आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, 'ए',मुंबई।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI
Before Shri SAKTIJIT DEY, Judicial Member, and
Shri G. MANJUNATHA, Accountant Member

ITA Nos.3434 & 3435/Mum/2016
Assessment Years:-2009-10 & 2010-11

M/s Anmol International, 5, Plot No.2, Hara Hira Park, Kurar Village, Malad(East), Mumbai-400097	**बनाम**/ Vs.	ITO-24(1)(3), Mumbai
(निर्धारिती /Assessee)		(राजस्व /Revenue)
		P.A. No. AAKFA2518B

निर्धारिती **की ओर से /** Assessee by	None
राजस्व **की ओर से** / Revenue by	Shri V.K.Chaturvedi

सुनवाई की तारीख / **Date of Hearing :**	**25/06/2019**
आदेश की तारीख /**Date of Order:**	**28/06/2019**

आदेश / O R D E R

Per G. Manjunatha (Accountant Member)

These two appeals filed by the assessee are directed against order of the Ld. CIT(A)-41, Mumbai, dated 01/04/2016 and they pertains to AYs 2009-10 and 2010-11. Since, facts are identical and issues are common, for the sake of convenience, these appeals were heard altogether and are disposed of by this consolidated order.

2. The assessee has more or less raised common grounds of appeal for both assessment years. For the sake of brevity, the grounds of appeal for AY 2009-10 are reproduced hereunder:-

*A) **BINDING PRECEDENT***

1. The learned CIT(A) has erred in law & in facts in not following binding precedents in the case of CIT v. Nikunj Eximp Enterprises (P) Ltd. (2013) 216 Taxman 171 (Mag.) & Babulal C.Borana (282 ITR 251 (Bom) (HC) & Bombay tribunal judgments quoted in written submission before CIT(A).

B) ASSESSMENT BASED ON SUSPICION & ON SURMISES

1. The learned CIT(A) has erred in law & in facts to confirm action of A.O. on the basis of conjunction, suspicion & surmises.

2. The learned CIT(A) has erred in law & in facts that when the books being not rejected & accepted as true, the book results cannot be disturbed by making addition for bogus purchases.

3. The learned CIT(A) has erred in law & in facts to appreciate that the books of accounts has to be treated as evidence except proving is to be wrong.

4. The learned CIT(A) has erred in law & in facts in rejecting the explanation by the appellant without proving that it is false & purely on the basis of predetermined mind without looking to the facts & evidences produced.

5. The learned CIT(A) has erred in law & in facts to held that material was purchased from different source only on the basis of suspicion and without any corroborative evidences & specially when turnover & Gross Profit in percentage terms is higher than earlier previous year.

6. The learned CIT(A) has erred in law & in facts for treatment of declaration of hawala dealer by vat authorities as evidence when the statements made by hawala dealers itself is contradictory and cannot be relied when made one sided to save their skin and failed to appreciate that finding in other law cannot be treated as evidence without proving it to be so & failed to appreciate that in certain cases VAT authorities themselves have stated to be suspicious hawala dealers and not confirmed hawala dealers & specially in the absence of any conclusive proof thereof and also due to the fact that in case of cancelled dealers

they were held as genuine dealers by VAT authorities before cancellation.

C) ADDITTION OF Rs. 1,03,50,862 OF HAWALA PURCHASES

1. The learned CIT(A) has erred in law & facts to confirm addition to the extent of Rs. 1,03,50,8627- on the ground of bogus purchase & to confirm addition of Rs. 1,03,50,8627- being 25% of gross profit on purchases.

2. The learned CIT(A) has erred in law & in facts & failed to appreciate the fact that when sales have been dully accepted by CIT(A) along with quantitative & production records there is no question of unaccounted purchases & the learned CIT(A) has erred in law & in facts to make addition when sales have been effected consequent to that purchases & sales have been accepted as true & correct & also GP has been accepted.

3. The learned CIT(A) has erred in law & in facts to appreciate that just because of non appearance of parties in response to summon U/S 133(6) does not amount that the appellant has bogus purchases & specially when cross examination was not allowed of witness inspite of demanded by the appellant.

4. The learned CIT(A) has erred in law & in facts to appreciate that addition has resulted in exorbitant G.P. which is impossible in this business & also with past records and also subsequent assessment u/s 143(3) for A.Y.2013-14,where there was no hawala purchase and hence making the addition bad & illegal.

5. The learned CIT(A) has erred in law & in facts in following judgments in case of VIJAY PROTEIN LTD VS CIT &, C1T VS S1MIT P SHETH where facts are completely different And also inspite of binding precedents of jurisdictional high court.

6. The learned CIT(A) has erred in law & in facts in confirming addition to the extent of 25% as against 2.5% in case of S1M1T P SHETH (after excluding 10% (vat in case of appellant @ 4%)rate for vat for which no expenses has been debited in profit & loss account).

7. The learned CIT(A) has erred in law & in facts to treat purchase parties as non-genuine just for non-production of purchase parties & on the basis of finding of VAT authorities without anything found by AO & also to held that delivery of goods is not proved.

8. The learned CIT(A) has erred in law & in facts to give more weightage on secondary evidence i.e. affidavit by hawala dealers

than primary evidences available in the form of bills, cheque payments subsequent sales etc. and confirming addition on the basis of third party statements without any corroborative evidences.

9. The learned CIT (A) has erred in law & in facts to make addition in current year even if it is held of suppression of stock of earlier year.

10. The learned CIT(A) has erred in law & in facts to note that the some of the purchase parties were " VAT cancelled" dealers & not hawala parties & the parties are treated genuine by the VAT Department before cancellation & even purchases in case of appellant has been treated genuine in vat penalty order by VAT authorities.

11. The learned CIT(A) erred in law & in facts to apply the rate of G.P. rather than the rate of N.P & also estimating very high rate of GP.

D) REASSESSMENT

1. The learned CIT (A) has erred in law & in facts to confirm action of AO to issue notice U/S 148 of the act.

2. The learned CIT (A) has erred in law & in facts to confirm action of AO of validity of reassessment u/s 147 which is bad & illegal in law and also time barred.

3. The learned CIT (A) has erred in law & in facts to confirm action of AO that reassessment can be made for making fishing enquiries.

4. The learned CIT (A) has erred in law & in facts to do reassessment merely on the basis of information of investment wing.

2. The brief facts of the case are that the assessee is partnership firm, which is engaged in the business of manufacturing of steel products, filed its return of income for the assessment year 20009-10 on 25/09/2009, declaring total income at Rs.4, 83,170. The return was processed under section 143(1) of the Act (hereinafter 'the Act'). Subsequently, the case has been reopened under section 147 of the Act, for the reasons recorded, as per which income chargeable to tax had been escaped

assessment within the meaning of section 147 of the Act, on account of claim of bogus purchases from suspicious/hawala dealers, as per the information received from DGIT(Inv.), therefore, a notice under section 148 of the Act, dated 03/12/2012 was served upon the assessee. In response to 148 notices, the assessee neither filed its objections nor filed return of income. Therefore, notice under section 142(1) dated 11/10/2013 was issued and duly served upon the assessee. In response to notices, the authorised representative of the assessee appeared from time to time and filed details as called for. During the course of assessment proceedings, the AO called upon the assessee to furnish details of purchases, more particularly in respect of purchases from M/s Murphy metals Pvt Ltd., M/s Sandesh Sales Pvt. Ltd. Bhavik Steels Ltd. Mani Bhadra Sales Pvt. Ltd. and Shreeji Traders total amounting to Rs.4,14,03,447/- in light of information received from DGIT(INV.). In response, the assessee furnished list of purchases along with certain basic evidences. During the course of assessment proceedings, in order to verify genuineness of purchases from above parties, the AO issued 133(6) notices to all the parties, but such notices were returned unserved with remark either 'not known' or 'left'. Thereafter, the AO called upon the assessee to produce parties in person for verification, but the assessee failed to produce parties and also failed to file necessary evidences to justify purchases from the above parties. Therefore, the AO, on the basis of information received from DGIT(Inv.), which was further supported by enquiries conducted by Maharashtra Sales Tax Department, Govt. of Maharashtra, coupled with enquiries conducted during the course of survey, came to the conclusion that purchases from

above parties are bogus in nature which is not supported by necessary details or evidence, therefore, he came to the conclusion that the assessee has failed to produce the parties and accordingly made additions towards total purchase from above parties amounting to Rs.4,14,03,447/- under section 69C of the act. Aggrieved by the assessment order, the assessee preferred an appeal before the Ld CIT(A).

3. Before the Ld CIT(A), the assessee had challenged reopening of assessment on the ground that the AO has reopened assessment on the basis of change of opinion without there being any material to suggest that income chargeable to tax had been escaped assessment. The assessee had also challenged additions made by the AO towards purchases on the ground that merely for the reason that parties were not responded in respect of 133(6) notices, no adverse inference could be drawn against the assessee, when the assessee has discharged its burden by filing necessary details about purchases. The Ld CIT(A), after considering the relevant submissions of the assessee and also taken note of the fact that the assessee has filed certain basic information including the purchases, came to the conclusion that the AO was incorrect in making additions towards 100% alleged Hawala purchases, but what needs to be taxed only profit element embedded in those purchases, therefore, by following the decision of Hon'ble Gujarat High Court in the case of CIT vs Simit P. Seth (2013) 356 ITR 451(Guj) scaled down additions made by the AO towards 25% of alleged bogus purchases and accordingly, sustained the additions to the extent of Rs.1,03,50,862/-

out of total additions made by the AO of Rs.4,14,03,447/-. The relevant findings of the learn CIT(A) as under:-

> "5. I have considered the submissions of the appellant. I have also perused the findings of the A.O. in the assessment order.
>
> 5.1 So far the validity of re-opening is concerned, it is found that the reasons for reopening was provided by the AO wherein party wise bogus purchases made by the assessee as per information from the office of the DGIT(Inv.) has been mentioned. Therefore, it is found that the notice under section 148 was issued on the basis of fresh information and tangible materials. The AO also considered the objections raised by the appellant and rejected the same. **In view of above, ground nos.I to 4 challenging the validity of notice u/s 148 are dismissed.**
>
> 5.2 So far addition of Rs. 4,14,03,447 u/s 69C is concerned, it is found that the notices issued to 4 parties out of 5 parties returned unserved. The one patty on whom the notice was served did not file any reply. The assessee failed to produce the parties. The enquiries and investigation conducted by the Sales Tax Department along with the deposition of alleged suppliers clearly establish that these parties have issued bogus bills without any supply of goods. The AO has confronted all the materials and findings to the assessee. In fact, findings of the Sales Tax Department are available on its web-site and it is in public domain. The assessee has also failed to bring evidence of actual transportation and delivery of goods. **In** view **of above, the AO's view of treating the purchases from the 5 parties as bogus Ir upheld. Now the quantum of disallowance/ addition is to be decided based on facts of this case.** On the issue of bogus purchases, there are contrary decisions of High courts and Tribunals.
>
> 5.3 In some of the decisions, it has been held that the fact that supplier's name appeared in list of hawala dealers of sales tax department and the assessee is to produce him does not mean that the purchases are bogus if the paymentis made through banking channels and the G.P. ratio becomes abnormally high if the additions made by the AO is accepted. The entire additions have been deleted in such cases on the ground that there is no proof that the amount has been received back by the assessee and on the ground that the opportunity of cross examination was not allowed to assessee.
>
> 5.4 In another set of decisions, disallowance of a particular percentage of the purchase price has been upheld on the ground

that it is a matter of fact that the goods were not received from the parties who issued bills but from a different source which is exclusively within the knowledge of the assessee and none else. Therefore, it is evident that the assessee had inflated the expenditure in question by showing higher amount of purchase price through fictitious invoices in the name of bogus supplier. It was also held that on the basis of entries recorded in the books of account of the assessee, the provisions of Section 40A(3) of the Act would not be applicable as such payments were shown to have been made by crossed cheques.

