

IN THE INCOME-TAX APPELLATE TRIBUNAL "C" BENCH MUMBAI
BEFORE SHRI G.S. PANNU, VICE PRESIDENT AND SHRI
PAWAN SINGH, JUDICIAL MEMBER

ITA No. 795/Mum/2018 (Assessment Year 2011-12)

Income Tax Officer, Ward-3(1), Room No.3, 6 th floor, B-Wing, Ashar I.T. Park, Road, No. 16Z, Wagale Estate, Thane (W)-400604.	Vs.	M/s Om Sai Traders, 31, Ashok Chambers, 2 nd floor, Devji Ratansey Marg, Broach Street, Mumbai-400009. PAN: AAAFO9152F
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Appellant

Respondent

C.O. No. 84/Mum/2019 (Assessment Year 2011-12)

M/s Om Sai Traders, 31, Ashok Chambers, 2 nd floor, Devji Ratansey Marg, Broach Street, Mumbai-400009. PAN: AAAFO9152F	Vs.	Income Tax Officer, Ward-3(1), Room No.3, 6 th floor, B-Wing, Ashar I.T. Park, Road, No. 16Z, Wagale Estate, Thane (W)-400604.
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Appellant

Respondent

Revenue by : Shri Ajay Kumar Keshari (AR)

Assessee by : Shri Shreyash Shah with
Sh. Kunal Shah (AR)

Date of Hearing : 01.05.2019

Date of Pronouncement : 31.05.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. The appeal by the Revenue and the cross objection by the assessee are directed against the order of ld. Commissioner of Income Tax (Appeals)-2, Mumbai dated 30.11.2017 for Assessment Year 2011-

12, which in turn arises from the assessment order passed by the Assessing Officer (AO) u/s 143(3) of the Income Tax Act 1961, (the 'Act') on 28.03.2014. The revenue has raised the following grounds of appeal:

2. On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) erred in not following the order of ITAT, Pune in ITA No. 1411-1415 dated 20.02.2015 in the case of M/s KoltePatil Developers Ltd. wherein 100% addition of bogus purchases was confirmed.
3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition without appreciating the law that once the purchases are unverifiable/non-entirety.
4. On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) erred in giving relief to the assessee to the extent of suppressed G.P. out of total bogus purchases even though –
 - i. The assessee could not produce primary evidences like Octroi receipts, Delivery Challan etc. evidence to prove the genuineness of the purchases before the AO and before CIT(A).
 - ii. The affidavits filed by the entry providers before Sales Tax Authorities cannot be ignored having evidentiary value.

2. The assessee in its cross-objection has raised the following grounds:

1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in sustaining addition made by the assessing officer('AO') alleged as non-genuine purchases from two parties i.e. M/s KotsonImpex Pvt. Ltd. and M/s. Rupani & Co. at Rs.16,23,330/-.
2. On the facts and in the circumstances of the case and in law, while sustaining addition made by the AO the learned CIT(A) erred in not appreciating the two remand reports from the AO as well as understated vital facts, being as under:

- a. On perusal and examining the details filed as additional evidence during the two remand proceedings, the AO came to a conclusion that the Said purchases were genuine in nature.
- b. no-response upon serving notice u/s 133(6) of the Income Tax Act, 1961 ipso facto is not a reason to make addition
- c. The appellant has submitted various documentary evidences in support of alleged bogus purchaser such as purchase invoices, excise invoices of original importer, delivery challans. PAN, entries in bank statement for account payee cheques, stock statements;
- d. all the goods purchased from these parties have been backed by corresponding sales which are accepted to be genuine;
- e. The purchase is treated as non-genuine merely relying on the information received from the Sales tax department.

3. The learned CIT(A) erred in law and in facts in alleging that respondent's purchases are non-genuine without bringing on record any independent and reliable evidences.

3. Brief facts of the case are that the assessee is a partnership firm carrying its business as a wholesale dealer and stockiest of Galvanized Iron Tubes, Pipes and other steel item. The assessee filed its return of income for the assessment year 2011-12 on 28.09.2011 declaring income of Rs. 9,19,260/-. The return was selected for scrutiny and the assessment was completed on 28.03.2014 under section 143(3) of the Act. The Assessing Officer after giving the opportunity of hearing to the assessee finalized the assessment by making disallowance of purchase of Rs. 2,22,90,667/- (2,88,676/- + 98,163/- + 1,54,508/- + 99,02,973/- + 1,17,63,085/-) on account of various discrepancies. On appeal before

the ld. CIT(A), the addition on account of alleged non-genuine purchase from two parties namely Kotson Impex Pvt. Ltd. and Rupani & Co. of Rs. 16,23,330/- was sustained, however, on remaining purchases the disallowance was sustained to the extent of suppressed Gross Profit out of total alleged bogus purchase. Aggrieved by the order of ld. CIT(A), the revenue has filed present appeal for raising the grounds of appeal as referred above. On service of notice of appeal, the assessee has filed its cross objection raising the grounds as narrated above.

