

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

BEFORE SHRI B.R. BASKARAN (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 4038/MUM/2017
Assessment Year: 2010-11**

The ACIT-19(3), Matru Mandir, 2 nd Floor, R. No. 206, Tardeo Road, Mumbai - 400007	Vs.	M/s Yogesh Construction, 1/11, 1 st Floor, 25- Harharwala Building, S.V.P. Road, Mumbai - 400004 PAN: AAIFY6766D
(Appellant)		(Respondent)

**CO No. 164/MUM/2018
Assessment Year: 2010-11**

M/s Yogesh Construction, 1/11, 1 st Floor, 25- Harharwala Building, S.V.P. Road, Mumbai - 400004 PAN: AAIFY6766D	Vs.	The ACIT-19(3), Matru Mandir, 2 nd Floor, R. No. 206, Tardeo Road, Mumbai - 400007
(Appellant)		(Respondent)

Revenue by : Shri V. Vidhyadhar (Sr. DR)
Assessee by : Shri Rahul Hakani (AR)

Date of Hearing: 19/07/2018
Date of Pronouncement: 31/07/2018

ORDER

PER RAM LAL NEGI, JM

These are the appeal and cross objection filed by the revenue and the assessee respectively against the orders dated 15.03.2017 passed by the Ld. Commissioner of Income Tax (Appeals)-29, Mumbai pertaining to the Assessment Year 2010-11, whereby the Ld. CIT (A) has partly allowed the

appeal filed by the assessee against order passed u/s 143 (3) read with section 147 of the Income Tax Act, 1961 (for short 'the Act') and sustained the addition to 15% as against the 100% made by AO on account of bogus purchases.

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Brief facts of the case are that the assessee engaged in the business of constructions, filed its return of income for the assessment year under consideration declaring the total income of Rs. 1,66.94,074/-. The return was processed u/s 143(1) of the Act. Subsequently, on the basis of information received from the sales tax department, Govt. of Maharashtra through Director General of Income Tax (inv) that during the previous year relevant to the assessment year under consideration the assessee had obtained accommodation entries from 24 bogus entities amounting to Rs. 2,85,79,563/- without actually purchasing any goods, the assessment was reopened u/s 147 of the Act after issuing notice u/s 148 of the Act. In reply to the notice u/s 148 of the Act, the assessee asked the AO to treat the original return as the return filed in response to the notice u/s 148 of the Act. Further in response to the notices u/s 143(2) and 142(1) of the Act, the authorized representative of the assessee attended the proceeding and submitted the details. During the assessment proceedings, the assessee failed to produce delivery challan, Stock Register and other documents to establish the genuineness of the transaction purchases in question. The assessee also failed to produce the parties before the AO for verification. The notices issued to the parties u/s 133(6) of the Act, were received back un-served. Accordingly, the AO treating the entire amount of bogus purchases made addition of the said amount to the total income of the assessee.

Aggrieved by the assessment order, the AO challenged the same *inter alia* on the ground that the AO has wrongly made addition of the entire amount of bogus purchases. The Ld. CIT (A) after hearing the assessee restricted the addition to 15% of the total amount of bogus purchases made by the assessee

relying on the decision of ITAT, Ahmadabad in the case of *Vijay Proteins Ltd. vs. ACIT 58 ITD 0428*. The judgments of Hon'ble High Court of Gujarat in the case of *Sanjay Oil Cakes vs. CIT 316 ITR 274* and in the case of *CIT vs. Simit P. Sheth 356 ITR 451* and also the order passed by the then CIT (A) in the assessee's case for the A.Y. 2009-10. The revenue is in appeal against the findings of the Ld. CIT (A).

2. The revenue has raised the following effective grounds of appeal against the impugned order passed by the Ld. CIT (A):-

1. *“Whether in the facts and in the circumstances of the case and in law, the Ld. CIT (A) is correct in deleting the addition of unexplained expenditure of Rs. 2,85,79,563/- made on account of bogus purchase by the Assessing Officer and limiting it to a gross profit addition?”*
2. *Whether in the facts and in the circumstances of the case and in law, the Ld. CIT (A) is justified in not confirming the addition in view of the decision of the Hon'ble Supreme Court dated 10.01.2017 in the case of N K Proteins Ltd. wherein the Hon'ble Supreme Court confirmed the entire addition on account of bogus purchase?*
3. *Whether in the facts and in the circumstances of the case and in law, the Ld. CIT (A) is justified in confirming the addition @ 15% profit rate on total purchases of Rs. 2,85,79,563/- made by the assessee from 24 parties when during the investigation made by sales tax department of Maharashtra Government, it was conclusively proved beyond doubt that these parties are only into providing accommodation entries and do not do any real business?*
4. *Whether in the facts and in the circumstances of the case and in law, the Ld. CIT (A) is justified in not appreciating the fact that during the investigation made by sales tax department of Maharashtra Government, directors/Prop./Partners of such parties have accepted on*

oath that they are providing only accommodation entries and not doing any real business, the treatment of such purchases as being genuine does not hold ground?"

3. At the outset, the Ld. counsel for the assessee submitted that the issues involved in the present appeal is covered by the decision of the ITAT, Mumbai rendered in assessee's own case, ITA No. 195/M/2017 and Cross Appeal ITA No. 324/M/2017 for the A.Y. 2009-10, whereby the ITAT has restricted the disallowance to 12.5% of the total impugned purchases. The Ld. counsel further submitted that since the facts and the issues involved in the present case are identical to the facts and issues involved in the assessee's case for the A.Y. 2009-10 aforesaid, the present appeal may be decided in accordance with the decision of the Tribunal aforesaid. The Ld. counsel further submitted that the assessee has also filed cross objection against the findings of the Ld. CIT (A) challenging the action of the Ld. CIT(A) in sustaining 15% addition of the total amount of bogus purchases.

4. On the other hand, the Ld. Departmental Representative (DR) relying on the assessment order passed by the AO submitted that the order passed by the Ld. CIT (A) is not in accordance with the ratio laid down by the Hon'ble Supreme Court in the case of N.K. Proteins Ltd., wherein the Hon'ble Supreme Court has confirmed the entire addition made by the AO on account of bogus purchases. In view of the aforesaid facts, the findings of the Ld. CIT (A) are liable to be set aside.

5. We have heard the rival submissions and also gone through the material on record. We notice that the coordinate Bench has dealt with the identical issue in the assessee's own case for the A.Y. 2009-10. The relevant paras of the decision of the co-ordinate Bench read as under:-

“6. We have considered the rival submissions of the ld. representatives of the parties and have gone through the orders of authorities below. We have seen that the AO has not rejected the books of account of the assessee. Further, the execution of work and clearance of bill from MCGM on the contract awarded to the assessee is also not disputed. The transactions of purchases were through banking channel. The consumption of material not disputed. The AO has not brought any material on record that the amount of the said purchases have come back to the assessee except disputing the purchases as not genuine. We have noted that ld. CIT (A) has also observed that the AO is silent about the execution of work and clearance of the bills against the execution of contract. The Ld. CIT (A) on the basis of CIT vs. Simit P Sheth (2013) Taxmann.com 385 (Guj) sustained the disallowance @ 15%. The ld. CIT (AO) while sustaining the disallowance observed that the assessee is also doing sub-contract work where the profit percentage is more. We have seen that neither the AO nor the ld. CIT (A) examined the Gross Profit and Net Profit ratio for the year under consideration as well as for earlier and subsequent years.

7. We are of the considered opinion that under Income-tax Act only real income can be taxed by the Revenue. We may further note that even in cases where entire transaction is not verifiable due to various reasons, the only taxable is the taxable income component. After considering the fact and rival submission of the parties, we are of the opinion that in order to fulfill the gap of revenue leakage, the disallowance of reasonable percentage of amount, purchases would meet the end of justice. Considering the business of the assessee the disallowance of 15% is on higher side. In our opinion the disallowance on account of bogus purchases in the present case @ 12.5%, of the

total impugned purchases meet the end of justice. The AO is directed accordingly.”

6. We notice that facts and the issues involved in the present appeal are identical to the facts and the issues involved in the assessee's own case for the A.Y. 2009-10. Since, the co-ordinate Bench has dealt with the identical issue in the assessee's own case for the A.Y. 2009-10 aforesaid and restricted the addition to 12.5% of the total amount in question, we respectfully following the decision of the coordinate Bench dismiss the sole ground of appeal of the revenue and restrict the addition to 12.5% of the total amount of bogus purchases determined by the AO.

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The assessee has filed cross objection against the findings of the Ld. CIT(A) on the ground that the Ld. CIT(A) has wrongly sustained 15% addition of the total amount of alleged bogus purchases on the following effective grounds:

1. *“The learned CIT (A) erred in restricting addition of alleged bogus purchase to the extent of 15% of alleged bogus purchase of Rs. 2,85,79,563/- without appreciating that assessee had discharged its onus to prove the purchases as genuine as payment was made through account payee cheques, purchases were utilized in executing government contracts and purchases were duly supported by invoices etc. and assessee has shown reasonable gross profit and hence the entire addition of Rs. 2,85,79,563/- ought to be deleted.*
2. *Without prejudice to above, the learned CIT (A) failed to appreciate that addition of alleged bogus purchase to the extent of 15% of alleged bogus purchase of Rs. 2,85,79,563/- is on a very high side and same may be reduced.”*

2. Since, we have restricted the addition to 12.5% of the total amount of bogus purchases in the revenue's appeal by following the decision of the coordinate Bench rendered in the assessee's own case for the A.Y. 2009-10, we dismiss the CO filed by the assessee.

In the result, appeal filed by the revenue as well as the Cross Objection filed by the assessee, are dismissed.

Order pronounced in the open court on 31st July, 2018.

Sd/-

(B.R. BASKARAN)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 31/07/2018

Sd/-

(RAM LAL NEGI)

JUDICIAL MEMBER

Alindra, PS

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