

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'के', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "K", BENCH, MUMBAI
सर्वश्री राजेन्द्र, लेखा सदस्य, एवं , राम लाल नेगी न्यायिक सदस्य के समक्ष

BEFORE SHRI RAJENDRA, AM AND SHRI RAM LAL NEGI, JM
आयकर अपील सं./ITA No. 7343/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2009-10)

The ITO-10(2)(4), R. No. 213, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s Moonlight Electrical Contractors and Engineering Pvt. Ltd., B/3, Sona Udyog, Parsi Panchayat Road, Old Nagardas Road, Andheri (East), Mumbai - 400069
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADCM7048L		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

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आयकर अपील सं./ITA No. 7344/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2010-11)

The DCIT-10(2)(2), R. No. 209, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s Moonlight Electrical Contractors and Engineering Pvt. Ltd., B/3, Sona Udyog, Parsi Panchayat Road, Old Nagardas Road, Andheri (East), Mumbai - 400069
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADCM7048L		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से /Revenue by : Shri V. Jenardhanan (DR)
निर्धारिती की ओर से /Assessee by : Shri Subhash S. Shetty (AR)

सुनवाई की तारीख / Date of Hearing : **17/08/2017**
घोषणा की तारीख/Date of Pronouncement: **27/09/2017**

आदेश / O R D E R

PER RAM LAL NEGI, JM

These appeals have been preferred by the revenue against the orders dated 29/09/2016 and 30/09/2016 passed by the Ld. Commissioner of

Income Tax (Appeals)-17, Mumbai pertaining to the Assessment Years 2009-10 & 2010-11 respectively, whereby the Ld. CIT (A) has partly allowed the appeals filed by the assessee against assessment orders passed u/s 143(3) read with section 147 of the Income Tax Act, 1961 (for short 'the Act')

ITA No. 7343/MUM/2016 (Assessment Year: 2009-10)

Brief facts of the case are that the assessee engaged in the business of electrical contracts, filed its return of income for the assessment year under consideration declaring the total income of Rs. 18,39,642/-. The return was processed u/s 143(1) of the Act. Subsequently, the case was reopened under section 147 of the Act on the basis of information received by the investigation wing of the income tax department regarding assessee's involvement in hawala transactions during the relevant year. As per the information the assessee during the year relevant to the assessment year the assessee obtained bogus receipts showing purchase of Rs. 2,03,98,557/- from the 8 bogus entities mentioned in the assessment order. During the course of re-assessment proceedings, notice u/s 142 (1) was issued and the assessee was asked to submit *inter alia* details of ledger accounts of the above parties along with copies of bills / invoices raised, proof of delivery of goods with complete transportation details/ rendering of services, complete bank statements and other documentary evidence to prove the genuineness of the transaction with the aforesaid parties. The assessee was further asked to produce the parties for verification. In response thereof the assessee submitted written reply and claimed that all purchases were genuinely made and the payments were made by banking channels. In support of its contention the assessee furnished job wise utilization of material purchased from the said parties. The assessee further submitted that it was not aware of the fact that these parties have not paid VAT, the assessee further contended that just because the parties from

whom the purchases were made are listed as bogus/hawala parties in the official website of the Sales Tax Department. The purchases made by the assessee cannot be treated as bogus. The AO after considering the submissions of the assessee and cases relied upon by the assessee, determined the amount of bogus purchase u/s 69 of the Act at Rs 1,85,10,239/- and added back the said amount to the income of the assessee.

2. In the first appeal, the Ld. CIT (A) after hearing the assessee modified the assessment order by directing the AO to restrict the addition to the extent of 2% of alleged bogus purchases made by the assessee during the previous year. The revenue is in appeal before the Tribunal against the said findings of the Ld. CIT (A).

3. The revenue has raised the following effective grounds of appeal against the impugned order passed by the Ld. CIT (A):-

1. *“On the facts and circumstances of the case and in law, the Ld. CIT (A) is erred in deleting the addition of Rs. 1,85,10,239/- made on account of disallowance of non-genuine purchase and restricting the disallowance to 2% of the alleged purchases without appreciating the fact that the assessee was not able to substantiate its claim of alleged purchases and also the fact that alleged suppliers were non-existent and were identified as hawala dealers by the official website of the Sale Tax Department, Government of Maharashtra, www.mahavat.gov.in.*
2. *On the facts and circumstance of the case and in law, the Ld. CIT (A) is erred in coming to a conclusion that the goods allegedly purchased from the hawala dealers were either utilized in the process of manufacturing or are lying in stock-in-trade on the basis of inspection & testing report of material purchased and stock flow statements submitted during the appellate proceedings without giving an opportunity to the Assessing Officer to examine the same in violation of Rule 46A of the Income-tax Rules, 1962.*

3. *The appellant prays that the order of the CIT (A), Mumbai on the above directions be set-aside and that of the assessing officer be restored.”*

4. Before us, the Ld. Departmental Representative (DR) submitted that the Ld. CIT (A) has wrongly deleted the addition of Rs. 1,85,10,239/- by restricting the disallowance to 2% of the alleged bogus purchases without appreciating the fact that the assessee was not able to substantiate its claim by wrongly concluding that the goods purchased from the hawala dealer were either utilized in the process of manufacturing or are lying in stock-in-trade on the basis of inspection and testing report of material purchased and stock flow statements submitted during the appellate proceedings without an opportunity to the AO to examine the same in violation of Rule 46A of the Income Tax Rule, 1962. The Ld. DR further submitted that since the impugned order is not based on the evidence the same is liable to be set aside.

5. On the other hand the Ld. counsel for the assessee relying on the findings of the Ld. CIT(A) submitted that the Ld. CIT(A) has decide the issue in question by following the decision dated 20.07.2016 rendered by the ITAT Bench Mumbai in *Innovators Facade vs. ACIT (Cir-2), Thane, ITA No. 5450,5451 and 5452/Mum/2012*. Hence, there is no merit in the revenue's appeal.

6. We have heard the rival submissions and also carefully perused the material on record. The only grievance of the revenue is that the Ld. CIT(A) has wrongly restricted the addition to 2% on the total amount of bogus purchases determined by the AO as against 100% made by the AO. The Ld. CIT (A) has restricted the disallowance to the extent of 2% of the total alleged bogus purchases holding as under:

“14. I have carefully considered the A.O.’s contention and Appellant’s submissions and arguments. The A.O.’s main grievance was that the alleged parties from whom the appellant purchased the materials are hawala parties and bogus as per the investigation carried on by the Sales Tax Department and also their name appeared on the website of Sales Tax Department of Maharashtra. Further, these alleged parties did not respond to the notice issued under section 133(6) of the Act for verification and cross examination. Therefore, the purchases made from them are bogus. On the other hand A.R. of the appellant argued that the materials purchased from these alleged parties have been utilized in the various projects undertaken by them. Though the Appellant Company had been dealing with old suppliers but due to shortage of material from their end and also non availability of material on timely basis, the Company started searching new vendors through networking sites where the Appellant Company could get the electrical goods, as per project requirement and hence purchases were made from new vendors. The A.R. of the appellant also submitted the statement of Net Profit in support of their claim that if the alleged bogus purchases are added to the net profit it works out to 29.97%, which is unimaginary.

15. After carefully considering the Assessment Order and the submissions given by the AR of the appellant that sales cannot be made without purchases and AO has not disputed the sales made by the appellant and therefore directed the AO to delete the above addition of Rs. 1,85,10,239/-. However, having made the transaction of the Hawala suppliers as per the Sales Department information, I am of the considered opinion that only profit element embedded in such purchases of Rs. 1,85,10,239/- could be added to the appellant company. Hence, the party totally cannot be treated as bogus one as long as the sales were not under dispute and therefore the addition made on account of bogus purchases of Rs. 1,85,10,239/- is to be deleted.

16. However, respectfully following the recent jurisdictional Hon’ble ITAT decision in the case of Innovators Façade vs. ACIT (Cir-2), Thane, ITA No. 5450,5451 and 5452/Mum/2012 dtd. 20.07.2016 wherein the issue has been decided by fixing the addition at 2% of the bogus purchases which is as under:-

“From the record we found that assessee had shown GP rate of 16.39% and 23.49 in the assessment year 2009-10 and 2010-11, which is much better than the gross profit rate shown in the assessment year 2008-09 at 11.41%. Moreover the GP rate shown by the assessee is comparable to the GP rate shown by other assessee engaged in similar trade. However, to safeguard the interest of revenue and to cover the leakage of revenue, if anyone, and also totality of facts and circumstances of the case before us, we direct the AO to restrict the addition to the extent of 2% of alleged bogus purchases made. We direct accordingly.

Facts and circumstances in the year 2010-11 and 2011-12 are pari material, following the reasoning given hereinabove, we restrict the ITA No. 5450 to 5452/MUM/2015 Assessment Year 2009-10 to 2011-12 additions in these years also to the extent of 2% of alleged bogus purchases so made. We direct accordingly.

In view of the above cited recent ITAT decision dated 20.07.2016, I am of the considered opinion that fixing the GP at 2% of bogus purchases will be fair and meet the ends of the justice which works out to Rs. 3,70,205/- (2% of Rs. 1,85,10,239/-).”

7. We notice that the Ld. CIT(A) has decided the issue involved in this case by following the decision of coordinate Bench of the Tribunal rendered in *Innovators Facade vs. ACIT (Cir-2), Thane, ITA No. 5450,5451 and 5452/Mum/2012 dtd. 20.07.2016*, vide which the coordinate Bench has restricted the addition to 2% of the alleged bogus purchases made by the assessee taking into consideration the facts of the case and the GP rate shown by the assessee in the relevant year. The Ld. CIT(A) has further pointed out that AO has not disputed the sales made by the assessee. The Hon'ble Bombay High Court In *CIT Vs. Nikunj Eximp Enterprises Pvt. Ltd. 372 ITR 619 (Bom)* has held that merely because the suppliers had not appeared before the Assessing Officer or the CIT (A) one could not conclude that the purchases were not made by the respondent/assessee. In view of

the Law laid down by the Hon'ble High Court 100% addition is bad in law. Under these circumstances only profit element is to be taken into consideration while making addition on account of bogus purchases. In our considered opinion the Ld. CIT(A) has restricted the addition after due application of mind hence, we do not find any reason to interfere with the findings of the Ld. CIT(A). We, therefore, uphold the findings of the Ld. CIT(A) and dismiss this ground of appeal of the revenue.

8. Ground No 2 of the appeal does not arise out of the CIT(A) order hence not adjudicated.

ITA No. 7344/MUM/2016 (Assessment Year: 2010-11)

Brief facts of the case are that the assessee engaged in the business of electrical contracts, filed its return of income for the assessment year under consideration declaring the total income of Rs. 34,45,916/-. The return was processed u/s 143(1) of the Act. Subsequently, the case was reopened under section 147 of the Act on the basis of information received by the investigation wing of the income tax department regarding assessee's involvement in hawala transactions during the relevant year. As per the information the assessee during the year relevant to the assessment year the assessee obtained bogus receipts showing purchase of Rs. 2,96,63,889/- from the six bogus entities mentioned in the assessment order. During the course of re-assessment proceedings, notice u/s 142 (1) was issued and the assessee was asked to submit *inter alia* details of ledger accounts of the above parties along with copies of bills / invoices raised proffer of delivery of goods with complete transportation details/ rendering of services, complete bank statements and other documentary evidence to prove the genuineness of the transaction with the aforesaid parties. The assessee was further asked to produce the parties for verification. In response thereof the assessee submitted written reply and

claimed that all purchases were genuinely made and the payments were made by banking channels.

2. The AO after considering the submissions of the assessee and cases relied upon by the assessee, determined the amount of bogus purchase u/s 69 of the Act at Rs 2,96,63,889/- and added back the said amount to the income of the assessee. Similarly, the AO also made GP addition of Rs.11,86,555/-on bogus purchases @ 4% and addition of Rs. 2,96,638/-on account of commission paid to the parties at 1% on estimation basis.

3. In the first appeal, the Ld. CIT (A) after hearing the assessee modified the assessment order by directing the AO to make addition to the extent of 2% of alleged bogus purchases made by the assessee during the previous year. The Ld. CIT(A) further restricted the addition made on account of commission made to the parties to 0.25% of the Bogus purchases in question The revenue is in appeal before the Tribunal against the said findings of the Ld. CIT (A).

4. The revenue has raised the following effective ground of appeal against the impugned order passed by the Ld. CIT (A):-

1. *“On the facts and circumstances of the case and in law, the Ld. CIT (A) is erred in deleting the addition of Rs. 2,69,63,889/- made on account of disallowance of non-genuine purchases without appreciating the fact that the assessee was not able to substantiate its claim of alleged purchases and also the fact that alleged suppliers were non-existent and were identified as hawala dealers by the official website of the Sale Tax Department, Government of Maharashtra, www.mahavat.gov.in.*
2. *On the facts and circumstances of the case and in law, the Ld. CIT (A) is erred in restricting the disallowance on account of gross profit from 4% to 2% of the alleged purchases without appreciating the fact that the assessee was not able to substantiate its claim of alleged*

purchases and also the fact that alleged suppliers were non-existent and were identified as hawala dealers by the official website of the Sale Tax Department, Government of Maharashtra, www.mahavat.gov.in.

3. *On the facts and circumstances of the case and in law, the Ld. CIT (A) is erred in coming to a conclusion that the goods allegedly purchased from the hawala dealers were neither utilized in the process of manufacturing or are lying in stock-in-trade on the basis of inspection & testing report of material purchased and stock flow statements submitted during the appellate proceedings without giving an opportunity to the Assessing Officer to examine the same in violation of Rule 46A of the Income Tax Rules, 1962.*
4. *On the facts and circumstances of the case and in law, the Ld. CIT (A) is erred in restricting the commission on bogus purchases to 0.25% as against 1% made in the assessment order without bringing anything on record to show that the same is fixed at the prevailing market rate whereas in the assessment order it was mentioned that the percentage of commission applied is based on the statement of some hawala dealers before the Sales-tax authorities.*
5. *The appellant prays that the order of the CIT (A), Mumbai on the above directions be set-aside and that of the assessing officer be restored.”*

“19. I have carefully considered the A.O.’s contention and Appellant’s submission and arguments. The A.O.’s main grievance was the alleged six parties from whom the appellant purchased the materials are hawala parties and bogus as per the investigation carried on by the Sales Tax Department and also their name appeared on the website of Sales Tax Department of Maharashtra. Further these six parties did not respond to the notice issued under section 133(6) of the Act for verification and cross examination. Therefore, the purchases made from them are bogus. On the other hand A.R. of the appellant argued that the materials purchased from

these six parties have been utilized in the various projects undertaken by them. In support of their claim they submitted the item wise utilization of the materials purchases in the various contract job with the job order no., name of the client, material utilized, sales billed etc. The A.R. of the appellant also submitted the statement of Net Profit and Gross Profit in support of their claim that if the alleged bogus purchases are added to the net profit it works out to 35.89%, which is unimaginary. The A.R. also argued that the material purchased is included in the closing stock of the company and therefore if purchases are considered as bogus to that extent the closing stock should be reduced. He further argued that the alleged purchased material is used in the job work carried on by the company and sales/ contract bills were raised against them, therefore if purchases are considered as bogus to that extent sales amount/contract amount is also reduced to that extent.”

20. *After carefully considering the Assessment Order and the submissions given by the AR of the appellant that sales cannot be made without purchases and AO has not disputed the sales made by the appellant and therefore directed the AO to delete the above addition of Rs. 2,96,63,889/-. However, having made the transaction of the Hawala suppliers as per the Sales Department information, I am of the considered opinion that only profit element embedded in such purchases of Rs. 2,96,63,889/- could be added to the appellant company. Hence, the party totally cannot be treated as bogus one as long as the sales were not under dispute and therefore the addition made on account of bogus purchases of Rs. 2,96,63,889/- is to be deleted. Hence, Ground No. 1 is allowed.*

21. *With regard to GP addition made of Rs. 11,86,555/-, the A.R. of the appellant pleads that recently ITAT, Mumbai has decided the issue by fixing the addition at 2% of the bogus purchases in the case of Innovators Façade vs. ACIT (Cir-2), Thane, ITA No. 5450, 5451 and 5452/Mum/2012 dtd. 20.07.2016 wherein it is held that-*

“From the record we found that assessee had shown GP rate of 16.39% and 23.49 in the assessment year 2009-10 and 2010-11, which is much better than the gross profit rate shown in the assessment year 2008-09 at 11.41%. Moreover the GP rate shown by the assessee is comparable to the GP rate shown by other assessee engaged in similar

trade. However, to safeguard the interest of revenue and to cover the leakage of revenue, if anyone, and also totality of facts and circumstances of the case before us, we direct the AO to restrict the addition to the extent of 2% of alleged bogus purchases made. We direct accordingly.

Facts and circumstances in the year 2010-11 and 2011-12 are pari material, following the reasoning given hereinabove, we restrict the ITA No. 5450 to 5452/MUM/2015 Assessment Year 2009-10 to 2011-12 additions in these years also to the extent of 2% of alleged bogus purchases so made. We direct accordingly.

However, to safeguard the interest of revenue and to cover the leakage of revenue, if anyone, and also totality of facts and circumstances of the case before me, I direct the AO to restrict the addition to the extent of 2% of alleged bogus purchased so made. I direct the AO to restrict the addition of bogus purchase to the extent of 2% which works out to Rs. 5,93,278/- (2% of Rs. 2,96,63,889/-) and delete the balance addition of Rs. 5,93,277/-. Accordingly this ground of appeal is partly allowed.

22. Further, the A.O. has made an addition on alleged commission paid for arranging bogus bills amounting to Rs. 2,96,638/-. The A.R. for the appellant contested that they have not paid any such commission of Rs. 2,96,638/- nor debited such expenses in the Profit & Loss Account. However, I am in agreement with the AO that the beneficiaries are liable for payment of commission and I am of the considered opinion that fixing the commission at the prevailing market rate i.e. @ 0.25% of bogus purchases will be fair and meet the end of the justice of the appellant company which works out to Rs. 74,160/- and accordingly the addition made by the AO is restricted to Rs. 74,160/- and the balance appellant gets relief of Rs. 2,22,478/-. Hence, this ground of appeal is partly allowed.”

5. Before us, the Ld. DR relying on the findings assessment order passed by the AO reiterated the arguments advanced in assessee's own case for the assessment year 2009-10 aforesaid and further submitted that the impugned order is erroneous and liable to be set aside.

6. On the other hand, the Ld. counsel also reiterated its arguments advanced in assessee's own case for the assessment year 2009-10 aforesaid and further submitted that there is no merit in the appeal of the revenue.

7. Having heard the rival submissions, we notice that the Ld. CIT(A) has decided ground No 1& 2 by following the decision of coordinate Bench of the Tribunal rendered in *Innovators Facade vs. ACIT (Cir-2), Thane, ITA No. 5450,5451 and 5452/Mum/2012 dtd. 20.07.2016* referred above. Since, we have upheld the addition of 2% of the total bogus purchases made by the Ld CLT(A) in assessee's own case for the assessment year 2009-10 aforesaid, we upheld the findings of the Ld. CIT(A) in this appeal and dismiss ground No 1 & 2 of the appeal of the revenue. We therefore, direct the AO to compute the addition in terms of the order passed by the Ld. CIT(A).

8. Ground No 3 of the appeal does not arise out of the CIT(A) order hence not adjudicated.

9. Ground No 4 pertains to addition made on account of commission paid to the parties for obtaining bogus bills from the parties. The Ld. CIT(A) has restricted the addition from 2% of the bogus purchases made by the AO to 0.25% of the said amount. We notice that the AO as well as the LD CIT(A) have made the addition on estimation basis. However, in our considered opinion, the view taken by the Ld. CIT(A) is more rational in the light of the fact that some of the hawala operators have stated before the sales tax authorities that they used to obtain commission @ 0.5% to 2% from the so called buyers. AO has not carried out any further verification or collected any evidence ascertains the veracity of the statements made before the sales tax authorities and to determine the actual amount paid by the assessee

towards commission. Hence, we uphold the findings of the Ld CIT(A) and dismiss ground No 4 of the revenue's appeal.

In the result, appeals filed by the revenue for assessment years 2009-10 & 2010-11 are dismissed.

Order pronounced in the open court on 27th.Sept., 2017.

Sd/-
(RAJENDRA)
ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 27/9/2017

Alindra, PS

आदेश 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
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