4. We have heard the submission of ld. Authorised Representative (AR) of the assessee and ld. Departmental Representative (DR) for the revenue and perused the material available on record. The ld. DR for the revenue supported the order of Assessing Officer. The ld. DR further submits that the ld. CIT(A) erred in not confirming the 100% disallowance on the purchases which were not genuine and the assessee has failed to substantiate the purchases by documentary evidences. The ld. DR further submits that Assessing Officer made full-fledged enquiry during the assessment proceeding and the parties either not found at the given address or the notices sent through postal authorities was returned back.
5. On the other hand, the ld. AR of the assessee submits that the ld. CIT(A) gave relief after seeking two detailed remand report from the

Assessing Officer. The Assessing Officer has not rejected the books of account of assessee nor was the sales of assessee disputed. The Id. CIT(A) granted relief after considering the Gross Profit qua the alleged bogus purchases. The Id. AR submits that the fact in Kolte Patil Developers (supra) is entirely different and not applicable on the facts of the present case. The Id. AR for the assessee in support of his cross objection submits that they have raised the cross objection only in respect of ground no.3.

6. We have considered the submission of parties and have gone through the orders of authorities below. Ground No.1 relates to not following the decision of Pune Tribunal in ITA Nos. 1411-1415/PN/2013 dated 20.02.2015. The Id. DR for the revenue has not argued anything as to how the facts of Kolte Patil case are applicable on the facts of the present case. However, the perusal of the facts of said case reveals that during the course of search action, the statement of supplier was recorded under section 131 of the Act wherein they admitted that they have not made any actual sale/supply and have issued accommodation bills only. In consideration of bills they were provided 1% commission. There is no such fact involved in the present case. Therefore, the facts

of the said case are entirely different. Thus, we do not find any merit in the ground no.1 of the appeal and the same is dismissed.

7. Ground No.2 relates to deleting the addition of unverifiable purchases.

In our view, the revenue has raised a vague ground of appeal. However, perusal of assessment order reveals that the Assessing Officer issued notice under section 133(6) to 14 parties. In response the parties file their confirmation of ledger and in certain case no response was filed. On scrutiny of ledger account received from various parties the AO determined difference of Rs. 1.66 Crore in respect of the 14 parties. The assessing officer issued show cause notice for necessary reconciliation. After perusal of reconciliation the assessing officer noted that the assessee file reconciliation on 9 parties, however, failed to reconcile difference of 5 parties of Rs. 6,24,609/-. The AO made addition of Rs. 6,24,609/-.

8. The second group of purchases related to 17 parties. The AO issued notice under section 133(6) to all 17 parties, despite service of notice no confirmation was filed by the parties. During assessment the AO asked the assessee to furnish confirmation of ledger of the parties. The assessee could file confirmation of 8 parties. The details of those parties are recorded by AO on page 4&5 of his order. The total of purchases

from 8 parties were of Rs. 9,21,05,288/-, the assessing officer disallowed 10% of the purchases, that is Rs. 9,21,288/-.

9. The third group of purchases relates to 7 parties. The AO issued notice under section 133(6) to all 7 parties. The notices were return back in respect of five (5) parties as unserved. As notice were return back through postal authorities the AO issued show cause notice to the assessee to file proof of identity, confirmation and audited balance sheet and return of income of the parties. The AO noted that the assessee failed to produce the parties for verification. The AO further noted that out of these parties two parties namely Rupani & Co and Kotsons Impex Pvt Ltd were declared as bogus, thus the AO disallowed 100% of the purchases from these 5 parties of Rs. 1,17,63,085/-.

10. Aggrieved by the additions the assessee challenged all the additions before Id CIT(A) urged that no additions are sustainable the additions were made without considering the facts and the evidences. The assessee also filed detailed written submission and furnished confirmation of the accounts and the ledger of all the parties, bank statement copy of invoices, and payments details. The details written submissions of the assessee and the evidences furnished by assessee was admitted by Id CIT(A) and forwarded to the AO for his remand

report on 29.06.2015. As per direction of the Id CIT(A), the AO made verification and collected evidences and furnished his remand report on 01.08.2016. On perusal of the remand report dated 01.08.2016, the Id CIT(A) noted that AO has not carried out proper verification, the AO was again asked to furnish remand report after mare enquiries. The AO furnished second remand report on 10.10.2017. The nutshell result of the both the remand reports furnished by AO's is as under;

