

**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. Nos. 47 & 48/Mum/2018

(निर्धारण वर्ष / Assessment Years: 2010-11 & 2011-12)

Mircon Infrastructure Private Limited 505/506, Shalimar Morya Park, New Lind Road, Andheri (W), Mumbai-400 053	<b>बनाम/</b> Vs.	ITO, Ward 10(2)(4), M. K. Road, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAFCM 1309 J		
(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	:	27.03.2018
घोषणा की तारीख / Date of Pronouncement	:	02.04.2018

**आदेश / ORDER**

Per Shamim Yahya, A. M.:

These are appeals by the assessee against the common order of the Commissioner of Income Tax (Appeals) for the assessment years 2010-11 and 2011-12. The issues are common and the appeals were heard together, these have been disposed of by this common order.

2. The common issue raised is that the Id. Commissioner of Income Tax (Appeals) erred in upholding the validity of the reopening as well as confirming the addition on account of bogus purchases amounting to Rs.5,12,541/- for assessment year 2010-11 and Rs.2,53,601/- for assessment year 2011-12.

3. Brief facts of the case are that the assessment in the cases were reopened on account of information from Sales Tax Department that the assessee was a beneficiary of an accommodation bills of purchase from certain bogus hawala dealers. In this background, the Assessing Officer examined the issue.

4. During the course of assessment proceeding, the Assessing Officer issued summons u/s.131 of the act to all the four Hawala Parties. However, he could serve only on M/s.Gururaj Enterprises. Rest of the three of such summons came back unserved. Even Mr.Jayesh M.Shah of M/s.Gururaj Enterprises, submitted in response to summons u/s.131 that he has not done any business transaction with the assessee company, rather he has closed down his business long back i.e. w.e.f. 17.4.2007. Even the Sales Tax Registration was cancelled w.e.f.17.4.2007. These facts were brought to the knowledge of the Authorised Representative of the assessee company and was asked to explain the same. It was submitted before the Assessing Officer that the assessee company has provided proof of transaction in the form of bank statement, ledger account of the party, bill of the party for materials purchased. It was further submitted that materials are not directly procured by the company. The work is being done through subcontractors. The Assessing Officer considered all the arguments of the assessee company and observed

that simply payments having been routed through banking channels, the purchases cannot not be treated as genuine. The assessee company could not produce the parties before the Assessing Officer, nor could satisfactorily rebut the contention of one of the party M/s.Gururaj Enterprises. The Assessing Officer further observed that the claim of the assessee company that it re-imburses the expenditure incurred, to the sub-contractor as the material is not directly procured by the assessee, does not hold any ground in view of the fact that the bills from Hawala Operators have been raised in the name of assessee company and not in the name of sub-contractors. The Assessing Officer has taken help from the provisions of section 101 of Indian Evidence Act 1872 and concluded that burden of proof lies on the assessee company. The Assessing Officer also referred that as per section 106 of Indian Evidence Act 1872, when any fact is specifically within the knowledge of any person, then burden of proving that fact is upon him. In the background of facts of the case and provisions of Indian Evidence Act, it was concluded by the Assessing Officer that the assessee company has failed to establish the genuineness of the purchases. The Assessing Officer also specifically mentioned that books of accounts, maintained by the assessee did not reflect true and genuine picture of financial status of the company. Finally, the Assessing Officer disallowed the purchase of Rs.5,12,541/- and added to the total income.

5. Upon the assessee's appeal, the ld. Commissioner of Income Tax (Appeals) has confirmed the addition which is 100% of the bogus purchases.

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

7. 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.

8. 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 (that 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).”

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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. Accordingly, I modify the order's of authorities below and direct that the disallowance in this case should be restricted to 12.5% of the bogus purchase. The ld. Counsel of the assessee fairly agreed to the above proposition.

15. In the result, these appeals by the assessee stands partly allowed.

*Order pronounced in the open court on 02.04.2018*

Sd/-

(Shamim Yahya)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 02.04.2018

व.नि.स./Roshani, Sr. PS

**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**