

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'सी', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH, MUMBAI
सर्वश्री राजेन्द्र, लेखा सदस्य, एवं , राम लाल नेगी न्यायिक सदस्य के समक्ष
BEFORE SHRI RAJENDRA, AM AND SHRI RAM LAL NEGI, JM

आयकर अपील सं./ITA No. **3834/Mum/2016**

(निर्धारण वर्ष / Assessment Year: 2010-11)

The ACIT-13(3)(2), Room No. 229, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s Technotrade Impex India Pvt. Ltd., 19/40/C-2, Seksaria Indl. Estate, SV Road, Malad (W), Mumbai - 400064
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCT1000G		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

&

प्रत्याक्षेप सं /CO No. **159/Mum/2017**
(Arising out of ITA No. 3834/Mum/2016)
(निर्धारण वर्ष / Assessment Year: 2010-11)

M/s Technotrade Impex India Pvt. Ltd., 19/40/C-2, Seksaria Industrial Estate, Chincholi Bunder Road, Off SV Road, Malad (W), Mumbai - 400064	Vs.	The ACIT-13(3)(2), Room No. 229, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCT1000G		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से / Revenue by : Shri H.N. Singh (CIT DR)
निर्धारिती की ओर से / Assessee by : Dr. K. Shivram & Ms. Neelam (AR)

सुनवाई की तारीख / Date of Hearing : **30/01/2018**
घोषणा की तारीख/Date of Pronouncement: **28/02/2018**

आदेश / O R D E R

PER RAM LAL NEGI, JM

These are the appeal and cross objection filed by the revenue and the assessee against the order dated 23.03.2016 passed by the Ld. Commissioner

of Income Tax (Appeals)-21, Mumbai pertaining to the Assessment Years 2010-11, whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short 'the Act').

ITA No. 3834/MUM/2016 (Assessment Year: 2010-11)

2. The brief facts of the case are that the assessee company filed its return of income for the assessment year under consideration declaring the total income of Rs. 4,38,61,781/-. Since the case was selected for scrutiny, notice u/s 143 (2) and 142(1) were issued. In response to the said notices, the authorized representative of the assessee appeared before the AO and filed the details as asked by the AO. The assessee had claimed to have made purchases of Rs. 10,07,28,518/- from 23 parties during the previous year. AO had received information from Director General of Income Tax (Inv.) (DGIT), Mumbai that certain hawala entities had issued bogus/accommodation bills to the assessee and others.

3. A survey u/s 133A of the Act was conducted by the DDIT (Inv.) Unit II Pune, in the case of M/s Middle Earth Enterprises on its business premises in which the assessee company was having 25% shares. As per the document seized during the survey proceedings, the assessee company had claimed to have made purchases from the aforesaid parties. It was further revealed that the said parties have not supplied any material but have only given accommodation entries to the assessee company and others.

4. During the assessment proceedings, the AO issued notices u/s 133 (6) of the Act to the said parties. The notices were return back un-served by the Postal Authorities with the remarks 'not claimed or address not known or

address incomplete'. Only in respect of 3 parties reply were received, however, they also denied to have any business transaction with the assessee company. Accordingly, show cause notice was issued calling explanation from the assessee as to why the purchases claimed to have been made from the above parties should not be disallowed. The assessee contended that the purchases were genuine and the goods were received at various sites. However, the assessee failed to produce any cogent evidence to establish the genuineness of the transaction. The assessee also failed to produce the parties before the AO. Accordingly, the AO determined the total amount of bogus purchases at Rs. 10,49,70,098/- made from 31 parties during the financial year relevant to the assessment year under consideration and added the said amount to the income of the assessee.

5. Aggrieved by the said order, the assessee challenged the same before the Ld. CIT(A) in the first appeal. The Ld. CIT(A) after hearing the assessee deleted the addition of Rs. 10,26,47,961/- out of the total disallowance made by the AO. Against the said order the revenue has preferred the present appeal by raising the following effective grounds:

1. *“Whether on the facts and the circumstances of the case and in law, the ld. CIT (A) erred in deleting the addition of Rs. 10,26,47,961/- out of total addition of Rs. 10,49,70,098/- made on account of bogus purchases.*
2. *Whether on the facts and the circumstances of the case and in law, the Ld. CIT (A) was right in deleting the addition without appreciating the fact that the said purchases could not be proved genuine by the assessee even after giving sufficient opportunity.*
3. *Whether on the facts and the circumstances of the case and in law, the Ld. CIT (A) was right in deleting the addition without appreciating the fact that the assessee is end user/consumer*

of the said items and there is no clear mapping of purchases and utilization. In that situation this logic is not correct that since the sales are there purchases cannot be denied.”

6. Before us, the Ld. departmental representative submitted that the Ld. CIT (A) has wrongly deleted the addition made by the AO. Since, the assessee has failed to prove the genuineness of the purchases in question by adducing cogent and convincing evidence, the Ld. CIT(A) ought to have confirmed the addition made by the AO. The Ld. counsel further pointed out that the findings of the Ld. CIT(A) is not based on the evidence on record. The facts of cases relied upon by the Ld. CIT (A) are different from the facts of the present case. In view of the fact that the assessee is the end user of the material, the Ld. CIT(A) has wrongly calculated the amount of disallowance on the basis of gross profit disclosed by the assessee.

7. On the other hand, the Ld. counsel for the assessee submitted that the assessee is a supplier and also undertakes contract for garden development. During the course of assessment, the AO identified certain parties from whom the assessee made purchases, who were appearing in the list received from DGIT (Inv.). The assessee has submitted complete details of purchases along with the name of the parties addresses TIN and amount of purchases etc. The assessee also submitted copy of ledger account of the parties in the books of the assessee along with sample copies of invoices issued by the parties. The assessee also submitted bank statements, in which payments made to the parties are duly reflected. The assessee also produced sample copies of work order issued by Municipal Corporation of Greater Mumbai (MCGM) for garden development in which item purchase from the parties and use of the same for garden development are reflected. The Ld. counsel further submitted that the payment certificate issued by MCGM in respect of work order and copy of completion certificate further establish that the material was used. The garden

development work was done as per work order issued by MCGM and the payments received from MCGM have been reflected in the profit and loss account of the assessee company. The Ld. counsel further contended whatever profit was earned has duly been offered as income in the return filed by the assessee. If the AO treats the purchases and sub contractor charges paid to the parties as bogus, the corresponding sale should also be treated as bogus. The Ld. counsel further submitted that the Ld. CIT (A) has wrongly sustained the purchases to the extent of Rs. 23,22,137/- on the basis of estimated gross profit without appreciating the fact that the assessee has declared sufficient gross profit. The Ld. counsel further submitted that the assessee has filed cross objection against the addition sustained by the Ld. CIT (A).

8. We have heard the rival submissions and also perused the material on record including the cases relied upon by the authorities below. The AO has made addition of the entire amount of bogus purchases determined during the assessment proceedings holding that the assessee has failed to establish the genuineness of the purchases in question. The Ld. CIT (A) has also affirmed the findings of the AO that the purchases in question are not genuine. However, the Ld. CIT (A) has reduced the addition Rs. 23,22,137/- on the basis of gross profit declared by the assessee. The relevant portion of the findings of the Ld. CIT (A) reads as under:-

“4.42 I am guided by the ratio of decision of the Hon’ble Gujarat High Court in the case of CIT Vs. Simit P. Sheth pronounced on 16.1.2013 in the tax appeal No. 5531 of 2012 wherein the Hon’ble Court have held that when the total sale is accepted by the AO, then the entire purchases cannot be added to the income of the appellant. The Hon’ble Court have, therefore, held that fair profit ratio would be needed to be added back to the income of the assessee. Similar basis was adopted by CIT (A) in the case of Shri Kishore Kumar Agarwal for AY 2011-12 and Shri Bimal Agarwal for AY 2010-11, where facts were similar to this case and the persons concerned are the key persons of the appellant group. Since I am satisfied that the

entire purchases cannot be said to be not genuine, the only way to judge such inflated purchase/cost is to estimate the profit on transactions where the purchase parties could not be verified. I further note that there are basically two types of transactions whereby such purchases parties could not be verified. (1) Trading items, and (2) Garden Maintenance contract. As regards the trading items, sales cannot be accepted without purchases. No loss on trading has been shown. If the purchases parties are not traceable, it could be a case of inflation of turnover. As regards contract income, the net profit shown is over 8% which is not a low income shown. On total turnover (including trading sales) of Rs. 91.52 crores, net profit of Rs. 4.71 crores has been shown. I am of the view that the assessee might have earned a gross profit of 2% on grain trading, 8% on Garden item trading and 12.50% on garden maintenance contract, accordingly I compute the profit on the transaction vis-à-vis profit declared by the appellant in the table given below and work-out the disallowance as under:-

Particulars	Sales/Contract Amount (Rs.)	Estimated G/P rate in %)	Estimated G/P (Rs.)	G/P declared (Rs.)	Addition to be confirmed (Rs.)
Grains Trading	2,30,12,196	2%	4,60,244	95,000	3,65,244
Garden Items Trading	3,28,51,204	8%	26,28,096	17,71,454	8,56,551
Garden Maintenance	18,65,08,139	12.5%	2,33,13,517	2,22,13,175	11,00,342
Total Rs.			2,54,69,317	2,40,79,720	23,22,137

4.43. In view of above, the disallowance made in respect of bogus purchases is restricted to Rs. 23,22,137/-, as against Rs. 10,49,70,098/- made by the A.O. Thus, the appellant gets a relief of Rs. 10,26,47,961/-. These grounds of appeals are thus, partly allowed.”

9. We notice that the Ld. CIT (A) has agreed with the AO that the purchases in question are bogus because on the basis of evidence adduced by the assessee are not sufficient to hold that the purchases are genuine. So far as the disallowance is concerned, the Ld. CIT(A) has substantially reduced the same estimating the gross profit rate on the basis of estimated gross profit and the gross profit declared by the assessee. Since, the Hon'ble Bombay High Court has held in *CIT vs. Nikunj Eximp Enterprises Pvt. Ltd.*(supra) that merely because the suppliers have not appeared before the Assessing Officer one cannot conclude that the purchases were not made by the assessee and the AO has not rejected the sale/consumption of the material allegedly purchased from the concerned parties, 100% disallowance cannot be made. However, as per the decision of the Hon'ble Gujarat High Court in the case of *CIT vs. Simit P. Sheth* (supra), the Ld. CIT(A) ought to have determined the addition keeping in view the profit element embedded in the purchases in question. Once it is established that the purchases are not genuine, it can safely be concluded that the assessee has purchased the material in the grey market evading the taxes applicable during the relevant period. In our considered view, the Ld. CIT(A) has ignored this aspect while reducing the addition. The Hon'ble Gujarat High Court has confirmed the addition of 12.5% of the total amount sustained by the ITAT taking into considering the tax evasion by purchasing material in the grey market and the profit earned thereon.

10. Hence, in our considered opinion, the Ld. CIT (A) has not followed the principles of law laid down by the Hon'ble Gujarat High Court in the case of *CIT vs. Simit P. Sheth* (supra). On the other hand we do not find any basis for determining the gross profit earned @ 2% on grain seeding, 8% on garden item trading, 12.50% on garden maintenance contract and further determining the amount of addition to be made. Moreover, the Ld. CIT(A) has not assigned any cogent reason for reducing the addition to less than 2.50% of the total amount

of bogus purchases determined by the AO. So, we are of the considered view that the impugned order passed by the Ld. CIT(A) is not based on reasons. We, therefore, set aside the order and send the issue back to the Ld. CIT (A) for passing order afresh based on the reasons and in accordance with the established principles of law after hearing the parties. The appeal is disposed of accordingly.

CO No. 159/MUM/2017 (Assessment Year: 2010-11)

11. The assessee has filed cross objection against the impugned order on the following effective grounds:

1. *“On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in confirming the action of the Assessing Officer in disallowing bogus purchases to the extent of Rs. 23,22,137/- on the basis of estimated gross profit without appreciating the fact that the assessee has declared sufficient gross profit.”*

12. Since, we have restored the issue to the file of Ld. CIT (A) for passing order afresh, the CO filed by the assessee has become infructuous. Accordingly, we dismiss the same being infructuous.

In the result, appeal filed by the revenue for assessment year 2010-11 is treated as allowed for the statistical purposes and the cross objection filed by the assessee is dismissed.

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

Sd/-
(RAJENDRA)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 28/02/2018

Alindra, PS

Sd/-
(RAM LAL NEGI)

JUDICIAL MEMBER

आदेश 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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**