<i>Issue</i>	<i>Sub Issue</i>	<i>Report</i>	<i>Amount Involved</i>
Addition of Rs.6,24,609/- (purchases from 4 parties was disallowed)	1)Motital Chand Sanghavi	In remand report, predecessor verified & reported the purchases to be genuine	Rs. 2,88,676
	2)Neo Impex Stainless Pvt. Ltd.	In remand report, predecessor verified & reported the purchases to be genuine	Rs. 98,163
	3)Parekh Pvt. Ltd.	Predecessor reported that there is no inflation of purchase expenses of Rs.83,262/-	Rs. 83,262
	4)Shah Steel & Tuves	In remand report, predecessor verified & reported the purchases to be genuine	Rs. 1,54,508
Addition of Rs. 92,10,529	1)Industrial Metal Corporation	Confirmations and balance sheet & profit & loss account submitted alongwith bills & ledger of purchases. Purchases appear to be genuine	Rs. 15,54,827
	2) J. V. Seamless (India) .	Confirmations submitted along with bills & acknowledgement of ITR and ledger of purchases. Purchases appear to be	Rs. 31,12,444

		<i>genuine</i>	
	3)Kwality Tube	<i>In the remand report dated 01.08.2016, the A.O has reported that there is a difference in closing balance as per books of assessee and supplier of Rs.1,368/-, which requires to be sustained.</i>	Rs. 21,61,066
	4)Maruti Metal Industries	<i>In the remand report dated 01.08.2016, the A.O had stated that out of the purchases, Rs. 24, 89, 327/- pertain to F.Y.2009-10 and the material was unloaded at the assessee 's godown on 01.04.2010 and the transactions are reflected in the bank statement of the assessee.</i>	Rs. 6,84,18,062
	5)Max Alert Systems Pvt. Ltd.	<i>Confirmations and balance sheet & profit & loss account submitted along with bills and ledger. Purchases appear to be genuine</i>	Rs. 37,28,019
	6)Seth Carbon & Alloys Pvt. Ltd.	<i>In the remand report dated 01.08.2016, the A.O has reported that there is a difference in closing balance as per books of assessee and supplier of Rs.6,922/-, which requires to be sustained.</i>	Rs. 22,88,948
	7)Simplex Metal & Alloys	<i>Confirmations and balance sheet & profit & loss account submitted along with bills and ledger of purchases. Purchases appear to be genuine</i>	Rs. 10,9 1,87 5
	8)Tubes India	<i>Confirmations and balance sheet & profit & loss account submitted along with bills and ledger of purchases.</i>	Rs.97, 50,047

		Purchases appear to be genuine	
<i>Addition of Rs. 1,17,63,085 (purchases from 5 parties were disallowed)</i>	<i>1) Sigma Trading Corpn.</i>	<i>In remand report, predecessor verified & reported the purchases to be genuine</i>	<i>Rs. 15,13,293</i>
	<i>2) Denmark Metals</i>		<i>Rs. 22,81,218</i>
	<i>3) Moksh Industries Pvt Ltd.</i>		<i>Rs. 14,75,256</i>
	<i>4) Ruypani & Co.</i>	confirmation of ledger accounts not filed by the assessee, but payments reflected in the bank account	<i>Rs. 47,77,773</i>
	<i>5) Kotsons</i>		<i>Rs. 17,15,545</i>
<i>Addition of Rs 77,638/- as expenses not fully verifiable</i>		<i>In remand report, predecessor had reported that the A.O. had rightly made the disallowance.</i>	<i>Rs 77,638</i>

11. The copy of remand report was furnished to the assessee for their comment. The assessee vide his reply dated 27.11.2017 filed his comment. In the reply the assessee besides the other submissions stated that in AY 2009-10 the disallowance of hawala parties was restricted to 12.5% only. It was further stated that this year the purchases shown from the alleged hawala parties are only Rupani & Co and Kotsons Impex Pvt Ltd. (subject matter of Ground No.3 & C.O.). It was further stated that the assessing officer has accepted the genuineness of the purchases in his remand report. The assessee conceded for disallowances of Rs. 1,67,822/- instead of various disallowances. The Id CIT(A) after considering the submissions, evidences furnished by the assessee and the record of the

case concluded that except purchases of Rs.83,262/- of Parekh Pipe Pvt Ltd, Rs 1,368/- of Kwality Tubes and Rs. 6,922/- of Alloys Pvt Ltd aggregate of Rs.91,552/-, are not verified. The ld. CIT(A) after considering the submissions of the assessee, wherein the assessee has conceded for disallowances confirmed the disallowance to that extent that is Rs. 91,552/- and remaining additions were deleted.

12. We have noted that the ld. DR for the revenue argued that the Assessing Officer made full-fledged enquiry during the assessment proceeding and the parties either not found at the given address or the notices sent through postal authorities was returned back. On the contrary the AO in his report stated that all the purchases were, except few transactions were verified, which we have recorded above. The ld CIT(A) deleted the substantial additions only after giving full opportunity to the AO and considering his remand. Neither any contrary fact is not brought to our notice nor is any evidence filed by the revenue to prove otherwise. There is no allegation of the ld. DR that the finding of the ld CIT (A) is perverse or the purchases were not verifiable. No contrary law is brought to our notice to take other view. Therefore, we do not find any illegality or infirmity in the order passed by ld CIT(A), which we affirm.

13. In the result ground No. 2 of the appeal is dismissed.

14. Ground No.3 relates to sustaining the disallowance to the extent of suppressed Gross Profit out of alleged total bogus purchases. The Id. DR and AR argued on the similar line as argued for ground no.2. The Id. AR further submits that he has also filed Cross Objection in respect of this ground. It was argued that assessee furnished complete documentary evidence to prove the genuinity of purchases. Despite furnishing complete documentary evidence, the Id. CIT (A) erred in holding that assessee's purchases are not genuine, without bringing any independent evidence on record. The Id. AR for the assessee submits that the entire disallowance is liable to be deleted when the assessee has substantiated all the purchases by documentary evidences. The sale of the assessee is not disputed by AO. In absence of purchases no sale is possible. In support of his submissions the Id AR for the assessee relied on the decision of Bombay High Court in PCIT Vs Mohommad Haji Adam & Co & Other (ITA No. 1004 of 2016 & other connected cases) dated 11.02.2019 on the ratio that the decision of Gujarat High Court in N.K. Industries ltd cannot be applied without reference of the facts.

15. We have considered the rival submission of the parties and have gone through the orders of authorities below. As noted earlier, the Assessing Officer/revenue has raised a vague ground of appeal. However, perusal of

records reveals that the dispute in the impugned ground of appeal relates to purchases of Rs. 47,77,773/- from Rupani & Co. and Rs. 17,15,545/- from Kotsons Impex Pvt. Ltd. During the assessment, the Assessing Officer made addition on taking view that these parties are hawala traders and that similar disallowances were made in Assessment Year 2010-11 also. Considering the facts that the revenue as well as assessee both have filed their appeal and cross objection against the finding of the Id CIT(A), therefore, we will adjudicated the ground raised by revenue and cross objection of the assessee altogether.

16. The Assessing Officer made addition of 100% disallowances from both these parties. The Id. CIT(A) after considering the remand report, summery of which we have already recorded above, while discussing the facts of ground No.2. The Id CIT(A) concluded that on the aggregate purchases from these two parties of Rs. 64,93,318/- the assessee has already declared Gross Profit @ 4.78%, against sale of Rs. 68,19,284/-. The Id CIT(A) sustained the disallowance @ 25% of the aggregate of the purchases by taking view that the assessee might have procured goods from the gray market to avoid the various legitimate Government taxes. The Id. CIT (A) relied on the decision of Gujarat High Court Sanjay Oil Cake and Vijay Proteins. In our humble view the ratio of decision in

Sanjay Oil Cake and Vijay proteins are not applicable on the facts of the present case. The assessee in the present case is trader, while in the said cases the assessee's were manufactures. Moreover, there is no finding disputing the sales of the assessee. In absence of purchases the sale is not possible. The assessee has shown the GP @ 4.78% on the sales of these parties. The Id AR for the assessee claimed that in earlier years the disallowances on similar purchases from the same parties were restricted to 12.5% only. This fact is not disputed by the lower authorities. The Hon'ble Bombay High Court in PCIT Vs Mohommad Haji Adam & Co & Other (supra) held that the ratio of the decision of Gujarat High Court in N.K. Industries Ltd cannot be applied without reference of the facts.

17. After considering the facts and the nature of business of the assessee, particularly, when the sales of the impugned purchases were not disputed, and that the assessee has already shown GP of 4.78% on such purchases, we are of the considered opinion that under 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. Hence, the addition is restricted to i.e. (12.5% minus 4.78% declared by assessee) of the impugned (disputed) purchases from Rupani & Co. and Kotsons Impex Pvt. Ltd. Similar view has been approved by Hon'ble Bombay High Court in CIT Vs Hariram Bambani (ITA No. 313 of 2013 dated 04.02.2015). In the result the grounds in the Cross Objections raised by the assessee are partly allowed, consequently the Ground No. 3 appeal of the revenue is dismissed.

18. In the result the appeal of the revenue is dismissed and the Cross Objections raised by the assessee are partly allowed.

Order pronounced on 31st May of 2019 in the open Court.

Sd/-
G.S. PANNU
VICE PRESIDENT

Mumbai, Date: 31/05/2019
SK. P.S.

Copy of the Order forwarded to :

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

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

BY ORDER,

Dy/Assistant Registrar
ITAT, Mumbai