

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'आई', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "I", 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. 5607/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2009-10)

The ITO-12(3)(3), Room No. 224, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s M.S. Infraproject Pvt. Ltd., G Wing, Flat No. 3, Ground Floor, Sumer Nagar – Building, S.V. Road, Behind Ajanta Party Hall, Borivali West, Mumbai - 400092
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABC17701C		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से / Revenue by : Sh. Saurabh Kumar Rai (DR)
निर्धारिती की ओर से / Assessee by : Sh. Anil Thakrar (AR)

सुनवाई की तारीख / **Date of Hearing** : **10/08/2017**
घोषणा की तारीख/**Date of Pronouncement**: **09/11/2017**

आदेश / O R D E R

PER RAM LAL NEGI, JM

This appeal has been preferred by the revenue against order dated 24/06/2016 passed by the Ld. CIT (A)-20, Mumbai pertaining to the Assessment Year 2009-10, whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against assessment order passed u/s 144 read with section 147 of the Income Tax Act, 1961 (for short 'the Act').

2. Brief facts of the case are that the assessee company engaged in execution of civil works contracts, filed its return of income for the assessment year under consideration declaring the total income of Rs. 1,87,880/-. The return was processed u/s 143 (1) of the Act.

3. Subsequently, on the basis of information received from the Sales Tax Department, Maharashtra and enquiries conducted by the DGIT (Inv.), Mumbai, the assessment was re-opened u/s 147 of the Act. As per the information the assessee obtained accommodation entries from hawala entities who used to issue bogus bills without actually supplying the goods. As per the information, the assessee company during the year relevant to the assessment year under consideration obtained bogus bills to the tune of Rs. 1,82,21,300/- from 10 bogus entities mentioned in the assessment order to show purchases in the books of account.

4. Accordingly, the AO issued notice u/s 148 of the Act after recording reasons. Thereafter, notices u/s 143(3) and 142(1) were issued. However, the assessee did not respond to the said notices. The AO also issued notice u/s 142 (1) read with section 129 of the Act. Again no response was received from the assessee. Since, the assessee did not appear or furnish any detail regarding the purchases in question, the AO issued letters calling information u/s 133 (6) from the parties from whom, the alleged purchases were made. But no response was received from any of the parties as the notices were returned by the postal department with the remarks either 'not known' or 'left' or had 'refused'. Accordingly, AO passed assessment order u/s 144 read with section 147 of the Act on the basis of material on record and determined the total income of the assessee at Rs. 1,84,09,180/- after making addition of the amount of bogus purchases to the tune of Rs. 1,82,21,300/- to the income of the assessee.

5. Feeling aggrieved, the assessee challenged the assessment order in the first appeal before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee partly allowed the appeal and restricted the addition to 4% of the alleged bogus purchases. Against the said order the revenue is in appeal before the Tribunal.

6. The revenue has challenged the impugned order by raising the following effective grounds of appeal:-

1. *“Ld. CIT (A) has erred in law and on facts of the case in restricting the addition of Rs. 1,82,21,300/- made by assessing officer on account of Bogus Purchases shown to have been made from entry providers to G.P. addition @ 4% of the bogus purchases, without appreciating that*
 - i. *Assessee was not able to prepare and submit quantitative tally of the goods in question.*
 - ii. *Notices sent u/s 133(6) by the assessing officer to entry providers were returned back unserved and subsequently assessee failed to produce these parties before assessing officer for examination when specifically required to do so.*
2. *Without prejudice to the above ground, Ld. CIT (A) was not justified in adopting the figure of 4% of the bogus purchases as G.P. considering that no basis, whatsoever, for same has been given in the appellate order and in number of cases, involving similar facts, including the cases relied upon by the Ld. CIT (A), addition to the tune of 12.5% of purchases of even more have been upheld.”*

7. Before us, the Ld. Departmental Representative (DR) submitted that the Ld.CIT (A) has wrongly restricted the addition without appreciating that the assessee has failed to submit quantitative tally of the goods in question and the assessee has failed to prove the genuineness of the purchases. Without prejudice to the main ground the Ld. DR further submitted that there is no justification in restricting the addition to 4% of bogus purchases as GP as in a number of cases involving the similar facts, the High Courts and the Tribunal have upheld the addition of 12.5% and above of the bogus purchases. Since, the findings of the Ld. CIT(A) are not based on the evidence on record and no in

accordance with the settled principles of law, the impugned order is liable to be set aside.

8. 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 rightly restricted the addition to GP addition @ 4% of the bogus purchases. The assessee had purchased construction materials including sand, metal, bricks etc. from the suppliers and the material purchased were consumed and utilized in the construction and the entire payments were made through account payee cheques. The Ld. counsel further submitted that AO has relied on the statements of third parties without affording opportunity to cross examine the makers of the statements. Relying on the judgment of Hon'ble Gujarat High Court pronounced in *DCIT vs. Rohini Builders (2003) 127 Taxman 523* and the judgment of Hon'ble Bombay High Court delivered in *CIT Vs. Nikunj Eximp Enterprises Pvt. Ltd. 372 ITR 619 (Bom)*, the Ld. counsel submitted 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. The Ld. Counsel further submitted that since the findings of the Ld. CIT(A) are based on the evidence on record and in accordance with the settled principles of law, there is no merit in the revenue's appeal.

9. We have heard the rival submissions and perused the entire record and also gone through the cases relied upon by the authorities below as well as referred by the parties before us. The only grievance of the revenue is that the Ld. CIT (A) has wrongly restricted the addition to 4% of the bogus purchases. We notice that the AO has not rejected the books of account and accepted the sales shown by the assessee. Since, the AO has not rejected the sales shown during the relevant year, the entire amount of purchases cannot be added to the income of the assessee as there cannot be sale without any purchase. If the assessee had not purchased the goods in question from the parties concerned,

it implies that purchases were made from the parties other than those mentioned in the books of account. Hence, there is no justification in making addition of the entire amount of bogus purchases determined by the AO. Under profit element embedded in the purchases in question. On the other hand the Ld CIT(A) has not given any cogent reason as to how 4% addition is justified.

10. The Hon'ble Bombay High Court In *CIT Vs. Nikunj Eximp Enterprises Pvt. Ltd.* 372 ITR 619 (Bom), while upholding the decision of Mumbai Tribunal, has observed 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. The Hon'ble Gujarat High Court in *CIT vs. Simit P. Seth* 356 ITR 451(Guj) upheld the decision of the Tribunal and sustained the addition 12.5% of the total bogus purchases holding that only profit element embedded in such purchases can be added to income of the assessee. Hence, following the principles of law laid down by the Hon'ble High Courts of Bombay and Gujarat, discussed above, we partly allow the appeal of the revenue and modify the order of the Ld. CIT(A) and direct the AO to make addition @ 12.5% of the total amount of bogus purchases to the income of the assessee.

In the result, appeal filed by the revenue for assessment year 2009-10 is partly allowed.

Order pronounced in the open court on 9th November, 2017.

Sd/-

(RAJENDRA)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 09/11/2017

Alindra, PS

Sd/-

(RAM LAL NEGI)
JUDICIAL MEMBER

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**