

**आयकर अपीलीय अधिकरण “एक-सदस्य मामला” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH, MUMBAI**

श्री शमीम याहया, लेखा सदस्य के समक्ष ।  
**BEFORE SHRI SHAMIM YAHYA, AM**

आयकर अपील सं./I.T.A. No. 6527/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2009-10)

Vishal Tube Industries Badrika Ashram Building, Ground Floor, 92, Nanubhai Desai Road, Dhetwadi Main Road, Mumbai-400 004	<b>बनाम/</b> Vs.	ITO-19(3)(5), 2 <sup>nd</sup> Floor, Matru Mandir, Tardeo Road, Mumbai-400 007
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AADFV 5562 F		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	None
प्रत्यर्थी की ओर से/Respondent by	:	Ms. N. Hemalatha
सुनवाई की तारीख / Date of Hearing	:	26.03.2018
घोषणा की तारीख / Date of Pronouncement	:	26.03.2018

**आदेश / ORDER**

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order by the Commissioner of Income Tax (Appeals) dated 25.09.2017 and pertains to the assessment year 2009-10.

- The issue raised relates to the validity of reopening of assessment and addition @ 12.50% of alleged bogus purchases.

3. Brief facts of the case are that the assessee filed its return of income for A.Y.2009-10 on 09.09.2009 declaring total income at Rs.30,551 /-. Subsequently, the case was reopened u/s. 147, by issuing notice u/s 148 of the Act on 10.02.2014 and served upon the assessee, based on the information received from the DGIT (Inv.), Mumbai, that the assessee is one of the beneficiaries of the accommodation entries provided by some of the MVAT dealers who were indulging in issuing bogus sale/purchase bills, which was investigated and kept on the public domain by the Sales Tax Department. Assessment u/s. 143(3) r.w.s. 147 of the I.T. Act, 1961 was completed by the Assessing Officer on 27.02.2015 determining the total income at Rs.5,06,750/-. In the assessment so completed, the Assessing Officer has made an addition of Rs.4,78,194/- on account of bogus purchases.

4. During the course of assessment proceedings, to ascertain the genuineness of purchases shown in the accounts, notices u/s 133(6) of the Act was issued by the Assessing Officer to the said party from whom the purchases were made, by registered post. The notice was returned unserved by the postal authorities with a remark 'not known'. The Assessing Officer asked to prove the genuineness of the said party's and the purchases made from them with adequate supporting evidences and also to produce the party for verification. However, the assessee failed to do so, and only furnished some details and could not produce the vital documents like delivery challans, transport receipts, Octroi, receipts, excise gate pass, goods inward register maintained at godown etc., On going through the submissions and contentions of the assessee at length, the

Assessing Officer concluded that the assessee's purchase from the above said party was not genuine. The Assessing Officer also rejected the books of accounts by invoking provisions of Sec. 145(3) of the Act, as he was not satisfied about the correctness and completeness of the accounts of the assessee. Relying on the decision in the case of CIT Vs. Simit P. Sheth, ITA No.553 of 2012, the Assessing Officer concluded that intention of indulging in such activity is to suppress the true profits and to reduce the tax liability. Therefore, element embedded in such purchases is taken as the profit earned from purchases shown to have been made from the two parties and estimated the profit @12.5% of the total non-genuine purchases of Rs.38,25,554/- which worked out to Rs.4,78,194/- and added to the total income of the assessee.

5. Against the above order, the assessee appealed before the Id. Commissioner of Income Tax (Appeals) challenging the validity of reopening as well as the merits of the addition.

6. The Id. Commissioner of Income Tax (Appeals) uphold the validity of reopening by holding as under:

In this case there was no assessment or re-assessment for the year under consideration prior to issue of notice u/s 148 dated 10-02-2014 by the Assessing Officer, It is a settled legal position that in a case where there was no assessment or re-assessment prior to the reopening of assessment, even if all the material facts are disclosed in the return of income already filed, reopening can be initiated, if the Assessing Officer has 'reason to believe' that the income has escaped assessment. The assessee in such cases cannot assail the reopening on the ground that the facts were already placed on record and that the Assessing Officer ought to have considered the facts. Hon'ble Supreme Court in the case of ACIT vs. Rajesh Jhaveri Stock Brokers (P) Ltd. (291 ITR 500) observed that the word 'reason' in the expression 'reason to believe' would mean cause or justification and

if the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reasons to believe that income had escaped assessment. It is further observed by the Supreme Court that the expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. 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 that income has escaped assessment. In the present case, it is evident that the AO has received specific and credible information from the DGIT(Inv.), Mumbai that the assessee was involved in making bogus purchases through hawala dealers to the extent of Rs.38,25,554/- from M/s, Newzone Multitrade P.Ltd. The information prima facie revealed that the appellant has claimed purchases for the A.Y. 2009-10 in their books. Based on this precise information, the AO issued notice u/s. 148 of the I.T. Act as he had prima-facie reasons to believe that income chargeable to tax had escaped assessment within the meaning of sec. 147 of the I.T, Act. Thus, there was cause or justification for the AO to invoke provisions of sec. 147 and issue notice u/s. 148. As already mentioned, at the initiation stage, what is required to be seen is r there are prima-facie 'reasons to believe'<sup>1</sup> but not the established fact of escapement of income. The AO also recorded proper reasons for formation of the belief that income has escaped assessment. It is also important to note that the information relating to Hawala operators was also made available in public domain i.e. in the official website of the Maharashtra Sales Tax Department and therefore the reasons for reopening the assessment are not based on mere suspicion. Thus, all the conditions necessary for reopening of the assessment under the provisions of sec. 147 and for issue of notice u/s. 148 are satisfied in the case of the appellant for the year under appeal. Hence the reopening the assessment u/s 148 of the Act was absolutely valid.

7. As regards the merits, the Id. Commissioner of Income Tax (Appeals) confirmed the action of the Assessing Officer.

8. Against the above order, the assessee is in appeal before the ITAT.

9. I have heard the Id. Departmental Representative. None appeared on behalf of the assessee. An adjournment petition has been received from a CA Firm. However, no power of attorney is on record. This is the second time when the case has been posted and

adjournment by persons not holding the proper authority is sought, accordingly the same is dismissed.

10. As regards the reopening of the assessee, on a careful consideration, I note that in this case information was received by the Assessing Officer from DGIT Investigation (Mumbai) there are some parties who are engaged in the hawala transactions and are also involved in issuing bogus purchase bills for sale of material without delivery of goods, which information was based on information received by Revenue from Maharashtra Sales Tax Authority. Information was received that the assessee was beneficiary of hawala accommodation entries from entry providers by way of bogus purchase. The accommodation entry provider has deposed and admitted before the Maharashtra Sales Tax Authority vide statement/ affidavit that they were engaged in providing bogus accommodation entries wherein bogus sale bills were issued without delivery of goods, in consideration for commission. These, accommodation entry providers, on receipt of cheques from parties against bogus bills for sale of material, later on withdrew cash from their bank accounts, which was returned to beneficiaries of bogus bills after deduction of their agreed commission. The Assessee was stated to be one of the beneficiaries of these bogus entries of sale of material from hawala entry operators in favour of the assessee wherein the assessee made alleged bogus purchases through these bogus bills issued by hawala entry providers in favour of the assessee. These dealers were surveyed by the Sales Tax Investigation Department whereby the directors of these dealers have admitted in a deposition vide statements/affidavit made before the Sales Tax Department that they

were involved in. issuing bogus purchase bills without delivery of any material. There is a list of such parties wherein the assessee is stated to be beneficiary of bogus purchase bills.

11. From the above, I 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 guilt. 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. Ltd*, 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).”

12. The above discussion and precedent from Apex Court fully justify the validity of reopening in this case. Further I find that the Ld. CIT(A) has carefully examined the issue and has properly appreciated the issue. Hence, I do not find any infirmity in the same. Accordingly, I uphold the order of the Ld. CIT(A) on the issue of reopening. Since, the issue has been decided on the basis of the Hon’ble Apex Court decision, the other case laws referred by assessee are not supporting the assessee’s case.

13. As regards merits of addition, I 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 obtained 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 has been confirmed by the learned CIT(A) and by ITAT as above. Furthermore it is noted that in such factual scenario 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. The necessary evidence for transportation of goods have not been provided by the assessee. In this factual scenario it is amply 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 and there is no cogent evidence of transportation of goods. 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. The assessing officer has noted that there is no cogent evidence of the provision of goods. 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.

14. Hence 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.

15. In these circumstances learned departmental representative has referred to Hon'ble Gujarat High Court decision in the case of Apex Appeal No. 240 of 2003 in the case of *N K Industries vs Dy CIT*, order dated 20.06.2016, wherein hundred percent 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 dated 16.1.2017.

16. I 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. Upon careful consideration I find that sales in these cases are not doubted. When sales are not doubted, 100% disallowance for bogus purchase is not sustainable as per the decision of the Hon'ble jurisdictional High Court in the case of *Nikunj Eximp Enterprises* (in writ petition no 2860, order dt. 18.6.2014). However, the facts of that case were different inasmuch as sales were to the Government department. However the facts and circumstances of the present case indicate that assessee has engaged into dealings in the grey market. Dealings in the grey market give the assessee various savings at the expense

of the Exchequer. Hence, on the overall consideration of facts and circumstances and following the decision of Hon'ble Gujarat High Court in the case of CIT vs Simit P. Sheth [2013] 356 ITR 451 (Guj.) I hold that a disallowance of 12.5% of the bogus purchase would meet the end of justice. Hence, I affirm the order of the authorities below.

18. In the result, this appeal by the assessee stands dismissed.

*Order pronounced in the open court on 26.03.2018*

Sd/-

(Shamim Yahya)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 26.03.2018

व.नि.स./Roshani, Sr. PS

**आदेश की प्रतिलिपिअग्रेषित/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**