

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "H", MUMBAI

Before Shri R C Sharma, Accountant Member &
Shri Ram Lal Negi, Judicial Member

ITA No.3782/Mum/2017
Assessment Year : 2010-11

Triveni Realities 001, Ground Floor, Balaji Business Park, Plot No.3 &5, Survey No.785, Marol, Andheri (E), Mumbai 400059 PAN AAFFT1575N	Vs.	ACIT Cent. Cir 2, Now with DCIT 25(1) Mumbai
(Appellant)		(Respondent)

ITA No.4356/Mum/2017
Assessment Year : 2010-11

DCIT 25(1) Mumbai	Vs.	Triveni Realities Mumbai 400059 PAN AAFFT1575N
(Appellant)		(Respondent)

For the assessee : Shri Rushabh Mehta
For the Revenue : Shri M C Omi Ningshan
/ Shri Saurabh Kumar

Date of Hearing : 16.03.2018	Date of Pronouncement : 20.03.2018
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ORDER

Per R C Sharma, Accountant Member:

These are cross appeals filed by the assessee and the Revenue against the order of the CIT(A)-1, Aurangabad, dated 01.03.2017 for A.Y. 2010-11, in the matter of order passed u/s. 143(3) of the Income tax Act.

2. Rival contentions have been heard and record perused. Facts in brief are that the assessee is engaged in the business of builder and developer. During the course of assessment proceedings, the Assessing Officer found that the assessee firm had made purchases of materials from various dealers which were included in work-in-progress account and hence not claimed as expenditure in the profit & loss account. However, the Assessing Officer, on the basis of the information received from the Sales Tax department treated these parties as having been engaged in the activity of merely issuing bills without actual delivery of goods, accordingly added entire amount of such purchases in assessee's income.

3. By the impugned order CIT(A) restricted the addition of bogus purchases to the extent of Rs.64,95,711/-. Against this order of CIT(A) both the Revenue and assessee are in further appeal before us.

4. It was argued by learned AR that the Sales Tax Department has nomenclated the above referred parties as Suspicious Dealers and not Bogus Dealers which in itself goes to suggest that the investigation is still on and there is no clinching conclusive evidence thereof even by the Sales Tax Department. Our attention was also invited by learned AR to the following evidences which were filed during the assessment and appellate proceedings:

- i. Copy of ledger of the dealer for the period 01.04.2009 to 31.03.2010*
- ii. Copies of tax invoices which bear the TIN of the dealer*
- iii. Copies of delivery challan —*

- iv. Copies of confirmation received from the dealers*
- v. Copies of Bank statement highlighting the payment in cheque to the dealers*
- vi. Copy of Architect's certificate certifying consumption of materials*
- vii. Copy of quantitative details of materials purchased*

5. As per learned A.R, no negative observation/ finding is brought on record in relation to the said evidences. Further, the architect's certificate along with quantitative details clearly established the consumption of materials for the purpose of construction of the building.

6. It was further contended by learned AR that the non-service of notice u/s. 133(6) could not be viewed adversely against the assessee in view of the decision in the case of CTT v. Orrisa Corporation P. Ltd. (1986) 159 ITR 78 (SC) and CIT v. Nikunj Eximp Enterprises (P.) Ltd. [2015] 372 ITR 619 (Bom.). The Assessing Officer had not provided the opportunity of cross examining Shn. Chandrakant Dherai, on whose statement reliance was placed. Further, the said party was a MVAT defaulter and accordingly to avoid the consequences of default may have given such a statement. Reliance in this regard was placed on the decision in the case of CIT v. M/s. Ashish International (ITA no. 4299 of 2009) (Bom.) and H.R. Mehta v. ACIT [2016] 387 ITR 561 (Bom.)

7. As per learned AR, Section 48(5) of MVAT Act shifts the burden of paying MVAT to the purchaser of goods on the seller giving such a deposition of issuing bogus bills. He accordingly submitted that the statement of VAT defaulters who are saving their skin and having vested interest cannot be relied upon. He further contended that the transport documents were not

available with the assessee, as the transportation was usually undertaken by the supplier and the goods were directly delivered at the site of construction.

8. The A.R. further submitted that the average cost per sq. ft. of assessee worked out at Rs.2958/- per sq.ft, is equivalent to its associate concern M/s. Triveni Properties with project in the same vicinity having average cost as Rs. 2907/- per sq. ft. Since, no allegation on purchases of said associate concern was made by the department, the average cost per sq. ft. of the assessee is to be accepted.

9. As per learned AR, addition if any should be restricted to 2% of the alleged bogus purchases as held in the case of the assessee's group concern - M/s. Triveni Homes in ITA No. 3780/Mum/2017 & 4355/Mum/2017 vide order dated 13/02/2018 under identical facts.

10. On the other hand, learned DR relied on the order of the AO and contended that addition has been made by AO after making full enquiry with regard to the bogus suppliers of the material alleged to be used in construction of building.

11. We have considered rival contentions and carefully gone through the orders of the authorities below and found from record that the Id. Assessing Officer has alleged that the assessee has made bogus purchase (from approx. 27 parties) as indicated at page 184 of the paper book based on the information received from the sales tax department. The AO issued notices u/s. 133(6) which were returned unserved. In response to notice issued u/s.133(6), during the first appellate proceeding, the assessee had submitted

following additional evidences (refer page 74 to 146 of the Paper Book) on 06-08-2014.

- Copy of architect 's certificate certifying the consumption of material
- Quantitative details of material purchased.

12. The additional evidences were forwarded by CIT(A) to AO on 13.08.2014 and report was called for before 29.08.2014. Reminders dated 13.01.2015 and 14.12.2015 were also sent by the Id. CIT(A). However, no remand report was received till the date of order of the Id. CIT(A).

13. By the impugned order, CIT(A) restricted the addition in respect of bogus purchases to the extent of Rs.64,95,711/- by observing that the assessee had not claimed any purchases as deduction for the year under consideration but accounted for in work in progress carried forward to subsequent years, the Id. CIT(A) reduced the work in progress by an amount of Rs.64,95,711/-. Accordingly, the Id. CIT(A) has deleted the disallowance for the year under consideration and enhanced the income of the assessee for A.Y. 2012-13 to the tune of Rs.64,95,711/- when the project was completed and the expenditure was claimed.

14. Neither AO nor CIT(A) has invoked Section 40A(3) and hence, the department's ground on disallowance of purchases u/s.40A(3) in the grounds of appeal are unjustified. Further, even there is no finding brought on record to prove that Section 40A(3) is violated by the assessee.

15. In so far as the reliance of the revenue on the decision of the Hon'ble Apex Court in the case of N.K. Proteins Ltd. v. DCIT in SLP (Civil) No. 769/2017 dated 16.01.2017, the same is distinguishable on facts. In the said case before Hon'ble Apex Court, evidence in the form of blank signed cheque books and vouchers of number of concerns (vendors) were found during the course of search proceedings at the office premises of NKPL (assessee). Endorsed blank cheques of NKPL by these concerns were also found from the office premises of NKPL wherein the endorsement was on the back of the cheques. Blank bill books, letter heads and vouchers of these concerns were found and seized from the factory premises of NKPL.

16. Considering the totality of facts and circumstances of the case, we found that cost of construction shown by the assessee was Rs.2,958/- as against the cost of construction shown by the sister concern M/s. Triveni Properties with the project in the same vicinity having average cost at 2907/- per sq.ft. wherein there is not allegation of purchases from bogus suppliers. Even though learned AR relied on the order of the Co-ordinate Bench in case of Triveni Himes dated 13/02/2018, wherein addition was restricted to 2% of the alleged bogus purchases, but we found that in that case, the cost of construction shown by the assessee worked out to Rs. 2812.70, however, in the instant case the cost of construction has been shown by the assessee at a higher figure of Rs.2958/- therefore, it appears that assessee had shown higher cost of construction. Keeping in view the totality of these facts and circumstances, vis-à-vis finding of CIT(A) and judicial pronouncements

referred above, we direct the AO to restrict the addition to the extent of 3% of the alleged bogus purchases. We direct accordingly.

17. In the result, appeal of the Revenue is dismissed whereas appeal of assessee is allowed in part.

Order pronounced in the open court on 20/03/2018.

Sd/-
(Ram Lal Negi)
JUDICIAL MEMBER

Mumbai; Dated: 20/03/2018

Karuna, Sr. P.S.

Sd/-
(R C Sharma)
ACCOUNTANT MEMBER

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai
4. The CIT
5. DR, 'H' Bench, ITAT, Mumbai

BY ORDER,

#True Copy #

Assistant Registrar
Income Tax Appellate Tribunal, Mumbai