

THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Ravish Sood (JM)

I.T.A. No. 3622/Mum/2018 (Assessment Year 2011-12)
I.T.A. No. 3623/Mum/2018 (Assessment Year 2014-15)

Smaru Gems FW 6070, Bharat Diamond Bourse Bandra Kurla Complex Bandra East Mumbai-400 051. PAN : ABGFS6292P (Appellant)	Vs.	ITO-19(3)(3) Matru Mandir 219, Tardeo Mumbai-400 007. (Respondent)
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Assessee by	Shri Rajendra B. Shah
Department by	Shri Chaitanya Anjaria
Date of Hearing	1.5.2019
Date of Pronouncement	28.6.2019

ORDER

Per Shamim Yahya (AM):-

These are appeals by the assessee wherein the assessee is aggrieved that the learned CIT-A has erred in sustaining 4.08% and 3.77% respectively disallowance on account of bogus purchases vide separate orders for concerned assessment years.

2. Brief facts of the case are that the assessment in this case was reopened upon receipt of information from the Sales Tax Department that assessee has made bogus purchases and has received accommodation entries from Mr. Rajendra Jain. The assessee submitted the purchase vouchers and the payments were made through banking channel. However, the suppliers were not produced before the Assessing Officer. Sales in this case were not doubted.

3. The Income Tax Officer in this case has made 5% addition on account of bogus purchases as under :-

A.Y. 2014-15	Rs. 9,96,835/-
A.Y. 2011-12	Rs. 15,57,496/-

3. Upon assessee's appeal Id CIT(A) directed that disallowance should be 8% as reduced by the gross profit already declared.
4. Against above order assessee is in appeal before the ITAT. We have heard both the counsel and perused the records.
5. Upon careful consideration we find that assessee has provided the documentary evidence for the purchase. Adverse inference has 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 Hon'ble jurisdictional High Court decision in the case of Nikunj Eximp Enterprises (in writ petition no 2860, order dt. 18.6.2014). In this case the Hon'ble High Court has upheld hundred percent allowance for the purchases said to be bogus when sales are not doubted. However in that case all the supplies were to government agency.
6. 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. As regards the quantification of the profit element embedded in making of such bogus/unsubstantiated purchases by the assessee. Learned Counsel of the assessee has submitted precedence that in the case of diamond traders it should be 2% to 3%. However we refer to the latest decision of Hon'ble Bombay High Court in this regard. We find that as held by Hon'ble High Court of Bombay in its recent judgement in the case of principle Commissioner of income tax versus M. Haji Adam & Co(ITA No. 1004 of 2016 dated 11/2/2019) the addition in respect of bogus purchases is to be limited to the extent of bringing the gross profit rate on such purchases at the

same rate as of other genuine purchases. The observation of the Hon'ble High Court is reproduced as under:

1. *All these appeals arise out of common Judgment of the Income Tax Appellate Tribunal. The facts in all these appeals being same, we make it from ITXA No. 1004 of 2016. The revenue-appellant has raised following questions for our consideration*

“(a) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in not confirming the addition made by the Assessing Officer on account of bogus purchases shown to have been made through hawala transactions from certain parties who were only providing accommodation sale bills?

(b) Whether on the facts and in the circumstances of the case and in law, where evidently no purchases were made from these parties who were issuing only bogus accommodation bills and this finding has been accepted by the CIT(A) and the ITAT, the ITAT, without any evidence, was justified in presuming that there must have been purchases and thereupon giving huge relief to the assessee ?

(c) Whether on the facts and in the circumstances of the case and in law, the order of the Hon'ble ITAT is perverse as no reasonable person acting judicially and properly instructed in the relevant law could arrive at such a finding on the evidence on record?”

2 *The issues relate to the Assessment Year (“A.Y.” for short) concerning the respondent – assessee who is a trader of fabrics. During the survey operations in case of the entities from whom the assessee had claimed to have made purchases, the department collected information suggesting that such purchases were not genuine. The Assessing Officer (“A.O.” for short) noticed that the assessee had shown purchases of fabrics worth Rs.29.41 Lacs (rounded off) from three group concerns, namely, M/s Manoj Mills, M/s Astha Silk Industries and M/s Shri Ram Sales & Synthetics. On the basis of the statement recorded during such survey operations, the A.O. concluded that the selling parties were engaged only in supplying the bogus bills, that the goods in question were never supplied to the assessee, and therefore, the purchases were bogus. He, therefore, added the entire sum in the hands of the assessee as its additional income.*

3 *The assessee carried the matter in the appeal before the Commissioner of Appeals who accepted the factum of purchases being bogus. However, he compared the purchases and sales statement of the assessee and observed that the department had accepted the sale, and*

therefore, there was no reason to reject the purchases, because without purchases there cannot be sales. He, therefore, held that under these circumstances A.O. was not correct in adding the entire amount of purchases as the assessee's income. He, therefore, deleted the addition refreshing it to 10% of the purchase amount. He also directed the A.O. to make addition to the extent of difference between the gross profit rate as per the books of accounts on undisputed purchases and gross profit on sales relating to the purchases made from the said three parties.

4 The assessee carried the matter before the Tribunal. The Revenue also carried the issue before the Tribunal. The Tribunal in the impugned Judgment allowed the appeal of the assessee partly and dismissed that of the Revenue. The Tribunal noted that the CIT(A) had not given any reasons for retaining 10 % of the purchases by way of ad hoc additions. The Tribunal, therefore, deleted such additions, but retained the portion of the order of the CIT(A) to that extent he permitted the A.O. to tax the assessee on the basis of difference in the GP rates.

Learned counsel Mr Chhotaray for the Revenue strenuously contended that the CIT(A) and the Tribunal committed serious error. In the present case when it was established that the purchases are bogus, the entire amount should have been added to the income of the assessee. There is no question of granting any relief in the facts of the case. In this context he relied on a decision of the Division Bench of Gujrat High Court in the case of N.K. Industries Ltd. Vs Dy. C.I.T. in Tax Appeal No. 240 of 2003 and connected appeals decided on 20th June, 2016. In such judgment the Court had observed as under –

“The Tribunal in the case of Vijay Proteins Ltd. Vs. CIT had observed that it would be just and proper to direct the Assessing Officer to restrict the addition in respect of the undisclosed income relating to the purchases to 25 % of the total purchases. The said decision was confirmed by this Court as well. On consideration of the matter, we find that the facts of the present case are identical to those of M/s Indian Woolen Carpet Factory (supra) or M/s Vijay Proteins Ltd. In the present case the Tribunal has categorically observed that the assessee had shown bogus purchases amounting to Rs.2,92,93,288/- and taxing only 25 % of these bogus claim goes against the principles of Sections 68 and 69C of the Income Tax Act. The entire purchases shown on the basis of fictitious invoices have been debited in the trading account since the transaction has been found to be bogus. The Tribunal having once come to a categorical finding that the amount of Rs.2,92,93,288/- represented alleged purchases from bogus suppliers it was not incumbent on it to restrict the disallowance to only Rs.73,23,322/-.”

6 Counsel pointed out that the S.L.P. against such decision was dismissed by the Supreme Court.

7 On the other hand, Ms Khan learned counsel for the assessee opposed the appeals contending that the Tribunal has given proper reasons. The assessee was a trader. Even if the purchases are found to be bogus, entire purchase amount cannot be added by way of assessee's income.

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.”*

7. We respectfully following the aforesaid judgement of the honourable High Court set aside the matter to the file of the assessing officer with the direction to restrict the addition as regards the bogus purchases by bringing the gross profit rate on such bogus purchases at the same rate as that of the other genuine purchases. Needless to add the assessee should be granted adequate opportunity of being heard.

8. In the result these appeals by the assessee allowed for statistical purposes.

Order has been pronounced in the Court on 28.6.2019.

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 28/6/2019

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

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