

आयकर अपीलीय अधिकरण, मुंबई "ई" खंडपीठ
Income-tax Appellate Tribunal -"E"Bench Mumbai
सर्वश्री राजेन्द्र,लेखा सदस्य एवं सी. एन. प्रसाद,न्यायिक सदस्य
Before S/Shri Rajendra,Accountant Member and C.N. Prasad,Judicial Member
आयकर अपील सं./ITA/715 to 717/Mum/2015,
निर्धारण वर्ष /Assessment Years: 2009-10 to 2011-12

Income tax Officer-29(1)(4) Mumbai.	vs.	Shri Hiren Shantilal Doshi 11, Mahavir Darshan, Kasturba Road, Mulund (W) Mumbai-80. PAN:AFJPD 7256 H
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आयकर अपील सं./I.T.A./7554 to 7556/Mum/2014,
निर्धारण वर्ष /Assessment Years: 2009-10 to 2011-12

Shri Hiren Shantilal Doshi Mumbai-400 080. (अपीलार्थी /Appellant)	vs.	Income tax Officer-23(2)(3) Mumbai. (प्रत्यर्थी / Respondent)
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Revenue by:Shri N. Sathya Moorthy-DR

Assessee by: Shri Bhupendra Shah

सुनवाई की तारीख / Date of Hearing: 21.07.2016

घोषणा की तारीख / Date of Pronouncement:03.08.2016

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश
Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order dt.14.11.2014 of the CIT(A)-33Mumbai the Assessing Officers(A.O.s) and the assessee have filed the cross appeals for the above mentioned three years.The assessee is engaged in the business of supplying iron and steel.As the issues involved in all the appeals are common involving identical issue, so we are disposing them off by a consolidated order,for the sake of convenience.The details of filing of returns, returned incomes and assessed incomes etc.can be summarised as under :-

AY.	ROI filed on	Income returned	Assessment dt.	Assessed income
2009-10	25.09.2009	Rs.9,79,390/-	22.03.2014	Rs.2,33,04,760/-
2010-11	28.09.2011	Rs.9,98,770/-	22.03.2014	Rs.2,16,67,920/-
2011-12	29.09.2011	Rs.15,95,937/-	22.03.2014	Rs.1,51,49,610/-

ITA/715/Mum/2015,AY.2009-10 (By Revenue):

Effective ground(GOA1-4)of appeal,filed by the AO,for the AY.under consideration,is about deleting the addition made u/s.69C of the Act,amounting to Rs.22.27 lakhs.During the assessment proceedings,the AO found that the sales tax Department,Mumbai had gathered information about the parties who had been only providing accommodation entries, without doing actual business,that the Sales Tax Department had identified over 1100 such hawala operators and over 37,000 beneficiaries of such transaction.He further found that following 11 parties, from home the assessee had claimed to have purchased goods, figured in the said list of suspicious hawala operators.

He observed that the Sales Tax Department had conducted independent enquiries in each case of the hawala parties including the aforesaid 11 cases, that the investigation wing of the Income Tax Department had also carried out searches/serveys on the basis of information gathered by the Sales Tax Department. He issued notices under section 133 (6) of the Act to the aforesaid parties to ascertain the genuineness of the transaction.However, such notices were returned back by the postal authorities with the remark “not known”. He directed the assessee to produce the sales parties for verification and also to produce its books of accounts,corresponding sales, transportation bills in support of having made purchases from the above-mentioned parties. The assessee filed its submission vide its letter dated 11/03/2014 and stated that it had purchased goods from the above-mentioned parties. After considering the submission of the assessee, the AO held that claim of payment through banking channel was not the conclusive proof to establish the genuineness of the purchases, that the assessee could not submit the details of transportation of such goods to substantiate delivery of goods, that assessee had failed to produce the parties for verification. He added the amount of purchase made from the aforesaid 11 parties, amounting to Rs. 2.22 crores,to the total income of the assessee. He also held that the assessee was not able to furnish any evidence to establish the delivery of goods, that the results declared by the assessee in the

books of accounts were not believable. He further observed that without purchases there cannot be any sale, that the assessee had shown the income in his return of income arising out of the sales of goods, that the supplier of the goods in question were not genuine, that the physical delivery of the goods not had taken place, that the goods were purchased from other parties, that the bills issued by the said parties were not genuine, that in reality no actual purchases were made from the above-mentioned eleven parties, that the purchase of goods was a mere sham transaction. Finally, he treated the entire purchase of Rs.2,22,70,672/- as unexplained expenditure under section 69C of the Act.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him, it was argued that during the course of assessment proceedings the assessee had furnished complete details of purchases including the documents in form of delivery challans, transport receipts and the acceptance of the delivery by the third parties who had received the goods on behalf of the assessee, that the payment for the said purchases were made by account payee cheques, that all the purchases and sales were passed through the stock register maintained by the assessee, that the AO, in his assessment order, had admitted that goods were separately purchased, that the AO had relied upon the affidavits filed by the dealers before the Sales Tax authorities, that no affidavit was made available to the assessee, that the AO did not give opportunity of cross-examining the parties whose statements were relied upon by him for making the additions. The assessee relied upon the case of JMD Computers (320 ITR 6). It was further argued that the conclusion of the assessee about obtaining hawala bills from the 11 parties was based on mere suspicion, that there was no material on record to establish that payment of the impugned purchases had come back to the assessee, that the assessee could not be saddled with the liability arising out of unilateral statement of a person for the said proposition. He relied upon the certain case laws and argued that if the

investment/transactions were recorded in the books of accounts and the identity of the vendor was disclosed the amounts could not be included in the total income is unexplained investment,that the purchases from the 11 parties mentioned above were duly recorded in the stock register,that the corresponding sales arising from the said purchases were not doubted.

3.1.After considering the submission of the assessee and the assessment order, the FAA held that the bonus to prove the genuineness of the expenditure was on the assessee,that he had discharges onus by furnishing the bills,delivery challan and the evidences showing the payment through banking channels, that all the purchases were reflected in the stock reconciliation, that the AO had not doubted the sales arising out of the said trading activity and profit earned by him, that the entire purchases in the case under consideration could not be treated as bogus, that the AO had not made available the copies of innovative its witchy had relied upon for the purpose of making the addition, that there was no evidence to show that money which was given by cheques to the 11 parties had come back to the assessee in form of cash, that the AO had made addition under section 69C of the Act, that he had held that the assessee had purchased goods from third parties, that the conclusion drawn by the AO was based on presumption, that he had not disputed the fact that assessee had in fact purchase the goods and also made sales out of such purchases,that purchase of goods was not in doubt,that the parties from whom purchases were shown to have been made were registered dealers under MVAT.He referred to the case of Kirtila Kalidas Jewellers Pvt.Ltd.(54SOT29) and held that no addition could be made under section 69C of the Act. He also referred to the other cases decided by the Tribunal and held that the AO did nothing except relying upon the non-verification of the parties under an enquiry under section 133 (6) and the information obtained from the Sales Tax Department, that he had completely ignored the factors like corresponding consumption and sale of goods purchased

,payment made by him to the parties concerned through proper banking channels, that the provisions of section 69C were applicable in a case where the source of expenditure was in doubt and not the expenditure itself, that in the case under consideration on the one hand the AO had doubted the expenditure in form of purchases from the above-mentioned 11 parties and on the other he had added the income on the ground that source of the said expenditure had remained unexplained, that if the expenditure itself had been rejected as non-genuine then there was no question of adding any income on the ground that the source of the said expenditure had remained unexplained, that both the issues were mutually exclusive. Finally, he held that no addition could be made under section 69C of the Act in the case the consideration. AO's alternative plea that assessee would have made sales out of unaccounted stock also did not find favour with the FAA. He held that the entire sales had been reflected in the books of accounts as well as the purchases, that neither the sales nor the purchases were out of records maintained by the assessee, that provisions of section 69 could be invoked when the assessee had made investment but the same were not found recorded in the books of accounts and the sources thereof were not explain, that in absence of any material brought on record to show that assessee had in fact incurred expenses/made investment which was not entered in the books, no addition could be made under section 69 also.

3.2. He further held that though the addition under section 69/69C could not be made, but, the question remained as to whether any addition/ disallowance was required to be made on account of the purchases from the said 11 parties which were not verifiable, that the assessee should not get escaped the taxation merely because the AO had invoke the wrong provisions of the Act, that as an appellate authority it was his duty to decide the whole issue, that all the facts and circumstances prove that goods purchased from the above even parties were not conclusively proved to be non-genuine or bogus, that it was also a fact that

above parties from whom the goods had been purchased during the year were not available for verification of purchases made from them, that the assessee had made the purchase in question but due to the non-availability of such parties and adverse report from the sales tax authorities the AO had treated the purchases, amounting to Rs. 2.22 crores as bogus, that there was no question of disallowing the entire purchase made from certain alleged bogus parties, that the purchases had not been confirmed by the parties concerned, that there was possibility that such purchases were over invoiced to reduce the profit, that in such cases profit element amended in the transaction could be upheld. He referred to the cases of Simit P Seth (ITA/ 553 of 2012) of the Hon,ble Gujarat High Court and Bholenath Poly Fab (P.) Ltd (ITA/63 of 2012, dated 23/10/2012) and Sathyanarayan P Rathi(351 ITR 150) and reiterated that only the profit element embedded in such purchases shown could be added to the income of the assessee. Finally, he held that it would be fair and reasonable if the disallowance, out of the alleged bogus purchases to cover up inflation namely case in the case of the assessee, was restricted to 10%. He directed the AO to disallow the 10% of the alleged bogus purchases i.e to Rs. 22.27 lakhs.

4. During the course of hearing before us, the Departmental Representative (DR) supported the order of the AO and argued that assessee had not produced the parties for verification, that the assessee had not proved the genuineness of the transaction. The Authorised Representative (AR) stated that provisions of section 69C were not applicable in the year under consideration. He referred to the cases of 1. Rajeev M. Kalathil, (ITA No.6727/Mum/2012 AY.2009-10 Dt.20.08.2014);
2. Paresh Arvind Gandhi (ITA No.5706/Mum/2013 AY.2010-11 Dt.13.05.2015);

3. Hiralal Chunilal Jain (ITA No.4547/Mum/2014 AY.2009-10 Dt.01.01.2016) and 4. M/s. Imperial Imp. & Exp (ITA No.5428/Mum/2015 AY.2009-10,Dt.18.03.2016)

5. We have heard the rival submissions and perused the material before us. We find that the AO had directed the assessee to produce the parties from whom the assessee had claimed to have made the purchases, that assessee did not produce the alleged purchasers before him, that the notices sent by the AO, under section 133 (6), were returned back by the postal authorities with the remark that not known, that the assessee had failed to discharge the initial burden of purchase cost upon him, that the AO had accepted the sales. We are of the opinion that once the AO does not doubt the sales corresponding purchases have to be accepted—there cannot be any sales of goods without the purchases. In such circumstances, in our opinion, entire purchases cannot be added to the total income of the assessee nor the provisions of section 69/69C could be invoked. For not discharging the initial burden of proof, the FAA had restricted the addition to 10% of the total purchases. We find that the Hon'ble Gujarat High Court has dealt with the similar issue in the case of Sathyanarayan P. Rathi(351ITR150). In that matter it was found that the assessee was in the business of trading in iron and steel, that during the reassessment proceedings for the year 2003-04 the AO had made an addition of the entire amount of purchase of Rs.61.40 lakhs to the income of the assessee, that the FAA added only the profit element and not the entire amount of the purchases, that the Tribunal allowed further relief to the assessee and retained the addition to the level of 12.5% in pursuance of the various purchases. On appeal, the Hon'ble High Court deliberated upon the following question:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in restricting the disallowance to the extent of 12.5 per cent. of the addition on account of bogus purchase, without appreciating the factual aspect and by ignoring

the manifest evidence relied upon by the Assessing Officer and overlooking the ratio laid down by the hon'ble High Court in the case of Pawanraj B. Bokadia in Tax Appeal No. 3245 of 2009 dated September 29, 2011"

The Hon'ble Court mentioned the facts of the case and decided the issue as under:

"2. The issue pertains to bogus trade made by the respondent-assessee. The assessee is in the business of trading in iron and steel. For the AY. 2003-04, during the reassessment proceedings, it was found that the purchases worth Rs. 61.40 lakhs (rounded off) were not supported by sufficient evidence. The assessee's claim of having purchased such goods from various suppliers was verified, but was not found genuine. It was found that such parties had never supplied the goods as named by the assessee. On such basis, the Assessing Officer made addition of the entire amount of purchase of Rs. 61.40 lakhs (rounded off). The assessee carried the matter in appeal and the Commissioner of Income-tax (Appeals) partly allowed the appeal. It was found that though the purchases were not made from the parties from whom the assessee claimed, there was complete quantitative tally of material purchased and sold. In that view of the matter, the Commissioner of Income-tax (Appeals) was of the view that such materials were purchased from the open market incurring cash payment and bills were procured from various sources. Resultantly, the Commissioner (Appeals) added only profit element and not the entire amount of the said purchase, for the limited addition to 30 per cent. of the total amount and reduced the same to Rs. 18.42 lakhs (rounded off).

3. The assessee carried the issue in further appeal before the Tribunal. The Revenue also preferred an appeal against the order of the Commissioner (Appeals). Both these appeals came to be decided by the Tribunal by the impugned judgment. The Tribunal gave further relief to the assessee and refused the addition to the level of 12½ per cent. in pursuance of the various purchases. The Revenue's appeal was dismissed.

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5. From the record, we noticed that the Commissioner (Appeals) as well as the Tribunal found that the purchase of raw material, in which the assessee was trading, were only made, but not from the disclosed sources. In other words, the case against the assessee was that the purchases were made in the grey market through cash

payment and some entries were obtained from certain suppliers who had not sold such goods.

6. The present case, thus, being one of only purchase but not from disclosed sources, it would be only the profit element embodied in such purchase which could be added in the income of the assessee and, thus, rightly so done by the Commissioner (Appeals) and the Tribunal.

7.If this be our conclusion, the only question arises whether such profit element should be estimated at the rate of 30 per cent. or 12½ per cent. Whenever such a question arises, some reasonable estimation is always permissible. Hardly any question of law on such aspect would arise. Merely, it is pointed out that the assessee was a trader and that the Tribunal retained 12½ per cent. of the purchase towards its possible profit, we do not find any reason to entertain the appeal. In the result, tax appeal is dismissed.”

We find that while deciding the cases, relied upon by the assessee before us, the tribunal had not considered the above-mentioned judgment, delivered by the Hon'ble Gujarat High Court. The facts and circumstances of the case under consideration are similar to the facts of Sathyanarayan P. Rathi (supra). The FAA has held that only the profit embedded in the transaction should be taxed. In our opinion, considering the peculiar facts of the case, his order does not suffer from any legal or factual infirmity, as far as deleting the addition of Rs. 2.27 Crores is concerned. We would discuss the issue of estimating the profit element embedded in the transaction, while adjudicating the appeal filed by the assessee. As far as the appeal of the AO is concerned, it is sufficient to say that effective ground of appeal has to be decided against AO.

ITA/7554/Mum/2014, AY.2009-10 (Appeal by the Assessee):

6. While deciding the appeal, filed by the AO, we have taken note of judgment of Satyanarayan P. Rathi (supra). We find that the said case was not brought to the notice of the Tribunal, in the cases relied upon by the assessee, as stated earlier. The failure of the assessee to produce the alleged purchasers before the AO and returning back the notices issued by the AO by the postal authorities

lead to the inference that the purchases made by the assessee were not verifiable as the sales were. In our opinion, to that extent, the assessee was not able to prove the genuineness of the purchases made from the above-mentioned 11 parties. So, in absence of veracity of the claim made by the assessee about the purchases, the FAA had to make an estimate. In the case of Sathyanarayan P. Rathi (supra), the Hon'ble Gujarat High Court has approved the estimation of the profit embedded in the transaction. While determining the tax liability of an assessee, in certain circumstances estimation has to be made. In such peculiar circumstances, the facts of the cases are to be considered. The job of the AO/FAA is to collect the due taxes on behalf of the sovereign. In the case under consideration, the FAA has been very fair holding that the entire purchases cannot be added to the total income of the assessee. However, he considered transaction as a whole and following the judgments delivered by the Hon'ble Gujarat High Court in three cases, held that some estimation should be made. Therefore, in our opinion, his order should not be interfered. Respectfully, following the judgments of the Hon'ble Gujarat High Court, referred to by the FAA at paragraph no.3.2. of the order, we decide the effective ground of appeal against the assessee.

ITA.s.716-717/Mum/2015 (By Revenue)]
& 7554-7556-/Mum/2015-(By Assessee)] AY.s.2010-11,2011-12:

7. While deciding the appeals filed by the AO and the assessee for the AY.2009-10, we have dismissed the effective grounds of appeal against them. Following our order for that year, effective grounds of appeal raised by them for the AY.s under consideration stand rejected.

As a result appeals filed by the AO and the assessee for all the three AY.s stand dismissed.

फलतः निर्धारण अधिकारी और निर्धारिती द्वारा तीनों नि.वर्षों के लिए दाखिल की गई अपीलें नामंजूर की जाती हैं.

Order pronounced in the open court on 3rd August,2016.
आदेश की घोषणा खुले न्यायालय में दिनांक 3अगस्त,2016 को की गई।

Sd/-

(सी .एन .प्रसाद /C.N. Prasad)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांकDated : 03.08.2016.

Jv.Sr.PS.

Sd/-

(राजेन्द्र / Rajendra)

लेखा सदस्य / ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "E" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.