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

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No.4212/M/2015
Assessment Year: 2011-12

Office of the ITO-31(1)(5), Pratyaksha Kar Bhavan, C-11, Room No.707, Bandra Kurla Complex, Bandra (E), Mumbai – 400 050	Vs.	M/s. Gold Finger Establishment, 603/A, Malkani Tower, Jogeshwari (W), Mumbai – 400 062 **PAN: AABFG3543M**
(Appellant)		(Respondent)

CO No.94/M/2017
Assessment Year: 2011-12

M/s. Gold Finger Establishment, 603-A, Malkani Tower, Jogeshwari (W), Mumbai – 400 062 **PAN: AABFG3543M**	Vs.	Office of the ITO-31(1)(5), Pratyaksha Kar Bhavan, C-11, Room No.707, Bandra Kurla Complex, Bandra (E), Mumbai – 400 050
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Vimal Punmiya, A.R.
Revenue by : Shri V. Vidhyadhar, D.R.

Date of Hearing : 17.04.2018
Date of Pronouncement : 17.05.2018

O R D E R

Per Rajesh Kumar, Accountant Member:

The present appeal by the Revenue and the cross objection by the assessee have been preferred against the order dated 29.04.2015 of the Commissioner of Income Tax

(Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2011-12.

2. The only issue challenged by the Revenue in its appeal is against the deletion of addition of Rs.1,14,16,135/- by Ld. CIT(A) as made by the AO on account of unexplained expenditure in respect of which the sundry creditors to whom the notices under section 133(6) of the Act were not responded. The issue raised in ground No.2 is against the violation of rule 46A of IT rules as the Ld. CIT(A) has accepted the confirmations from the creditors at the appellate stage without confronting the same to the AO. The issue raised in the cross objection filed by the assessee is against the confirmation of Rs.66,09,022/- by Ld. CIT(A) as made by the AO on account of disallowance made by the AO under section 69C of the Act.

3. We shall adjudicate the issue raised by the Revenue as well as the issue raised by the assessee in CO in the following paras.

4. The facts in brief are that AO during the assessment proceedings noticed that assessee has made total turnover of Rs.17.23 crore against which a GP of 0.64 crore was shown which works out to be 3.75% of the total sales. Thus the AO in order to verify the purchases from various parties issued notice under section 133(6) of the Act to 13 parties which are narrated in para 3.1 of the assessment order. Out of the said parties six parties from whom the alleged purchases of

Rs.1,14,16,135/- was made could not be confirmed the details whereof are as under:-

S.N.	Name of Supplier	Amount
1	Durabuild Tech	42,72,424/-
2	Jas Ceramics	20,70,543/-
3	Lucky Trading	18,55,789/-
4	Navkar Wood	12,55,044/-
5	Rajdeep Impex	13,36,756/-
6	Payees Impex	6,25,579/-
	Total Purchase debited	1,14,16,135

In respect of four parties no reply was received to the notice issued under section 133(6) of the Act whereas in respect of two parties notice could not be served and was received back. The AO also found from the examination of reply received from the six parties as stated in para 3.4(a) that there was a difference of Rs.66,09,022/- as per the purchases in the books of accounts of the assessee and as per the reply received from these parties. Finally, the AO came to the conclusion that the assessee has inflated the purchases to reduce his profit and made addition of Rs.66,09,022/- as inflated purchases and Rs.1,14,16,135/- as bogus purchases and added the same to the income of the assessee under section 69C of the Act.

5. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee as regards the inflation of purchases to the tune of Rs.66,09,022/- whereas the Ld. CIT(A) deleted the addition of Rs.1,14,16,135/- by observing and holding as under:

"2.7 I have carefully considered the above submission of the appellant.

The impugned assessment order, paper book and material available on record. I have observed that Notices were issued to parties. Most of parties replied to notice and confirm the transactions to some extents. But these parties on those notices were duly served but failed to reply. It is not the case where parties are not found or whether transaction were doubted. Addition was made just because parties were failed to reply. These are purchases; therefore, appellant was not required to prove creditworthiness of parties. Appellant has to prove the identity of person. Which is proved by the AU itself by the serving the Notice u/s 133(6). Just because parties not reply cannot be basis for addition. IF AO has any doubt than he has to made further enquiry which he failed to do. Therefore, addition made by the AO is not justified.

2.8 For the above proposition I put my reliance on the decision of **Shri Ganpatraj A Sanghavi V/s ACIT** I.T.A. No.2826/Mum/2013. In this case the jurisdictional tribunal where held that bank payment is proof of identity -

> 7. A perusal of the orders passed by the tax authorities would show that they have suspected the genuineness of the purchases only for the reason that the above said five parties were not available in the given addresses. It is pertinent to note that the AO himself, during the course of remand proceedings, have obtained the bank statements of the above said five parties. It is in the common know/edge of everybody that the bank account, now a days, could be opened only on submission of proper documents. Further the assessee has furnished the Sales tax documents of the above said five parties and also their income tax details to prove their existence. Thus, it is seen that the assessee has furnished many documents to prove the existence of the parties and they have not been controverted by the assessing officer.
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> 8. Be that as it may, another important factor the bank account copies collected by the assessing officer shows that the assessee had made the payments to the above said parties by way of account payee cheques. Thus, it is seen that the transactions have been routed through the bank accounts. Further, it is not the case of the assessing officer that the assessee has indulged in accounting of bogus purchases. When the assessee submitted that he could not have effected the sales without making corresponding purchases, the A 0 has taken the view that the assessee could have effected purchases in the grey market, which conclusion is, in fact, not supported by any material. Under this impression only, the AO has further expressed the view that the assessee would have purchased the materials by paying cash thus violating the provisions of sec. 40A(3) of the Act, which is again based on only surmises. In the absence of any material to support the said view, we are unable to agree with the view taken by the tax authorities that the purchases amount is liable to be disallowed u/s 40A(3) of the Act. On the same impression only, the AO has expressed the view in the remand report that the purchases amount is also liable to assessed u/s 69C of the Act- as the source of purchases were not proved. Again the said conclusion is based upon only surmises, which could not be sustained. Thus, it is seen that the assessing officer has accepted the fact that the quantity details of purchases and sales have been reconciled by the assessee. Further, various case law relied upon by the assessee also supports his case. Under these set of facts, we are of the view that the Ld

CIT(A) was not justified in confirming the disallowance of purchases. Accordingly, we set aside the order of Ld CIT(A) on this issue and direct the AO to delete the disallowance of purchases.

2.9 Further, it is well settled law that addition cannot be made on mere ground that parties failed to reply in response to notice u/s 133(6). On above proposition I relied on following decisions:-

a) **ACITV/S M/s Swastik Roadlines Pvt. Ltd. ITA No. 41/Agra/ 2012**
The appellant has submitted required details showing that it had regular business dealings in respect of transactions involved. Simply because no reply has been received in response to information sought u/s 133(6), A.0. cannot jump to the conclusions that these are bogus creditors and treat the same as unexplained credits in absence of any adverse material. The instant cases are not found to be of cash credits simpliciter, but all amounts are payable to parties against the services rendered by them and which have also been paid in due time during next year. On perusal of records, it is seen that the appellant has claimed freight and route expenses and sundry creditors against them regularly in earlier years as per its audited balance sheet which have also been accepted by the A. 0. vide orders passed u/s 143(3).

b) **Continental Carbon India Ltd. V/s ITO ITA Nos. 5269, 5270 & 5271/Del/ 2010**
We find merit in the argument of the learned counsel for the assessee that for 133(6) compliance it had no control over third parties. In our view, once the AO issued summons u/s 133(6), as held by Hon'ble Supreme Court in the case of CIT v. Orissa Corporation (P) Ltd. (supra), it is his duty to ensure that the progress of issue of summons is brought to a logical conclusion b1v enforcing summons. The enforcement can be achieved in many ways including taking action on un-complied summoned persons, by appointing commission on, the income-tax authorities having jurisdiction over them and getting the verification from their returns or accounts. In these cases neither AO nor CIT(A) adopted this course as laid down by law.
.....

