IN THE INCOME-TAX APPELLATE TRIBUNAL "SMC" BENCH MUMBAI

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND

SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No.984/Mum/2018 (Assessment Year 2009-10)

M/s Rolex Products C-12, 4th Floor, Samarpan New Maneklal Estate, LBS Marg, Ghatkopar (W), Mumbai-400086. **PAN: AAHFR2053H**	Vs.	ITO-27(3)(2) Tower No.6, Room No. 418, Vashi Railway Station Complex, Vashi, Navi Mumbai-400076.
Appellant		Respondent

Appellant by	:	Shri Manish V. Shah with Niyanta Mehta (AR)
Respondent by	:	Shri S.K. Bepair (Sr. DR)
Date of Hearing	:	09.08.2018
Date of Pronouncement	:	09.08.2018

ORDER UNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee under section 253 of the Income Tax Act (the Act) is directed against the order of ld. Commissioner of Income-tax (Appeals)-25, Vashi, Navi Mumbai [ld. CIT(A)] dated 23.11.2017 for Assessment Year 2009-10. The assessee has raised the following grounds of appeal:

> APPEAL BEFORE THE HON'BLE INCOME TAX APPELLATE TRIBUNAL, MUMBAI AGAI ST THE ORDER PASSED BY THE COMMISSIONER OF INCOME TAX (APPEALS) - 25, MUMBAI ["the CIT(A)"] UNDER SECTION 250 OF THE INCOME TAX ACT, 1961 ("the Act").
>
> 1. GROUND I: ADDITION OF RS. 1,78,136/- UNDER SECTION 69 OF THE ACT
>
> 1.1. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in sustaining the action of the Income Tax Officer, Range 27(3)(2), Mumbai ("the AO") in making addition to the extent of Rs. 1,78,136/- under section 69 of the Act.

1.2. The Appellant, therefore prays that purported reliance of the Hon'ble CIT(A) on section 69 of the Act is misplaced and the aforesaid addition under section 69 of the Act be deleted.

2. WITHOUT PREJUDICE TO GROUND I:
GROUND II:

2.1 On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in making an addition to the gross profit as despite the fact that he himself gave a finding that the purchases have found to be genuine and also ignoring the fact that when the gross profit is in line with the other Assessment years, the question of Gross Profit addition does not arise.

2.2 The Appellant, therefore prays that the aforesaid addition be deleted.

3. WITHOUT PREJUDICE TO GROU D I & II:
GROUND III:

3.1 On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in computing the gross profit of 12.5% without reducing the gross profit already offered to tax and without considering the fact that all the purchases alleged to be bogus are liable to V A T at the rate of 4%

3.2 The Appellant, therefore prays that the aforesaid addition be appropriately reduced.

4 GROUND IV:

The Appellant craves leave to add, to alter and / or amend the above ground of appeal.

2. Brief facts of the case are that the assessee is engaged in the business of Manufacturers of X-Ray Chemicals and Sonography & ECG jelly. The assessee filed its return of income for Assessment Year 2009-10 on 09.09.2009 declaring total income of Rs. 26,560/-. The return was processed under section 143(1). Subsequently, the assessment was re-opened on the basis of information received from DGIT (Investigation), Mumbai. The assessing officer received the information that the assessee is one of the beneficiaries, who has availed bogus entry from hawala trader. On the basis of information from Sales Tax Department the assessment was re-opened.

During the re-assessment proceedings the Assessing Officer noted that the assessee has shown purchases of Rs. 14,25,088/- from eight (8) such hawala dealers. The re-assessment was completed on 12.02.2014. The Assessing Officer while passing the assessment order made the addition of Rs. 6,22,249/- on the theory of peak credit standing in the name of the allwged bogus parties. On appeal before the ld. CIT(A), the disallowance under section 69C on account of bogus purchases was sustained @ 12.5% of the alleged bogus purchases. Therefore, further aggrieved by the order of ld. CIT(A), the assessee has filed the present appeal before us.

3. We have heard the ld. Authorized Representative (AR) of the assessee and ld. Departmental Representative (DR) for the Revenue and perused the material available on record. Though, the assessee has raised three grounds of appeal, which are alternative to each other. However, in our view, the only substantial grounds of appeal raised by the assessee is " Whether the order of ld CIT(A) is not justified in sustaining the disallowance of alleged bogus purchases @12.5%" .

4. The ld. AR of the assessee submits that all purchases of the assessee are genuine one. The assessee has proved by sufficient evidence the genuinity of purchases. The ld AR further submits that as per trading account, copy of which is placed on record at page No. 4 of the paper book, the applicable Value Added Tax (VAT) or Sales Tax applicable on the purchases made by assessee was 2% to 4 % ,except only on one the items at 12.5%. The assessee

has already shown gross profit @16% and net profit @5% during the year. The learned AR of the assessee further submits that where sales are supported, purchases and payments were made through banks, merely because supplier had not appeared before the assessing officer, the purchases could not be rejected as bogus. In support of his submission the learned AR of the assessee relied upon the decision of Hon'ble Bombay High Court in case of CIT Vs. Nikung Exim Enterprises (372 ITR 619) (Bombay), Gujarat High Court in case of PCIT versus Tejua Rohit kumar Kapadia Tax Appeal No. 691/2017(Gujarat High Court), Arun Shimpy Versus ITO (53 ITR(Tri) 151)(Mumbai Tribunal) and ACIT Versus Mahesh K Shah (184 TTJ 702) (Mumbai Tri). In alternative submission the learned AR of the assessee submits that once it is established that purchases were actually made then only profit embedded in the same could be added in the income of the assessee. In support of his submission the learned AR of the assessee relied upon the decision of Mumbai Tribunal in SVPHN Steel Services Vs ITO in ITA No.1177/M/2017(Mumbai Tri), Sanjay Shah versus ITO in ITA No. 5063/5064/5065/M/2017(Mumbai Tri and Rajesh Hira Chand Desai Vs ITO in ITA No.6881/ M/2016 (Mumbai Tribunal) and submits that in all cases. In third alternative submission the learned AR of the assessee submits that since the profit/benefit which would be generated by the assessee by procuring the goods from the open/grey market, can fairly be estimated considering the

saving of value-added tax, therefore, the disallowance should be restricted to the rate of value-added tax.

5. On the other hand, the ld. DR for the revenue supported the order of authorities below. The DR further submits that the Sales Tax Department, Govt. of Maharashtra and the Investigation Wing of Income tax Department made full-fledged enquiry with regard to hawala dealers who were indulging in providing accommodation enteritis without delivery of goods. The assessee has shown purchases from such parties whose names appeared in the list of hawala dealers. The assessee merely obtained accommodation bills only to inflate expenses and bring out the profitability in order to avoid tax. The ld. DR further submits that AO has already given sufficient relief to the assessee.

6. We have considered the submission of the parties and have gone through the orders of authorities below. During the re-assessment proceeding the Assessing Officer noted that the assessee has shown purchases from eight dealers, which are shown in the list of hawala dealers. The assessing officer issued notice under section 133(6) to all the parties. Out of eight parties, one party namely KC Enterprises denied its transaction with assessee vide reply dated 19.08.2014. The notices sent to other seven parties were returned unserved by the postal authorities. The assessee was asked to provide fresh address and contact number of the seven parties. Assessee failed to provide such information. The assessee was asked to produce the parties. The assessee failed to produce the any of such party/dealer. The assessee vide its

letter dated 04.08.2014 submits that the assessee has purchased the material and sold the finished goods to various Hospitals and Clinics. The assessee has no intention to reduce the profit. The assessee also furnished the Gross Profit ratio for AY 2005-06 to AY 2008-09. The Assessing Officer not accepted the contention of assessee and disallowed Rs. 6,22,249/- on the basis of peak credit in the name of bogus parties and added as unexplained expenditure under section 69C of the Act. During the first appellate stage the ld. CIT(A) observed that Assessing Officer made independent enquiries by issuing notice under section 133(6). Out of eight parties, the notices sent to seven parties were returned unserved. Only one party namely KC Enterprises responded and denied the transaction with assessee. The assessee was asked to produce the parties and to produce the genuineness of transaction. In response to the Assessing Officer's query, the assessee expressed its inability to produce the party. The assessee also failed to furnish evidence of transport bill, stock register and purchase bills. The assessee could produce only delivery challans. The ld. CIT(A) also compared the signature on behalf of KC Enterprises with the signature on delivery challans which were differ. The ld. CIT(A) further observed that mere payment to banking channel is not sufficient to prove the genuineness of purchases. On the basis of his observation, the ld. CIT(A) concluded that the purchases are not verifiable from the parties in question. Since purchases shown on the invoices could not be subjected to verification, it was deficient to establish the correctness of

purchases price paid for such material. The ld. CIT(A), on the basis of decision of Hon'ble Gujarat High Court in case of CIT vs. Smith P. Seth (ITA No. 553 of 2010 dated 16.01.2013 and Bholanath Pollyfeb (ITA No. 63 of 2012 dated 23.12.2012) restricted the disallowance to 12.5% of profit embedded in such type of impugned/bogus purchases effected through hawala dealers.

7. We are of the considered opinion that under Income Tax Act only real income can be taxed by the Revenue. We may further conclude that even if the transaction is not verifiable, the only taxable is the taxable income component and not the entire transaction. And after considering the facts of the case and the rival contentions of the parties we are of the opinion that in order to fulfil the gap of revenue leakage the disallowance of reasonable percentage of such purchases would meet the end of justice. We have seen that the VAT rate applicable on the items purchased by the assessee is 2 5 to 4% except on one item @ 12.5%. Therefore, considering the peculiarity of the facts and the circumstances of the present case the addition are restricted to the extent of 10 % of the total impugned (disputed) purchases, which would be reasonable and justifiable. Similar view was taken by Hon'ble Bombay High Court in **CIT Vs Hariram Bhambhani in ITA No. 313 of 2013** decided on 04.2.2015.

8. The case law relied by ld. AR for the assessee is not helpful to him as the facts of each and every case related with the dispute of bogus purchases are at variance and no straight jacket formula can be applied in all cases.

9. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 09.08.2018.

Sd/-	**Sd/-**
G.S. PANNU	**PAWAN SINGH**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: 09.08.2018
SK

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT(A)
5. DR "SMC" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai