

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "SMC", MUMBAI**

**BEFORE SHRI R.C. SHARMA (AM) AND SHRI RAM LAL NEGI (JM)**

**ITA No. 1765/MUM/2018  
Assessment Year: 2010-11  
&  
ITA No. 1766/MUM/2018  
Assessment Year: 2011-12**

Shri Prakash B. Thakur, C/o M/s Bhavik Metal Industries, Room No. 3, Krishna Building, Pathe Bapurao Marg, Mumbai - 400004  PAN: ACTPT0016A	<b>Vs.</b>	The Income Tax Officer-19(2)(5), Matru Mandir, II Floor, Tardeo Road, Nana Chowk, Mumbai - 400007
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by : Shri G.P. Mehta (AR)  
Revenue by : Ms. N. Hemalatha (DR)

Date of Hearing: 06/06/2018  
Date of Pronouncement: 19/06/2018

**ORDER**

**PER RAM LAL NEGI, JM**

These appeals have been filed by the assessee against the two orders dated 05.01.2018 passed by the Commissioner of Income Tax (Appeals) (for short 'the CIT (A)')-53, Mumbai, for the assessment years 2010-11 and 2011-12, whereby the Ld. CIT (A) has dismissed the appeals filed by the assessee against assessment order passed u/s 143 (3) read with section 147 of the Income Tax Act, 1961 (for short 'the Act').

**ITA No. 1765/MUM/2018 (Assessment Year: 2010-11)**

2. Brief facts of the case are that the assessee filed its return of income for the assessment year under consideration declaring the total income of Rs.

4,90,588/-. The same was processed u/s 143 (1) of the Act. Subsequently, the assessment was re-opened after issuing notice u/s 148 on the ground that the assessee has obtained false entries from bogus entities namely Dev Deep steel, Rudhara Overseas, Swastik Trading Company, Jagdish Metals (India)/Sunshine Enterprises, Rajkamal Steel Center, Rajeshwari Metal Industries, B P Shah and Co., Navpad Exports Pvt. Ltd. and Varsha International to show purchases amounting to Rs. 74,86.138/-. Since the assessee failed to establish the genuineness of the transactions, AO made addition of 12.5% of the total amount of bogus purchases to the income of the assessee by following the decision of Hon'ble Gujarat High Court in the case of *CIT vs. Simit P. Sheth 356 ITR 451* and *M/s Bholenath Polyfab Pvt. Ltd. 355 ITR 290*, holding the purchases in question bogus.

2.1 Aggrieved by the assessment order, the assessee challenged the same before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee dismissed the appeal and confirmed the addition made by AO holding the addition @ 12.5% is reasonable in terms of the law laid down by the Hon'ble Gujarat High Court, in the aforesaid cases. Against the said order, the assessee is in appeal before the Tribunal.

3. The assessee has preferred this appeal before the Tribunal on the following effective grounds:-

1. *"The orders passed by the learned authorities are bad in law and bad in facts.*
2. *The notice issued u/s 148 of the I.T. Act, 1961, by the learned Assessing Officer is void ab-initio, inasmuch as, it was not issued in accordance with the mandatory requirement of law. Consequently, the assessment order passed in also void-ab-initio.*
3. *The notice issued u/s 148 of the I.T. Act, 1961, by the learned Assessing Officer is void ab-initio inasmuch as, there was no tangible material brought on record to support*

*the belief of escapement of income. Consequently, the assessment order passed in pursuance of said notice is also void-ab-initio.*

4. *The assessment order passed is void-ab-initio, inasmuch as, same has been passed in clear disregard of the principles of natural justice, as neither the appellant was provided with a copy of material relied upon nor an opportunity to cross examine the parties was granted, though there testimony was relied upon for issue of notice u/s 148 of the I.T. Act, 1961.*
5. *The learned lower authorities have grossly erred in making/upholding an addition of Rs. 9,35,767/- purely on an estimated basis, without bringing any material or evidence on record to support impugned addition.*
6. *The learned Assessing Officer has grossly erred in rejecting audited books of account, by recourse to sec. 145(3) of the I.T. Act, 1961 though no adverse finding about the correctness or completeness of the accounts or method of accounting followed has been recorded by him.*
7. *Having regard to the facts of the case, provisions of law and judicial propositions, the impugned addition of Rs. 9,35,767/- is wholly untenable in law.”*

