

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'G', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G", MUMBAI

Before Shri Shamim Yahya, AM & Shri Shaktijit Dey, JM

ITA No.817/Mum/2017 : Asst.Years 2009-2010

Asst.Commissioner of Income-tax Circle 19(1) Mumbai.	बनाम/ Vs.	M/s.HBS Mall Nahur 607, Parikh Market, Opera House Mumbai – 400 004. PAN : AAAAH2531A
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से /Appellant by : **Shri V.Vidhyadhar**

प्रत्यर्थी की ओर से /Respondent by : **Shri Mandar Vaidya**

सुनवाई की तारीख / Date of Hearing : 22.08.2017	घोषणा की तारीख / Date of Pronouncement : 03.10.2017
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आदेश / ORDER

Per Shamim Yahya, AM

This is an appeal by the Revenue, wherein the Revenue is aggrieved that the learned CIT(A) has not sustained 100% disallowance on account of bogus purchases.

2. The grounds of appeal read as under:-

"1) On the facts and in the circumstance of the case and in law, whether the Ld. CIT(A) was justified in sustaining only an addition @ 15% profit rate on total purchases of Rs.64,20,135/- made from 2 purchase parties as the assessee failed to prove the genuineness of the said purchases when asked to produce consumption register and labour register by the Assessing Officer."

2) The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the AO be restored.

3) The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

3. The Assessing Officer in this case has made 100% addition on account of bogus purchases amounting to Rs.64,20,135.

4. The facts of the case are that the assessee is partnership firm engaged in the business of 'Real Estate Development'. The return of income for the year under appeal was filed on 26-09-2009, declaring total income of Rs.6,00,04,243/-. The return was processed u/s 143(1) of the Act. Subsequently, the case was reopened u/s 147, by issuing notice u/s 148 of the Act on 19-02-2014, based on the information received from the DGFT(Inv.), Mumbai, that the assessee is one of the beneficiaries of the accommodation entries provided by two of the MVAT dealers, who were indulging in issuing bogus sale/purchase bills, which was investigated and kept on the public domain by the Sales Tax Department. Assessment, u/s 143(3) r.w.s 147 of the I.T. Act, 1961 was completed by the Ld. AO on 25-03-2015, determining the total income at Rs. 6,64,24,380/-.

5. During the course of assessment proceedings, to ascertain the genuineness of purchases shown in the accounts, AO asked to furnish a copy of notice u/s 302 issued by the Sales tax Department and copy of VAT audit report. On verification it is found that the assessee purchased the goods from two parties labour register, stock register, construction register along with the books of accounts to verify the purchases from the 2 parties and the consumption of such material purchased from them. The assessee failed to produce consumption register and labour register to establish the consumption of goods. In view of the same, appellant was asked to explain as to why the books of accounts should-not be rejected u/s 145(3) of the Act. After obtaining the details and explanations from the assessee, AO

concluded that the appellant failed to furnish the whereabouts of the parties, consumption register for the goods claimed to have been purchased from the parties. In view of the same AO felt that the completeness and correctness of the books of accounts are not established and rejected the same under the provisions of section 145(3) of the Act Purchases made from the two parties were treated as bogus purchases and the total amount of such purchases of Rs.64,20,135 and added to the total income of the assessee.

6. Upon assessee's appeal learned CIT(A) has noted that the sales has not been doubted. That after having rejected books of accounts Assessing Officer should have made an estimate of profit instead of making disallowance of the impugned purchases amount. Accordingly placing reliance upon several case laws and upon the facts of the case, he sustained 15% disallowance out of the bogus purchases. We may gainfully refer to the order of learned CIT(A) in this regard as under:-

"6.7 Coming to the issue of bogus purchases made from the two parties, Ld. AO stated in the assessment order that parties in question are non-existent and the appellant failed to furnish whereabouts of the parties. It is also stated that the appellant failed to furnish the consumption register for the goods claimed to have been purchased. In view of the same, AO rejected the books of accounts of the appellant and the total amount of purchases made from the two parties was added to the total income, instead of making an estimation of profit. When the completeness and correctness of the books of accounts is questioned, instead of adding the total amount of purchases from the two parties, AO should have gone for the estimation of profit on the total sales. In this nature of business i.e. construction, it is practically not possible one to one correlation of purchases and sales as the purchases will go into the construction, as submitted by the appellant. Maintaining the quantitative tally of purchases and consumption of the same is

practically not possible in this line of business. In view of the same, Ld. AO not having doubted receipts, could not have gone ahead and made addition in respect of the total amount of purchases from the two parties. As stated by the appellant, without purchases being made, the construction work cannot be done. Thus, the issue would boil down to finding out the element of profit embedded in bogus purchases which the appellant would have made from some unknown entities.

6.8 In this regard, it is apt to refer to the decision of Gujarat High Court in the case of Bhoianath Poly Fab Pvt. Ltd. 355 ITR 290 (Guj) where the Hon'ble Court was battling with the finding of Hon'ble ITAT that purchases were made from bogus parties since notice issued by the A.O. to these parties were allegedly received`returned/unserved' and the assessee was unable to produce any confirmation from these parties. The Tribunal had held that though purchases were made from bogus parties, nevertheless, the purchases themselves were not bogus as the entire quantity of opening stock, purchases and sales were tallying and hence, only the profit margin embedded in such amount would be subjected to tax. The Hon'ble Gujarat High Court taking cognizance of the fact held that whether purchases themselves were bogus or whether parties from whom such purchases were made were bogus, is essentially a question of fact and the Tribunal having examined the evidence on record and concluded that the assessee did produce cloth and sell finished goods, the entire, amount covered under such purchase would not be subjected to tax and only the profit element embedded therein was to be taxed. While coming to the above conclusion, the Hon'ble High Court also relied on the decision in the case of Sanjay Oil Cake Ind. 316 ITR 274 (Guj).

