

**IN THE INCOME TAX APPELLATE TRIBUNAL "H", BENCH MUMBAI  
BEFORE SHRI R.C.SHARMA, AM  
&  
SHRI RAVISH SOOD, JM**

**ITA No.3537/Mum/2015  
(Assessment Year :2010-11)**

DCIT CIR 29(3), Mumbai – 400 051	Vs.	SMC SBK JV Shop No.2, Aakruti Elgance, 90 Feet Road Govanpada, Mulund (W), Mumbai – 400 080
<b>PAN/GIR No.</b>		<b>ABLFS7647H</b>
<b>Appellant)</b>	<b>..</b>	<b>Respondent)</b>

Revenue by	Shri M.C. Omi Ningshen
Assessee by	Shri Neelkanth Khandelwal
<b>Date of Hearing</b>	<b>16/05/2017</b>
<b>Date of Pronouncement</b>	<b>24/05/2017</b>

**आदेश / O R D E R**

**PER R.C.SHARMA (A.M):**

This is an appeal filed by the Revenue against the order of CIT(A)-40, Mumbai dated 26/03/2015 for the A.Y.2010-11 in the matter of order passed u/s.143(3) of the IT Act.

2. Rival contentions have been heard and record perused.
3. Facts in brief are that assessee is engaged in the business of Civil construction. During the course of scrutiny assessment, AO found that assessee had made purchases from the bogus suppliers amounting to Rs.70,23,639/-. The AO asked the assessee to produce these parties, however, the assessee failed to do so. It was also claimed that from the MVAT angle, there could be a case of non-filing of return or non-payment of

MVAT taxes by the suppliers and in such scenario applying provisions of Section 48(5) of the MVAT Act, 2002, the assessee's input tax credit on the supplies cannot be allowed. This does not go on to prove that these parties were bogus suppliers. However, the AO did not agree with assessee's contention and added entire purchases in assessee's income.

4. By the impugned order, CIT(A) restricted the addition to the extent of 12.5% of such purchases after having following observation:-

*6.3. I have considered the submission of the AR and the order of the AO. It is seen that the AO has not doubted that the assessee is in the business of civil construction and had carried out the contract received from MMRDA for road widening. The AO has also not doubted the turnover or gross receipts shown by the assessee in the books. He has only disallowed purchases from 6 parties, for the reason that these parties' names figured in the list of hawala dealer published by the MY AT Department of Maharashtra and they had given statement before the MY AT Department to that effect. These parties were also found non-existent at the addresses the provided by the assessee, when the Ward Inspector went to conduct field inquiries. On the other hand the claim of utilisation of material purchased from these parties has not been rebutted as also the proof of payment to these parties through account payee cheques. The payment is duly debited in the bank account of the assessee and the steel consumed in the execution of contract undertaken is supported by R A Bills raised. The AO has not brought anything on record to indicate that the payments made for the purchases have been received back by the assessee. The entire payment for all the purchases from these 6 parties has been made during the year itself and there is no delay, which is the hallmark of bogus purchases debited to lower the profits.*

*6.4 It is thus seen that although the AO had a good prima facie reason to suspect the genuineness of purchases, he stopped short of establishing sufficiently that these purchases, were actually bogus. He has disbelieved the purchases only because the names of the parties appeared on the list of hawala operator and the assessee failed to produce him during assessment proceedings. The proof for payment made by the assessee to these parties through account payee cheque, which is duly debited in the books of account, has not been rebutted by the AO. The AO has not brought anything on record to indicate that the payments made for purchases have been received back by the assessee. It is common knowledge that some assesseees make purchases from unregistered dealers who do not issue bills as the sale*

*made by them are not accounted for. To provide authenticity to such purchases, accommodation bills are obtained from other parties. The list of parties investigated and published by the MVAT Department is a list of such parties providing accommodation bills. The purchases shown by the assessee from these six parties included in the list of MY AT Department therefore it is to be seen in the light of these market practices and the finding of the Sale Tax Department as also the inquiries conducted by the AO as brought out in the assessment order. The decisions of various ITAT/High Court on identical facts are also considered to decide the issue in the present case. Some of the recent Cases, which are also relied upon by the AR, are as under:-*

*6.5 In Bholanath Polyfab P.Ltd. 355 ITR 290 (Guj), the facts of the case were that the assessee was engaged in the business of trading in finished fabrics. For the A.Y. 2005-06, the A.O held that the purchases worth RAO,69,546/-were unexplained. He, therefore, disallowed such expenditure claimed by the assessee and computed the total income of Rs.41,10,187/-. The issue was carried in appeal by the appellant before CIT(A). The Commissioner rejected the appeal, upon which the assessee went in further appeal before the Hon'ble Tribunal. The Hon'ble Tribunal substantially allowed assessee's appeal. In so far as the question of bogus purchase is concerned the Hon'ble Tribunal concurred with the Revenue's views that such purchases were made from bogus parties. The Tribunal noted that the A.O had issued notice to all parties from whom such purchases were allegedly made. Such notices were returned unserved by the postal authorities with the remark that address was incomplete. The Inspector deputed by the LT. Department also could not find any of the parties available at the given addresses. The assessee was unable to produce any confirmation from any of the parties. Though the assessee had claimed to have made payments by account payee cheques, upon verification it was found that the cheques were encashed by some other parties and not by the supposed sellers. Having come to such conclusion, however, the Tribunal was of the opinion that the purchases may have been made from bogus parties, nevertheless, the purchases themselves were not bogus. The Tribunal adverted to the facts on record and came to the conclusion that the entire quantity of opening stock, purchases and the quantity manufactured during the year under consideration were sold by the assessee. The purchases of the entire 1,02,514 meters of cloth were sold during the year under consideration; The Hon'ble Tribunal, therefore, accepted the assessee's contention that the finished goods were purchased by the assessee, may not be from the parties shown in the accounts, but from other sources. In that view of the matter, the Tribunal was of the opinion that' not the entire amount, but the profit margin embedded in such transaction would be subjected to tax. The Tribunal relied on its earlier decision in the case of Sanket Steel Traders vs. ITO (IT Appeal No.280! & 2937 (Ahd.) of2008, dated 20.05.2011) and also made*

*reference to Tribunal's decision in the 'case of Vijay . Proteins Ltd. vs. AcrT (1996) 58 ITD 428 (Ahd.). On appeal by the department, the Hon'ble Gujarat High Court held as follows:*

*6 We are of the opinion that the Tribunal committed no error. Whether the purchases themselves were bogus or whether the parties from whom such purchases were allegedly made were bogus is essentially a question of fact. The Tribunal having examined the evidence on record came to the conclusion that the assessee did purchase the cloth and sell the finished goods. In that view of the matter, as natural corollary, not the entire amount covered under such purchase, but the profit element embedded therein would be subject to tax. This was the view of this court in the case of San jay Oilcake Inds. Vs. CIT (2009) 316ITR 274 (Guj). Such decision is also followed by this court in a judgment dated August, 16, 2011 in Tax Appeal No. 679 of 2010 in the case of CIT Vs. Kishor Amrutlal Patel. In the result tax appeal is dismissed."*

*6.6 In the case of Vijay Proteins Ltd. 58 ITD 428, Hon'ble ITAT Ahmedabad 'C' Bench, under similar circumstances, where the A.O had disallowed the entire expenditure on account of purchases made from certain parties treating the same as bogus, has held that "it is elementary rule of accountancy as well as of taxation laws that profit from business cannot be ascertained without deducting cost of purchase from sales, otherwise it could amount to levy of income tax on gross receipts or on sales. Such a course is not permissible unless it is specifically authorized to do so under any particular provisions contained in the Act." It has been held by the Hon'ble Tribunal that in such circumstances, a certain percentage of expenditure. has to be disallowed on account of inflation of purchase price. Hon'ble Tribunal has held that if purchases are made from open market without insisting for genuine bills, the suppliers may be willing to sell those products at a much lower rate compared to the rate at which they may charge in case the dealer has to give a genuine sale invoice in respect of that sale and supply of goods. There may be various factors due to which there is bound to be a substantial difference between the purchase price of unaccounted material and rate of purchase of accounted for goods. There may be a saving on account of sales tax and other taxes and duties which may be leviable in respect of manufacture of the goods in question. The suppliers or manufactures make a substantial saving in the income tax in respect of income from sale of unaccounted goods produced and sold by them. This may also be one of the factors due to which the seller may be willing to charge lower rates for unaccounted goods as compared to accounted for goods.*

*6.7 In the case of Mls Sanjay Oilcake Industries V. Commissioner of Income Tax reported in 316 ITR 274 (Guj) , the Hon'ble court had*

*upheld the action of the CIT(A) and ITAT in determining estimated "addition of 25% of the purchases in cases involving bogus purchase. Very recently in the case of Commissioner of Income Tax v. Simit P. Sheth 356 ITR 451 (Guj), the Hon'ble High Court has given a finding that estimation of rate of profit must necessarily vary with the nature of business and no uniform yardstick could be adopted and finally confirmed the action of the ITAT in determining 12.5% of the bogus purchases as the profit embedded in such transactions.*

*6.8 The same ratio also has been applied by the Bombay High Court in the CIT vs. Nikunj Eximp Enterprise Pvt.Ltd. (Bombay High Court) (ITXA No.5604 of 2010 - judgement dated 17 December 2012). Corresponding ITAT decision ITA No.899/M/04 - order dated 30 April 2010).*

*6.9 In a recent judgement given by IT AT, Mumbai on 20<sup>th</sup> August, 2014 in case of Shri Rajeev G. Kalathil vs DCIT, it was held that the supplier declared as hawala dealer by Sales Tax Department cannot be the sole reason for disallowance. It can be a good starting point for making further investigation and take it to a logical end. Suspicion of highest degree cannot take place of evidence. The Assessing Officer could have called for details of the bank account of the supplier to find out as whether there was any immediate cash withdrawal from their accounts. The ITAT held that since such exercise was not done, the said purchase cannot be disallowed only on the basis of the information given by Sales Tax Department.*

*6.10 It is also seen that for A.Y. 2009-10, the case of the assessee was reopened and the AO, on identical facts, disallowed only 12.5% of the purchases shown from the tainted parties. There is force in the argument of the AR that had the assessment for assessment year 2010-11 been passed after the finalisation of this reopened assessment for assessment year 2009-10, then only 12.5% of the purchases would have been disallowed by the AO for this year also.*

*6.11 The facts in the present case show that the appellant was not in a position to prove the existence of the suppliers or of supply of goods by those vendors. The suppliers were found to be engaged in providing bogus bills without actual delivery of goods. On careful analysis of the decisions of Hon'ble High Court of Gujarat and ITAT in the above mentioned cases, I am also of the view that without purchase of material it is not possible to complete the contract work of road widening done by the assessee. As mentioned above, the AO had never disputed or examined the sales. Once sales are accepted, corresponding purchases have to be considered and cannot be disregarded in totality. Looking to the market trend, the appellant may have made cash purchases from other parties which were not recorded in the books, and took only bills from these 6 parties as*

*accommodation, to explain the purchases. The purchases themselves are not bogus but the purchase parties shown in books are. Therefore the entire purchase from these 6 parties cannot be added as bogus and what needs to be taxed is the profit element embedded in such transactions. Estimations ranging from 12.5% to 25% have been upheld by the Hon'ble Gujarat High Court, depending upon the nature of the business. As held in the case of Simit P. Sheth (supra), no uniform yardstick could be applied to estimate the rate of profit and it varies with the nature of business. Taking all facts into consideration, the findings of the Hon'ble Courts on this issue and the assessment order for A.Y. 2009-10 in assessee's own case, I am of the view that estimation of 12.5% as profit embedded in impugned purchases and adding the same to the total income returned, would meet the ends of justice. Therefore, I direct the AO to estimate profit of 12.5% in the alleged bogus purchases, which works out to Rs. 8,77,955/- (12.5% of Rs. 70,23,639/-) and restrict the addition to Rs. 8,77,955/-. The appellant get the relief for the balance Rs. 61,45,684/-. The grounds of appeal No. 1 & 2 are partly allowed to the above extent.*

5. Against the above order of CIT(A), revenue is in further appeal before us.

6. We have considered rival contentions and carefully gone through the findings recorded by AO and CIT(A). After giving detailed finding, CIT(A) found that purchases themselves were not bogus but the purchase parties shown in the books were bogus, therefore entire purchases from these six parties cannot be added as bogus. Accordingly, he taxed the profit element embedded in such purchases. By following the order of Gujarat High Court, the CIT(A) upheld the addition to the extent of 12.5% of such purchases. The detailed finding so recorded by CIT(A) has not been controverted by learned DR by bringing any positive material on record. Accordingly we do not find any reason to interfere in the order of CIT(A).

**7. In the result, appeal of the Revenue is dismissed.**

Order pronounced in the open court on this 24/05/2017

**Sd/-  
(RAVISH SOOD)  
JUDICIAL MEMBER**

**Sd/-  
(R.C.SHARMA)  
ACCOUNTANT MEMBER**

Mumbai; Dated 24/05/2017

Karuna Sr.PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)  
ITAT, Mumbai