



ITA Nos.3197-98,3284-85/Mum/2017
Oswal & Associates
Assessment Years- 2011-12 & 2012-13

आयकर अपीलीय अधिकरण “एच” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“H” BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE SHRI MAHAVIR SINGH, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./I.T.A. Nos. 3197 & 3198/Mum/2017
(निर्धारण वर्ष / Assessment Years: 2011-12 & 2012-13)

Oswal & Associates 205, Marine Chambers 43, New Marine Lines Mumbai-400 020	बनाम/ Vs.	Assistant Commissioner Of Income-Tax Central Circle 3(1) Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAAF0-0056-E		
(□ पीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)

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आयकर □ पील सं./I.T.A. Nos. 3284 & 3285/Mum/2017
(निर्धारण वर्ष / Assessment Years: 2011-12 & 2012-13)

Deputy Commissioner Of Income-Tax Central Circle 3(1) 1924, 19 th Floor Air India Building Nariman Point, Mumbai-400 021	बनाम/ Vs.	Oswal & Associates 205, Marine Chambers 43, New Marine Lines Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAAF0-0056-F		
(□ पीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)
Assessee by	:	Prateek Jain, Ld. AR
Revenue by	:	Saurabh Kumar Rai, Ld. DR

सुनवाई की तारीख / Date of Hearing	:	21/02/2018
घोषणा की तारीख / Date of Pronouncement	:	28 /02/2018



आदेश / ORDER

Per Manoj Kumar Aggarwal (Accountant Member)

1. These are cross-appeals for Assessment Years [AY] 2011-12 & 2012-13 which contest separate orders of first appellate authority on separate grounds of appeal. Since common issues are involved, we dispose-off the same by way of this common order for the sake of convenience & brevity. First we take up assessee's appeal ITA No. 3197/Mum/2017 for AY 2011-12, where the assessee is aggrieved by certain additions on account of *alleged bogus purchases* as confirmed by Ld. Commissioner of Income Tax (Appeals)-51, Mumbai [CIT(A)], *Appeal No. CIT(A)-51/IT-37/2015-16* dated 21/02/2017. The assessment for impugned AY was framed by Ld. Deputy Commissioner of Income Tax-Central Circle 3(1), Mumbai u/s 143(3) *read with Section 147* of the Income Tax Act, 1961 on 27/03/2015.

2.1 Facts in brief are that the assessee being *resident firm* engaged in *civil construction activity as builders & developers* was subjected to an assessment u/s 143(3) *read with Section 147* on 27/03/2015 wherein the assessee has been saddled with addition on account of *accommodation entries* for Rs.62,43,421/- and which is the sole subject matter of this appeal. The original return was filed by the assessee on 18/08/2011 declaring total income as '*Nil*' and the same was processed u/s 143(1).

2.2 Pursuant to information received in the course of search & seizure action on *Bhanwarlal Jain Group* by *DGIT (Inv.)*, it was noted that the assessee made impugned purchases from three entities of the group as per the following details:-



ITA Nos.3197-98,3284-85/Mum/2017
Oswal & Associates
Assessment Years- 2011-12 & 2012-13

No.	Name	Amount (Rs.)
1.	G M International	7,75,098/-
2.	Swastick Enterprises	18,26,311/-
3.	Impex Sales Corporation	36,42,012/-
	Total	62,43,421/-

The search / survey actions on the said group revealed that the said group consisting of numerous business entities was engaged in providing *accommodation purchases bills & accommodation loans & advances*. Consequently, the assessee was called upon to substantiate the purchase transactions. The assessee defended the purchases made by him and produced certain documentary evidences to substantiate the same. However, not convinced, Ld. AO disallowed the same and added the same to the income of the assessee.

3. Aggrieved, the assessee contested the same with partial success before Ld. CIT(A) vide impugned order dated 21/02/2017 where Ld. AO, *inter-alia*, noted that the assessee carried out construction activity at various projects and therefore full disallowance thereof was not justified. Finally, the impugned additions were restricted to 12.5% of the *alleged bogus purchases* by Ld. CIT(A) by making following observations:-

*11. In view of the above discussion, it may be said that the assessee has furnished significant details regarding the above purchases and the same could not be held as bogus by the AO simply because the names of the parties wherefrom purchases were made were appearing in the list of Maharashtra VAT Department. However, the fact also remains that names of these parties were appearing in the list of hawala dealers as received from the Maharashtra Sales Tax and DGIT (Inv.), Mumbai. Further, the assessee could not produce these parties for examination before the AO. It is also gathered that these parties are apparently not available on their last known address. Therefore, there is a possibility that the assessee might have made purchases from some other unregistered dealers and in turn would have saved VAT and other taxes on such purchases. The Hon'ble Gujarat High Court has addressed the identical situations in the judgment in the case of **Simit P Sheth 356 ITR 451** and has held that in such case profit of the assessee may be computed at 12.5% of such purchases. The relevant portion of the decision is reproduced hereunder:-*



ITA Nos.3197-98,3284-85/Mum/2017
Oswal & Associates
Assessment Years- 2011-12 & 2012-13

We are broadly in agreement with the reasoning adopted by the Commissioner (Appeals) with respect to the nature of disputed purchases of steel. It may be that the three suppliers from whom the assessee claimed to have purchased the steel did not own up to such sales. However, vital question while considering whether the entire amount of purchases should be added back to the income of the assessee or only the profit element embedded therein was to ascertain whether the purchases themselves were completely bogus and non-existent or that the purchases were actually made but not from the parties from whom it was claimed to have been made and instead may have been purchased from grey market without proper billing or documentation.

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 Mistry 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.

If the entire purchases were wholly bogus and there was finding of fact on record that no purchase were made at all, counsel for the revenue would be justified in arguing that the entire amount of such bogus purchases should be added back to the income of the assessee. Such were the facts in case of ACIT (OSC) Ward 5(3) Nadiad Vs. Pawanraj B Bokadia (supra).

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.

12. Therefore, respectfully following the decision of Hon'ble Gujarat High in the case of **Simit P Sheth 356 (supra)**, the profit rate of 12.5% is applied on the suspected bogus purchases of Rs.62,43,421/- made by the assessee company which works out to Rs.7,80,428/-. Therefore, out of the total amount of Rs.62,43,421/-, an amount of Rs.7,80,428/- is confirmed and the balance is directed to be deleted. **This ground is accordingly partly allowed.**



Aggrieved, the assessee as well as the revenue is in further appeal before us. The assessee is aggrieved by confirmation of addition to the extent of 12.5% whereas the revenue is aggrieved by relief granted by Ld. CIT(A).

4. The Ld. Authorised representative [AR] for assessee pleaded for some more relief whereas Ld. Departmental Representative [DR] pointed out the Ld. CIT(A) erred in granting relief to the assessee since the payment through Banking Channels, by itself, was not sufficient to substantiate the assessee's claim. It was further contended that the assessee could not produce any of the party for confirmation of transactions and moreover, the search / survey action on the concerned group clearly revealed that the transactions were merely accommodation entries and therefore, the stand of Ld. CIT(A) was not justified.

5. We have carefully heard the rival contentions and perused relevant material on record. We are of the considered opinion that since the assessee carried out certain construction activities at various projects during impugned AY, the same could not be possible without consumption of actual material like *tiles, steel, Cement, TMT Bars etc.* stated to be purchased by the assessee from these suppliers. The assessee was in possession of primary purchase documents and the payments were through banking channels. As evident from documents placed in *paper-book*, the assessee reconciled project wise quantitative details of consumption of material. At the same time, the assessee could not produce any of the suppliers before lower authorities and substantiate the delivery of material with cogent evidences. Further, the assessee reflected purchases from three entities, all of which were



controlled by the same group and the search / survey action clearly revealed that the said group controlled more than 70 entities with the sole objective of providing accommodation bills to the interested person. All these factors cast a serious doubt on assessee's claim. Therefore, in such a situation, the addition, which could be made, was to account for profit element embedded in these purchase transactions to factorize for profit element earned by assessee against possible purchase of material in the *grey market* and undue benefit of VAT against *alleged* bogus purchases, which Ld.CIT(A) has rightly done. Finding the estimated addition of 12.5% quite fair and reasonable, we find no reason to interfere with the order of Ld. first appellate authority.

6. Resultantly, the appeal of the assessee as well as revenue stands dismissed.

Cross Appeals for Assessment Year 2012-13

7. The assessee, in AY 2012-13, has similarly been saddled with additions on account of *accommodation entries* for Rs.37,91,029/- in an assessment u/s 143(3) on 31/03/2015. The Ld. first appellate authority, on similar reasoning, restricted the same to 12.5% against which the assessee as well as revenue is in appeal before us by way of identical worded grounds. Since facts and circumstances are similar, taking the same view, we confirm the stand of Ld. first appellate authority and dismiss the cross appeals *qua* this ground.

8. In this year, the assessee has raised one more ground of appeal which reads as under:-

On the facts and circumstances of the Appellant's case and in law Ld. Commissioner of Income Tax (Appeals) erred in confirming the action of Ld.



ITA Nos.3197-98,3284-85/Mum/2017
Oswal & Associates
Assessment Years- 2011-12 & 2012-13

Assessing Officer in disallowing the expenses claimed against the interest income amounting to Rs.21,67,942/-.

9. Facts *qua* the same are that the assessee offered income of Rs.85,87,102/- @8% as per *Project Completion method*. During assessment proceedings, it was noted that the assessee earned interest on *Fixed Deposits with Bank [FDR]* amounting to Rs.21,67,942/- which has been nullified by claiming expenditure of the same amount on the premise that the said deposits were created out of interest bearing unsecured loans obtained by the assessee. However, Ld. AO opined that the interest paid on unsecured loans had direct nexus with the ongoing projects and therefore, the same could not be allowed to the assessee u/s 57 against interest income earned by the assessee on FDRs which was assessable under the head *other sources*. Aggrieved, the assessee contested the same without any success before Ld. CIT(A) vide impugned order dated 21/02/2017 where Ld. CIT(A), after considering assessee's submission, confirmed the stand of Ld. AO. Aggrieved, the assessee is in further appeal before us.

10. After due consideration, we find that this issue requires re-appreciation at the end of Ld. AO since the material on record is inadequate to adjudicate this issue. The assessee has merely contended that unsecured loans have been utilized to make FDRs with the bank and therefore, the expenditure should be allowed to him. However, a perusal of *Balance Sheet* as on 31/03/2012 reveals that the *work-in-progress* reflected by the assessee far exceeds the amount of *unsecured loans*. Therefore, without delving much deeper into the issue, we remit the matter back to the file of Ld. AO with a direction to the



ITA Nos.3197-98,3284-85/Mum/2017
Oswal & Associates
Assessment Years- 2011-12 & 2012-13

assessee to justify the claim of interest expenditure u/s 57 failing which Ld. AO shall be at liberty to decide the same as per law on the basis of material available on record. Resultantly, this ground of assessee's appeal stands allowed for statistical purposes.

Conclusion

11. The cross appeals for AY 2011-12 and revenue's appeal for AY 2012-13 stands dismissed whereas assessee's appeal ITA No. 3198/Mum/2017 for AY 2012-13 stands partly allowed for statistical purposes.

Order pronounced in the open court on 28th February, 2018

Sd/-

(Mahavir Singh)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 28. 02.2018

Sr.PS:- Thirumalesh

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