

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

**Before Shri G.Manjunatha, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA No.2085/Mum/2018
(Assessment Year: 2011-12)**

The ACIT-19(2)
Room No. 207,
Matru Mandir,
Mumbai-400 007

M/s Kwaliti Tubes,
Room No. 9,105 Ratna Sadan,
2nd Pathan Street,
Vs. 5th Kumbharwada
Mumbai 400004

PAN – AADFK5452D

(Appellant)

(Respondent)

Appellant by: Shri Manoj Kumar Singh, D.R

Respondent by: Shri Tanmay Phadke, A.R

Date of Hearing: 12.06.2019

Date of Pronouncement: 14.06.2019

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-30, Mumbai, dated 15.01.2018, which in turn arises from the order passed by the A.O under Sec. 143(3) of the Income Tax Act,1961 (for short 'I.T Act') dated 14.03.2014. The revenue assailing the order of the CIT(A) has raised before us the following grounds of appeal:

- “1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in not confirming the addition of Rs. 3,48,83,485/- made by the Assessing Officer on account of peak of credits claimed by the assessee in view of the decision of the Hon'ble Supreme Court dated 10.01.2017 in the case of N. K. Proteins Ltd. wherein the Hon'ble Supreme Court confirmed the entire addition on account of bogus purchase.

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in confirming the addition @ 6.5% of total purchases of Rs.6,31,22,978/- made by the assessee from nine parties when during the investigation made by sale tax department of Maharashtra Government, it was conclusively proved beyond doubt that these parties are only into providing accommodation entries and do not do any real business.
3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in not appreciating the fact that during the investigation made by sale tax department of Maharashtra Government, directors/Prop./Partners of such parties have accepted on oath that they are providing only accommodation entries and not doing any real business, the treatment of such purchases as being genuine does not hold ground.
4. The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the AO be restored.
5. The appellant craves leave to amend or alter or add a new ground which may be necessary.”

2. Briefly stated, the assessee firm which is engaged in the business of trading and import of ferrous and non-ferrous metals had filed its return of income for A.Y. 2011-12 on 29.09.2011, declaring total income at Rs.41,04,600/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the I.T Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2). On the basis of information gathered by the A.O from the website of the Sales Tax Department, Government of Maharashtra, it was observed by him that the assessee had claimed to have made purchases from certain parties, which as per the aforesaid information were stated to be involved in the business of providing accommodation entries. In order to verify the veracity of the purchases claimed by the assessee to have been made from the aforementioned parties the A.O issued notices under Sec. 133(6) to them, which however, were returned undelivered by the postal authorities, as under:

Name	Amount of Sales to assessee in FY 2010-11(Rs)	Remarks
BAJARANGI STEEL P. LTD.	366309	Returned undelivered by the postal authorities
JAI STEEL & ALLOYS	10977007	Returned undelivered by the postal authorities

KRISHNA CORPORATION	8690416	Returned undelivered by the postal authorities
POONAM STEEL	799675	Returned undelivered by the postal authorities
REALTY SALES (INDIA) PVT. LTD.	103940	Returned undelivered by the postal authorities
RUPANI & COMPANY	30029312	Returned undelivered by the postal authorities.
SATYANARAYAN STEEL & ENGG. CO. PVT. LTD.	121815	Returned undelivered by the postal authorities
STAINLESS IMPEX PVT. LTD.	408859	Returned undelivered by the postal authorities
VATIKA METALS PVT. LTD.	4428605	Returned undelivered by the postal authorities

On the basis of the aforesaid factual position, the A.O called upon the assessee to produce the aforesaid parties for verification and, also to prove the genuineness of the purchase transactions on the basis of supporting documentary evidence. However, as the assessee failed to produce the aforesaid parties from whom purchases were claimed to have been made for necessary verification before the A.O, and also could not substantiate the genuineness of the purchase transactions by placing on record supporting documentary evidence, therefore, the A.O concluded that no genuine purchases were made by the assessee from the said parties. In the backdrop of the aforesaid facts, the A.O worked out the peak credit pertaining to the purchases claimed by the assessee to have been made from the aforementioned 9 parties at Rs. 3,48,83,485/- and added the same to the total income of the assessee.

3. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the facts of the case observed, that as the assessee had failed to discharge the onus that was cast upon it to prove the genuineness of the purchase transactions, therefore, the A.O had rightly concluded that the assessee had not made any genuine purchases from the said parties. However, the CIT(A) was of the view that the addition in the hands of the assessee was liable to be restricted to the extent of the profit element embedded in the purchases which were claimed by the assessee to have been

made from the aforementioned parties. On the basis of his aforesaid observations, the CIT(A) relying on the judgment of the Hon'ble High Court of Gujarat in the case of CIT Vs. Simit P. Sheth (2013) 356 ITR 451 (Guj) concluded, that the addition in the hands of the assessee was liable to be restricted to the extent of 6.5% of the aggregate value of the bogus purchases of Rs.6,31,22,978/- that were claimed by the assessee to have been made from the said parties.

4. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Departmental Representative (for short 'D.R') took us through the observations of the A.O in context of the issue under consideration. It was submitted by the ld. D.R, that as the assessee had failed to substantiate the genuineness and veracity of the purchase transactions under consideration, therefore, the A.O had in all fairness restricted the addition to the extent of peak amount of credit of Rs. 3,48,83,485/- and, added the same under Sec. 69C of the I.T Act. Accordingly, it was submitted by the ld. D.R that the order passed by the A.O may be restored and that of the CIT(A) be vacated.

5. Per contra, the ld. Authorized Representative (for short 'A.R') for the assessee relied on the order passed by the CIT(A). It was submitted by the ld. A.R, that the CIT(A) after considering the VAT rate of 4% applicable in the case of the assessee had in all fairness restricted the addition to the extent of 6.5% of the aggregate value of the purchases, which were claimed by the assessee to have been made from the aforementioned parties.

6. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. Admittedly, as the assessee had failed to discharge the onus that was cast upon it as regards proving the

authenticity of the purchases claimed to have been made from the aforementioned 9 parties, therefore, the A.O in the totality of the facts of the case, had rightly concluded, that no genuine purchases were made by the assessee from the aforementioned parties. At the same time, we are persuaded to subscribe to the observation of the CIT(A), that since the purchases made by the assessee were not bogus, but were made from parties other than those mentioned in the books of accounts, therefore, only the profit element embedded in such purchases could be added to the assessee's income. Insofar the quantification of such profit element is concerned, we find that the **Hon'ble High Court of Bombay** in its recent judgement in the case of **Pr. Commissioner of Income Tax-17 Vs. M/s Mohhomad Haji Adam & Company (ITA No. 1004 of 2016, dated 11.02.2019)**, while upholding the order of the Tribunal, had observed, that the addition in the hands of the assessee as regards the bogus/unproved purchases was to be made 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.

7. On the basis of our aforesaid observations, we are in agreement with the view taken by the CIT(A), that the addition as regards the purchases claimed by the assessee to have been made from the aforementioned 9 parties was liable to be restricted to the extent of the profit element embedded in such purchase transactions. We thus, respectfully following the judgement of the Hon’ble jurisdictional High Court in the case of Pr. Commissioner of Income Tax-17 Vs. M/s Mohhomad Haji Adam & Company (ITA No. 1004 of 2016, dated 11.02.2019), direct the A.O to restrict the addition as regards the bogus/unproved purchases aggregating to Rs.6,31,22,978/-, by bringing the G.P rate on the amount of such bogus purchases, at the same rate of the other genuine purchases. In this regard, it would be relevant to point out that the ld. A.R on the basis of a working furnished before us, has claimed, that the overall G.P rate for the year under consideration was 7.66%. Further, as per the said working, it is the claim of the ld. A.R that the G.P rate of genuine purchase

transactions (after excluding the bogus purchase transactions) works out at 8.19%. Also, it is claimed by him that the G.P rate on the alleged bogus purchases works out at 5.14%. Accordingly, by drawing support from the aforesaid facts and figures, it is claimed by the Id. A.R, that pursuant to the order of the Hon'ble High Court of Bombay in the case of PCIT Vs. Mohommad Haji Adam & Co. (ITA No. 1004 of 2016, dated 11.02.2019), the addition in the case of the assessee would be liable to be restricted to the extent of 3.05% i.e [8.19% (G.P rate on genuine purchases) (-) 5.14% (G.P rate on the alleged bogus purchases)] of the aggregate value of the alleged bogus purchases. It is submitted by the Id. A.R, that now when the CIT(A) has sustained the addition to the extent of 6.5% of the aggregate value of the alleged bogus purchases, which is substantially more than the required addition of 3.05% of the aggregate value of such bogus purchases, therefore, no infirmity emerges from his order.

8. We have given a thoughtful consideration to the aforesaid issue under consideration. As the aforesaid facts and figures furnished by the assessee before us requires verification and, cannot be summarily accepted on the very face of it, therefore, in all fairness, we restore the matter to the file of the A.O for making necessary verification as regards the veracity of the said claim of the assessee. In case, the aforesaid claim of the assessee is found to be in order, then the addition restricted by the CIT(A) to 6.5% of the aggregate value of such purchases shall not be disturbed. However, in case the G.P rate of the genuine purchases made by the assessee during the year under consideration is found to be in excess of 6.5%, then, a consequential addition to the extent of bringing the G.P rate of such alleged bogus purchases at the same rate of other genuine purchases shall be made by the A.O. Accordingly, the matter is restored to the file of the A.O for making the aforesaid verifications.

9. Accordingly, the appeal of the revenue is allowed for statistical purpose in terms of our aforesaid observations.

Order pronounced in the open court on 14.06.2019

Sd/-
(G.Manjunatha)
ACCOUNTANT MEMBER

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 14.06.2019
Ps. Rohit

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