The assessee's purchase transactions with these parties is repeated one or other in these years and the actual credit purchases therefrom have been accepted either by the AO or CIT(A) on one ground or the other. It is not the case of A0 that the purchases were bogus or the purchases are not effected. This is evident from the fact that all the purchases of the assessee, stock register, yield, sales, sundry debtors remain accepted in all these years. Consequently, it cannot be held that such suppliers were not genuine only because summons u/s 133(6) were not served.

2.10 And further, addition cannot be made on ground that parties are not produce before the Assessing Officer. On above proposition I relied on following decisions:-

1. CIT V/s Nikunj Eximp Enterprises (P.) Ltd. [2013] 35 taxmann.com 384 **(Bombay HC)**
2. ANIL KIJMAR MIDHA (HUF) V/s IT0[2006] 153 TAXMAN 65 (JODH.) (MA G.)
3. CIT V/s Divine Leasing etc 299 ITR 268 (Del HC) SLP was also

dismissed by Hon 'ble Supreme Court.
4. Mather & Platt (India) Ltd. V/s CIT (1987) 168 JTR 493 (Cal HC)
5. Dy CIT V/s Rohini Builders [2002] 256 ITR 360 (CLI]). SLP was also dismissed by the Hon 'ble Supreme Court.
6. Anis Ahmed V/s CIT (2008) 297 ITR 441 (SC)
7. CIT V/s U K Shah (1973) 90 ITR 396 (Bom. HC)
8. Add. CIT V/s 1-lanuman Agarwal (1984) 151 ITR 150 (Patna HC)
9. Jhaver Bhai Bihar Lal & Co. v. CIT [1985] 154 ITR (1985] 154 ITR 591/21 Taxman 238
10. CIT vs. Sahibqanj Electric Cables (P) Ltd. 11978115 ITR 4087

Thus, in view of the above discussion and respectfully following the judicial pronouncement, the addition made by AO on account of mere non reply by parties in response to notice u/s 133(6) is in my opinion not justified. However, the same time the facts emerge from the replied received from the parties cannot be denied. Therefore, appellant was directed to file the confirmation from the parties. Appellant vide letter dated 27.04.2015 filed the confirmation of the parties. And perusal of the ledger account no discrepancy was found. Therefore, this grounds of appeal No.1b) is allowed."

6. The Ld. D.R. vehemently submitted before us that Ld. CIT(A) has grossly erred in deleting the addition of Rs.1,14,16,135/- in respect of six parties out of which the four did not file any replies despite having served the notices under section 133(6) of the Act and in respect of 2 parties the notices were not served. The Ld. D.R. submitted that the Ld. CIT(A) has deleted the addition by accepting the additional evidences in the form of copies of accounts/confirmations without confronting the same to the AO and thus violated the provision of Rule 46A and therefore ,even though the Ld. CIT(A) did not find any discrepancy between the books of accounts of the assessee and the reply received from the six parties aggregating to Rs.1,14,16,135/-, the same could not be deleted without confronting the same to the AO. The Ld. D.R. finally prayed that the order of AO be restored by setting aside the order of first appellate authority on this issue.

7. During the course of appellate proceedings, the Ld. A.R. submitted that the Ld. CIT(A) directed the assessee to file the confirmations of these parties and accordingly these are filed before the first appellate authority as well as before the AO. The ld AR contended that it is only after the Ld. CIT(A) found that there was no discrepancy as per the books of accounts of the assessee and the confirmations received from the said parties, the Ld. CIT(A) directed the AO to delete the addition.

8. The argument of the Ld. DR. is that the AO has not been confronted the evidences filed before the Ld. CIT(A) in the form of confirmations and copies of accounts was totally wrong and against the facts of the case as the assessee has filed all these evidences before the AO also. In view of the said facts, the Ld. A.R. prayed before the Bench that Ld. CIT(A) has taken a legal and correct view of the matter after calling for examining the confirmations and copies of accounts of the six parties and accordingly prayed before the Bench to uphold the order of Ld. CIT(A) on this issue.