4. Before us, the Ld. counsel for the assessee submitted that the Ld. CIT(A) has wrongly confirmed the action of reopening of the assessment ignoring the fact that the notice issued by the AO is *void ab intio* as much as it was not issued in accordance with the mandatory requirement of law. Since, there was no tangible material to form the belief that income of the assessee has escaped, the AO had wrongly reopened the assessment. Moreover, the assessee was neither provided with the material relied upon by the AO nor any opportunity was given to cross examine the parties. The Ld. counsel further argued that the Ld. CIT (A) has grossly erred in upholding the action of AO in making addition of Rs. 9,35,767/- to the income of the assessee on purely estimation basis

without bringing any material on record. The assessee has submitted the details regarding purchase and sale of the goods including ledger account and the statement of bank account and details of payments were furnished in order to establish the genuineness of transaction. The Ld. counsel further submitted that the Ld. CIT (A) has wrongly confirmed the action of the AO in rejecting the books of account despite the fact that no adverse finding about the correctness or completeness of the accounts or method of accounting followed has been recorded by the AO. The Ld. counsel further submitted that the assessee has already paid the taxes on the alleged bogus purchases as applicable during the relevant period. The Ld. counsel further submitted that in the light of the aforesaid facts, the impugned order passed by the Ld. CIT(A) is liable to be set aside. The Ld. counsel relied on the following decisions to substantiate his contentions:

- 1 *Pr. CIT-12 vs. Chawla Interbid Construction Co Pvt. Ltd., Income Tax Appeal No. 1103 of 2015 (Bombay High Court).*
- 2 *Principal Commissioner of Income Tax-5 vs. Shodiman Investment (P.) Ltd. [2018] 93 taxmann.com 153 (Bombay).*
- 3 *Commissioner of Income Tax vs. SFIL Stock Broking Ltd. 325 ITR 0285.*
- 4 *Income Tax Officer & Ors. Vs. Lakhmani Mewal Das 103 ITR 0437.*
- 5 *Andaman Timber Industries vs. Commissioner of Central Excise 281 CTR 0241 (SC).*
- 6 *ITO-14(1)(3) vs. Shri Takhtmal Bhuralal (ITA No. 4528/Mum/2014) and CO No. 212 to 214/Mum/2015.*
- 7 *Deputy Commissioner of Income-tax C-11 vs. Rajeev G. Kalathil [2014] 51 taxmann. Com 514 (Mumbai-Trib.)*
- 8 *Shri Ganpatraj A Sanghavi vs. Assistant Commissioner of Income Tax (ITA No. 2826/Mum/2013).*

*9. Commissioner of Income-Tax-1, Mumbai vs. Nikunj Eximp Enterprises (P.) Ltd. 372 ITR 619 (Bombay).*

*10. Babulal C. Borana vs. Income Tax Officer 282 ITR 251 (Bombay).*

*11. Ganesh Dass Piara Lal Jain vs. Income Tax Officer 49 ITR (Trib) 0036 (Chandigarh)”.*

5. On the other hand, the Ld. Departmental Representative (DR) submitted that since the assessee has failed to discharge the onus of proving the genuineness of transaction and further failed to rebut the evidence confronted by the AO during the assessment proceedings or during the appellate proceedings, the Ld. CIT (A) has rightly confirmed the action of the AO. The Ld. DR further submitted that the addition of 12.5% of the total amount of bogus purchases in accordance with the law laid down by the Hon'ble Gujarat High Court in the cases referred above. Therefore, there is no merit in the appeal of the assessee.

6. We have heard the rival submissions of the parties and also perused the material on record including the cases relied on by the Ld. counsel and the authorities below. Ground No. 1 is of general in nature. Hence, we do not consider it necessary to decide the same separately. Vide Ground Nos. 2, 3 and 4, the assessee has challenged the re-opening on the ground that the AO had no reason to believe that any part of income has escaped and the AO has not provided the material relied upon while recording reasons for re-opening and further not provided an opportunity to cross examine the parties, whose statements were relied upon by the AO. Under Section 147 of the Act, the assessment can be re-opened if the AO has reason to believe that any income chargeable to tax has escaped assessment. In the present case, the assessment was re-opened on the basis of information received from Sales Tax Department, Maharashtra through DGIT to the effect that the assessee has obtained purchase bills from the bogus entities in order to show purchases. So, the

information received by the AO is in our considered view sufficient to form the belief that the income of the assessee has escaped. The Hon'ble Supreme Court has held in the case of *Income Tax Officer vs. Purushottam Das Bangur & Anr* 224 ITR 362 has upheld action of AO in reopening the assessment u/s 147(b) of the Act on the basis of letter written by DDI (Inv) to jurisdictional IAC containing relevant facts and information without any further investigation. Hence, we do not find any merit in the contention of the assessee. We therefore dismiss Ground Nos. 2 to 4 raised by the assessee.

7. The assessee has further challenged the addition of Rs. 9,35,767/- vide Ground No. 5 & 7. We notice that during the assessment proceedings, the assessee has failed to prove the physical delivery of goods by producing any cogent evidence. Since, the notices u/s 133(6) issued by the AO to the parties were received back un-served and the assessee also failed to produce them before the AO for verification, there is no merit in the contention of the assessee that the AO has not given opportunity to cross examine the parties. The assessee could not produce delivery challan to prove that the goods were actually received from the suppliers. During the course of investigation, the Sales Tax Department has found that the bogus parties aforesaid only used to issue accommodation bills after obtaining their commission. The assessee could not produce any evidence even before the Ld.CIT (A) to prove that the purchases were actually made from the aforesaid parties. So we are of the considered view that the assessee has failed to establish the genuineness of the transaction. Once it is established that the assessee has not purchased the goods from the aforesaid parties it can be inferred that the purchases were made in a grey market to evade the taxes applicable during the relevant period. Since, the AO has not rejected the sales, The Ld. CIT(A) has rightly confirmed the addition of 12.5% of the total amount of bogus purchases by following the decision of the Hon'ble Gujarat High Court in the case of CIT vs.

*Simit P. Sheth* (supra). In the said case, the Hon'ble Court has upheld the decision of the Tribunal and sustained the addition 12.5% of the total bogus purchases holding that only profit element embedded in such purchases can be added to income of the assessee. Since, the Ld. CIT(A) has sustained the addition by following the principles law laid down by the Hon'ble Gujarat, High Court, we do not find any reason to interfere with the findings of the Ld. CIT(A). We accordingly uphold the findings of the Ld CIT(A) and dismiss this ground of appeal of the assessee. Since, the Ld. counsel has furnished the details of VAT paid by the assessee in the assessment year under consideration and claimed the benefit of the same, we direct the AO to verify as to whether the assessee has paid the VAT on the bogus purchases in question and if paid to give benefit of the same by deducting the amount of VAT paid from the addition of 12.5% to be made in terms of our order passed in this appeal .

**ITA No. 1766/MUM/2018 (Assessment Year: 2011-12)**

The assessee has preferred this appeal before the Tribunal on the following effective grounds:-

1. *"The orders passed by the learned authorities are bad in law and bad in facts.*
2. *The notice issued u/s 148 of the I.T. Act, 1961, by the learned Assessing Officer is void ab-initio, inasmuch as, it was not issued in accordance with the mandatory requirement of law. Consequently, the assessment order passed in also void-ab-initio.*
3. *The notice issued u/s 148 of the I.T. Act, 1961, by the learned Assessing Officer is void ab-initio inasmuch as, there was no tangible material brought on record to support the belief of escapement of income. Consequently, the*

*assessment order passed in pursuance of said notice is also void-ab-initio.*

4. *The assessment order passed is void-ab-initio, inasmuch as, same has been passed in clear disregard of the principles of natural justice, as neither the appellant was provided with a copy of material relied upon nor an opportunity to cross examine the parties was granted, though there testimony was relied upon for issue of notice u/s 148 of the I.T. Act, 1961 as also for making additions to returned income.*
5. *The learned lower authorities have grossly erred in making/upholdings an addition of Rs. 9,35,767/- purely on an estimated basis, without bringing any material or evidence on record to support impugned addition.*
6. *The learned Assessing Officer has grossly erred in rejecting audited books of account, by recourse to sec. 145(3) of the I.T. Act, 1961 though no adverse finding about the correctness or completeness of the accounts or method of accounting followed has been recorded by him.*
7. *Having regard to the facts of the case, provisions of law and judicial propositions, the impugned addition of Rs. 9,35,767/- is wholly untenable in law.”*

2. The facts of the present case and the issues involved in the preset appeal are identical to the facts and the issues involved in the assessee's own appeal for the assessment year 2010-11 except the amount of bogus purchases made by the assessee during the financial year relevant to the assessment year under consideration. Since, we have dismissed the assessee's appeal pertaining to the assessment year 2010-11, consistent with our findings, we dismiss all the grounds of appeal of the assessee for the reasons mentioned in our order for the assessment year 2010-11. We direct the AO in this case also to verify as to whether the assessee has paid the VAT on the bogus purchases in question

and if paid, to give benefit of the same by deducting the amount of VAT paid from the addition of 12.5% to be made in terms of our order.

In the result, both the appeals filed by the assessee for assessment years 2010-11 and 2011-2012 are dismissed.

Order pronounced in the open court on 19<sup>th</sup> June, 2018.

Sd/-  
(R.C. SHARMA)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 19/06/2018

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