

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

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

**ITA No.44/Mum/2018
Assessment Year-2009-10**

Kavita Hule, D-304, Sunshruti, Sakivihar Road, Andheri (East), Mumbai-400072	बनाम/ Vs.	ITO-26(2)(1), Aayakar Bhavan, M. K. Road, Mumbai-400020
PAN No.ABPPH4244K		
(निर्धारिती /Assessee)		(राजस्व /Revenue)

निर्धारिती की ओर से / Assessee by	NONE
राजस्व की ओर से / Revenue by	Shri Manoj Kumar Singh

सुनवाई की तारीख / Date of Hearing :	24/04/2019
□ देश की तारीख / Date of Order:	25/04/2019

□ देश / O R D E R

Per Shamim Yahya, Accountant Member

This is an appeal by the assessee wherein the assessee is aggrieved that the learned CIT(A)-38, Mumbai, dated 23/06/2017, has erred in sustaining 12.5 percent disallowance on account of bogus purchases.

2. The assessing officer in this case has made 25 percent addition on account of bogus purchase.

3. The brief facts in this regard are as under:-

The appellant is an individual and is proprietor of M/s. RMC Laboratories, engaged in the business of trading in pharmaceuticals, bulk drugs and allied products. The return of Income for AN 2009-10 was filed by the appellant on 24/09/2009 declaring the total income of Rs.5,05,430/-.

Subsequently, the information has been received from DCIT(Inv) wing, Mumbai through CIT-21, Mumbai, forwarding there with a list of concerns which have been investigated by the Sales Tax Authorities and have held to be as Hawala billers. The names of the persons who have obtained the bogus bills from such Hawala billers alongwith the transaction details of each person has also been received by the AO. The Sales Tax Authority displayed the names of these hawala dealers on the website of Sales Tax Department of Maharashtra Government, who has only issued bills without any delivery of goods.

Further on perusal of the assessment records vis-a-vis the information, it was observed by the AO that during F.Y 2008-09 relevant to AN 2009-10, the appellant had obtained bogus bills/ accommodation entries from 8 hawala dealers to the extent of Rs.2,80,01,614/- in respect of purchases which were not genuine.

In view of the above, the AO observed that there is inflation of expenditure resulting in escapement of income to the extent of Rs.2,80,01,614/- for AY 2009-10 in the case of the appellant and therefore after verifying the aforesaid information, a case for the Assessment Year under consideration was reopened by the AO after recording the reasons for reopening and notices u/s. 148 of the 1.1' Act was issued to the appellant.

In response to the notice under section 148 of the IT act, the appellant has requested to treat the original return of income filed to be filed in response to notice u/s 148 of the I.T. Act & requested to provide the reasons for reopening the case which were provided by the AO.

However, in order to verify the genuineness of the purchases, the AO issued notice u/s. 133(6) of the I.T Act, to these parties on the addresses provided by the appellant. The said notices were returned by the postal authority with the remarks Not known/Left".

These facts were brought to the notice of the appellant by the AO vide show cause notice dated 02.11.2015. The appellant was asked to produce the parties alongwith books of accounts. Thereafter the AO accorded opportunity to the appellant to substantiate his claim of purchases made from the aforesaid parties by producing the said parties along with the details or documents to prove the genuineness of the purchases made from these parties. He was also given a show cause notice stating that, if he is not able to produce the alleged parties with their books of accounts, the amount involved will be treated as bogus purchase and will be added to the total income of the appellant for the year under consideration. In response to the above, the appellant produced the copy of t.-Lx invoice, ledger a/c of hawala purchases parties, sales invoice, Bank statement of payments made, copies of item-wise stock register of purchases 8i, corresponding sales for the year under consideration. The AO contended that the assessee submitted invoices from the alleged bogus parties but failed to produce delivery challans &, that no supporting document for

acknowledgement of receipt of goods was produced by the assessee to confirm that the goods purchased were actually delivered to him. Further, the AO observed that the appellant had failed to produce any of the suppliers or any further material evidence despite granting enough opportunities to prove contrary to the supplier's disposition before the Sales Tax Authorities. It is a settled law that onus lies on the appellant to prove the genuineness of any expenditure which is claimed as deduction in computing its taxable income. Therefore, The AO held that the onus in the instant case, squarely lies on the appellant to prove the genuineness of the purchase of materials made from the aforesaid parties which has been alleged as bogus by the Sales tax Authorities and facts stated above.

In view of the above facts and circumstances of the case, the AC) observed that these purchases are bogus as the assessee has merely indulged in inflating expenses by introducing bogus purchases. The AO contended that the aforesaid purchases themselves were not bogus but were made from open market while the relevant bills were obtained from bogus billing parties to whom cheques were issued by the assessee. Therefore, the AO estimated profit @25 % on the above alleged transactions amounting to Rs.2,80,01,614/-, over and above that declared by the appellant which was worked out at Rs.70,00,404/ and was added by the AO to the total income of the appellant.

4. Upon assessee's appeal, the Ld. CIT(A) restricted the disallowance @ 12.5%
5. Against above order assessee is in appeal before the ITAT.

6. We have heard the Ld. Departmental Representative and perused the records. None appeared on behalf of assessee despite notice

7. Up on careful consideration, we find that assessee has provided the documentary evidence for the purchase. Adverse inferences have been drawn due to the inability of the assessee to produce the suppliers. We find that in this case the sales have not been doubted. It is settled law that when sales are not doubted, hundred percent disallowance for bogus purchase cannot be done. The rationale being no sales is possible without actual purchases. This proposition is supported from honourable jurisdictional High Court decision in the case of Nikunj eximp enterprises (in writ petition no 2860, order dated 18.6.2014). In this case the honourable High Court has upheld hundred percent allowances for the purchases said to be bogus when sales are not doubted. However in that case all the supplies were to government agency.

8. In this regard we also note the decision of honourable Gujarat High Court in the case of Pr CIT vs T R Kapadia in Tax Appeal no 691 of 2017. In this case, the

honourable High Court has confirmed the deletion of disallowance on account of alleged bogus purchase as necessary documentary evidence for the purchase were on record. The special leave petition against this order has been dismissed by the honourable Supreme Court in its decision dated 4/ 5/ 2018 S L P CIVIL Diary no 12670/2018

9. In the present case the facts of the case indicate that assessee has made purchase from the grey market. Making purchases through the grey market gives the assessee savings on account of non-payment of tax and others at the expense of the exchequer. In such situation in our opinion on the facts and circumstances of the case the 12.5 % disallowance out of the bogus purchases meets the end of justice. However in this regard we also note that only the profits earned by the assessee on these bogus purchase transaction is to be taxed, hence, the gross profit already shown by the assessee and offered to tax should be reduced from the standard 12.5% being directed to be disallowed on account of bogus purchase. Accordingly, we modify the order of learned CIT-A and direct that the disallowance in this case be restricted to 12.5 % of the bogus

purchases as reduced by the gross profit rate already declared by the assessee on these transactions.

10. In the result this appeal filed by the assessee stands partly allowed.

Order pronounced in the Open Court on 25/04/2019.

Sd/-
(Ravish Sood)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 25/04/2019

Shekhar, P.S./नि.स.

Sd/-
(Shamim Yahya)

लेखा सदस्य / ACCOUNTANT MEMBER

□ देश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

□ देशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

□ यकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai