

IN THE INCOME-TAX APPELLATE TRIBUNAL “SMC” BENCH MUMBAI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND SHRI PAWAN SINGH JUDICIAL MEMBER
ITA No. 1062/Mum/2018 (Assessment Year 2010-11)

Mrs Reeta Jain 701, Ahimsa Tower, Chincholi Bunder, Malad(West), Mumbai-400064. PAN: ACAPJ7693Q	Vs.	ITO - 30(3)(2) Pratyakshar Bhavan, BKC, Bandra (East), Mumbai- 400051.
Appellant		Respondent

ITA No. 1063/Mum/2018 (Assessment Year 2011-12)

M/s Reeta Jain 701, Ahimsa Tower, Chincholi Bunder, Malad(West), Mumbai-400064. PAN: ACAPJ7693Q	Vs.	ITO - 30(3)(2) Pratyakshar Bhavan, BKC, Bandra (East), Mumbai- 400051.
Appellant		Respondent

Appellant by : Shri Rajesh Sanghvi (AR)

Respondent by : Shri S.K Bepari (DR)

Date of Hearing : 01.10.2018

Date of Pronouncement : 10.10.2018

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. These two appeal by assessee are directed against the order of Id. CIT(A)-41, Mumbai dated 22.12.2017 for Assessment Year 2010-11 & 2011-12. In both the appeal, the assessee has raised the identical grounds

of appeal except variation of figures. Facts of both the appeals are also identical; therefore, both the appeals were clubbed, heard and are being decided by common order. With the consent of parties, appeal for Assessment Year 2010-11 was treated as lead case. In appeal for Assessment Year 2010-11, the assessee has raised the following grounds of appeal:

1) In the facts & circumstances of the case and in law, the Ld CIT (A) has erred by confirming the addition of Rs. 18,23,371/- (being 8% of the alleged hawala purchase of Rs. 2,28,19,876/-) and by further enhancing the addition by Rs. 2,09,96,505/- U/S 69C

2) In the facts & circumstances of the case and in law, the Ld CIT (A) has erred by ignoring the rules of natural justice, not providing material before the AO and himself and by not providing cross examination of the relevant parties.

3) In the facts & circumstances of the case and in law, the Ld CIT (A) has erred by confirming the addition and making the enhancement due to absence of third party independent evidences and ignoring that books of accounts were rejected and ignoring the important observations by the AO in Para 6.1, 6.3 and 6.4 of the assessment order.

2. Brief facts of the case are that the assessee is a dealer in all kind of Papers, filed her return of income for Assessment Year 2010-11 on 21.09.2010 declaring total income of Rs. 3,76,540/-. The return was processed and accepted under section 143(1) of the Act. The assessment was re-opened on the basis of information received from Sale Tax Department, Government of Maharashtra, about the assessee, being one of the beneficiaries who have taken accommodation entries from hawala

dealers declared by Maharashtra Sale Tax Department. The assessment was completed under section 143(3) r.w.s 147 of the Act on 22.02.2016. The Assessing Officer during the re-assessment proceeding identified eleven parties, the name of which were figured in the list of hawala dealers. The assessee has shown the purchases of Rs. 2.28 crore during the relevant Financial Year. The Assessing Officer issued notice under section 133(6) to all the said parties calling for quantitative details of sales, copy of ledger account of assessee in their books, copy of bank statement. The notices were either returned back with the remark 'not known/refused'. The assessee has given opportunity to prove the genuineness. In response to the show-cause notice, the assessee filed its reply dated 09.02.2016, along with the reply, the assessee filed ledger account of all eleven parties, copies of invoices and challans. The assessee also furnished the bank statement highlighting the details of payment. The assessee further contended that without the purchases sale is not possible. The assessee specifically contended that it may be possible that those parties might have been issued bogus bills to some other parties in their normal course of business transaction; however, the assessee has made genuine business transaction with those parties. The assessee also contended that the transaction is more than five years old

and it is not possible to produce the parties. The contention of the assessee was not accepted by Assessing Officer on his view that onus is upon the assessee to prove with what has been stated/accounted in books is true as well as genuine. The assessee should have produced the parties before the Assessing Officer along with inward register, lorry receipt and purchase of goods from the parties. The Assessing Officer further recorded that apart from the ledger accounts, copies of bills and payment by way of cheque, the assessee has not produce the delivery challan and transport details neither to prove the genuineness of purchases nor to produce the parties. The Assessing Officer rejected the books of account of the assessee. The assessee has declared gross profit of Rs. 35,74,420/- being gross profit @ 7.15% of the turnover. After considering the nature of business of assessee and the ratio of non-genuine purchases to the total turnover, the Assessing Officer estimated the Gross Profit to 10.81%, thereby made the addition of Rs. 18,23,371/-.

3. On appeal before the Id. CIT(A), the addition was not only confirmed, but it was further enhanced by making addition of Rs. 2,09,96,505/- to the total income of assessee. The Id. CIT(A) enhance the addition on his observation that the assessee failed to produce the parties concerned as well as vital evidence like inward register, lorry receipt for purchase of

goods, regular stock register and proof of payment received against sale. Thus, further aggrieved by the order of Id. CIT(A), the assessee has filed the present appeal before us.

4. We have heard the submissions of the Id. Authorized Representative (AR) of the assessee and the Id. Departmental Representative (DR) for the Revenue and perused the material available on record. We have also deliberated on the various case laws relied by lower authorities. The Id. AR of the assessee submits that filing of appeal before the First Appellate Authority (FAA) has become curse for the assessee, the Id. CIT(A) instead of considering the facts of the case sympathetically enhance the addition by making disallowance of purchases of aggregate of all of the alleged bogus purchases from all eleven parties. The Id. AR of the assessee submits that the assessee is dealers of Paper and declared Gross Profit (GP) @ 7.15%. The Id. AR of the assessee further submitted the chart of financial working from Assessment Year 2009-10 to 2014-15, showing the details of purchases, sales, Gross Profit, Gross Profit ration, Net Profit, Net Profit ration of alleged bogus purchases identified/disputed by Revenue. The Assessing Officer rejected the books of account of assessee and made addition and estimated the GP of assessee at 10.81% by considering all the facts. Though the GP addition

made by Assessing Officer was on higher side, the assessee approached the Id. CIT(A) for further relief, however the Id. CIT(A) made the addition of entire purchases from 11 parties. The Id. AR of the assessee submits for subsequent year i.e. assessment year 2012-13 the Assessing Officer made similar addition and estimated the GP at 7.04% against 5.52% shown by assessee. On appeal before the Id. CIT(A), the addition was sustained and on further appeal before the ITAT, the disallowance was confirmed. The Id. AR of the assessee submits that facts for the year under consideration are identical compared to the Assessment Year 2012-13 and therefore, the disallowance on account of alleged bogus purchases in any case should not exceed more than the disallowance made by Assessing Officer.

5. On the other hand, the Id. DR for the Revenue supported the order of authorities below. The Id. DR further submits that the Hon'ble Gujarat High Court in case of N.K. Proteins Ltd. vs. DCIT in Tax Appeal No. 240-242/2003 dated 20.06.2016 held that once a finding of fact has been given that entire purchases is shown fictitious invoices and debited in Profit & Loss Account are established as bogus. The entire purchases are liable to be disallowed. The facts of N.K. Proteins Ltd. (supra) are fully

- applicable on the present case and that the assessee is not entitled for any relief.
6. We have considered the rival submission of the parties and have gone through the orders of authorities below. The Assessing Officer made the addition by rejecting the books of account. The Assessing Officer while estimating the GP addition observed that there cannot be a uniform yardstick in making the estimation, the estimation by rule of thumb as absolutely infirm. The estimation must necessarily vary with the nature of business; judgment can only be based on the material available on record, past record and considering the totality of the fact. The Assessing Officer concluded that real income is neither notional nor astronomical, income be estimated while making GP estimation. We have noted that the Assessing Officer has not disputed the sale of the assessee. The Assessing Officer rejected the books on his observation that the purchases shown by assessee are unverifiable.
7. The Id. CIT(A) during the first appellate stage issued notice of enhancement under section 251(2) dated 16.10.2017 as to why the purchases of Rs. 2.28 crore from eleven parties identified during the assessment proceeding should not be treated as bogus. The assessee filed its reply dated 13.11.2017. In the reply, the assessee contended that she

has purchased the goods as mentioned in the transactions and are properly accounted. The purchases have been affected for trading and goods are sold to various reputed parties. There is no dispute regarding the sales. The assessee also contended that all the vendors during the period were registered with the Sale Tax Department. The Sale Tax Department found those dealers as they failed to discharge their liability of tax to the Sale Tax Department. The Assessing Officer never doubted the sales of the assessee. There cannot be sale without purchase. The assessee has properly discharged his opinion in furnishing last known address of all the parties, proof of payment, and copy of account. The Assessing Officer should have issued summons to enforce the attendance of the parties and to given an opportunity to assessee to cross-examine. The proposed enhancement is not justified as the entire purchases cannot be added to the income when the sales are genuine and purchases are made by cheques.

8. The contention of assessee was not accepted by Id. CIT(A). The Id. CIT(A) observed that Assessing Officer issued notice to all the parties under section 133(6), which were returned un-served by postal authorities. The assessee was given opportunity to produce the parties for verification. The assessee expressed her inability to produce the parties.

The Assessing Officer asked the assessee to produce Inward Register, Lorry receipt for purchase of goods from the parties. These vital documents were not produced. The assessee produced the only document such as Ledger Account, Copy of payments, payment made by cheques. The Id. CIT(A) concluded that the assessee failed in his duty to produce the parties and to produce the vital evidence like inward register, lorry receipt for purchase of goods. All the parties were not found at their given address. The re-conciliation were not produced for verification before Assessing Officer or before the Id. CIT(A). The Id. CIT(A) also concluded that the assessee has not produced the physical Stock Register, Confirmation of parties, delivery challan, lorry receipt, Octroi payment, confirmation of brokerage, quantitative tally, sales Register/payment, confirmation through transport, record of godown keeper and rate comparison. Thus, the Id. CIT(A) disallowed the entire purchases in the impugned order.

9. We have seen that Id. AR of the assessee has filed financial working from Assessment Year 2009-10 to 2014-15. In the Assessment Year, the assessee has shown the purchases of Rs. 4.23 crore and sales of Rs. 4.57 crore and declared GP @ 7.15% and Net profit of 0.89%. However, no bogus purchases were identified by revenue. For Assessment Year 2010-

11, the assessee has shown the purchases of Rs. 4.55 crore and sales of Rs. 4.99 crore on which Gross Profit is declared at 7.16% and Net Profit at 1.5%. The Revenue has identified 50% purchases as bogus (though the assessee claimed otherwise). For Assessment Year 2011-12. The assessee has shown the purchases of Rs. 7.03 crore and sales of Rs. 7.52 crore on which Gross Profit was declared at 6.79% and Net Profit at 1.19%. The Revenue has identified 20% of purchases as bogus. For Assessment Year 2012-13, the assessee has shown the purchases of Rs. 8.22 crore and sales of Rs. 8.87 crore on which Gross Profit is shown at 5.52% and Net Profit at 1.10%. The Revenue has identified 9% of purchases as bogus. For Assessment Year 2013-14, the assessee has shown the purchases of Rs. 7.13 crore and sales of Rs. 7.76 crore on which Gross Profit is shown at 6.27% and Net Profit is shown at 1.12% for this year, the revenue has not identified the bogus purchases. For better appreciation of fact, the financial statements from Assessment Year 2009-10 to 2013-14 are summarized below.

Asst year	09-10	10-11	11-12	12-13	13-14	14-15
Purchases	4,23,82,616	4,55,47,075	7,03,04,034	8,22,16,541	7,13,14,033	1,35,69,690
Sales	4,57,83,275	4,99,33,316	7,52,38,261	8,87,42,135	7,76,86,392	2,04,21,774
Gross Profit	32,73,321	35,74,420	51,07,271	48,95,466	48,69,001	9,06,528
GP Ratio	7.15%	7.16%	6.79%	5.52%	6.27%	4.44%
Net profit	4,07,756	5,22,366	8,94,914	9,73,547	8,70,750	(52,865)
NP ratio	0.89	1.05%	1.19	1.10	1.12	(0.26)

Alleged purchases		2,28,19,876	1,44,11,857	73,75,136	-	0
Ratio of Bogus purchase to Total Purchase	0%	50%	20%	9%	0%	0%

10. We have noted that for all Assessment Year beginning from 2009-10 to 2013-14, the assessee's average Gross Profit @ 5.68 % and average Net Profit @ .93%. However, for the year under consideration the assessee has shown GP @ 7.16% and NP @ 1.05%. We have further noted that the assessing officer has not doubted the sale of the assessee; sale is not possible without purchases.
11. Considering the submissions of the Id representatives of the parties, and facts of the case and the details of financial working furnished before us, and the peculiarity of the present case, we are of the view that the finding of the Id CIT(A) is not sustainable under the law. It is settled position that, under the Income-tax Act only real income can be taxed by the revenue, even in cases where whole transaction is not verifiable due to various reasons, the only taxable is the taxable income component and not the entire transaction. The Hon'ble Bombay High Court in case of CIT vs. Hariam Bhambhani in ITA 313/2013 decided on 04.02.2015 also held that revenue is not entitled to bring the entire sale consideration to

tax but only profit attributable on such unrecorded sale consideration alone can be subject to income-tax. After considering the nature of business activities of the assessee conducted during the relevant period. We are of the view that in order to fulfill the revenue leakage, the disallowance of reasonable percentage of impugned/disputed purchases would meet the end of justice. Thus, we are of the view that estimating the GP of assessee @ 10.81%, which would be sufficient to fulfill the possibility of revenue leakage. Hence, the order of Id CIT(A) is reverse and assessing officer is restored. The Assessing Officer is directed accordingly. In the result the ground No. 1 to 3 of the appeal raised by the assessee are partly allowed.

12. In the result the appeal of the assessee is partly allowed.

ITA No. 1063/Mum/2018 for AY 2011-12 by assessee

13. The assessee has raised identical grounds of appeal except variation of figure. Considering our decision in appeal for AY 2010-11, the appeal for the year under consideration is also allowed with similar direction. To be more specific the assessing officer is directed to take the estimated profit @ 8.32% as directed by him while passing the assessment order under section 143(3)/147 dated 22/02/2016, which would be sufficient to fulfill

the possibility of revenue leakage. In the result the ground No. 1 to 3 of the appeal are partly allowed.

14. Order pronounced in the open court on 10/10/2018.

Sd/-

SHAMIM YAHYA
ACCOUNTANT MEMBER

Mumbai, Date: 10.10.2018

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Copy of the Order forwarded to :

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

Sd/-

PAWAN SINGH
JUDICIAL MEMBER

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai