Information as are available with the Assessing Officer contained in section 15888 of the Income-tax Act, 1961, would include the materials gathered during the survey operation under section 133A. vide CIT v. G. K. Senniappan (2006) 284 ITR 220 (Mad);

(iv) The material or information found in the course of survey proceeding could not be a basis for making any addition in the block assessment, vide decision of this court in T. C (A) No. 2620 of 2006 (between CIT v. S. Ajit Kumar [2008] 300 ITR 152 (Mad);

(v) Finally, the word "may" used in section 133A(3)(ii) of the Act, viz., "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act, as already extracted above, makes it clear that the materials collected and the statement recorded during the survey under section 1334 are not conclusive piece of evidence by itself.

For all these reasons, particularly, when the Commissioner and the Tribunal followed the circular of the Central Board of Direct Taxes dated March 10, 2003, extracted above, for arriving at the conclusion that the materials collected and the statement, obtained under section 1334 would not automatically bind upon the assesses we do not see any reason to interfere with the order of the Tribunal.

Accordingly, finding no substantial question of law arises for consideration, the tax case appeal stands dismissed.

CIT vs S Khader Khan Son, 254 CTR 248 (SC)

Section 133A of the Income Act, 1961-Survey Whether Section 1334 does not empower any ITO to examine any person on oath, so statement recorded under section 133A has no evidentiary value and any admission made during such statement cannot be made basis of addition - Held, yes

19. Thus, the statement recorded during the course of survey is an important piece of evidence but not conclusive and addition cannot be made on the basis of statement by itself. Further, the person whose statement was recorded has the option to show that the same was incorrect. In the appellant's case there is matching corroborative evidence to show that the appellant had planned to reduce its profit by an amount of Rs. 1.25 crores and the same was actually done

by obtaining bogus purchase bills amounting to Rs. 1,25,62,972/- Nothing has been brought on record by the appellant or by Ms. Isha Majalkar to show that her statement recorded during the course of survey was incorrect in any respect. Therefore, it is held that the addition made by the AO has rightly been made after considering the material found during the course of survey, statement of Ms. Isha Majalkar and documentary evidence regarding bogus purchase bills. Therefore, addition of Rs. 1,25,62,972/- is confirmed.”

5. Aggrieved the assessee is in appeal before the Tribunal.
6. The ld. AR submitted that the assessee is in the business of civil contract, working for Government and Semi-Government Agencies which is a highly competitive business. The ld. AR further submitted that the assessee has produced the confirmations from the vendors and has also submitted the work contract that the assessee carried out for Government. The ld. AR also submitted that the sworn statements of the vendors during sales tax investigation was recorded some time in 2012 and therefore the transactions of the assessee with the vendors which happened during the year under consideration cannot be held to be bogus. The ld. AR also took us through the alleged noting of the accountant based on which the entire addition is made (page 398 to 447 of Paper Book) to submit that the noting does not specify anything about the period for which the entry pertain to and that the noting are maintained by the Accountant from Financial Year 1999-2000. The ld. AR submitted that merely because the profit likely to be suppressed as mentioned in the statement of the Accountant is matching with the purchases made by the assessee from the above vendors who later admitted as entry providers cannot be the reason for making the addition without bringing any evidence on record to prove that the assessee has obtained the bogus entries towards purchases. The ld. AR also submitted that the books of accounts of the assessee are subject to audit and the Auditor has not recorded any adverse finding with regard to purchases of the assessee. The ld. AR further submitted that the AO has not

rejected the books of accounts and the sales figure as declared by the the assessee is not questioned by the revenue. The ld. AR made a without prejudice submission that even in the case of bogus purchases the AO is not correct in adding the entire amount as income of the assessee and that the AO could add only the profit margin earned on such purchases since the AO has not questioned the revenue declared by the assessee. In this regard the ld AR submitted the below table containing details of profit % of the assessee for 6 years in support of the alternate plea that only the profit element in the impugned transactions can be taxed which should be based on the average profit % that works out to 5.66%.

Financial Year	Turn Over (INR)	Gross Profit (INR)	G.P. Ratio	Net Profit (INR)	Net Profit Ratio
2007-08	48,914,275	13,573,283	27.75%	2,675,365	5.47%
2008-09	109,873,559	18,216,023	16.58%	5,049,640	4.60%
2009-10	252,231,243	35,509,105	14.08%	15,966,318	6.33%
2010-11	124,787,767	18,509,579	14.83%	7,395,065	5.93%
2011-12	98,379,405	25,368,886	25.79%	6,681,014	6.79%
2012-13	119,323,130	20,452,821	17.14%	5,746,928	4.82%

7. The ld. DR on the other hand submitted that from the statement recorded from the Accountant it is clear that the assessee has suppressed the profit to the extent of Rs. 1.3 crores. The ld. DR further submitted that the AO has clearly linked the purchases from entry providers with the amount purported to be suppressed by the assessee. The ld. DR also drew our attention to the noting (page 398 of PB) where it is mentioned that "account finalizing instruction book" to submit that from this it is clear that all the noting in the book are with regard to the finalization of the accounts and therefore the AO has correctly relied on the statement made by the Accountant while confronting her with the said noting. The ld. DR submitted that the AO has done a thorough enquiry with regard to the entry providers which is evidenced from the finding given by the AO that none of the

parties are existing at the addresses given by the assessee. The Id. DR also submitted that the assessee has not made any payments to the above party which also goes to substantiate that the purchases made from these parties are not genuine. Therefore, the Id. DR contended that the AO has not merely relied on the statement but has also recorded clear findings with regard to the purchases made before concluding the same to be not genuine. The Id. DR accordingly prayed that the entire amount is correctly added back by the AO as income of the assessee.

8. We have heard the parties and perused the material on record. The AO during the course of assessment proceedings noticed that statement was recorded under section 131 in which the accountant of the assessee was confronted with certain noting found during the survey, and that the accountant has stated that the profit to be declared is to be reduced to the extent of Rs.1.30 crores. The relevant part of the statement recorded in reproduced below –

Q.9 I am showing you page no 37 having following notings:-

<i>B. Narayan Profit:</i>	<i>Rs. 3,50,00,000/-</i>
<i>(-) Cash</i>	<i><u>Rs. 70,00,000/-</u></i>
	<i>Rs. 2,80,00,000/-</i>
<i>(-) Profit</i>	<i><u>Rs. 1,50,00,000/-</u></i>
	<i>Rs. 1,30,00,000/-</i>

Please go through the same and state that for which financial year the notings are made.

Ans. The profit of Rs. 3,50,00,000/- is the profit of B. Narayan & Associates for the F.Y. 2009-10, the cash of Rs. 70,00,000/- is reduce because the expense to the tune of Rs. 70,00,000/- remained to be entered and Rs. 2.80,00,000/- is the profit out of which Rs. 1,50,00,000/- was intended to be declare as income for A.Y. 2010- 11. the figure of Rs. 1,30,00,000/- was profit of income which was not to be declared in the return of income for A.Y. 2010-11. These notings were made after the notings made on Page No.21.”

9. The AO further noticed from the perusal of the financial statements of the assessee that the below listed creditors are outstanding in the books of accounts and that the assessee has not made any payments to these parties

Sl.No.	Name of the party	Amount – Rs.
1	Amee Enterprises	32,19,018
2	Bright Corporation	23,86,370
3	Sai Enterprises	20,97,905
4	Suraj Sales Corporation	15,88,960
5	Zenith Enterprises	32,70,719
	Total	1,25,62,972

10. The AO held that the amount purported to be suppressed from profits as declared by the accountant is matching with the above listed purchases and since these parties have admitted to be entry providers, the AO treated the entire amount as bogus purchases. The AO accordingly added the entire amount as income of the assessee which is upheld by the CIT(A). The claim of the assessee is that merely because the amounts are matching the AO cannot make the addition and that necessary evidence such as confirmation, invoices etc., submitted before the AO have not been considered. The alternate plea of the assessee is that the AO cannot add the entire amount since the AO has neither disputed the sales of the assessee and nor rejected the books of accounts and therefore addition to the extent of profit element in the alleged bogus purchases only could be added.

11. From the perusal of AO's order we notice that though the AO has used the statement of the accountant as basis, he has conducted certain independent enquiry wherein the inspector of the ward had visited the addresses of the above listed parties and found them not existing in the said premises. The AO has also relied on the findings of sales tax department and the affidavits admitting that these vendors are entry providers, submitted before the sales tax department. Further, the CIT(A)

has also held that the assessee did not submit proper evidences in support of the purchases such as the delivery challan, transport bills etc. The claim of the assessee, is that the sales tax inspection happened subsequently and not during the year under consideration when the impugned transaction are entered into. However it is relevant to notice that the department has brought on record the affidavits and statements where the vendors themselves have admitted that they have been operating as entry providers and merely the fact that this admission happened subsequently does not support assessee's contention. The argument of the ld AR is that the assessee is engaged a competitive business of construction of Government contracts and even if the purchases are presumed to be from the grey-market against which the assessee has taken bills from the entry providers, the entire purchase cannot be added. In this regard it is relevant to notice that the AO has neither disputed the sales declared by the assessee nor any discrepancy is found by the AO in the books of accounts and therefore there is merit in the submission that the addition towards the impugned purchases should be restricted to the profit embedded in such transactions. Tthe Hon'ble Bombay High Court in the case of Principal CIT vs Mohammed Haji Adam & Co (in Income Tax Appeal No.1004 of 2016 dated 11/02/2019) while considering a similar issue has held that the additions should be limited to the extent of the G.P. rate on purchases at the same rate of other genuine purchases. In the facts and circumstances of the case we are of the considered view that the ratio of the above decision is applicable to assessee's case also. Accordingly we remit the issue to the AO with a direction to examine the profit % on the impugned transactions and the profit % genuine purchase transactions of the assessee and decide by applying the ratio of the Jurisdictional High Court. The assessee is directed to submit the relevant details as may be called for by the Ao. It is ordered accordingly.

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

Order pronounced in the open court on 22-02-2024.

Sd/-
(ABY T VARKEY)
Judicial Member

**SK, Sr. PS*

Sd/-
(MS. PADMAVATHY S)
Accountant Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,
(Dy./Asstt. Registrar)
ITAT, Mumbai