

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI

Before Shri G S Pannu, Accountant Member &
Shri Pawan Singh, Judicial Member

ITA Nos.1936, 1937, 1938 & 1939/Mum/2015
Assessment Years : 2006-07, 2007-08, 2008-09 & 2009-10

Turnkey Electrical Engineers P Ltd Plot No.236/13, Tekchand Niwas, Keal Anand Co-op Society Opp GTB Rly Station, Sion, Mumbai 400 022 PAN AAAC1459M (Appellant)	Vs.	DCIT 7(3) Mumbai (Respondent)
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ITA No.1976/Mum/2015
Assessment Year : 2008-09

DCIT 8(3)(1) Mumbai (Appellant)	Vs.	Turnkey Electrical Engineers P Ltd Mumbai 400 022 PAN AAAC1459M (Respondent)
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For the Assessee : Shri Mandar Vaidya
For the Revenue : Shri V Justin

Date of Hearing : 24.08.2017	Date of Pronouncement : 13.09.2017
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ORDER

Per Pawan Singh, Judicial Member :

This group of five appeals (four by the assessee and one by the Revenue) arise out of different orders of the CIT(A)-14, Mumbai, for assessment years 2006-07, 2007-08, 2008-09 and 2009-10. Facts of all the appeals under consideration are almost identical, except the variation in

figures of addition on account of bogus purchases. All the appeals were heard together and are being disposed of by this common order for the sake of convenience.

2. A perusal of record reveals that the appeals by the assessee have been filed beyond six days of the prescribed period of limitation. The assessee has filed application for condonation of delay. The application is supported with the affidavit of Shri Rajesh Kumbhar, who is working as Accounts Manager in the assessee company. In the affidavit, the deponent has stated that the orders of the CIT(A) for A.Ys. 2006-07, 2007-08, 2008-09 and 2009-10 were received on 30.01.2015. The copy of the orders was sent to their counsel and Chartered Accountant for advice. The counsel advised them to file application u/s. 154 for all the assessment years before the CIT(A), which was filed on 24.02.2015. The representative of the assessee remained under the bonafide impression that the appeal could be filed before the Tribunal only after disposal of the application by the CIT(A). Thus, there was delay in filing present appeals. It was argued that the delay is neither intentional nor deliberate but due to bonafide belief that appeal could be filed only after disposal of application filed before the CIT(A). The learned DR for the Revenue did not oppose the application for condonation of delay. Considering the contention of both the parties, we condone the delay in filing the appeals.

4. For appreciation of facts, first we take up appeal in **ITA No.1936/Mum/2015 for A.Y. 2006-07**, in which following grounds have been raised:

"1) The Ld. CIT(Appeals) erred in holding that purchases for an amount of Rs. 6,13,9527-, are sham and bogus.

2) The Ld. CIT(A) failed to appreciate that the addition has been made by the Ld. AO solely on the basis of information supplied by the Sales Tax Authorities, without any independent inquiry by the Ld. AO. The Ld. CIT(A) further failed to appreciate that the assessee had not been given any opportunity of cross-examining such persons who had made statements about the transaction being sham.

3) Without prejudice to the above, the Ld. CIT(A) erred in not confining the addition to the gross profit rate on the value of purchases.

4) The Ld. CIT(A) erred in confirming the disallowance of deduction of bad debts of Rs.7,12,7667-, u/s. 36(1)(iii) of the Act.

5) The appellant craves leave to add, alter, amend, modify any grounds of appeal."

5. The brief facts of the case are that the assessee filed its return of income for the relevant assessment year on 30.11.2006, declaring income of ₹ 1,22,78,606/-. The return was processed u/s. 143(1) on 04.10.2007 at an income of ₹ 1,22,78,610/-. Subsequently, the assessment was re-opened on the basis of information received from the Sales Tax Department through DGIT (Investigation) that the assessee has bogus purchases from Bhavika Enterprises, Sahyog Enterprises and Supreme Enterprises. The assessee was served with notice, dated 22.03.2013, u/s. 148 of the I.T.Act. The reasons

recorded for initiating proceedings u/s. 147 were also served upon the assessee on 10.09.2013. The assessment was completed u/s. 143(3) r.w.s 147 of the Act, on 31.01.2014. While passing assessment order, the Assessing Office disallowed a sum of ₹ 6,13,952/- on account of bogus purchases. The Assessing Officer disallowed the purchases of ₹ 1,15,061/- from Sahyog Enterprises, ₹ 2,03,060/- from Bhavika Enterprises and ₹ 2,95,831/- from Supreme Enterprises. The Assessing Officer added 100% of the amount incurred on alleged bogus purchases. He further disallowed the claim of bad debts amounting to ₹ 7,12,766/- u/s. 36(1)(iii) of the Act. On appeal, the CIT(A) sustained the addition on account of bogus purchases. However, no decision was given on the ground of appeal relating to disallowance of bad debt. Aggrieved, the assessee is in appeal before us.

6. We have heard the learned AR of the assessee and DR for the Revenue. We have also perused the material available on record along with the orders of the authorities below. The learned AR of the assessee argued that during the assessment proceedings, the assessee provided copies of bills/vouchers and delivery challans. Further, the assessee furnished evidence related with payments through banking channels. The assessee discharged its primary onus to substantiate the expenses incurred on purchases. It was further argued that the Assessing Officer made addition only on the basis of third party information without making any independent inquiry. The learned CIT(A) sustained 100% disallowance made by the

Assessing Officer on account of alleged bogus purchases, which is unreasonable. The lower authorities have not rejected the books of account or the sales of the assessee. The learned DR, on the other hand, argued that the investigation wing of the department made full fledged inquiry. The parties from whom the assessee has shown purchases were hawala dealers. The name of three concerns from whom the assessee has shown purchases are shown in the list of hawala dealers. Thus the dealers were engaged in providing accommodation entries without delivery of any material or goods. The assessee obtained accommodating bills to show increased cost and bring down the profitability in order to avoid tax.

7. We have considered the rival submissions of the parties and have gone through the orders of the authorities below. We have noted that the Assessing Officer has not made any independent inquiry before making the disallowance of entire purchases from three parties viz. Bhavika Enterprises, Sahyog Enterprises and Supreme Enterprises. The Assessing Officer has not rejected the books of account or the sale/consumption of the assessee. The Assessing Officer disallowed the entire purchases holding that the assessee failed to produce any satisfactory evidence to show the actual purchase of the material, transportation and consumption details. The learned CIT(A) while considering the appeal of the assessee has examined the bills raised by Bhavika Enterprises, Sahyog Enterprises and Supreme Enterprises and concluded that the delivery challan does not mention any vehicle number and

there is no signature of the receiver. Further, the audit report filed by the assessee shows that the assessee is not maintaining any stock register or any register for consumption of material. On queries from the learned CIT(A), the assessee explained that being a contractor, the assessee is not required to maintain such register. It was further explained that the assessee is working as a contractor and the consumption of material is estimated by the parties, who awards contract and, thus, consumption cannot be inflated arbitrarily to reduce profit. On the basis of above observation, the learned CIT(A) concluded that the assessee failed to explain the genuineness of the purchases. The learned CIT(A) also examined the working of peak for the relevant period and confirmed the entire disallowance. We have noted that no independent inquiry was made by the lower authorities. The lower authorities made addition of 100% of the purchases made from all the three parties. In our view, the addition was made on the basis of third party information. Under the Income Tax Act, Income Tax Authorities are entitled to tax the real income. Even if the transactions is not verifiable the only taxable amount is the taxable income component therein and not the entire transactions. We are of the view that in order to fulfill the gap of revenue leakage, the disallowance of reasonable percentage of alleged bogus purchase must meet the ends of justice. Considering the facts of the present case, we restrict the addition @12.5% of the alleged bogus purchases (12.5% of 6,13,952/-). The Hon'ble Bombay High Court in the case of CIT vs. Hariram

Bhambhani in ITA No. 313 of 2013 decided on 04.02.2015 also held that the Revenue is not entitled to treat the entire sale consideration to tax, but only the profit attributable to the total unrecorded sale consideration alone can be subject to tax. Accordingly, we direct the Assessing Officer to restrict the addition. Ground nos. 1 to 3 of the appeal is partly allowed.

8. Ground no.4 relates to confirming the disallowance on account of deduction of bad debts.

9. The learned AR of the assessee argued that the CIT(A) has not considered and adjudicated this ground of appeal. The learned AR of the assessee argued that the assessee is entitled for deduction of bad debt shown in the year under consideration. On the other hand, learned DR fairly admitted that this ground is not adjudicated by the CIT(A) and, hence, it may be restored to the file of the CIT(A). Considering the fact that the CIT(A) has not given any finding on this ground, we restore this issue to the file of the CIT(A) for deciding the issue afresh. Needless to say that the CIT(A) shall grant adequate and reasonable opportunity of being heard to the assessee before deciding the issue afresh in accordance with law.

10. In the result, appeal in ITA No. 1936/Mum/2015 for A.Y. 2006-07 is partly allowed.

11. **ITA No.1937/Mum/2015 for A.Y. 2007-08**

The assessee has raised identical grounds as in A.Y. 2006-07. We noted that the Assessing Officer, for the year under appeal also, disallowed 100% of the purchases from all the three parties, who were involved in A.Y. 2006-07. The disallowance so made was ₹ 52,55,518/-. On appeal, the CIT(A) sustained the addition to the extent of ₹ 44,71,886/- on the basis of peak credit. We have noted that the disallowance sustained by the CIT(A) is about 85% of the alleged bogus purchase. Considering the fact that we have restricted similar addition @12.5% for A.Y. 2006-07, we direct the Assessing Officer to restrict the disallowance @12.5% (12.5% of ₹ 52,55,518/-) for this year also.

The appeal is partly allowed.

12. **ITA No.1938/Mum/2015 for A.Y. 2008-09**

The assessee has raised identical grounds as in A.Y. 2007-08. For the year under appeal, the Assessing Officer made the addition of ₹.83,50,600/- on account of alleged bogus purchases. On appeal, the CIT(A) restricted the disallowance to ₹ 57,87,373/- which is about 69.30% of the total disallowance. Considering the fact that we have restricted similar disallowance @12.5% of the alleged bogus purchase for the A.Ys. 2006-07 and 2007-08 in the preceding paragraphs, following the principle of consistency, we direct the Assessing Officer to restrict the disallowance to 12.5% (12.5% of ₹ 83,50,600/)

Appeal is partly allowed.

13. **ITA No.1939/Mum/2015 for A.Y. 2009-10:**

In this appeal also the grounds raised by the assessee are similar to those in A.Ys. 2006-07, 2007-08 and 2008-09. We noted that the Assessing Officer disallowed a sum of ₹ 50,10,870/- on account of alleged bogus purchases as in preceding assessment year from the very same parties viz. Bhavika Enterprises, Sahyog Enterprises and Supreme Enterprises. On appeal, CIT(A) confirmed the action of the Assessing Officer. Considering the fact that we have restricted similar disallowance @12.5% of the alleged bogus purchase for the A.Ys. 2006-07, 2007-08 and 2008-09 in the preceding paragraphs, following the principle of consistency, we direct the Assessing Officer to restrict the disallowance to 12.5% (12.5% of ₹ 50,17,870/-)

Appeal is partly allowed.

14. Now coming to the Revenue's appeal in **ITA No. 1976/Mum/2015 for A.Y. 2008-09**

(i) The Learned CIT(A) has erred on facts and in law, in allowing the assessee the benefit of peak without appreciating that this being a case of utter disregard and subversion of law, the burden of proof (required for claiming benefit of peak) cast on the assessee was of a very high degree and assessee failed to discharge this burden.

(ii) The Learned CIT (A) has erred on facts and in law, in not appreciating that for proof of purchase debited in assessee's books of accounts, absolute burden of proof is cast on the assessee and this burden of proof never shifts to the department.

(iii) The Learned CIT(A) has erred on facts and in law, in allowing the assessee the benefit of peak even though, the assessee has failed to prove by producing cogent, relevant and reliable material to prove that the cash withdrawn from the bank account was available for making subsequent purchases.

(iv) The Learned CIT(A) has erred on facts and in law, in not giving effect to Section 114(g) of the India Evidence Act which clearly lays down that if a fact in knowledge of party is not explained, adverse inference can be drawn against the party possessing the knowledge of facts/information.

15. At the outset, the learned AR for the assessee argued that the tax effect involved in the appeal of the Revenue is less than ₹.10 lacs and, hence, it is precluded from filing the appeal by Central Board of Direct Taxes vide Circular No. 21/2015 dated 10th December, 2015 file no.279 of Misc. 142/2007 – ITJ (PT). The learned DR, on the other hand, fairly conceded that the tax effect is less than ₹ 10 lacs in the present appeal. Considering the contentions of both the parties, we are of the view that the appeal filed by the Revenue is not maintainable and is dismissed as such.

16. In the result, the appeals filed by the assessee are partly allowed and that of the Revenue is dismissed.

Order pronounced in the open court on 13th day of September, 2017.

Sd/-

(G S Pannu)

ACCOUNTANT MEMBER

Mumbai; Dated: 13th September, 2017

Sd/-

(Pawan Singh)

JUDICIAL MEMBER

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Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai
4. The CIT
5. DR, 'E' Bench, ITAT, Mumbai

BY ORDER,

#True Copy #

Assistant Registrar
Income Tax Appellate Tribunal, Mumbai