9. We have heard the rival submissions of both the parties and perused the relevant material on record including the impugned order. We find that in this case the AO has made addition of Rs.66,09,022/- on account of discrepancies between the books of accounts of the assessee and the replies received from six parties/creditors in response to notices issued under section 133(6) of the Act as mentioned in para 3.4(a) of the assessment order. We find merit in the contention of the Ld. A.R. that so far as the confirmation of

addition of Rs.66,09,022/- is concerned by the first appellate authority, the mere fact that there is a difference between the books of accounts of the assessee and replies received from the six parties to the tune of Rs.66,09,022/-, the same can not be added as unexplained expenditure under section 69C of the Act. In this case, the AO has found that the assessee has recorded excess purchases to the tune of Rs.66,09,022/- and treated the same as unexplained expenditure. We also find merit in the contention of the assessee that these creditors might not have shown the respective sales in their books of account and therefore the addition confirmed by the Ld. CIT(A) was wrong and can not be confirmed. The alternative plea of the Ld. A.R. was also put forward before the Bench that in case these are treated as bogus purchases, if the assessee fails in the main prayer the only percentage is required to be added and not the entire amount of Rs.66,09,022/-. We are not in agreement with the findings of the Ld. CIT(A) on this issue as the AO has made the addition only on the basis of replies received under section 133(6) of the Act. Even if we consider these purchases as bogus/inflated purchases as has been observed by the authorities below even then the entire disallowance is unwarranted and uncalled for. In our opinion, a reasonable disallowance based upon the GP should be made to bring these purchases to tax. Accordingly, we direct the AO to apply a percentage of GP on the said difference in the purchases. Since the assessee has shown a GP rate of 3.75%

during the year, we also direct the AO to apply a GP of 4% on these purchases of Rs, 66,09,022/-.

10. So far as the issue raised as regards the deletion of Rs.1,14,16,135/- is concerned, the Ld. CIT(A) has recorded a finding of fact that the assessee has proved the identity of the suppliers as notices under section 133(6) were issued nonetheless not replied. The ld CIT(A) has noted that the AO has not doubted the transactions at all. The fact is that the party has failed to reply the notices issued under section 133(6) of the Act can not be sole basis for disallowance of purchases from these parties. The details of these parties are again extracted below for the purpose of convenience:-

S.N.	Name of Supplier	Amount
1	Durabuild Tech	42,72,424/-
2	Jas Ceramics	20,70,543/-
3	Lucky Trading	18,55,789/-
4	Navkar Wood	12,55,044/-
5	Rajdeep Impex	13,36,756/-
6	Payees Impex	6,25,579/-
	Total Purchase debited	1,14,16,135

11. In respect of parties at sr. 1 to 4, the suppliers/creditors did not respond to the notices in spite of the notices being served whereas in respect of parties at Sl. No.5 & 6, the notices were not served at all . So we are in agreement with the reasoning of the first appellate authority that no addition can be made on the ground that notices issued u/s 133(6) of the Act were not replied. Under these facts and circumstances,

we are of the opinion that the deletion of addition in respect of 4 parties as stated above aggregating to Rs.94,53,800/- is correct but in respect of the remaining two parties on whom the purchases to tune of Rs. 19,62,335/- were made on whom the notices u/s 133(6) could not be served the entire deletion is not correct as the profit has to be brought to tax on some GP basis. The GP of the assessee as declared by it is 3.75%. Therefore it would be reasonable to assess the income on such addition at 5%. So far as the grievance of the Revenue as regards violation of Rule 46A is concerned, we hold that there is no violation of Rule 46A as the Ld. CIT(A) has called for the evidences from the assessee and only thereafter the assessee filed the copies of account/confirmations. Accordingly we direct the AO to delete the addition in respect of first four parties aggregating to Rs. 94,53,800/- and direct to apply GP of 5% on the purchases from remaining two parties of Rs. 19,62,335/-. In result the addition of Rs. 98,117/- being 5% of Rs. 19,62,335/- is sustained. Accordingly, the appeal of the Department is partly allowed.

12. In the result, the appeal of the Department as well as the cross objection of the assessee is partly allowed.

Order pronounced in the open court on 17.05.2018.

Sd/-	**Sd/-**
(Saktijit Dey)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 17.05.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.