

IN THE INCOME-TAX APPELLATE TRIBUNAL “G” BENCH MUMBAI
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, ACCOUNTANT MEMBER
ITA No. 375/Mum/2018 (Assessment Year 2009-10)

Sahyadri Construction 1, Sheetal Chhaya, Near Pratap Cinema, Kolbad Road, Thane (W)-400601. PAN: AAEFS7999E	Vs.	DCIT Circle-3, Room No. 2, ‘B’ Wing, 6 th Floor, Ashar I.T. Park, Road No.16Z , Wagale Ind. Estate, Thane-400604.
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Appellant

Respondent

Appellant by : Shri Subodh Ratnaparkhi (C.A)

Respondent by : Shri P. Kumar (DR)

Date of Hearing : 29.03.2019

Date of Pronouncement : 29.03.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee is directed against the order of Id. Commissioner of Income-tax (Appeals)-2, (hereinafter referred as Id. CIT (A), Pune dated 15.09.2017 for Assessment Year 2009-10. The assessee has raised the following grounds of appeal:

On the facts and in law,

1. The Hon. CIT (A) erred in upholding the re-opening of assessment u/s 147 of the I. Tax Act 1961, by issue of the notice u/s 148 dt. 25.03.2013, without there being any independent and valid reason on the part of the Id AO to believe that any income chargeable to tax had escaped assessment. The re-opening of assessment u/s 147 being bad-in-law, the asst. order flowing there from, being the order u/s 143(3) r.w.s. 147 now under appeal is also invalid and bad in law and hence is required to be struck down on that count.

2. The Hon. CIT (A) erred in confirming the addition of Rs. 23,57,872/-, made on account of alleged hawala purchases debited to the profit and loss account of the appellant, not appreciating that the purchases were genuine purchases duly supported by substantial evidences and that the material purchased was consumed by the appellant in civil construction work.

3. The Hon. CIT (A) erred in upholding the addition of Rs. 23,57,872/-, made on account of alleged hawala purchases, without affording your appellant with any opportunity to cross examine the source of adverse evidence, thereby breaching the silent principles of equity, fair play and natural justice.

2. Brief facts of the case are that the assessee is a registered partnership firm and engaged in the business of civil contractor. The assessee filed its return of income for Assessment Year 2009-10 on 09.09.2009 declaring total income of Rs. 1,27,59,094/-. The assessment was initially completed under section 143(3) of the Act and return of income was accepted. The assessment was reopened under section 147 on 25.03.2013. Notice under section 148 dated 25.03.2013 was issued to the assessee on the basis of information received from Sale Tax Department, Mumbai about the entities who were providing entries of bogus purchases. The assessee was one of the beneficiaries, who has provided such entries. No reply was filed by assessee in response to the notice under section 148, thus, the return originally filed by assessee was treated as return in response to the notice under section 148. The assessment was completed under section 143(3) on 13.03.2014. The Assessing Officer while passing the assessment order noted that the assessee is beneficiary of bogus purchases of Rs. 10,63,920/- from

Samay Sales Corporation and Rs. 12,93,952/- from Maulik Steel Corporation. The Assessing Officer in order to verify the genuineness of transaction issued notice under section 163. The notices were returned back by postal authorities. Thereafter Inspector was directed to serve the notice on the said parties. The inspector reported that no such concerns are running on the said premises. The Assessing Officer issued show-cause notice to the assessee as to why the purchases made from the parties should not be treated as bogus expenses. The assessee filed its reply dated 21.02.2014. In the reply, the assessee contended that they have made payment through cheques and the transactions are genuine. The reply of assessee was not accepted by Assessing Officer. The Assessing Officer concluded that assessee failed to prove the genuinity of transaction and identity of seller and other evidence like transport, stock register. The Assessing Officer disallowed the claim of entire purchases. On appeal before the Id. CIT(A), the assessee challenged the reopening as well as the 100% addition on the basis of information of sale tax authority. The Id. CIT(A) confirmed the action of Assessing Officer on the issue of reopening as well as on addition on account of said bogus purchases. Thus, further aggrieved by the order of Id. CIT(A), the assessee has filed the present appeal before us.

3. We have heard the Id. AR of the assessee and Id. DR for the revenue and perused the material available on record.

4. Ground No.1 relates to validity of re-opening under section 147. The Id. AR of the assessee submits that original assessment was completed under section 143(3), wherein the expenses incurred on account of purchases was accepted. The assessment was reopened on the basis of third party information. The Assessing Officer reopened the assessment by relying upon the information of sale tax department. The Assessing Officer has not recorded any independent belief or satisfaction that the income of assessee has escaped assessment. The reopening being bad-in-law, the assessment order passed in pursuance of reopening is also invalid. The Id. AR has also filed copy of written submission filed before Id. CIT(A), Tax Audit Report, copy of reasons recorded, party-wise ledger accounts, tax invoices, payment details highlighting the payments to the disputed parties. Copy of audited P&L A/c for Assessment Year 2008-09 and 2010-11.
5. On the other hand, the Id. DR for the revenue supported the order of lower authorities. The Id. DR submits that the AO was having sufficient material based on the information received from sale tax department that assessee is one of the beneficiary who had availed accommodation entries from such hawala traders. The information received by Assessing Officer was sufficient for making belief for reopening.
6. We have considered the rival submission of the parties and perused the order of authorities below. We have noted that the Assessing Officer

made the reopening on the basis of information received from sale tax department. The sale tax department provided name and address of parties who were indulged in providing entries of bogus purchases. The information also contains the details of beneficiaries of such bills. The assessee has also shown the purchases from two of such parties.

7. It is well settled that section 147 authorizes and permits the Assessing Officer to assess or re-assess the income chargeable to tax if he has reason to believe that income for any assessment year has escaped the assessment. The word 'reason' in the phrase 'reason to believe' would mean cause or justification and after considering and analyzing the provision, it has been propounded that the expression cannot be read to mean that Assessing Officer should have finally ascertained the fact of legal evidence or conclusion. In our view, at the initial stage, the information regarding the escapement of income is sufficient to make a belief and not the established fact of escapement of income. Therefore, at this stage only question whether there was relevant material to form a reasonable belief is to be seen and in the background of present facts, there is a specific information received from investigation wing of sale tax department that assessee is one of the beneficiary of hawala purchases. In our view, the information was sufficient for making belief that income of assessee has escaped assessment. Therefore, we do not

find any merit in the ground no.1 of the appeal. In the result, ground no.1 of the appeal is dismissed.

8. The Ground No.2 relates to the disallowance of purchases debited to the P&L A/c. The Id. AR of the assessee submits that assessee is a civil contractor, working with Municipal Corporation, Thane. During the relevant period, the assessee has made genuine purchases of Steel & Iron. The assessee filed sufficient evidence in the form of tax invoices, delivery challan and proof of payment through banking channel. The assessee received the material at the site. The Assessing Officer has not disputed the consumption. The statement of account of assessee was not rejected. The Id. AR further submits that it was not possible for the assessee to complete the civil work without purchase and consumption of material. The assessee has shown taxable income of Rs. 1,27,59,094/- during the assessment year under consideration. The assessee has shown higher gross profit than the ordinary profit in the business of civil construction. The Assessing Officer and the Id. CIT(A) has not examined the Gross Profit and Net Profit for prior and subsequent years. The Assessing Officer solely rely upon the report of third party/sales tax department without providing copy of the report of investigation of sales tax department and the statement of the parties allegedly recorded by the Investigation Wing. The assessee made specific grounds of appeal before the Id. CIT(A), however, the Id. CIT(A) failed to adjudicate the said

grounds of appeal despite recording of submission of assessee in para-4.3 of his order. The ld. AR of the assessee submits that the lower authority has passed the order in violation of principle of natural justice. The ld. AR prayed for deleting the entire addition.

9. On the other hand, the ld. DR for the Revenue supported the orders of authorities below. The ld. DR for the Revenue argued that the Investigation Wing of the Income-tax Department made full-fledged enquiry. The parties from whom the assessee has shown the purchases are bogus Hawala dealers. The hawala dealers are indulged in issuing bogus bills without delivery of any material or goods. The assessee obtained accommodation bills only in order to inflate the expenses and to bring down the profitability in order to avoid the tax. The ld. DR for the Revenue prayed for confirming 100% of the disallowance and for dismissal of the appeal.
10. We have considered the rival submissions of the parties and have gone through the orders of the authorities below. We have also deliberated on the various case laws relied by the lower authorities. During the course of assessment proceedings, the Assessing Officer issued notices under section 133(6) of the Act to the parties seeking details of transactions entered by them with the assessee. None of the above respond to the notices, and notices was returned un-served. The assessing officer deputed the inspector to serve the notice on the parties. The inspector

reported that none of the parties is available on the given address. The assessing officer issued show cause notice to the assessee as to why the entire purchases be not disallowed. The assessee filed its reply dated 21.02.2014. In the reply, the assessee contended that they have made payment through cheques and the transactions are genuine. The reply of assessee was not accepted by Assessing Officer. The Assessing Officer concluded that assessee failed to prove the genuinity of transaction and identity of seller and other evidence like transport, stock register. Hence the AO disallowed a sum of Rs.22,57,872/- as detailed below:—

Sr. No.	Name of the party	Amount
1	Samay Sales	10,63,920/-
2	Maulik Steel Corporation	12,93,952/-
	Total	22,57,872/-

11. We have noted the before disallowing the entire purchases from the alleged hawala dealers, the assessing officer not rejected the books of account. No adverse comment was made by Assessing Officer about the consumption of the material purchased by the assessee. The assessee is Government contractor and executed the civil contract. No inquiry about the scope of work, if executed by the assessee. The Gross Profit and the Net Profit shown by the assessee in previous and subsequent year was not examined by the Assessing Officer. The Assessing Officer mainly relied on the report of sales tax department, wherein the said supplier

allegedly made statement about the accommodation entry provided by them. The copy of the statement and the report of the investigation conducted by sales tax department was not provided to the assessee. The assessee raised specific grounds of appeal before Id. CIT(A) that no opportunity of cross-examination of source of adverse information (evidence) was provided to the assessee. Though, the submissions of the assessee was duly recorded by Id CIT(A) in para-4.3 of his order. The Id CIT(A) failed to adjudicate the specific ground of appeal. The assessee again has raised similar ground of appeal before us.

12. We are of the considered opinion that under the 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 fulfill the gap of revenue leakage the disallowance of reasonable percentage of such purchases would meet the end of justice. The Hon'ble Bombay High Court in **CIT Vs Hariram Bhambhani in ITA No. 313 of 2013** decided on 04.2.2015 held that revenue is not entitled to brought the entire sales consideration to tax, but only the profit attributable on the total unrecorded sales consideration alone can be subject to income tax.

13. Therefore, considering the business activities of the assessee and the nature of material purchased from the hawala dealers, we are of the view that a reasonable disallowance of the purchases would meet the possibility of revenue leakage; therefore, the disallowance is restricted to 12.5% of the impugned/disputed purchases. In the result, ground no.2 of the appeal is partly allowed.
14. The Ground No.3 of the appeal relates to denial of opportunity of cross-examination of source of evidence. Considering the fact that we have partly allowed the ground no.2 of the appeal and granted relief to the assessee, therefore, discussion on this ground of appeal has become academic.
15. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 29/03/2019.

Sd/-
N.K. PRADHAN,
ACCOUNTANT MEMBER
Mumbai, Date: 29.03.2019
SK

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Copy of the Order forwarded to :

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

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai