

**आयकर अपीलीय अधिकरण “ई” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI**  
**BEFORE SHRI SHAMIM YAHYA, AM AND SHRI SANDEEP GOSAIN, JM**

आयकर अपील सं./I.T.A. Nos. 6697 & 6698/Mum/2016  
(निर्धारण वर्ष / Assessment Years: 2009-10 & 2010-11)

Mr. Sumit M. Malhotra C/o. M/s. S. M. Steel Traders 702, “A” Wing, Archies Apartment, Oak Baug, Near Railway Station, Kalyan (W) – 421 301	<b>बनाम/ Vs.</b>	Income-tax Officer 3(4), Rani Mansion, 2 <sup>nd</sup> Floor, Murbad Road, Kalyan (W) – 421 301
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAYPM 8541 J		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	None
प्रत्यर्थी की ओर से/Respondent by	:	Shri V. Justin

सुनवाई की तारीख / Date of Hearing	:	16.08.2017
घोषणा की तारीख / Date of Pronouncement	:	16.10..2017

**आदेश / ORDER**

Per Shamim Yahya, A. M.:

These appeals by the assessee are directed against common order of learned CIT(A) dated 16.08.2016 and pertain to assessment years 2009-10 and 2010-11.

2. Since, common grounds have been raised against the common order of learned CIT(A), these appeals are being disposed of by this common order.

3. First issue raised is that the reopening was not justified.
4. Second issue raised is that Id. CIT(A) erred in sustaining disallowance of 12.5 % percent of bogus purchase.
5. Brief facts of the case are as under:

Since facts are similar we are considering facts again figures from assessment year 2009-10. In this case, the assessee is engaged in the business of trading of M.S. Beams, angles, channels and scrap in the name of his proprietary concern M/s. S.M. Steel Traders. During the year under consideration, the assessee had shown total turnover of Rs.1,45,32,877/- on which gross profit and net profit of Rs. 4,32,437/- & Rs.2,14,347/- was shown giving the gross profit and net profit ratio of 2.98% and 1.47% respectively. Information had been received by the AO from the Sales-tax Department, Maharashtra to the effect that the assessee was one of the beneficiaries of transactions with hawala dealers. The assessee had shown purchases amounting to Rs.1,08,91,612/- from the following parties -

Sr. No.	Name of Hawala dealer	Tin of Hawala dealer	PAN of Hawala dealer	Amount of bill
1	Vitrag Trading Co.	27830385697V	AAFFV2004C	36,15,641/-
2	Sampark Steels	27170360840V	ABAFS4806M	36,60,863/-
3	Prayan Trading Co.	27740535951V	AAISP6755D	36,15,108/-
			TOTAL	1,08,91,612/-

The names of these parties were appearing in the list of hawala dealers as supplied by the Sales-tax Department of Maharashtra. The hawala dealers had admitted before the Sales-tax authorities in their statement 7 affidavit that they were providing only accommodation bills without there being any actual purchase 7 sale of goods. Though the payment was received by the said parties from their customers through banking channels, however, after clearing of the cheques cash was withdrawn and handed over to the customers after deduction of nominal commission charges. The AO issued notice u/s. 148 of the I.T. Act dated 27.05.2013 to the assessee for re-opening of the assessment proceedings. During the course of assessment proceedings, the AO asked the assessee to file documentary evidence to establish the genuineness of the purchases like copy of purchase bills, transportation and octroi payment receipts as well as stock register. The assessee was also asked to file details of mode of payment and also to establish that the goods had actually been received at his premises. The assessee was able to file copies of purchase bills and ledger account of transportation charges which were paid in cash and were supported by self made vouchers. The assessee also filed copies of some octroi receipts. The A.O. issued notice u/s. 133(6) of the IT. Act to the above listed parties which were received back unserved with the remark "left / not known". On being asked to produce these parties before the AO for verification, the assessee failed to do so. For all these reasons the AO held that the assessee had not been able to establish the genuineness of the purchases shown from

the above listed three parties and therefore made addition of Rs.1,08,91,612/- to the assessee's income on account of unproved purchases.

6. Against the above order, the assessee appealed before the Id. CIT(A) who confirmed the action of the assessing officer in making addition of 12.5% of the bogus purchase. The Id. CIT(A) held as under:

*8. I have carefully considered the appellant's submissions, observations of the AO in the assessment order and the facts of the case. The appellant had shown purchases amounting to Rs.1,08,91,612/- from the above listed three parties which were appearing in the list of hawala dealers as per information received from the Sales-tax authorities of Maharashtra Government. The hawala dealers had admitted before the Sales-tax authorities in their statement 7 affidavit that they were providing only accommodation bills without there being any actual purchase / sale of goods. Though the payment was received by the said parties from their customers through banking channels, however, after clearing of the cheques cash was withdrawn and handed over to the customers after deduction of nominal commission charges. On being asked to establish the genuineness of the purchases from the above listed parties, the appellant was able to file copies of purchase bills, copy of ledger account of the parties and copy of the appellant's bank account to show that the payment to the said parties had been made through banking channels. The appellant was not able to file documentary evidence to establish the movement of the goods from the premises of the said parties to the appellant's business premises. The notices sent to these parties u/s. 133(6) of the I.T. Act by the AO had been received back unserved with the remark 'left /not known'. On being asked to produce these parties before the AO for verification, the appellant failed to do so. It is therefore held that the appellant had failed to establish the genuineness of purchases from the above listed three parties. Therefore, the books of accounts of the appellant were neither complete nor reliable and the AO therefore, had rightly rejected the same u/s. 145(3) of the I.T. Act.*

*9. However it is also true that if the sales were there, purchases have to be there as well as held by the IT AT, Bombay Bench 'B' in the case of Balaji Textile Industries Pvt. Ltd. In Col. No. 28(a) of the Audit report, the appellant has filed quantitative details of Opening stock, purchases, sales and Closing stock of various items traded by the appellant. This information has been filed*

*as per Annexure-4 of the Audit report and was also filed before the AO during the course of assessment proceedings. This information shows that the goods were actually purchased resulting in subsequent sale. However, it could not be established that the goods had been purchased from the parties listed above. In view of the detailed facts of the appellant's case as discussed above, it is seen that the appellant could not establish the genuineness of the purchase transactions with the parties listed above. Therefore, the only inference that can be drawn in this case is that the appellant had made purchases in the open market and had only obtained bills from the hawala dealers. In this process the appellant would have saved on the sales-tax / VAT and enhanced his profit by inflating the purchases. Therefore a suitable disallowance is required to be made on account of unproved purchases after rejecting the appellant's books of account u/s 145(3) of the Act. In this regard it is seen that in the case of CIT vs Simit P. Sheth, 356 ITR 451, Hon'ble Gujrat High Court upheld a disallowance of 12.5% of such unproved purchases after holding as under –*

*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 Misiry 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.*

*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.*

*10. As the appellant is engaged in the business of trading in M.S. Beams, angles, channels etc., relying on the decision of Hon'ble Gujrat High Court in the case of Smith P. Seth (supra) disallowance on account of unproved purchases is restricted to Rs.13,61,451/-being 12.5% of the unproved purchase amount of Rs. 1,08,91,6127-. The AO is directed accordingly.*

*11. The facts of the appellant's case for A.Y. 2010-11 are similar to the facts of the A.Y. 2009-10 as discussed above. Therefore, the disallowance on account of unproved purchases for this year is also restricted to Rs. 6,59,7927- being 12.5% of the unproved purchase amount of Rs. 52,78,3387-.*

*12. In result, both the appeals of the appellant are partly allowed.*

7. Against the above order of learned CIT(A), the assessee is in appeal before the ITAT.

8. We have heard the learned departmental representative. None appeared on behalf of the assessee despite notice. Hence, these appeals are being disposed of by hearing the learned departmental representative and perusing the records.

9. The first common issue raised pertains to the validity of reopening. This issue was never raised before the learned CIT-A. Assessee has also participated in the assessment proceedings as well as proceedings before the learned CIT-A without challenging the validity of reopening.

10. We find that tangible and cogent incriminating material were received by the AO which clearly showed that the assessee was beneficiary of bogus purchase entries from bogus entry providers which formed the reason to believe by the AO that income has escaped assessment. The information so received by the AO has live link with reason to believe that income has escaped assessment. On these incriminating tangible material information, assessment was reopened. At this stage there has to be prima facie belief based on some tangible and material information about escapement of income and the same is not required to be proved to the hilt. In this regard, I refer to the decision of the Hon'ble Apex Court in the case of CIT(A) Vs. Rajesh Jhaveri Stock Brokers P. td, 291 ITR 500:-

*"Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the AO has cause or justification to know or suppose (hat income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the AO should have finally ascertained the fact by legal/ statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Managnese Ore Co, Ltd. v. ITO(1991) 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the AO is within the realm of subjective satisfaction ITO v. Selected Dalurband Coal Co, (P.) Ltd. (1996) 217 ITR 597 (Supreme Court): Raymond Woollen Mills Ltd. v. ITO*

*(1999)236 ITR 34 (Supreme Court).”*

11. The above discussion and precedent from Apex Court fully justify the validity of reopening in this case. Accordingly, we uphold the validity of reopening.

12. As regards the merits of the case, we find that credible and cogent information was received in this case by the assessing officer that certain accommodation entry provider/bogus suppliers were being used by certain parties to obtain bogus bills. Assessee was found to have taken accommodation entry/bogus purchase bills during the concerned assessment year from different parties. Based upon this information assessment was reopened. The credibility of information relating to reopening remained un-assailed before the learned CIT-A. In such factual scenario, the assessing officer has made the necessary enquiry. The issue of notice to all the parties have returned unserved. Assessee has not been able to provide any confirmation from any of the party. Assessee has also not been able to produce any of the parties. Necessary evidence relating to transportation of the goods was also not on record. In this factual scenario it is amply clear that assessee has obtained bogus purchase bills. Mere preparation of documents for purchases cannot controvert overwhelming evidence that the provider of these bills are bogus and non-existent.

13. The Sales Tax Department in its enquiry have found the parties to be providing bogus accommodation entries. The assessing officer also issued notices to these parties at the addresses provided by the assessee. All these notices have returned unserved. Assessee has not been able to produce any of the parties. Neither the

assessee has been able to produce any confirmation from these parties. In such circumstances there is no doubt that these parties are non-existent. The purchase bills from these non-existent the/bogus parties cannot be taken as cogent evidence of purchases. In light of the overwhelming evidence the revenue authorities cannot put upon blinkers and accept these purchases as genuine. This proposition is duly supported by Hon'ble Apex Court decision in the case of Sumati Dayal 214 ITR 801 and Durga Prasad More 82 ITR 540. In the present case, the assessee wants that the unassailable fact that the suppliers are non-existent and thus bogus should be ignored and only the documents being produced should be considered. This proposition is totally unsustainable in light of above apex court decisions.

14. We further find that Hon'ble jurisdictional High Court in the case of Nikunj Enterprises has upheld 100% allowance for the purchases when the sales have not been doubted. However, the facts of that case were different. Furthermore, the sales in that case were basically to government departments. Hence, the ratio from this decision is not applicable on the facts of the case.

15. In these circumstances, the learned departmental representative has referred to Hon'ble Gujarat High Court decision in the case of Tax Appeal No. 240 of 2003 in the case of N K Industries vs. Dy CIT, order dt 20.06.2016, wherein 100% of the bogus purchases was held to be added in the hands of the assessee and tribunals restriction of the addition to 25% of the bogus purchases was set aside. It was

expounded that when purchase bills have been found to be bogus 100% disallowance was required. The special leave petition against this order along with others has been dismissed by the Hon'ble Apex Court vide order dt 16.1.2017.

16. We further note that Hon'ble Rajasthan high court has similarly taken note of decisions of the apex court on the issue of bogus purchases in the case of CIT Jaipur vs Shruti Gems in ITA No. 658 of 2009. The Hon'ble High Court has referred to the decision of CIT Jaipur vs. Aditya Gems, D. B. in ITA No. 234 of 2008 dated 02.11.2016, wherein the Hon'ble Court had *inter alia* held as under:

*"Considering the law declared by the Supreme Court in the case of Vijay Proteins Ltd. Vs. Commissioner of Income Tax, Special Leave to Appeal (C) No.8956/2015 decided on 06.04.2015 whereby the Supreme Court has dismissed the SLP confirmed the order dated 09.12.2014 passed by the Gujarat High Court and other decisions of the High Court of Gujarat in the case of Sanjay Oilcake Industries Vs. Commissioner of Income Tax (2009) 316 ITR 274 (Guj) and N.K. Industries Ltd. Vs. Dy. C.I.T., Tax Appeal No.240/2003 decided on 20.06.2016, the parties are bound by the principle of law pronounced in the aforesaid three judgments.*

17. However, we note that this is not an appeal by the Revenue. Hence, it will not be appropriate to take away the relief already granted by the revenue to the assessee. Hence, we confirmed the order of learned CIT(A).

18. In the result, these appeals filed by the assessee stands dismissed.

परिणामतः निर्धारिती की अपीलें खारिज की जाती हैं ।

*Order pronounced in the open court on 16.10.2017*

Sd/-

(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated : 16.10.2017

Sd/-

(Shamim Yahya)

लेखा सदस्य / Accountant Member

व.नि.स./Roshani, Sr. PS

**आदेश की प्रतिलिपि अग्रेषित/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 - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**