

आयकर अपीलीय अधिकरण “डी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं./I.T.A. Nos. 4086 to 4088/Mum/2016
(निर्धारण वर्ष / Assessment Years: 2009-10 to 2011-12)

Mr. Chirag Rajendra Shah D-305, Siddhi Vinayak Tower, Off Tank Road, Orlem, Malad, Mumbai-64	बनाम/ Vs.	ITO, Ward 24(1)(4), 502, 5 th Floor, C-13, Pratyakshkar Bhavan, Bandra Kurla Complex, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AFXPS 7904 P		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri A. K. Sharma & Ms. Taneshka Sharma
प्रत्यर्थी की ओर से/Respondent by	:	Shri V. Vidhyadhar

सुनवाई की तारीख / Date of Hearing	:	18.01.2018
घोषणा की तारीख / Date of Pronouncement	:	03.04.2018

आदेश / ORDER

Per Shamim Yahya, A. M.:

These are appeals by the assessee directed against the respective orders of the Id. Commissioner of Income Tax (Appeals) for the concerned assessment years. Since the issues are common and connected and the appeals were heard together, these have been disposed of by this common order for the sake of convenience.

2. The common issue raised in these appeals relate to the validity of the reopening as well as merits of confirmation of addition of 25% on account of bogus purchase as under:

<u>A.Y. 2009-10</u>	<u>A.Y. 2010-11</u>	<u>A.Y. 2011-12</u>
Rs.2,05,87,299/-	Rs.66,60,332/-	Rs.1,06,20,891/-

3. Since the facts are identical, we are referring to the facts and figures from assessment year 2009-10.

4. Brief facts of the case are as under:

The assessee is engaged in the business as a reseller and trader in iron and steel under the proprietorship concern M/s. Harsh Steel. Its case was initially processed u/s 143(1). Subsequently, the AO received information from DGIT(Inv.)/ Mumbai and Sales Tax Department that the assessee had claimed purchases of Rs.6,03,82,692/- from parties who have been declared as hawala dealers by Sales Tax Department. These parties had issued accommodation bills without actual sale and delivery of goods. Therefore, the case was re-opened. On further verification, the Assessing Officer observed that the assessee had claimed purchases of Rs.8,23,49,198/- from 5 hawala parties. The Assessing Officer issued notice u/s.133(6) to 5 parties which were returned back with remarks 'not known/left/unclaimed and address incomplete'. The Assessing Officer issued summons u/s 131 to the assessee to produce the parties, books of accounts, confirmation, ledger accounts of the purchase parties, evidence of movement of materials, transport receipts and the sale details. The assessee submitted that he had already filed the details of the purchase parties and the sales details, copies of vouchers and expenses made towards

transportation and octroi. All the goods were purchased in the normal course of business and sold the same to the sale parties. The assessee also filed the comparative analysis of the GP ratio for AY 2008-09 to 2011-12. The Assessing Officer rejected the explanation of the assessee on the ground that the assessee had not produced a single party. Further, the AO mentioned that the confirmations filed were self-made ones without any supporting evidences like copy of PAN card, Driving license or passport so that the signature of alleged hawala parties could be verified. The sample bills were not supported by transportation bills, octroi paid bills and loading and unloading details. Therefore, the ledger accounts and copy of bills are not sufficient to prove the genuineness of the transaction. The Assessing Officer has also relied upon the deposition made by the Principal Officer of the alleged concerns before the Sales Tax Department wherein all of them had admitted that they were not doing any genuine business but were indulged in providing accommodation entries to people who needed their services. The Assessing Officer has treated the expenditure incurred on such purchases as unexplained. The Assessing Officer rejected the assessee's reliance OR the judgment of the Gujarat High Court in the case of CIT Vs Simit P. Shah on the grounds that the purchases itself were not doubted. The Assessing Officer held the view that the assessee had purchased the goods at cheaper cost to avoid payment of sale tax, excise duty etc. To avoid disallowance u/s 40A(3) of the IT Act, the assessee had obtained the bills from hawala operators. Based on above, the Assessing Officer completed the assessment and treated the aggregate purchases of Rs.8,23,49,198/- from 5 parties as unexplained expenditure u/s 69C of the Income Tax Act against which the assessee is in appeal with this office.

5. Before the Id. Commissioner of Income Tax (Appeals), the assessee's submissions were noted as under:

- a) The AR of the appellant has challenged the validity of the issuance of notice / u/s 148 and the assessment made u/s 147. The AR stated that the question of reassessment does not arise as no assessment u/s 143(1) or 143(3) or 144 was completed. The assessee placed reliance on the judgment in the case of CIT v P.N. Sharma (2014) 222 Taxmann 178 (Mag.)/ 43 Taxmann.com 131 (All. (HC) wherein it is held that without passing assessment order, there was no occasion to pass the re-assessment order.
- b) Reassessment proceedings were initiated mechanically on the basis of the information provided by the Investigation Wing and no independent inquiry was conducted by the AO. No tangible material was brought on record to reach a conclusion that there was escapement of income.
- c) Further, no return of income was filed by the assessee in response to the notice u/s 148, the assessment is illegal and requires to be quashed.
- d) The AR stated that section 151 of the Income Tax Act has been violated in as much as there was no requirement of any approval from any authorities for reopening the assessment. However, the AO has sought approval of CIT-24, Mumbai rendering the assessment as invalid.
- e) The AR argued that the addition was made on presumption and suspicion basis and that the case was reopened to verify the bogus purchases whereas the addition was made u/s 69C of the Income Tax Act.
- f) Further, the AO has not rejected the book of accounts. The AR stated that the provisions of section 69C of the Income Tax Act can be invoked only when the assessee has incurred expenditure for which no satisfactorily explanation about the source of such expenditure is provided.
- g) The assessee had produced the evidence of making payments from his bank account and hence expenditure on purchase cannot be treated as unexplained. The assessee was not given any opportunity to cross-examine the parties despite the fact that assessee had specifically asked for the same.
- h) The appellant has placed reliance on various decisions, namely, CIT v. Smt. Laxmi Mehrotra [(2014)] 222 Taxmann III(Mag.) (All. HQ], Nivi Trading Ltd v. UOI (Bom)(HC), Mehta Parikh & Co Ltd. 30 ITR 181 (SC), Plus Paper Food Pac Ltd v ITO (Bombay High Court), Ramjidas Mahaiiram (1936) 42 ITR 25 (Cal), CIT v Dumraon Cold Storage & Refrigeration Service (1974) 97 ITR 137 (Patna), CIT v Kurban Hussain Ibrahimji Mithiborwala (1972) 82 ITR 821 (SC), Thyabali Mulla Jeevaji Kapasi (1967) 661JTR 147 (SC) etc.

6. Considering the above submissions, as regards the reopening, the Id. Commissioner of Income Tax (Appeals) confirmed the same by observing as under:

5.1 So far the validity of re-opening is concerned, it is found that the reasons for reopening was provided by the AO wherein receipt of information from DGIT(Inv.), Mumbai regarding involvement of the assessee in bogus purchases has been mentioned. Therefore, it is found that the notice under section 148 was issued on the basis of fresh information and tangible materials. The reasons were also provided to the assessee. It is also found that objections against re-opening was not filed by the assessee before the AO. Therefore while re-opening the case and thereafter, the procedure as per law was followed by the AO. In view of above, ground no.1 challenging the validity of assessment order is dismissed.

7. On the issue of merits of addition, the Id. Commissioner of Income Tax (Appeals) principally upheld the treatment of purchase as bogus by observing as under:

5.2 So far addition of Rs. 8,23,49,198/- u/s 69C is concerned, it is found that the notices issued to ail the 5 parties returned unserved. The assessee failed to produce the parties. The enquiries and investigation conducted by the Sales Tax Department along with the deposition of alleged suppliers clearly establish that these parties have issued bogus bills without any supply of goods. The AO has confronted all the materials and findings to the assessee. In fact, findings of the Sales Tax Department are available on its web-site and it is in public domain. The assessee "has also failed to bring evidence of actual transportation and delivery of goods. The appellant has not filed copy of any letter wherein he has made a request for cross-examination. In view of above, the AO's view of treating the purchases from the 5 parties as bogus is upheld. Now the quantum of disallowance/ addition is to be decided based on facts of this case.

8. Thereafter, the Id. Commissioner of Income Tax (Appeals) confirmed 25% of the addition.

9. Against the above order, the assessee is in appeal before us.

10. We have heard both the counsel and perused the records. While challenging the reopening, the Id. Counsel of the assessee's submissions are as under:

- (a) The original return of income remained unprocessed and an order u/s.147 could not have been passed .
- (b) No independent inquiry was conducted by the learned AO and the assessment was reopened on the basis of the information received from DG (Inv).
- (c) The notice issued under 148 was not in conformity with the law.

- (d) There was a gross violation of the provisions of section 151 of the Income tax Act, 1961.
- (e) The issuance of the notice under section was premature as no return of income in response to notice under section 148 was filed by the assessee.
- (f) The learned Assessing officer has taken a contrary stand than what was recorded in the reasons for reopening.
- (g) The assessment was reopened on the reasoning of bogus purchases were as completing assessment purchases were treated as genuine.

11. Furthermore, the Id. Counsel of the assessee submitted that the Id. Commissioner of Income Tax (Appeals) has passed a very laconic order. He submitted that the assessment order should not have been passed u/s. 143(2) rather should have been passed u/s. 144 of the Act. Furthermore, the Id. Counsel of the assessee referred to several case laws including those referred before the Id. Commissioner of Income Tax (Appeals). He also referred to certain case laws from the ITAT on the issue of merits. He also referred to few judgments from the following case laws from the Hon'ble jurisdictional High Court:

1. CIT vs. M/s. Golani Brothers (in ITA No. 17 of 2015 and others dated 29.08.2017)
2. CIT vs. M/s. Ashish International (in ITA No. 4299 of 2009 dated 22.02.2011)

12. The Id. Departmental Representative, on the other hand, relied upon the orders of the authorities below. He vehemently reiterated that the purchases are bogus inasmuch as no evidence of delivery has been furnished. He submitted that even today the assessee has not presented the delivery challans. In this regard, the Id. Departmental Representative further referred to the following case laws:

1. Hon'ble Gujarat High Court decision in the case of N K Industries vs. Dy CIT in Income Tax Appeal No. 240 of 2003, vide order dated 20.06.2016. SLP against this decision was dismissed by the Hon'ble Supreme Court vide order dated 16.01.2017.

2. Hon'ble Rajasthan High Court in the case of CIT Jaipur vs Shruti Gems in ITA No. 658 of 2009
13. We have carefully considered the submissions. As regards the reopening of the assessee, on a careful consideration, we 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.

14. From the above, we 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, we 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).”

15. The above discussion and precedent from Apex Court fully justify the validity of reopening in this case. Further we find that the Ld. CIT(A) has carefully examined the issue and has properly appreciated the issue. Hence, we do not find any infirmity in the same. Accordingly, we 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.

16. We find that the validity of the reopening has already been found to be justified by us. The other points raised by the Id. Counsel of the assessee are that for the reopening, the Assessing Officer was not required to take any permission but still he has taken some permission. In our considered opinion, how the same will be fatal to the reassessment has not been explained to us as that act of Assessing Officer is a nullity. The Assessing Officer was perfectly justified to reopen on his own on the facts and circumstances of the case. This the Id. Counsel of the assessee also admits. Hence, in our considered opinion, the same does not invalidate the reopening. Furthermore, the Id. Counsel of the assessee has alleged that the reopening was done on bogus purchase while in completing the

assessment, purchases were treated as genuine. This in our opinion has no merits. The Assessing Officer has confirmed 100% of the purchase as unexplained expenditure.

17. As regards merits of addition, we 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 obtain 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.

18. 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.

19. In these circumstances learned departmental representative has referred to Hon'ble Gujarat High Court decision in the case of 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.

20. We 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.

21. However, we note that this is not an appeal by the Revenue. Upon careful consideration we 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.) we hold that a disallowance of 12.5% of the bogus purchase would meet the end of justice. Accordingly, we 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. We also note here that before the Assessing Officer the assessee has

itself relied upon the decision of Hon'ble Gujarat High Court in the case of Simit P. Sheth (supra) where 12.5% of disallowance was upheld.

22. As regards the reference to the Hon'ble jurisdictional High Court in the case of M/s. Ashish International (supra), we find that the same was delivered on the facts of that case. In that case, the Hon'ble jurisdictional High Court has noted that the appellate authority has sought a remand report and even at that stage the genuineness of the statement has not been established by allowing the cross examination of the person whose statement was relied upon by the Revenue. We find that in the present case, we have not raised any such issue. Rather, we have found that the assessee wants to cross examine his own suppliers whom he has not been able to produce. Furthermore, the addition has not been made solely on the basis of the statement. Comprehensive enquiry has been done and the assessee has totally failed in discharging the onus of proving that the purchase bills produced were genuine and not bogus. Furthermore, the decision of Hon'ble jurisdictional High Court in the case of M/s. Golani Brothers (supra) was also rendered on the facts of the particular case, wherein the Hon'ble High Court has found that there was no serious infirmity or perversity in the order of the Tribunal. Hence, in our considered opinion, the case laws relied upon by the Id. Counsel of the assessee do not support the case of the assessee. Furthermore, since we have considered the issue on the basis of the Hon'ble Apex Court decision and the decision of the Hon'ble High Courts referred hereinabove, the decisions of the tribunal referred by the Id. Counsel of

the assessee are not relevant. Furthermore, those decisions were rendered on the facts of those cases.

23. In the result, these appeals by the assessee stand partly allowed.

Order pronounced in the open court on 03.04.2018

Sd/-
(Amarjit Singh)

न्यायिक सदस्य / Judicial Member

Sd/-

(Shamim Yahya)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 03.04.2018

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