6.9 In Sanjay Oilcake Industries v. Commissioner of Income-tax [2009] 316 ITR 274 (Guj), it was held as under:

"12. Thus, it is apparent that both the Commissioner (Appeals) and the Tribunal have concurrently accepted the finding of the Assessing Officer that the apparent sellers who had issued sale bills were not traceable. That goods were received from the parties

other than the persons who had issued bills for such goods. Though the purchases are shown to have been made by making payment thereof by account payee cheques, the cheques have been deposited in bank accounts ostensibly in the name of the apparent sellers, thereafter the entire amounts have been withdrawn by bearer cheques and there is no trace or identity of the person withdrawing the amount from the bank accounts. In the light of the aforesaid nature of evidence it is not possible to record a different conclusion, different from the one recorded by the Commissioner (Appeals) and the Tribunal concurrently holding that the apparent sellers were not genuine, or were acting as conduit between the assessee-firm and the actual sellers of the raw materials. Both the Commissioner (Appeals) and the Tribunal have, therefore, come to the conclusion that in such circumstances, the likelihood of the purchase price being inflated cannot be ruled out and there is no material to dislodge such finding. The issue is not whether the purchase price reflected in the books of account matches the purchase price stated to have been paid to other persons. The issue is whether the purchase price paid by the assessee is reflected as receipts by the recipients. The assessee has, by set of evidence available on record, made it possible for the recipients not being traceable for the purpose of inquiry as to whether the payments made by the assessee have been actually received by the apparent sellers. Hence, the estimate made by the two appellate authorities does not warrant interference. Even otherwise, whether the estimate should be at particular sum or at a different sum, can never be an issue of law."

6.10 Similarly, in yet another decision of Hon'ble Gujarat High Court in the case of CIT vs. Simit Sheth (2013) 38 Taxmann.com 385 (Guj), Hon'ble Court was seized with a similar issue where the A.O. had found that some of the alleged suppliers of steel to the assessee had not supplied any goods but had only provided sale bills and hence, purchases from the said parties were held to be bogus. The AO, in that case added the entire amount of purchases to gross profit of the assessee. Ld. CIT(A) having found that the assessee had indeed purchased though not from named parties but other parties from grey market, partially sustained the addition as probable profit of the assessee. The Tribunal however, sustained the addition to the extent of 12.5%. Taking into account the above facts, the

Hon'ble Gujarat High Court held that since the purchases were not bogus, but were made from parties other than those mentioned in books of accounts, only the profit element embedded in such purchases could be added to the assessee's income and as such no question of law arose in such estimation. While arriving at the above conclusion, the Hon'ble Court also relied on the decision in the case of Vijay M. Mistry Construction Ltd. 355 ITR 498 (Guj) and further approved the decision of Ahmedabad Bench, ITAT in the case of Vijay Proteins 58 LTD 428.

6.11 The motive behind obtaining bogus bills thus, appears to be inflation of purchase price ^d as to suppress true profits. Considering the facts of the case as well as the various case laws cited (supra) especially in the case of CIT vs. Simit P. Sheth (supra), and also considering the fact that the appellant himself made the alternative plea in the submissions that profit element embedded on such purchases should be considered for addition instead of adding the total amount of purchases, I feel that if profit element embedded on such purchases is added to the total income, that will meet the ends of justice. Considering the facts of the present case which are similar to the facts of the case of CIT vs. Simit Sheth (supra), respectfully following the decision in that case with regard to the estimation of profit, and also considering the fact that the appellant is in the construction business where the margin is higher than the case referred above, AO is directed to restrict the addition @15% of the non-genuine purchases of Rs.64,20,135/-, made from the two parties.”

7. Against the above order, assessee is in appeal before the ITAT.
8. We have heard both the Counsel and perused the records. We find that in this case addition has been made on the basis of information from the Sales Tax Department that the suppliers are bogus. The Assessing Officer has not issued any notice to those suppliers. He has rejected the books of

accounts. Thereafter he had disallowed the entire purchases said to be bogus. Thereafter learned CIT(A) has noted these aspects and after placing reliance upon several case laws has sustained disallowance of 15% of the bogus purchases.

9. We find that in this case the sales have not been doubted. It is law that when sales are not doubted, 100% disallowance for bogus purchase cannot be done. This proposition is supported from Hon'ble jurisdictional High Court decision in the case of Nikunj Eximp Enterprises. However, the facts of the present case indicate that assessee has made purchase from the grey market. Making purchases through the grey market gives the assessee selling on account of non-payment of tax and others at the expense of the exchequer. In such situation, in our considered opinion, on the facts and circumstances of the case the 15% disallowance out of the bogus purchases meets the ends of justice.

10. Accordingly, we uphold the order of learned CIT(A) and direct that the disallowance be limited to 15% of the bogus purchases.

11. In the result, this appeal filed by the Revenue stands dismissed.

Order pronounced on this 3rd day of October, 2017.

Sd/-
(Shaktijit Dey)
JUDICIAL MEMBER

Sd/-
(Shamim Yahya)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 03.10.2017.
Devdas*

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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