5.5 To take a fair and reasonable decision in such a situation, a balanced approach is required to be followed. In the decisions where additions have been totally deleted on the ground that manufacturing/sales are not possible without purchase, probably the fact that the sale may be out of suppressed stock of past period has not been considered. Further, it is not possible to find out evidence of refund of payments in cash to assessee is each case particularly when the supplier did not appear before the AO or the assessee failed to produce the said party before the AO for examination. Immediate cash withdrawals from the bank account may strengthen the case of Revenue but it is not a conclusive proof that the amount was refunded to the assessee. In a more sophisticated mechanism, the cash may not be withdrawn by the bogus supplier and still cash refund is possible. Further, evidentiary value of enquiries conducted by sales tax department and statements of suppliers recorded admitting accommodation entries should not be totally ignored.

5.6 In view of above, I find the second set of decisions more logical and -„ reasonable wherein certain percentage of purchase price has been disallowed. The disallowance is justified because the exact source of goods or exact amount of inflation is known to the assessee only. Further, without a much bigger benefit than the normal GP ratio, no prudent person will enter into transactions of purchasing materials from one source and taking bills from another. As a consequence, the profit embedded in such transactions of purchase and sales will be much higher than normal GP ratio.

5.7 The view of disallowing certain percentage of purchase price in case of bogus purchases was upheld in following decisions of Gujarat High Court:

> *1. Vijay Proteins Ltd. vs. CIT [2015] 58 taxmann.com 44 (Guj) - 25% disallowance was upheld.*

2. CIT vs. Simit P. Sheth [2013] 356 UR 451 (Guj.)- 12.5 % was disallowed with a finding that the estimation of rate of profit must necessarily vary with the nature of business and no uniform yardstick can be adopted. Normal G.P. was 3.56 %.

5.8 The appellant has filed particulars of purchase and the corresponding sales, summary of stock registers, bank statements etc. Disallowance of 100% of purchase as bogus does not seem to be justified for the reason that in-depth enquiries were not conducted by the AO. The AO did not carry out further investigation from Bank to examine whether the supplier has withdrawn cash from his account. However, the appellant has also failed to prove that the goods were purchased from the aforesaid parties. Moreover, the suppliers are in the list of hawala dealers of Sales Tax Department who have issued bills only and the appellant failed to produce the supplier for examination. The transportation bills were also missing in this case which is the adverse finding of assessment proceedings. The notice u/s 133 (6) issued by the assessing Officer to 4 parties out of 5 were returned back unserved. The one party on whom the notices u/s 133(6) was served did not submit any reply. The assessee was asked to produce the parties for verification which was not complied with. The assessee could not produce any evidence in support of the delivery and transport of the materials from the alleged purchase parties. In such a situation, it is logical to conclude that the assessee has taken bogus bills and the inflation of purchase and the extent of inflation has to be estimated based on facts of this case.

5.9 In view of above it is held that the appellant has failed to establish that the goods were purchased from the parties which had issued the bills. Natural inference is that either it was purchased from different source or the same were out of suppressed stock of past period because sales are not in dispute. Since the said source is not known, the extent of inflation of purchase cannot be ascertained. It will be 100% If the sale is made out of own suppressed stock of past period or it will be the difference of billed amount and actual payment made to procure the goods.

5.10 G.P. ratio of the appellant for any year is in the range of 4-6%. Total purchase of Rs. 9.54 Crore has been debited out of which addition of Rs. 4,14,03,447/- u/s 69C on account of bogus purchase has been made. **In the facts and circumstances of the case, 25% of purchase price is estimated to be reasonable disallowance for the reasons discussed above. In view of**

above, the addition/disallowance to the extent of 25% of purchase price of Rs. 4,14,03,4477- i.e. