

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI
**BEFORE SHRI JOGINGER SINGH, JUDICIAL MEMBER AND
SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER**
I.T.A. No.2172/M/2014 (Assessment Year: **2010-2011**)

M/s. Magoxy Infrastructure Pvt Ltd., 105, Sagar Pallazio, Sakinaka, Mumbai – 400072.	बनाम/ Vs.	DCIT, Circle 10(3), Mumbai.
स्थायी लेखा सं./PAN : AAECM7914L		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Rishabh Shah
प्रत्यर्थी की ओर से/ Respondent by	:	Shri Aarsi Prasad, DR

सुनवाई की तारीख / Date of Hearing : 14.09.2016

घोषणा की तारीख /Date of Pronouncement : 05.10.2016

आदेश / O R D E R

PER D. KARUNAKARA RAO, AM:

This appeal filed by the assessee on 1.4.2014 is against the order of the CIT (A)-22, Mumbai dated 4.2.2014 for the assessment year 2010-2011. In this appeal, assessee raised the following grounds which read as under:-

- "1. On the facts and in the circumstances of the case and in law, the Ld CIT (A) has erred in confirming the action of Assessing Officer in making an addition of Rs. 16,00,561/- on account of alleged bogus purchases of bricks and kadappa from M/s. Top Bricks & Sand Supplier and M/s. Raj Traders, without considering the facts & circumstances of the case.
2. On the facts and circumstances of the case as well as in law, the Ld CIT (A) has erred in confirming the action of the AO in treating the genuine purchases as alleged bogus purchases on the basis of the statement of third party, without providing the opportunity to cross examination of such parties as requested by the appellant, without allowing cross examination is in violation of principles of natural justice and thus void in law and needs to be quashed.
3. On the facts and in the circumstances of the case and in law, the Ld CIT (A) as well as Ld AO has erred in not appreciating the fact that the assessee has maintained the stock register showing one to one co-relation of sale and purchase."

2. Briefly stated relevant facts of the case are that the assessee is engaged in the 'excavation work, flooring and civil construction'. Assessee filed the return of income declaring the total income of Rs. 1,00,85,380/-. In the assessment

proceedings, an issue relating to Bogus Purchases (BP) came up, which has the effect of Rs. 16,00,561/- of addition. Bills are obtained from M/s. Top Bricks & Sand Suppliers and M/s. Raj Traders and there are hawala operators. In response to show cause notice of AO, assessee denied the allegation of BP. However, for the reasons discussed in para 4.2 of the assessment order, AO made addition of entire such purchases. Assessed income is determined at Rs. 1,16,85,940/- under normal provisions. Matter travelled to the first appellate authority.

3. During the proceedings before the first appellate authority, assessee pleaded for deletion of entire addition of Rs. 16,00,561/-. Assessee filed copies of the relevant purchase invoices and demonstrated the facts relating to the bank transactions of these bogus purchases. Assessee also relied on the Gujarat High court judgment in the case of Simit P. Sheth (356 ITR 451) for the proposition of restricting the addition to the GP on the said suspicious purchases. However, CIT (A) rejected the same and proceeded to confirm the addition as per the decision given in para 2.7 of the impugned order. CIT (A) opined that assessee failed to prove the purchases from grey market with evidences and therefore, the request for restringing the GP was dismissed. Aggrieved, assessee filed the present appeal before us.

4. During the proceedings before the Tribunal, Ld Counsel for the assessee narrated the above facts of the case and explained as to why the GP addition is appropriate in this kind of cases. According to the Ld Counsel for the assessee, when the bill providers for commission are involved and when the sales are undisturbed, the logical presumption is that the assessee must have purchased the matching products in the open market without bills and, therefore, there is need for buying the bills for commission. The ratio in the said case of Simit P Sheth should be applicable.

5. *Per contra*, Ld DR for the Revenue relied on the orders of the Revenue Authorities.

6. On hearing both the parties and perusal of the orders of the Revenue Authorities as well as the relevant material (Paper Book) placed before us, we find

that the argument of the Ld AR has merits. We have also perused the said judgment of the Hon'ble Gujarat High Court in the case of Simit P Sheth (supra) and find the same is relevant for the proposition that *the only profit element embedded in such purchases can be added to the income of the assessee when the assessee purchased goods in grey market without bills and made up the same with the accommodation entries / bills*. Considering the significance of the said Gujarat High Court judgment (supra) for the sake of completeness of this order, relevant paras from the said judgment are extracted as under:-

"We are broadly in agreement with the reasoning adopted by the Commissioner (Appeals) with respect to the nature of disputed purchases of steel. It may be that the three suppliers from whom the assessee claimed to have purchased the steel did not own up to such sales. However, vital question while considering whether the entire amount of purchases should be added back to the income of the assessee or only the profit element embedded therein was to ascertain whether the purchases themselves were completely bogus and non-existent or that the purchases were actually made but not from the parties from whom it was claimed to have been made and instead may have been purchased from grey market without proper billing or documentation.

In the present case, CIT believed that when as a trader in steel the assessee sold certain quantity of steel, he would have purchased the same quantity from some source. When the total sale is accepted by the Assessing Officer, he could not have questioned the very basis of the purchases. In essence therefore, the Commissioner (Appeals) believed assessee's theory that the purchases were not bogus but were made from the parties other than those mentioned in the books of accounts.

*That being the position, **not the entire purchase price but only profit element embedded in such purchases can be added to the income of the assessee.** So much is clear by decision of this Court. In particular, Court has also taken a similar view in case of Commissioner of Income Tax-IV vs. Vijay M Mistry Construction Ltd. vide order dated 10.01.2011 passed in Tax Appeal No. 1090 of 2009 and in case of Commissioner of Income Tax-I vs. Bholanath Poly Fab Pvt. Ltd. vide order dated 23.10.2012 passed in Tax Appeal No. 63 of 2012. The view taken by the Tribunal in case of Vijay Proteins Pvt. Ltd. Vs. CIT reported in 58 ITD 428 came to be approved.*

If the entire purchases were wholly bogus and there was finding of fact on record that no purchase were made at all, counsel for the revenue would be justified in arguing that the entire amount of such bogus purchases should be added back to the income of the assessee. Such were the facts in case of ACIT (OSC) Ward 5(3) Nadiad Vs. Pawanraj B Bokadia (supra).

*This being the position, the only question that survives is what should be the fair profit rate out of the bogus purchases which should be added back to the income of the assessee. The Commissioner adopted ratio of **30%** of such total sales. The Tribunal, however, scaled down to **12.5%**. We may notice that in the immediately preceding year to the assessment year under consideration the assessee had declared gross profit @ **3.56%** of the total turnover. If the yardstick of 30%, as adopted by the Commissioner, is accepted GP rate will be much higher. In essence, the Tribunal only estimated the possible profit out of purchases made through non-genuine parties. No question of law in such estimation would arise. The estimation of rate of profit return must necessarily vary with the nature of business and no uniform yardstick can be adopted."*

7. Considering the above, we are of the considered opinion, the said ratio in the case of Simit P Sheth (supra) has relevance to the facts of this case. During the proceedings before us, Ld AR submitted that the weighted average GP of the assessee works out to 10.91%. If the said judgment is followed, wherein the GP of 12.5% was approved when the reported profit rate is only 3.56%, GP as applicable to the industry was required to be considered. Therefore, instead of directing the AO to apply the normal GP of 7.9%, we direct the AO to consider weighted GP of 10.91% on the said suspicious purchases of Rs. 16,00,651/-. With these directions, the grounds raised by the assessee are partly allowed.

8. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 05th October, 2016.

Sd/-
(JOGINER SINGH)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 05.10.2016
व.नि.स./ OKK, Sr. PS

Sd/-
(D. KARUNAKARA RAO)
ACCOUNTANT MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**