

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI**

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER

ITA NO. 4308/MUM/2018 (A.Y: 2011-12)

Shri Netaram Chowdhary Shop No. 3, Mehta Mansion M.G. Mahimtura Road Mumbai – 400 004 PAN: ACXPC 2305 H	v.	Income Tax Officer - 19(2)(4) Matru Mandir, Tardeo Road Mumbai – 400 007
(Appellant)		(Respondent)

Assessee by : Shri Rushabh Mehta
Department by : Shri Chaitanya Anjaria

Date of Hearing : 12.06.2019
Date of Pronouncement : 12.06.2019

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the assessee against the order of the Learned Commissioner of Income Tax (Appeals)-53, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 13.04.2018 for the A.Y. 2011-12.
2. The assessee in the grounds of appeal challenged the order of the Ld.CIT(A) in sustaining the reopening made u/s. 147 of the Act. Assessee also contested the addition made by the Assessing Officer towards

unexplained investment in respect of bogus purchases estimating the profit element from such purchases at 12.5%.

3. Briefly stated the facts are that, the assessee engaged in the business of trade in Ferrous and Non-Ferrous Metals filed return of income on 14.09.2011 declaring income of ₹.2,50,255/-. Return was processed u/s. 143(1) of the Act and subsequently reopened u/s. 147 of the Act by issue of notice dated 22.09.2014 u/s. 148 of the Act, based on the information received from the DGIT(Inv.) Mumbai, stating that assessee has availed accommodation entries from various dealers without purchase of any materials from them, the assessment was reopened by the Assessing Officer. In the course of re-assessment proceedings assessee was required to prove the genuineness of the purchases made from six parties as mentioned in the Assessment Order. Assessing Officer also issued notices u/s. 133(6) of the Act to the said parties which were returned unserved. The assessee produced copies of ledger accounts along with copies of purchase invoices, copies of bank accounts evidencing payments made through banking channels, party wise details of purchases and corresponding sales and submitted that the purchases made are genuine and they cannot be treated as bogus. Not convinced with the submissions of the assessee the Assessing Officer treated the purchases as non-genuine and he was of the opinion that

assessee had obtained only accommodation entries without there being any transportation of materials and the assessee might have made purchases in the gray market. However, Assessing Officer following the decision of the Hon'ble Gujarat High Court in the case of CIT v. Simit P. Seth [356 ITR 451] estimated the profit element at 12.5% from such purchases treated as non-genuine and added to the income of the assessee. The Ld.CIT(A) sustained the addition and he rejected the contentions of the assessee that the reopening of assessment is bad in law.

4. Before me Ld. Counsel for the assessee at the outset submits that the ground raised on challenging the reopening of assessment is not pressed accordingly this ground is dismissed as not pressed.

5. Coming to the merits of the addition, Ld. Counsel for the assessee reiterated the submissions made before the lower authorities. Further placing reliance on the decision of the Hon'ble Bombay High Court in the case of PCIT v. M/s. Mohommad Haji Adam and Company in ITA.No.1004 of 2016 dated 11.02.2019 reported in 2019-TIOL-High Court–Mum-IT submitted that the Gross Profit rate shown on the regular purchases is at 5.67% and the overall Gross Profit rate is at 4.19% and therefore the overall Gross Profit rate of 4.19% may be adopted.

6. Ld. DR vehemently supported the orders of the authorities below.
7. Heard rival submissions, perused the orders of the authorities below. The Hon'ble Bombay High Court in the case of PCIT v. M/s. Mohommad Haji Adam and Company (supra) held as under:

"8. In the present case, as noted above, the assessee was a trader of fabrics. The A.O. 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 sales 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 trader. 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 as to costs."

8. As could be seen from the above judgement the Tribunal restricted the Gross Profit rate on non-genuine purchases to the same rate at which the assessee has shown in respect of genuine purchases in the Books of Accounts. This was confirmed by the Hon'ble Bombay High Court for the

reason that there are no discrepancies between the purchases shown by the assessee and sale declared and also for the reason that purchases cannot be rejected without disturbing the sales in the case of a trader. In the case on hand also the assessee who is a trader in Ferrous and Non-Ferrous Metals declared Gross Profit rate on the genuine purchases at 5.67% though overall Gross Profit was shown at 4.19%. There is no dispute that each purchase from the said parties has corresponding sales and the Assessing Officer has accepted the sales. Thus, respectfully following the said decision, I direct the Assessing Officer to adopt the Gross Profit rate at 5.67% for disallowance on non-genuine purchases and recompute the income accordingly.

9. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on the 12th June, 2019

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER
Mumbai / Dated 12/06/2019
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file. //True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum