

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

BEFORE SHRI D.T. GARASIA, JM AND SHRI RAJESH KUMAR, AM

I.T.A. No. 5171 to 5175/Mum/2014
Assessment Year: 2007-08 to 2011-12

ACIT 25(1) Pratyakshahkar Bhavan, R. No. 202 2 nd Floor, Bandra Kurla Complex, Bandra (E), Mumbai - 400051	Vs.	MR. BHARAT GAJANI 302 Shraddha Residency, Chanavarkar Rd. Borivali (W) Mumbai – 400 092
PAN/GIR No. AEC PG1808C		
(Appellant)	:	(Respondent)

Appellant by	:	Shri Suman Kumar, DR
Respondent by	:	Shri Sanjay Kapadia, AR

Date of Hearing	:	14/02/2017
Date of Pronouncement	:	08/05/2017

ORDER

PER D.T. GARASIA, JUDICIAL MEMBER:

All these appeals are filed by the revenue against the respective orders of CIT(Appeals) – 35, Mumbai all dated 09.05.2014 for the assessment years 2007-08 to 2011-12 respectively. All these appeals relate to the same assessee, therefore they are disposed of by this common order and involve common issue.

2. In all these appeals the ground of appeal raised by the department are same except for the change in figures.

- i. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 56,87,118/- made by the A.O. on account of bogus purchases.
 - ii. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in relying upon judgements in the case of CIT vs. Nikunj Exim Enterprises Pvt. Ltd. Without appreciating that the facts involved in the appellant's case are different from the facts of the above case law.
 - iii. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) grossly erred in not considering that the assessee in his statement on oath during the survey proceedings surrendered on additional income of Rs. 38,70,429/- for F.Y. 2006-07 and the assessee has not retracted from his statement during the assessment proceedings.
 - iv. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) grossly erred in not appreciating the fact that alleged bills were not supported by supply of goods and some of the notices under 133(6) issued to parties from whom alleged bills were received were returned undelivered by the postal authorities and the assessee has also failed to produce the parties before the A.O.
 - v. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance made by the A.O. overlooking the explicit finding of the investigation carried out by the Sales Tax Department and corroborated by the enquiries of the A.O.
 - vi. The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the A.O. be restored.
 - vii. The appellant craves leave to amend or alter any ground or add a new ground.
3. The brief facts of the case are as under:

A survey u/s 133A was conducted in the case of Bharat Gajani proprietor M/s. Appolo Associates on 19.12.2012. During the course of survey proceedings, certain books of accounts were impounded. Analysis of the same shows that assessee is a proprietor of M/s. Appollo associates. Mr. Bharat Gajani is a civil contractor and during the previous year was awarded BMC

contract. To carry out these contracts, assessee had made purchases from various various parties. It has come to notice that some of these purchases were made from bogus parties i.e. non-existent parties from A.Y. 2007-08 onwards. The break-up of the same is as follows:

Sr. No.	Assessment Year	Amount of Bogus Purchases
1.	2008-09	Rs. 1,54,80,417/-
2.	2009-10	Rs. 7,12,32,813/-
3.	2010-11	Rs. 1,40,17,638/-

The fact was confronted to the assessee during the questioning in survey proceedings. The assessee has offered the following amounts for taxation:

Sr. No.	Assessment Year	Amount of Bogus Purchases
1.	2006-07	Rs. 38,70,429/-
2.	2007-08	Rs. 2,63,60,329/-
3.	2008-09	Rs. 1,75,02,330/-
4.	2009-10	Rs. 7,20,75,620/-
5.	2010-11	Rs. 1,42,04,474/-

Therefore, the A.O. has reasons to believe that a tune of Rs. 38,70,429/- has escaped for the A.Y. 2007-08 in view of the provisions of section 147 of the Income-tax Act, 1961. During the course of survey a statement was recorded. The assessee has offered additional income on the ground that the said parties from whom the assessee has made purchases had admitted before the sales tax authorities for giving non genuine bills and they never supplied any material to the assessee and the assessee admitted that he did not have any documentary evidence and, therefore, he offered additional income. The assessee was given show-cause notice that why the alleged purchases from the 14 parties mentioned in the Sales Tax Department should not be treated as

unexplained expenditure. The notice is under 133(6) was issued to all the 14 parties and confirmations were received from 8 of them. The details is on page 9 of the Assessment Order. With respect of Prakash Engineers and Construction Co., they have filed the copy of acknowledgement of return of income filed by them for A.Y. 2007-08 and VAT registration No. was mentioned, however no confirmation of about transaction. The A.O. held of Rs. 23,49,748/- as bogus. In response to other parties, the notices were returned unserved. The 6th party, M/s. Suraj Enterprises replied that they had no transaction with M/s. Appolo Associates. The A.O., thereon has given the detailed modus operandi of business carried out by the assessee on pages 11, 12, 13, 14, 15, 16 & 17. The assessee has given written submission to the Assessing Officer but Assessing Officer did not accept the same and held that

i) It is settled law that onus lies on the assessee to prove the genuineness of any expenditure which is claimed as deduction in computing its taxable income. Therefore, the onus in the instant case, squarely lay on the assessee to prove that the suppliers were genuine suppliers. Such a burden had to be discharged by the assessee with very strong and clinching evidence in view of denial by these parties and non existence of parties as notices u/s. 133(6) have returned unserved. The Income-tax Inspector's report also corroborates this fact.

ii) The assessee was well aware that he was entering into colorable transactions with the alleged suppliers as these alleged suppliers were indulging in such transactions right from their inception.

iii) The Sales Tax Department had recorded the statement of the proprietors of these firms, the copy of which was provided to the assessee vide show-cause notice dated 30.01.2013. From these statements, it is quite evident that right from inception these 7 entities have not been engaged in any real business but

have been formed only for the purpose of issuing bills of sale for the persons needing their questionable services without any cash remitted to the alleged purchases, after deducting a nominal commission.

iv) The assessee's argument that he had indeed made purchases, is also not tenable on the fact that the purchases which have been recorded by him in the bogus of accounts, are found to be bogus, as corroborated by the fact that they exist in the hawala list of the Sales Tax Department, the statement of parties recorded by the Sales Tax Department of the Government of Maharashtra, wherein they have admitted that they have issued only bills and no actual transfer of goods has indeed occurred. The statement of the above parties were also provided to the assessee. The assessee was also asked to produce the above parties. The assessee had showed his inability to produce them. Therefore, assessee's argument that it has made genuine purchases from these parties is not acceptable. If indeed the assessee has made these purchases, the same have been made from out of the books and, therefore, the same is treated as bogus expenditure.

v) It is worthwhile to mention that mere payment by account payee cheque is not sufficient proof for claiming any expenditure as held by the following courts:

- a. Assam Pesticides and Agro Chemicals vs. Commissioner of Income-tax 227 ITR 845:
"Mere payment by itself would not entitle an assessee for deduction of the said expenditure unless the same was proved to be paid for commercial consideration. The onus of proof at all relevant items rests upon the assessee. The law does not prescribe any quantity test to find out whether the onus in a particular case has been duly discharged. It all depends on the facts and situations of the case".
- b. Chemaux Private Ltd. vs. Commissioner of Income-tax 25G ITR 134:

“ Complete proof is to be given by the person who has claimed the expenditure that he has incurred the same for business purpose”.

c. Ramanand Sagar vs. Deputy Commissioner of Income-tax 25G ITR 134:

“The expenditure must be laid out wholly and exclusively for the purpose of business or profession. If the assessee fails to satisfy any of these tests, the expenditure claimed is not allowable.

d. Commissioner of Income-tax Transport Corporation of India Ltd.

“Mere payment by itself would not entitle the assessee to deduction of expenditure unless the same was proved to be paid for commercial considerations. The burden of proof is always upon the assessee. It is for the tax payer to establish by evidence that a particular allowance is justified. It is not for the tax payer to establish by evidence that a particular allowance is justified. It is not for the Income-tax Officer to independently collect evidence and prove that the deduction claimed by the assessee is baseless”.

4. The assessee has given the details of work carried out by him and the assessee claimed that he has purchased the material which is utilized in the work. Therefore, the same material is purchases from Hawala parties. The Hawala parties have confirmed in Sworn statement recorded by the Sales Tax Authorities that they have not supplied any materials against the bills issued by them to various parties. In view of this, the Assessing Officer has disallowed Rs. 56,87,118/- as bogus purchase in assessment year 2007-08, in 2008-09 Rs. 2,73,35,549/-, in 2009-10 Rs. 1,74,33,833/-, in 2010-11 Rs. 8,59,57,089/- and in 2011-12 Rs. 2,18,70,719/-.

5. The matter carried to CIT(A) and CIT(A) has deleted by observing as under:

“The second ground of appeal pertains to addition made of Rs. 56,87,118/- by treating part of the purchases as non genuine by invoking provisions of section 69C of the

I.T. Act, 1961. The fact of the case is that during the course of survey conducted on 19.12.2012, the case is that during the course of survey conducted on 19.12.2012, the appellant was confronted with evidence available before the A.O. on the website of the Maharashtra Sales Tax Department of names of parties who were suspected to be bogus suppliers for A.Y. 2011-12, 2010-11, 2009-10, 2008-09 and 2007-08. The present appeal is vis-à-vis A.Y. 2007-08. The A.O's contention while disallowing the purchases detailed on page 6 of the Assessment Order was that (i) they were listed on the website of the sales tax department and secondly because 133(6) notices were sent to these parties and the same remained uncomplished with. Only one of them which is M/s. Prakash Engineers and Construction Co. filed copy of acknowledgement for return of income filed by them for A.Y. 2007-08 and mentioned their VAT Registration No. and did not file any transactions specifically done with the appellant. With respect to other 5 parties, notices were returned unserved by the postal authorities and later on one of these 5 parties filed its confirmation letter dated 25.01.2014. It was submitted that with reference to the above subject we would like to submit that during A.Y. 2007-08, we have made no transactions with M/s. Appollo Associates. In the submission made by the appellant before the A.O., the appellant has given out detailed system of his managing the work of civil contractor working for the Government/Semi Government Organization. The detailed pattern of work is given on paged 11 to 17 of the Assessment Order. Some of the critical and important part of the system of work are reproduced here. The appellant is registered as "without limit with government". The MCGM identifies the scope of work and accordingly estimates and prepared by them which are then floated in the newspaper and the procedure followed for the selection of the tender is followed as per norms of MCGM. In each of these tenders, the book of quantities (BOQ) is also submitted as a part of the tender documents, MCGM predefines the minimum technical and non technical requirements. All the required machineries for the execution of the work is planned and ordered by the project manager of the appellant directly with the suppliers as and when required. In addition to the work done recorded in the measurement book and payment certificate, there are many items which are included in the tender for which no payments are made to the contractor. The MCGM also appoints third quality auditors who also checks routinely the quality and quantity of works carried out and submit their specific observations before the bills of the appellant are cleared. Therefore, the

appellant has a system of maintaining site data of materials, labour and other inputs and outputs as per the norms prescribed by the MCGM. It is important to note that the A.O. had access to the list uploaded by the sales tax department of Maharashtra giving the names of supposedly suspected suppliers. However, in the course of assessment, the A.O. has not made any conclusive finding that the quantitative details as maintained by the appellant are dubious. All the registers and books examined by the A.O. during the course of assessment have not been commented upon by the A.O. to be found not matching with the project completed by the appellant. The A.O. neither during the course of survey nor during assessment or any specific finding to substantiate that the suspicious suppliers were actually bogus.

The appellant has also submitted that all the payments have been made by account payee cheques and the A.O. during the course of assessment has not found any reason or evidence to believe that these payments were not genuine considering that the said cheques have been encashed by the abovementioned 6 parties. Also even though physical survey has been conducted at the premises of the appellant, however there is no evidence available before the A.O. that any of these cheques or any other documents have been found which has raised doubt on any of the purchases made by the appellant being treated as same, neither is there any evidence found during the course of subsequent proceedings that any cash has been received back by the appellant. The appellant has also referred to the decision of M/s. Nikunj Exim Enterprises wherein the Hon'ble HC has decided the issue in favour of the appellant on similar facts. The appellant has also referred to the decision of the Hon'ble Settlement Commission in respect of assessee carrying out MCGM work wherein it has been held that 8% of the main contract and 4% of the sub contract turnover to be treated as net profit as being valid. While this may not alone be a major reason to substantiate the appellant claim, however, considering that the survey enquiries as well as assessment has not thrown up any evidence to doubt the appellants books etc. the appellants claim for relief assumes value.

During the course of appeal, the issue was raised before the appellant that why should the statement made during the course of survey not be taken as material evidence of the acceptance of the fact that these parties are suspicious and that the purchases made from

these parties be treated bogus. With respect to the same, I find merit in the argument advanced by the appellant in light of the various decisions of higher judicial authorities that merely a statement recorded during the course of survey is not enough evidence to suspect the statement of income especially when no other credible evidences have been found during the course of assessment or during subsequent assessment proceedings to substantiate the statement. Also reference is made to submission of the appellant wherein it may be noted that the appellant while making offer of “surrender of additional income” has categorically stated that “as per my knowledge there is no purchase without delivery of goods”. I am in agreement with the submissions made by the appellant in light of the various judicial pronouncements referred to in the submission of the appellant that the A.O. was free to verify the submissions of the said additional income vis-à-vis the various documents and the modus operandi of the appellant and since no infirmity has been found, merely the fact of admitting the income during the course of survey cannot be held against the appellant.

In light of the facts brought out above and the facts of the case specifically with respect to the modus operandi as Government Contractor and the fact that even survey conducted at the premises of the appellant could not provide any substantive or credible evidence to establish that the list of allegedly suspicious suppliers on the website of Sales Tax Department was found to be same, the appeal of the appellant is accepted.”

6. The learned DR submitted that onus lies on the assessee to prove the genuineness of any expenditure which is claimed as deduction in its taxable income. The assessee had not above to prove are strong and clinching evidence in view of denial of the party and non existence of the party. The Sales Tax Authority had recorded the statement of proprietors of these firms and they have not been any real business but they were giving only Hawala entries without any goods or materials and the alleged sale proceeds have been withdrawn and cash remitted to the alleged purchases after deducting a nominal commission. The learned DR relied upon the decision of Assam Pesticides and

Agro Chemicals vs Commissioner of Income Tax 227 ITR 845 and held that mere payment by itself would not entitle an assessee for deduction of the said expenditure unless the same are proved to be paid for commercial consideration. The expenditure must be incurred exclusively and wholly for business or profession. Mere payment itself would not entitle the assessee to deduction of expenditure unless the same was proved to be paid for commercial consideration.

7. The learned DR submitted that as per the decision of the Hon'ble Gujrat High Court in case of Commissioner of Income Tax vs. M.K. Brothers 30 taxman 547. If the assessee has made purchase from the parties and made payment through cheques, the ITO found that they were not available. Therefore, in view of the case only entire profits cannot be added but only profit element can be added.

8. The learned AR submitted that the assessee is a contractor carried out the work of Government. To executive the identified package scope of work and estimates and tenders are prepared by the Government. The assessee has carried the contract work as per the tender and rate contract. The MCGM measures the identified work and arrived at total quantity required for execution of the work and the assessee has carried out the work and all the work is supervised by the Municipal Authority i.e. engineers and all the projects were completed. Therefore, the assessee did purchase the material and all the purchases and utilization thereof for proper work are maintained in the office of the purchases are duly recorded. Moreover, there is no evidence to show that the assessee has received cash back against the payment which has been made during the course of survey proceedings. Moreover, the assessee carried out the work and

payment has been made by account payee cheque. Therefore, the assessee has all the right to claim as deduction. Moreover, all the goods purchased from the parties have been recorded in books of the accounts has purchased against which the payment have been made by account payee cheques to the parties from whom the goods were purchased from cash or credit.

9. The learned AR submitted that the supplier / broker has given the bills and the list of parties whom the A.O. has issued or notices but the assessee has no control on the same parties. The learned AR submitted that all the purchases are supported by respective bills and have been paid by account payee cheques. All purchase have been entire used for execution of the project as per survey the certification done by site engineer and for which the payment have been received by assessee from MCGM. Before clarification by MCGM deputed on engineering site for each work. He has supervised day to day work clarifies the quantity of materials and workmanship. Therefore, the assessee has prepared the books of accounts and the third party auditors of GP & NP will be by 13.19 percent and 9.73 percent. The learned AR relied upon the following decision:

SL No	Particulars	Page No
1.	The Commissioner of Income Tax-13 vs M/s . Ashish International	1-2
2.	ACIT-25(2) vs Shri Mahesh K. Shah	3-13
3.	ACIT-25(2) vs Shri Pratap U Purohit	14-19
4.	DCIT-25(3) vs Shri Rajeev G. Kalathil	20-25
5.	Ramesh Kumar & Co. vs The ACIT-21(1)	26-32
6.	ACIT vs M/s. S.D. Industries	33-35

10. We have heard the rival contention of both the parties. We find that during the course of survey conducted on 19.12.2012, the assessee was confronted with evidence available before the A.O. on the website and who were suspected to be bogus suppliers for A.Y. 2007-08, 2008-09, 2009-10, 2010-11 and 2011-12. The A.O. disallowing the purchase has relied upon the list of website of Sales Tax Department and secondly notice under section 133(6) were sent to 36 parties in respect of the 7 parties confirmations have been received in remaining 28 parties notices were returned unserved by the postal authorities. The assessee is a registered government contractor and the assessee identify the scope of work and accordingly estimate and tenders are prepared by them and then floated in newspaper and procedure followed by selection and tender as per the norms of MCGM. In each tenders, the books of quality as part of tender of documents. All the required minimum technical and non technical requirements of machinery for execution of the work is planned and ordered by the project manager of the company directly with the suppliers. In addition to the work recorded in measurement book and payment certificate and there are many items which are not included in tender for which no payments are made to the contractor. The MCGM also appoints third party who also check routinely the quality and quantity of the works carried out and submit their specific observations before the bills of the assessee are cleared. The assessee maintain a system of site data for material, labour and other inputs and outputs as per the norms prescribed by the MCGM. It is important to note that the A.O. has access to list uploaded by the Sales Tax Department of Maharashtra giving the names of supposedly suspected suppliers. The A.O. did not give any conclusive finding that the quantitative details maintained by the assessee are dubious. All the registers and books were examined by the A.O. and all the books were found to be matching with the project completed by the

assessee. The assessee has made all the payments by account payee cheques. Even physical survey conducted at the premises of the assessee and there is no evidence to show that cheques and other documents have been found to doubtful. We find that in the case of ITA No. 5194/Mum/2014, wherein the similar facts in the case of ITA No. 5194/Mum/2014 in the case of Mahesh K. Shah, the Tribunal has held as under:

“In our considered view, the A.O. has not brought on record any material evidence to conclusively prove that the said purchases are bogus. Mere reliance by the A.O. on information obtained from the Sales Department or on statements / affidavits of the 12 parties before the Sales Tax Department or that these parties did not respond to notices issued under section 133(6) of the Act, would not in itself suffice to treat the purchases as bogus and make the addition under section 69C of the Act. If the A.O. doubted the genuineness of the said purchases, it was incumbent upon him to cause further inquiries in the matter in order to ascertain the genuineness or otherwise of these transactions. Without causing any further enquiries to be made in respect of the said purchases, the A.O. cannot make the addition under section 69C of the Act by merely relying on information obtained from the Sales Tax Department, the statements / affidavits of third parties, without the assessee being afforded any opportunity of cross examination of those persons for non-response to information called for under section 133(6) of the Act.

In the factual matrix of the case of hand, where the A.O. failed to cause any enquiry to be made to establish his suspicions that the said purchases are bogus, the assessee has brought on record documentary evidences to establish the genuineness of the said purchase transactions, transactions, the action of the A.O. in brushing aside these evidences cannot be accepted. Further the Hon'ble Bombay High Court in the case of CIT vs Ashish International (ITA No. 4299 of 209) (Bom) has held that the genuineness of the statements relied upon by Revenue is not established when the assessee disputes the correctness thereof and has not been afforded opportunity to cross examine these parties. Moreover, when the payments for the said purchases to the said 12 persons is through proper banking channels and there is no evidence brought on record by the A.O. to establish that the said payments were routed back

to the assessee, the addition made by the A.O. is unsustainable. We are fortified in this view of ours by the decisions, inter alia, the Hon'ble Bombay High Court in the cases of Nikunj Eximp Enterprises Pvt. Ltd. (supra) and Ashish International (supra) and the decision of the Coordinate Bench in the case of M/s. Vaman International Pvt. Ltd. (ITA No. 794/Mum/2015 dated 16.11.2016). In this factual and legal matrix of the case on this issue, as discussed above, we find no reason for interference in the order of the learned CIT(A) and consequently uphold her order deleting the addition of Rs. 96,45,645/- made under section 69C of the Act as unexplained expenditure in respect of the aforesaid purchases. Consequently, ground 1 to 4 of the Revenue's are dismissed.

11. We also find that in ITA No. 6727/Mum/2012, in the case of CIT vs Rajeev G. Kalathil wherein the Tribunal has regarding the bogus purchase are reads under:

“We have heard the rival submissions and perused the material before us. We find that A.O. had made the addition as one of the supplier was declared a hawala dealer by the VAT Department. We agree that it was a good starting point for making further investigation and take it to logical end. But he left the job at initial point itself. Suspicion of highest degree cannot take place of evidence. He could have called for the details of the bank accounts of the suppliers to find out as whether there was any immediate cash withdrawal from their account. We find that no such exercise was done. Transportation of good to the site is one of the deciding factor to be considered for resolving the issue. The FAA has given a finding of fact that part of the goods received by the assessee was forming part of closing stock. As far as the case of Western Extrusion Industries (supra) is concerned, we find that in that matter cash was immediately withdrawn by the supplier and there was no evidence of movement of goods. But in the case before us, there is nothing in the order of the A.O. about the cash trial. Secondly, proof of movement of goods is not in doubt. Therefore, considering the peculiar facts and circumstances of the case under appeal, we are of the opinion that the order of the FAA does not suffer from any legal infirmity and there are not sufficient evidence on file to endorse the view taken by the A.O. So, confirming the order of the FAA, we decide ground no against the A.O.

12. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 08 /05/2017

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(D.T. GARASIA)
JUDICIAL MEMBER

Mumbai:
Date : 08/05/2017
Sr. P.S. B.S.

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai