

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI

Before Shri Saktijit Dey(JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A Nos.6968 /Mum/2015)
(Assessment year: 2009-10)

M/s Omkar Heavy Engineering Ltd, Plot No.B-9, Road No.15, Wagale Industrial Estate, Thane PAN : AAACO4100E	vs	ITO, Wd.3(2),Thane
APPELLANT		RESPONDEDNT

I.T.A Nos.5063/Mum/2015)
(Assessment year: 2009-10)

ITO, Wd.3(1),Thane	vs	M/s Omkar Heavy Engineering Ltd, Plot No.B-9, Road No.15, Wagale Industrial Estate, Thane
APPELLANT		RESPONDEDNT

Appellant by	Shri Dr P Daniel
Respondent by	Shri Rajat Mittal

Date of hearing	08-11-2017
Date of pronouncement	22-11-2017

ORDER

Per G Manjunatha, AM :

These cross appeals filed by the assessee as well as revenue are directed against the order of the CIT(A)-2, Thane dated 29-07-2015 and it pertains to AY

2009-10. Since facts are identical and issues are common, these appeals were heard together and are disposed of by this common order, for the sake of convenience.

2. The brief facts of the case are that the assessee company engaged in the business of manufacturing of engineering goods, filed its return of income for the assessment year 2009-10 on 29-09-2009 declaring total income at Nil. Subsequently, the case has been reopened u/s 147 of the IT Act, 1961 by issuing notice u/s 148 on 28-03-2013. The case was reopened on the basis of information received from the DGIT(Inv) which states that the assessee is one of the beneficiaries of bogus bills issued by hawala operators as per the list of Sales-tax department. It was further observed that the assessee is the beneficiary of bogus purchases from M/s Siddhi Vinayaka Steels to the extent of Rs.19,06,352. Therefore, the AO opined that income chargeable to tax had been escaped assessment within the meaning of section 147 of the Act. In response to notice issued u/s 148, the assessee vide its letter dated 09-04-2013 submitted that the original return filed u/s 139(1) may be treated as return filed in response to notice u/s 148 of the Act. Subsequently, the case has been selected for scrutiny and notice u/s 143(2) and 142(1) of the Act were issued. In response to notices, the authorized representative of the assessee appeared from time to time and furnished the details, as called for. During the

course of assessment proceedings, the AO called upon the assessee to justify purchases from M/s Siddhi Vinayaka Steels in the backdrop of allegation of sales-tax department that M/s Siddhi Vinayaka Steels is a suspicious dealer involved in providing accommodation entries. In response to show cause notice, the assessee has submitted that purchases from M/s M/s Siddhi Vinayaka Steels are genuine which are supported by purchase bills and also excise invoices issued by the supplier, M/s Lloyd Metals and Engineers and M/s Maharashtra Seamless Ltd and the assessee has availed CENVAT credit. The assessee further submitted that the relevant RG-23A wherever excise credit availed were also furnished to the AO. The assessee further submitted that the central excise department had conducted excise audit without there being any comment on input tax credit deduction from M/s Lloyd Metals and Engineers and M/s Maharashtra Seamless Ltd, therefore, only on the basis of Sales-tax department, list of hawala dealers, addition cannot be made despite furnishing of evidences. The assessee further submitted that the materials were purchased and the same were lying in work-in-progress during the end of the financial year and in the subsequent financial year the fabrication work was done for chilling plant and the same was sold to Voltas Ltd. Therefore, the purchases from M/s Siddhi Vinayaka Steels cannot be considered as bogus purchases. The AO, after considering relevant submissions of the assessee and

also taking into account the information received from sales-tax department observed that the assessee has failed to justify purchases from M/s Siddhi Vinayaka Steels. The AO further observed that mere production of purchase bills and payment proof by cheque is not sufficient compliance of discharging the genuineness of purchases that too, when information received from sales-tax department clearly indicates that the parties have accepted before the sales-tax authorities that they were hawala operators. The AO accordingly made addition of Rs.19,06,352 and added back to the total income of the assessee.

3. During the course of assessment proceedings, in order to verify genuineness of purchases and expenses debited to the P&L account, the bills and vouchers alongwith books of account and bank statement duly reflecting the transactions were also called for. The AO observed that the assessee failed to produce necessary supporting evidences for purchases and expenses. Therefore, a showcause notice dated 03-03-2014 was issued to the assessee asking it to explain as to why 20% purchases and expenses other than hawala purchases should not be disallowed. However, the assessee failed to furnish any explanation, therefore, to cover up the discrepancies in remaining purchases, an adhoc disallowance of 20% in remaining purchases including expenses of Rs.7,69,41,517 which came to Rs.1,53,88,303 has been added to

the total income. Aggrieved by the assessment order, the assessee preferred appeal before the CIT(A).

4. Before the CIT(A), the assessee has reiterated its submissions made before the AO. The assessee further submitted that the AO was erred in treating purchases from M/s Siddhi Vinayak Steels as bogus despite furnishing all evidences including tax invoices issued by source supplier of materials M/s Lloyd Metals and Engineers and M/s Maharashtra Seamless Ltd. The assessee further submitted that the AO has not pointed out any error or discrepancy in the books of account in order to make out any case of sales outside the books of account. The purchases from M/s Siddhi Vinayak Steels is lying in WIP at the end of the financial year and the same material has been used for chilling plant to be sold to Voltas Ltd. All these facts were filed before the AO. The AO ignored all evidences and made addition towards purchases only on the basis of information received from Sales-tax department which is incorrect. As regards disallowance of 20% of expenses including purchases, the assessee has filed all evidences including purchase bills and submitted that the AO has made ahoc disallowance without any basis despite furnishing of evidences to justify purchases. The assessee also challenged reopening of assessment on the ground that the AO has reopened the assessment on the basis of information received from sales-tax department without there being any independent

application of mind.

5. The Ld.CIT(A), after considering relevant submissions of the assessee and also relying upon various decisions observed that the assessee has failed to file any evidence including present communicable address, confirmation letter, and production of the party, M/s Siddhi Vinayak Steels for examination and verification despite providing number of opportunities to comply with various requirements during the course of appellate proceedings. The Ld.AR shown his inability to comply with the requirements with the plea that the same are not available and the supplier is also not traceable. The Ld.AR, vide order sheet noting dated 27-07-2015 stated that it is not possible to link up the purchase of materials to consumption and sale thereby with reference to hawala purchases, therefore, he informed that he did not want to press this ground of appeal. In view of this, the CIT(A) rejected ground raised by the assessee challenging reopening of assessment and also upheld addition made by the AO towards disallowance of bogus purchases from M/s Siddhi Vinayak Steels for Rs.19,06,352. Insofar as adhoc disallowance of 20% out of total expenses debited to P&L Account including purchases, the CIT(A) observed that the AO has not pointed out any defects in expenses debited to P&L Account including purchases. The assessee has maintained all relevant details such as bills and other related documents and also seen that payments are made through

banking channels. The raw materials purchases were duly recorded in the books and sales have been reflected against such purchases. In view of all these facts regular purchases cannot be doubted. In the absence of any specific defect, disallowance of 20% out of regular purchases is hereby deleted. As regards claims of expenses, the assessee has not maintained proper vouchers in respect of petty expenses. It was further observed that in some cases, personal expenses / expenses not related to business also been claimed. The Ld.AR, vide order sheet noting dated 27-07-2015 submitted that purchases from other regular parties are genuine and at the most 20% out of administrative expenses of Rs.60,26,584 may be disallowed. Therefore, considering the facts and also in view of admission of the AR of the assessee, the CIT(A) restricted disallowance of expenses at 20% to administrative expenses of Rs.60,26,584 and accordingly allowed relief of Rs.1,41,82,983 out of total disallowances worked out by the AO of Rs.1,53,88,303. Aggrieved by the order of CIT(A), the assessee as well as the revenue are in appeal before us.

6. The first issue that came up for our consideration from assessee's appeal is disallowance of purchases from M/s Siddhi Vinayak Steels. The Ld.AR for the assessee submitted that the Ld.CIT(A) erred in confirming addition made by the AO towards disallowance of purchases from M/s Siddhi Vinayak Steels only on the basis of information received from sales-tax department, despite

furnishing all details including tax invoices issued by source supplier of materials, M/s Lloyd Metals and Engineers and M/s Maharashtra Seamless Ltd. The assessee has purchased MS steel pipes from M/s Siddhi Vinayak Steels, which in turn, purchased the same from M/s Lloyd Metals and Engineers and M/s Maharashtra Seamless Ltd by valid tax invoice and the assessee has availed CENVAT credit and the relevant RG-23A were furnished before the AO. The Ld.AR further submitted that the purchased goods were lying in WIP at the end of the financial year and in the subsequent financial year, the same material has been used for chilling plant to be sold to Voltas Ltd. When all these evidences were furnished, the AO was incorrect in disallowing purchases only on the basis of information received from third party.

7. On the other hand, the Ld.DR strongly supported the order of the CIT(A).
8. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. It is an undisputed fact that M/s Siddhi Vinayak Steels was appearing in the list prepared by Sales-tax department of suspicious / hawala dealers involved in providing accommodation entries. The AO made addition on the basis of information received from Sales-tax department coupled with further enquiries conducted during the course of assessment proceedings which clearly establishes the fact that purchases from M/s Siddhi Vinayak Steels is

bogus in nature. Notice issued u/s 133(6) were returned unserved and the assessee failed to produce the supplier in person before the AO. Therefore, the AO opined that the assessee has failed to justify purchases with necessary evidences and hence made addition to total purchases from M/s Siddhi Vinayak Steels. It is the contention of the assessee that purchases from M/s Siddhi Vinayak Steels is genuine which is supported by proper evidence including tax invoice of source supplier. All these evidences have been furnished before the AO. The assessee further contended that purchases are supported by tax invoices and the assessee has availed CENVAT credit. The books of account were subjected to Central Excise Audit and the Central Excise department has conducted excise audit in the year under consideration without any adverse comment on input credit availed from the above dealers. The assessee further contended that materials purchased were lying in WIP at the end of the financial year and the same were used for chilling plant to be supplied to Voltas Ltd, therefore, there is no reason for the AO to suspect purchases from Siddhi Vinayak Steels.

9. Having heard both the sides and considered materials on record, we find the fact that the supplier is appearing in the list of hawala / suspicious dealers prepared by Sales-tax department is not disputed by the assessee with any evidences. At the same time, it is also an admitted fact that the assessee has

filed enormous evidences to justify purchases from Siddhi Vinayak Steels is genuine in nature. The assessee has filed various details including tax invoice issued by source supplier on which the assessee has availed CENVAT credit. All these facts cannot be ignored in toto only for the reason that the supplier is appearing in the list of suspicious / hawala operators issued by the sales-tax department. However, the fact remains that notice issued u/s 133(6) to the dealer has been returned unserved with remark 'party is not available at the address'. The assessee also failed to produce the party in person before the AO. Under these circumstances, a reasonable inference can be drawn that the assessee has purchased materials from grey market and obtained bills from the hawala operators to adjust the purchases. In this process, the assessee might have saved the VAT applicable on the goods and also a reasonable percentage on saving in price paid for purchase of materials. Therefore, what needs to be taxed is profit earned by the assessee from these transactions. Various courts and Tribunals have taken a consistent view in the case of bogus purchases and after considering various factors has upheld estimation of profit ranging from 12.5% to 25% depending upon the nature of business. The Hon'ble Gujarat High Court in the case of CIT vs Simit P Sheth 356 ITR 451 (Guj) observed that no uniform yardstick can be applied for estimation of net profit which depends upon nature of business of the assessee. The Hon'ble Gujarat High Court in the

case of Vijay Proteins Ltd vs CIT Income Tax Reference No. 139 of 1996 order dated 21-07-2014 held that only profit element embedded in bogus purchase need to be added, but not total purchases from the bogus parties. The co-ordinate bench of ITAT, Mumbai in number of cases has taken a consistent view and directed the AO to estimate net profit at 12.5% on bogus purchases. Therefore, considering the facts and circumstances of the case and also consistent with the view taken by the co-ordinate bench of ITAT, Mumbai, we deem it appropriate to direct the AO to estimate net profit of 12.5% on the alleged bogus purchases. Accordingly, ground raised by the assessee is partly allowed.

10. The next issue that came up for our consideration from assessee and revenue's appeal is adhoc disallowance of 20% towards expenses including purchases debited to the P&L Account. The AO has disallowed 20% in remaining purchases including expenses of Rs.7,69,42,527 which came to Rs.1,53,88,303. According to the AO, the assessee failed to justify expenses and other purchases with necessary evidences. It is the contention of the assessee that other purchases are fully supported by bills and the same are having nexus with the sales declared for the relevant financial year. The assessee further contended that purchases and sales are having one to one correlation and the AO has not made out any case of incorrectness in books of

account or stock register. Insofar as expenses, though the expenses are supported by self made vouchers, major expenses are supported by proper bills and vouchers and the payments were made by cheques. The assessee further contended that the administrative expenses consists of salary, ESIC, EPF, telephone expenses, municipal tax, professional tax, rent, audit fees, professional fees, etc. are fully covered by bills and payments have been made by cheques. Majority of the expenses have been paid to third parties and government agencies. The assessee further contended that it has suo moto disallowed donation and service tax penalty, which is included in administrative expenses and further disallowance would amount to double disallowances.

11. We have heard both the parties and perused material available on record and gone through the orders of authorities below. The AO made adhoc disallowance of 20% out of administrative expenses and other purchases without there being any observations with regard to correctness of books of account or bills and vouchers. The assessee has filed complete details including bills and vouchers and this fact has been accepted by the CIT(A). The CIT(A), after considering the details furnished by the assessee has accepted other purchases as genuine and directed the AO to delete adhoc disallowance made towards other purchases other than hawala purchases. . The revenue

has failed to bring on record any evidence to disprove the findings of facts recorded by the CIT(A). Therefore, we are of the view that the CIT(A) was right in deleting the addition made towards disallowance made by the AO towards other purchases. As regards administrative expenses, though the assessee has furnished bills and vouchers for various expenditure, petty expenses are supported by self made vouchers. The CIT(A) further observed that in some cases, personal expenses / expenses not related to business have also be claimed. The CIT(A) further observed that the assessee's authorized representative has agreed for 20% disallowance out of administrative expenses because he could not substantiate expenses with verifiable bills and vouchers. Insofar as administrative expenses, the assessee claims to have suo moto disallowed donation and service tax and penalty in the computation of total income. Once expenses have already been disallowed, further disallowance towards same expenses amounts to double disallowance. We further observe that out of the total expenses, majority expenses incurred in relation to salary, ESI, EPF, telephone expenses, municipal taxes, etc. which are fully incurred by cheques and are supported by proper bills and vouchers. The total expenses incurred under these heads come to Rs.29 lakhs where no disallowed is required, on adhoc basis. Therefore, we direct the AO to exclude expenses incurred towards salary, ESIC, EPF, telephone expenses, municipal taxes, etc.

which comes to Rs.29 lakhs out of total administrative expenses incurred by the assessee for Rs.60,26,584 for the purpose of adhoc disallowances. As regards the donation, service tax penalty, the assessee has already suo moto disallowed these expenses in its computation of income. Therefore, no further disallowance is required. Hence, we direct the AO to exclude these two items also for the purpose of disallowances. For the remaining expenses, the assessee has failed to justify expenses with necessary evidences. The assessee also agreed for disallowance before the CIT(A) because of its inability to furnish supporting evidences. Therefore, we are of the view that the AO was right in disallowing 20% expenses towards other expenses excluding salary and other expenses as discussed above. Hence, we direct the AO to restrict disallowance @20% out of administrative expenses excluding salary & related expenses and also donation and service tax penalty disallowed by the assessee. We order accordingly.

12. The next issue that came up for our consideration from assessee's appeal is validity of reopening of assessment. The Ld.AR for the assessee, at the time of hearing submitted that he did not want to press the ground challenging reopening of assessment. Hence, the ground raised by the assessee challenging reopening of assessment is dismissed, as not pressed.

13. In the result, appeal filed by the assessee and the appeal filed by the

revenue are partly allowed.

Order pronounced in the open court on 22nd November, 2017.

Sd/-

sd/-

(Saktijit Dey)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 22nd November, 2017

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Asstt. Registrar, ITAT, Mumbai