

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

BEFORE SHRI SHAMIM YAHYA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 1312/MUM/2018
Assessment Year: 2008-09**

The Dy. CIT, CC-8(4), 6 th Floor, Room No. 658, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s Aarti Jewellers Pvt. Ltd., 3 rd Floor, Hormuz Mansion, 32, Bhulabhai Desai Road, Near Breach Candy, Mumbai - 400026 PAN: AAACA4468M
(Appellant)		(Respondent)

Revenue by : Shri Anadi Varma (CIT DR)
Assessee by : Shri Gaurav Kabra (AR)

Date of Hearing: 05/03/2019
Date of Pronouncement: 30/04/2019

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue against the order dated 28.12.2017 passed by the Commissioner of Income Tax (Appeals)-50 (for short 'the CIT(A), Mumbai, for the assessment year 2008-09, whereby the Ld. CIT(A) has partly allowed the appeal filed by the assessee against the assessment order passed u/s 153A r.w.s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

2. In the present case, the assessee filed its return of income for the assessment year under consideration declaring the total income of Rs. 5,41,93,040/-, which was processed u/s 143(1) of the Act. Thereafter, a search and seizure action u/s 132(1) of the Act was carried out in the case of Rose Group of companies. Consequently, notice u/s 153A of the Act was issued to the assessee company. In response thereof the assessee filed return of income. Accordingly AO issued notice u/s 143(2) and 142(1) of the Act. In response to

the said notices, the Authorized Representative (AR) appeared before the AO and submitted the details called for along with clarifications with regard to the return of income. It was noticed that the assessee had obtained bogus entries for showing purchases amounting to Rs.29,28,24,729/-. Accordingly the AO asked the assessee to show cause as to why the aforesaid amount should not be added to the income of the assessee. The AO after hearing the AR rejected the purchases holding the same as bogus transactions. The assessee challenge the action of AO before the Ld. CIT(A). The Ld. CIT(A) following the decision of ITAT rendered in the assessee's own case ITA No. 5372/MUM/2017 restricted the addition to 5% of the total amount of bogus purchases shown by the assessee. Against the said findings of the Ld. CIT(A) the assessee is in appeal before the Tribunal.

3. The revenue has preferred the present appeal before the Tribunal on the following grounds:-

1. *“Whether on the facts and circumstances of the case and in law, the CIT (A) was justified to restrict disallowance on account of bogus purchases to 5% of the total amount of bogus purchases amounting Rs. 29,28,24,729/- by relying of the decision of Hon. ITAT in the assessee own case for AY 2007-08 without appreciating the fact that the decision of the ITAT in deleting the quantum addition has not been accepted by the department and appeal u/s 260A is recommended by A.O. for adjudication before the Hon'ble Bombay High Court.*
2. *Whether on the facts and circumstances of the case and in law, the CIT (A) was justified in deleting the addition of Rs. 14,6,123/- u/s 69C made by the Assessing Officer on account of commission paid towards the accommodation entries taken towards bogus purchases by applying the rate of 0.5% on the total purchases of Rs. 29,28,24,729/-.”*

4. Before us, the Ld. Departmental Representative (DR) submitted that since the assessee has failed to establish the genuineness of transaction of

purchases claimed, the AO had rightly made addition of total amount of bogus purchases. Therefore, the Ld. CIT(A) has wrongly restricted the addition to 5% of the total amount of bogus purchases. The Ld. DR further submitted that since the findings of the Ld. CIT(A) are contrary to the law.

5. On the other hand, the Ld. counsel for the assessee submitted that the ITAT has dealt with the identical issue in assessee's own case ITA No. 5372/MUM/2017 for the A.Y. 2007-08 and the Tribunal has restricted the addition to 5% of the total amount of bogus purchases shown in the books of account of the assessee. Since, the findings of the Ld. CIT(A) are based on the decision of the Tribunal aforesaid, there is no infirmity in the order of the Ld. CIT(A).

6. We have heard the rival submissions and also perused the material on record. The grievance of the Revenue is that the Ld. CIT(A) has wrongly restricted the addition to 5% as against the addition of 100 % made by the AO. As pointed out by the Ld. counsel for the assessee the Co-ordinate Bench has dealt with the identical issue in the assessee's own case for the A.Y. 2007-08 (supra) and the Tribunal restricted the addition to 5% of the total amount of bogus purchases claimed by the assessee. The findings of the Co-ordinate Bench read as under:

"9. We have heard the rival contentions and gone through the facts and circumstances of the case. We find from the facts of the case that the assessee had obtained bogus bills from various hawala parties but payments are made by account payee cheques and recorded in the books of account. It means that the payments are accounted for and not unaccounted. The assessee to avail the benefit of VAT and to obtain other benefits like lower market price of goods purchased material from grey market and obtained these bogus bills. This fact has not denied by either Revenue or Assessee. In such facts, the provisions of section 40(A)(3) of the Act cannot be invoked because the payments are accounted for and material is purchased which is accounted

for and sales are not doubted by the Revenue. The only alternative left with is to assess the profit rate on the bogus bill obtained by assessee and purchases are made from grey market. In such circumstances, we estimate the profit rate at 5% of the bogus bills of purchase, as estimated in similar circumstances by co-ordinate Bench in the case of ITO vs. Priti Gold (India) Private Ltd. in ITA No. 63/Mum/2017 for AY 2009-10 vide order dated 23/08/2007. In the similar circumstances, in the group cases, the settlement commission has accepted the application of profit rate on the bogus purchases as declared by assessee in SA No. MH/MUCC4/018/2015-6/IT dated 24-05-2017. The settlement commission has accepted voluntary offer of additional income of ₹ 75 lakhs by assessee Aarti Jewellers Pvt. Ltd. in equal proportion of ₹ 12.50 lakhs each for A.Yrs. 2009-10 to 2014-15 as there was bogus purchase bills amounting to ₹ 17.58 crores in AY 2009-10, 7.95 crore in AY 2010-11, 16.82 crore in AY 2011-12, 16.49 crore in AY 2012-13 and ₹ 3.94 crore in AY 2013-14. As all the authorities are consistently accepting these bogus purchases as bogus bills only and assessee has made purchases from grey market which are sold out, the only alternative left is for application of profit rate. Accordingly, we direct the AO to apply only profit rate of 5% of the bogus purchases of ₹ 7,10,73,950/- and assessed the income accordingly. We allow this appeal of assessee partly and appeal of Revenue is dismissed.”

7. Since, the Ld. CIT(A) has passed the impugned order by following the decision of the Co-ordinate Bench rendered in the assessee's own case for the A.Y 2007-08, we do not find any infirmity in the order of the Ld. CIT(A) to interfere with. We accordingly uphold the findings of the Ld. CIT(A) and dismissed this ground of appeal of the Revenue.

8. Vide second ground of appeal, the Revenue has challenged the action of the Ld. CIT(A) of deleting the addition made by the AO @ 0.5% on the total amount of bogus purchases towards commission paid by the assessee. The Ld. CIT(A) has deleted the addition holding as under:

“16.0 I have gone through the facts of the case, the assessment order and submission made by the appellant.

16.1 On this issue, the Appellant Company has submitted the addition on this account has been made by the AO without any incriminating evidences and purely on surmises and conjectures. The Jurisdictional Bombay HC has held in the case of Commissioner of Income Tax Vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. Vs.[2015] 374 ITR 645 (Bombay) that no addition can be made u/s. 153A otherwise than on the basis of any incriminating evidence found during the course of search.

16.2. Further, from the facts placed on record it is seen that no addition has been made by the AO on this account in the immediately preceding year i.e. A.Y. 2007-08. The matter of bogus purchases has travelled finally to the Hon’ble ITAT for the A.Y. 2007-08. The Hon’ble ITAT, Mumbai has vide order dated 16.11.2017 clearly held in Para 9 of the said order that only 5% of the bogus purchases needs to be taxed, as unaccounted income. Respectfully, following the order of the Hon’ble ITAT, Mumbai in ITA No. 3752/Mum/2017 (Assessee’s Appeal) & ITA No. 4651/Mum/2017 (Revenue’s Appeal) for the A.Y.2007-08 in the appellant’s own case on the identical issue, wherein it has been held that only 5% of the bogus purchases needs to be taxed, the further addition made by the A.O in the current year on account of commission is deleted.

9. Since, we have upheld the findings of the Ld. CIT(A) and confirmed the addition of 5% of the total amount of bogus purchases claimed by the assessee, we do not find any justification in making further disallowance of 0.5% on the amount of bogus purchases towards commission expenses. Hence, in our considered view the order of the Ld. CIT(A) does not warrant any interference. We therefore uphold the findings of the Ld. CIT(A) and dismissed this ground of appeal of the Revenue and direct the AO to delete the addition.

In the result, appeal filed by the revenue for assessment year 2008-2009 is dismissed.

Order pronounced in the open court on 30th.April, 2019.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Sd/-S
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 30/04/2019

Subhankar Samanta, PS

आदेश 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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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