

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "SMC", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER**

**ITA NO. 2651/MUM/2016 : (A.Y : 2011-12)**

ITO, Ward-19(2)(2),  
Mumbai (Appellant)

Vs. Shri Karsan Nandu  
B-52, Panalal Terrace,  
Lamington Road,  
Mumbai 400 007 (Respondent)  
**PAN : AABPS6203J**

**CO NO. 197/MUM/2016 : (A.Y : 2011-12)**  
(Arising out of ITA No.2651/Mum/2016)

Shri Karsan Nandu  
B-52, Panalal Terrace,  
Lamington Road,  
Mumbai 400 007 (Cross Objector)  
**PAN : AABPS6203J**

Vs. ITO, Ward-19(2)(2),  
Mumbai (Appellant in Appeal)

**Assessee by : Ms. Keyuri Desai**

**Revenue by : Shri S.R. Kirtane**

**Date of Hearing : 29/11/2016**

**Date of Pronouncement : 30/11/2016**

**ORDER**

The captioned appeal by the Revenue and Cross-objection by the assessee are directed against the order of CIT(A)-30, Mumbai dated 8.1.2016, pertaining to the Assessment Year 2011-12, which in turn has arisen from the order dated 25.3.2014 passed by the Assessing Officer, Mumbai under section 143(3) of the Income Tax Act, 1961 (in short 'the Act').

2. The captioned appeal and cross objection arises from the addition made by Assessing Officer of Rs.37,45,965/- as unexplained expenditure u/s 69C of the Act.

3. In order to appreciate the controversy in the captioned appeal and cross-objection, the following discussion is relevant. The assessee is an individual who is engaged in the business of wholesale trading in readymade garments in a proprietorship concern. For the Assessment Year 2011-12, assessee filed a return of income declaring a total income of Rs.11,81,130/-, which was subject to a scrutiny assessment. In the assessment order, the Assessing Officer has observed that an information was received by him from DGIT(Inv.), Mumbai that the assessee has taken accommodation entries from certain purchase parties. In this context, the Assessing Officer has referred to 7 such parties tabulated in para 6 of the assessment order from whom the total purchases effected amounted to Rs.37,45,965/-. The Assessing Officer has also observed that enquiries were made by him by issuing notices u/s 133(6) of the Act to such parties which revealed that such parties were not available at the given addresses since the notices were returned by the postal authorities with the remarks 'not known', 'left', 'unclaimed', etc. In this background, the assessee was show caused as to why the purchases amounting to Rs.37,45,965/- debited to the Profit & Loss Account should not be treated as bogus by invoking Sec. 69C of the Act. In response, assessee furnished a detailed explanation contesting the stand of the Assessing Officer and such explanation has been reproduced by the Assessing Officer in para 7 of his order. In

particular, assessee also asserted that there was no justification for invoking Sec. 69C of the Act in the present case as assessee had explained the source of expenditure and, therefore, Sec. 69C of the Act was inapplicable. The Assessing Officer was not satisfied with the submissions put forth by the assessee. The Assessing Officer noted that the notices issued u/s 133(6) of the Act to the parties were returned unserved; that the investigations conducted by the Department lead to *“doubt regarding the genuineness of purchases”*; that assessee would have made genuine purchases from undisclosed sources in cash and to regularise the account books had obtained accommodation entries from the said 7 parties; and, that payments made to the suppliers by account payee cheques was not sacrosanct to establish genuineness of the expenditure. For all the above reasons, the Assessing Officer treated the expenditure on purchases of Rs. 37,45,965/- as unexplained expenditure u/s 69C of the Act and added the same to the returned income.

4. The assessee carried the matter in appeal before the CIT(A) assailing the order of Assessing Officer on facts and in law. The assessee explained before the CIT(A) that complete details regarding the purchases made from 7 parties, namely, invoices of purchases made, payments made to the parties by account payee cheques, bank statement evidencing the payments, copy of account of each party, disposal of items purchased from the said parties and the subsequent sales made to various parties, etc. were furnished before the Assessing Officer. The assessee also pointed out that the Assessing Officer had merely proceeded on the information received from the Sales Tax

Department of the State of Maharashtra whereas the material furnished by the assessee has been merely disbelieved. The assessee also asserted before the CIT(A) that the Assessing Officer did not provide any opportunity to the assessee to cross-examine the parties regarding the sales made to assessee. For all the above reasons, the addition made by Assessing Officer was sought to be assailed. The CIT(A) noted that in the present case the Assessing Officer made independent investigations, apart from those conducted by the Maharashtra Sales Tax Department, which showed that the 7 parties in question and the transactions entered with them were not genuine. The CIT(A) also rejected the plea of assessee that the impugned addition could not be made in the absence of account books not having been rejected by the Assessing Officer u/s 145(3) of the Act. Even with regard to denial of opportunity to cross-examine the parties, CIT(A) found no fault with the action of Assessing Officer on the ground that insistence on cross-examining the witness is not a general proposition of law and, therefore, the Assessing Officer was competent to rely on the evidence against the assessee even if opportunity to cross-examine the witness was not allowed. However, the CIT(A) took note of the argument of assessee that when the sales had not been disturbed by the Assessing Officer, then the purchases could not be treated as bogus because without purchases, there is possibility of effecting the sales. The CIT(A) found some force in the said plea and he proceeded to scale down the addition to the extent of profit element embedded in such bogus purchases. Accordingly, CIT(A) applied the profit rate of 12.5% on the bogus purchases in order to retain the addition and the balance of the addition was directed to be deleted. With the partial relief

allowed by CIT(A), assessee is not satisfied and is in appeal before the Tribunal contending that the entire addition was liable to be deleted. On the other hand, Revenue has preferred an appeal challenging the decision of CIT(A) in sustaining the addition to the extent of profit element in the bogus purchases as against the action of Assessing Officer in disallowing the entire amount of purchases. Since the cross-grounds arise from a common addition, they have been taken up together.

5. Before me, the first and the foremost plea of the assessee is that the instant case does not fall within the scope of Sec. 69C of the Act inasmuch as the assessee had duly explained the source of effecting payments for the purchases in question. Without prejudice to the said plea, it is contended by the assessee that the necessary details to justify the purchases of Rs.37,45,965/- from the 7 parties have been furnished by the assessee and thus the onus cast on the assessee stood discharged. It has also been vehemently argued that the assessee had specifically asked for cross-examination of the witnesses, which has been completely denied and, therefore, there is a violation of principles of natural justice and on this aspect itself, the assessment deserves to be set-aside. In support, reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of *Andaman Timber Industries, (2015) 127 DTR (SC) 241*.

6. On the other hand, the Id. DR appearing for the Revenue has primarily supported the stand of Assessing Officer by placing reliance on the same. The reasoning taken by the Assessing Officer has already

been adverted to by me in the earlier paras and, therefore, is not being repeated for the sake of brevity.

7. I have carefully considered the rival submissions. In the instant case, the Assessing Officer has noted that certain information has been received from the DGIT (Inv.), Mumbai that assessee has taken accommodation entries from 7 parties enumerated in para 6 of the assessment order. It is also the case of Revenue that the Assessing Officer has made independent enquiries also by issuing notices u/s 133(6) of the Act to the 7 parties which reveal that the notices were returned unserved by the postal authorities with remarks 'not known', 'left', 'unclaimed', etc. The aforesaid two aspects have formed the basis for the Assessing Officer to treat the purchases of Rs.37,45,965/- from the said 7 parties as bogus transactions.

8. On the contrary, assessee asserted before the Assessing Officer that he has effected purchase of goods from the said parties and further resold it to various parties and that without effecting such purchases, sales were not possible. The assessee furnished copies of purchase bills, evidence of having made payments by account payee cheques, copies of bank statements, etc. Assessee also pointed out that the bills raised by the parties showed that they have collected the applicable Sales Tax/VAT on such purchases. Most importantly, assessee pointed out to the Assessing Officer that if any of the depositions made by the said 7 parties is to be used against him, copies of the same be furnished, so that the assessee can avail the opportunity of cross-examining each of them. All these submissions by the assessee

have been set to naught by the Assessing Officer by merely referring to the aspect of information having been received from DGIT (Inv.), Mumbai and the non-service of notices issued u/s 133(6) of the Act to the parties. I have carefully perused the assessment order and find that other than the generalised observation about information having been received from DGIT (Inv.), Mumbai, there is no reference to any specific material or details in this regard. It is not emerging from the assessment order as to whether the information from the DGIT (Inv.), Mumbai, being referred to by the Assessing Officer, is in the form of any depositions by the suppliers, etc. In this context, the plea of assessee to seek the adverse material, which the Assessing Officer has relied upon, becomes important. The entire factual matrix brings out that leave alone confronting the assessee with the specific material, the assessment order itself does not record any specifics about the material on which the reliance has been placed by the Assessing Officer. Therefore, on facts, such an addition is susceptible to deletion.

8.1 In this case, another aspect is the non-service of notices issued under section 133(6) of the Act. Notably, after the Assessing Officer found that the notices issued under section 133(6) of the Act have been returned unserved, no attempt was made to shift the onus on the assessee to produce such parties. Therefore, it is not a case where the assessee has failed to produce his witness, but it is a case where the attempt of the Assessing Officer to procure attendance of a witness has not fructified. In fact, non-service of notices issued u/s 133(6) of the Act by itself cannot be a conclusive proof that transactions with the parties are bogus because there was enough material before the

Assessing Officer to show that payments have been made to the said parties through banking channels. It required further collection of evidence by the Assessing Officer to prove the bogus nature of such transactions. In fact, the Hon'ble Bombay High Court in the case of *Nikunj Exim Enterprises (P.) Ltd., 372 ITR 619 (Bom)* has observed that merely because suppliers did not appear before the Assessing Officer, it could not be concluded that the purchases were non-genuine when assessee had discharged his onus by showing copies of bank statement evidencing payments through account payee cheques to suppliers, stock reconciliation statement, etc. In the present case too, the assessee has pointed to the Assessing Officer in its communication dated 3.3.2014, copy of which is placed at pg. 32 of the Paper Book, that it was maintaining day-to-day stock record wherein all purchases are entered as 'inward' and sales are recorded as 'outward'. Assessee had enclosed copies of account of the said parties appearing in his account books, copies of purchase invoices, copies of bank statement for payment to the parties, etc. At the time of hearing, the learned representative for the assessee has also referred to the Paper Book, wherein the relevant documents have also been placed. Under these circumstances, having regard to the material on record, it is not possible to uphold the charge of Assessing Officer that the purchases from the 7 parties in question are bogus.

9. Be that as it may, invoking of Sec. 69C of the Act in the present case is also suspect. Sec. 69C of the Act prescribes that where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or

the explanation offered by him is not found to be satisfactory by the Assessing Officer, then the amount covered by such expenditure or part thereof may be deemed to be the income of the assessee for such financial year. In the context of the application of Sec. 69C of the Act what is of importance is that either there is no explanation about the *“source of such expenditure”* or that the explanation offered is not found satisfactory. The underlying emphasis is on the explanation in relation to the *“source of such expenditure”*. In the present case, the Assessing Officer has invoked Sec. 69C of the Act to treat the expenditure on purchases of Rs. 37,45,965/- as unexplained. So however, the assessee has demonstrated that the payments for such purchases have been made through account payee cheques for which there is no repudiation by the Assessing Officer thereby implying that the source of expenditure stands explained. In fact, the case of Assessing Officer is that the purchase transactions are *“only accommodation entries and not really purchases”*, thereby implying that as per the Assessing Officer assessee has not incurred such expenditure. To hold the transactions as mere accommodation entries and not real purchases is quite different from saying that the sources of expenditure for the purchases from the 7 parties in question have not been explained in the context of Sec. 69C of the Act. Therefore, in my view, invoking of Sec. 69C of the Act in the present case to treat the purchases of Rs.37,45,965/- stated to have been made from the 7 parties in question is on a wrong footing. Thus, on this aspect also, assessee deserves to succeed.

10. In the result, in my view, order of CIT(A) deserves to be set-aside and Assessing Officer is directed to delete the addition of Rs.37,45,965/-.

11. Resultantly, whereas the Cross-objection of assessee is allowed, the appeal of Revenue is dismissed.

Order pronounced in the open court on 30<sup>th</sup> November, 2016.

Sd/-

**(G.S. PANNU)**  
**ACCOUNTANT MEMBER**

Mumbai, Date : 30th November, 2016

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "SMC" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar  
I.T.A.T, Mumbai