

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“SMC” Bench, Mumbai**

**Before Shri Shamim Yahya, Accountant Member  
and Shri Ravish Sood, Judicial Member**

**ITA No.4124/Mum/2018  
(Assessment Year: 2011-12)**

Kishanlal Khetaramji Vishnoi  
403-A, 4<sup>th</sup> Floor,  
Kaushtubh Park, Hospital,  
Borivali (W),  
Mumbai – 400092

The Income Tax Officer  
19(2)(2),  
Room No. 214, 2<sup>nd</sup> Floor,  
Vs. Matru Mandir, Tardeo Road,  
Mumbai – 400007

PAN – ADGPV7053H

(Appellant)

(Respondent)

Appellant by: Shri D.B. Sanghvi, A.R  
Respondent by: Shri Chaitnya Anjaria, D.R  
Date of Hearing: 01.05.2019  
Date of Pronouncement: 10.05.2019

**ORDER**

**PER RAVISH SOOD, JM**

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-53, Mumbai, dated 04.04.2018, which in turn arises from the order passed by the A.O under Sec. 143(3) r.w.s 147 of the Income Tax Act, 1961 (for short ‘I-T Act’), dated 17.10.2016. The assessee assailing the order of the CIT(A) has raised before us the following grounds of appeal :

“The following ground or grounds of appeal are without prejudice to one another:-

1. On the facts and circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in confirming the initiation of

reopening of the assessment u/s.147 of the Act and assessment order passed u/s.143(3) r.w.s. 147 as legal and valid. The said reopening is illegal, without application of mind and mechanical and the assessment order passed is bad- in-law and against the principles of natural justice;

Without prejudice to above,

- 2.1 The learned Commissioner of Income Tax (Appeals) erred in arbitrarily confirming the disallowance of Rs.7,47,727/- being 12.5% of the purchases of Rs.59,81,814/- from suspicious hawala parties;
- 2.2 The learned Commissioner of Income Tax (Appeals) failed to appreciate that the learned Assessing Officer failed to convey/confront to the appellant, the materials received by the learned Assessing Officer from Sales Tax Authorities which are relied upon and without affording an opportunity to cross examine the alleged suspicious hawala parties before making disallowance;

Without prejudice to above,

The Gross Profit percentage estimated by the Learned CIT (Appeals) is higher than the rate of gross profit prevailing as a trader in the industry;

- 4.1 The learned Commissioner of Income Tax (Appeals) erred in confirming the excess interest levied u/s.234B of the Income-tax Act, 1961;
- 4.2 The learned Commissioner of Income tax (Appeals) failed to appreciate or consider that the interest u/s. 234B is not calculated in accordance with sub-section (1) and (3) of Sec.234B of the Income-tax Act, 1961.”

2. Briefly stated, the assessee who is a wholesaler of all kind of ferrous and non-ferrous metals had filed his return of income for A.Y. 2011-12 on 28.09.2011, declaring total income of Rs.5,43,236/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the I-T Act. Subsequently, on the basis of information received by the A.O from the DGIT (Inv.) Wing, Mumbai, that the name of the assessee had figured in the list of the beneficiaries who had procured bogus purchase bills from certain hawala parties, his case was reopened under Sec.147 of the I-T Act.

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee had claimed to have made purchases aggregating to Rs. 59,81,814/- from the following tainted parties:

Name of the hawala parties	Amount (in Rs.)
Liberty Trading Corporation	5,14,275/-
Remi Trading Company Pvt. Ltd.	35,92,539/-

Nirma Metal Industries	6,75,000/-
Aarco Enterprises	12,00,000/-
Total	59,81,814/-

The A.O in order to verify the genuineness and veracity the purchases claimed by the assessee to have been made from the aforementioned parties, issued notices under Sec.133(6) to them. However, the notices issued by the A.O u/s 133(6) were returned by the postal authorities, with the remarks “not found”. The A.O brought the said fact to the notice of the assessee and directed him to produce the aforementioned parties for necessary examination. However, the assessee despite the aforesaid specific direction of the A.O failed to produce the parties before him, as a result whereof the purchase transactions under consideration remained unverified. Apart there from, it was observed by the A.O that the assessee had also failed to place on record vital documents which would have substantiated the authenticity of the purchase transactions to the hilt viz. delivery challans, transport receipts, octroi receipts, receipt of weighbridge, goods inward register maintained at the godown/ warehouse/storage house etc. Insofar the claim of the assessee that the payments to the aforementioned parties were made by him through account payee cheques was concerned, it was observed by the A.O that the said fact would not conclusively prove the genuineness of the purchase transactions under consideration. Once again, the A.O afforded an opportunity to the assessee, and vide his order sheet noting, dated 28.07.2016, directed him to produce the aforementioned parties for cross-verification. However, the assessee again failed to do the needful. In the backdrop of the aforesaid facts, the A.O concluded that the assessee had purchased the goods under consideration from the open/grey market, and not from the aforementioned parties. On the basis of his aforesaid observations, the A.O holding a conviction that the assessee would

had benefitted by procuring the goods from the open/grey market, thus, made an addition of Rs.7,47,727/- i.e @ 12.5% of the aggregate value of the purchases of Rs. 59,81,814/- that were claimed by the assessee to have been made from the aforementioned parties.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). However, the CIT(A) not being persuaded to accept the contentions advanced by the assessee dismissed the appeal.

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee, at the very outset of the hearing of the appeal assailed the addition/disallowance of the purchases which were claimed by the assessee to have been made from the aforementioned parties. It was submitted by the ld. A.R, that the assessee had on the basis of sufficient material substantiated the genuineness and veracity of the purchase transactions under consideration. In the backdrop of his foresaid submissions, it was submitted by the ld. A.R that no addition/disallowance of the purchases made by the assessee from the aforementioned parties was liable to be made. Alternatively, it was submitted by the ld. A.R that the lower authorities had erred in making/sustaining the addition as regards the profit element involved in the purchases made by the assessee from the open/grey market @ 12.5% of aggregate value of such purchases. It was averred by the ld. A.R, that the **Hon'ble High Court of Bombay** in its recent judgement in the case of **Pr. Commissioner of Income Tax-12 Vs. M/s Mohhamad Haji & Adam Company (ITA No. 1004 of 2016, dated 11.02.2019)**, had held, that the addition as regards the unproved/bogus purchases was to be made by bringing the G.P rate of such bogus purchases, at the same rate of the other purchases. In sum and substance, it was the

contention of the ld. A.R that the addition in the case of the assessee was liable to be made by bringing the G.P. rate of bogus purchase in conformity with the G.P. rate of the genuine purchase transactions. In the backdrop of the his aforesaid contention, it was submitted by the ld. A.R that the G.P rate of the assessee for the year under consideration was 8.09%, while for the G.P. rate of bogus purchases worked out at 7.49%. In order to fortify his aforesaid contention, the ld. A.R took us through the details of purchase transactions (Page 36) of the assesses 'Paper book' (for short 'APB'), and the details of the corresponding sale transactions (Page 37 to 39 of 'APB'). It was submitted by the ld. A.R that in the backdrop of the aforesaid facts, the additions in its case was liable to be made by enhancing the G.P rate of 7.49% on the bogus purchases to the average G.P. rate of 8.09%. Apart there from, it was submitted by the ld. A.R that the A.O had erred in computing the interest liability of the assessee under Sec. 234(B) while framing the assessment under Sec.143(3) r.w.s 147 of the I-T Act. It was averred by the ld. A.R, that as its return of income was initially processed under Sec.143(1) on 28.09.2011, therefore, as per the mandate of law the interest liability under Sec.234B was supposed to be worked out from the date on which determination of tax was made under Sec.143(1), and not from the first day of April, 2011, as was wrongly done by the A.O while framing the assessment. In support of his aforesaid contention, the ld. A.R relied on the judgment of the **Hon'ble High Court of Karnataka** in the case of **Vijay Kumar Saboo 7 Anr. Vs. ACIT (2012) 340 ITR 382, (Kar)** and the judgment of the **Hon'ble High Court Kerala** in the case **CIT Vs. B. Lakshmi Kanthan (2011) 198 taxman.com 485 (Kar)**.

6. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the ld. D.R that the CIT(A) had rightly upheld the addition @ 12.5% of the

aggregate value of the bogus purchases made by the assessee from the aforementioned parties.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record and the judicial pronouncements relied upon by them. Admittedly, the assessee had failed to substantiate the genuineness and veracity of the purchases aggregating to Rs.59,81,814/-, that were claimed by him to have been made from the aforementioned tainted parties. In fact, the assessee had failed to place on record any clinching supporting documentary evidence viz. delivery challans, transport receipts, octroi receipts, receipts of weighbridge for weighing of goods, goods inward register maintained at godown/warehouse/storage house etc, which would have substantiated the authenticity of the purchase transactions under consideration. Apart there from, the notices issued under Sec.133(6) to the aforementioned parties were also returned by the postal authorities with the remarks "not found". Insofar, the claim of the assessee that the purchases from the aforementioned parties were accounted by him in his 'books of accounts' and payment of the purchase consideration was made to them by payees account cheques is concerned, we concur with the view taken by the A.O that the said fact on a standalone basis would not conclusively substantiate the authenticity of the purchase transactions under consideration. We thus in the totality of the facts of the case, are persuaded to subscribe to the view taken by the lower authorities that the assessee had failed to prove the authenticity of the purchase transactions under consideration.

8. As regards the quantification of the profit element embedded in making of such bogus/unsubstantiated purchases by the assessee, we

find that as held by the **Hon'ble High Court of Bombay** in its recent judgment in the case of **Pr. Commissioner of Income Tax -17 Vs. Mohhamad Haji Adam & Company (ITA No.1004 of 2016, dated 11.02.2019)**, the addition in respect of bogus purchases is to be limited to the extent of bringing the G.P rate of such purchases at the same rate of other genuine purchases. The Hon'ble High Court while concluding as hereinabove, had observed as under:

“8. In the present case, as noted above, the assessee was a trader of fabrics. The AO found three entities who were indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied. The finding of the CIT(A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by the assessee and the sale declared. That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trade. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases. The decision of the Gujarat High Court in the case of N.K. Industries Ltd. (supra) cannot be applied without reference to the facts. In fact in paragraph 8 of the same Judgment the Court held and observed as under-

“So far as the question regarding addition of Rs.3,70,78,125/- as gross profit on sales of Rs.37.08 Crores made by the Assessing Officer despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 is concerned, we are of the view that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6 % gross profit is taken into account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price. We have to reduce the selling price accordingly as a result of which profit comes to 5.66% Therefore, considering 5.66 % of Rs.3,70,78,125/- which comes to Rs.20,98,621.88 we think it fit to direct the revenue to add Rs.20,98,621.88 as gross profit and make necessary deductions accordingly. Accordingly, the said question is answered partially in favour of the assessee and partially in favour of the revenue.”

9. In these circumstances, no question of law, therefore, arises. All Income Tax Appeals are dismissed, accordingly. No order at costs.”

As such, the Hon'ble jurisdictional High Court had observed, that the addition in respect of purchases which were found to be bogus in the case of the assessee before them, who was a trader, was to be worked

out by bringing the G.P rate of such bogus purchases at the same rate of other genuine purchases. We thus respectfully following the aforesaid judgment of the Hon'ble High Court, set aside the matter to the file of the A.O, with a direction to restrict the addition as regards the bogus/unproved purchases aggregating to Rs.59,81,814/-, by bringing the G.P rate of such bogus purchases at the same rate of the other genuine purchases. Needless to say, the assessee in the course of the set aside proceedings shall furnish the requisite details before the A.O, who shall after making necessary verifications restrict the addition in terms of our aforesaid observations. The **Grounds of appeal nos. 1 to 3** are allowed for statistical purposes.

9. We shall now advert to the claim of the ld. A.R, that the A.O while framing the assessment u/s 143(3) r.w.s 147, had erred in charging excess interest u/s 234B by computing the same from the 1<sup>st</sup> day of April of the assessment year viz. 01.04.2011, till the date of framing of the aforesaid assessment. It is the claim of the ld. A.R, that as per sub-section (3) of Sec. 234B, where as a result of an order of reassessment the amount on which interest was payable under sub-section (1) of Sec. 234B is increased, the assessee shall be liable to pay interest for every month or part of a month comprised in the period commencing on the day following the date of determination of its total income under sub-section (1) of Sec. 143 and ending on the date of the reassessment u/s 143(3) r.w.s 147, on the amount by which the tax on the total income determined on the basis of such reassessment exceeds the tax on total income determined under sub-section (1) of Sec. 143. In support of his contention support was drawn by the ld. A.R from the judgment of the **Hon'ble High Court of Karnatka in the case of Vijay Kumar Saboo & Anr. Vs. ACIT (2012) 340 ITR 382 (Kar)** and the judgment of the **Hon'ble High Court of Kerala in CIT Vs. B. Lakshmikanthan (2011) 198 taxman.com 485**

**(Ker).** As we have restored the substantive issue for readjudication in terms of our aforesaid observations to the file of the A.O, therefore, we also restore the matter as regards quantification of the interest liability of the assessee u/s 234B to the file of the A.O. The A.O shall in the course of the set aside proceedings quantify the liability of the assessee u/s 234B, as per the law as was applicable during the year under consideration, keeping in view the aforesaid judicial pronouncements relied upon by the assessee viz. (i). Vijay Kumar Saboo & Anr. Vs. ACIT (2012) 340 ITR 382 (Kar); and CIT Vs. B. Lakshmikanthan (2011) 198 taxman.com 485 (Ker). The **Ground of appeal no. 4** is allowed for statistical purposes.

10. The appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 10.05.2019

Sd/-  
(Shamim Yahya)  
ACCOUNTANT MEMBER  
मुंबई Mumbai; दिनांक 10.05.2019  
Ps. Rohit

Sd/-  
(Ravish Sood)  
JUDICIAL MEMBER

**आदेश की 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.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,  
उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai

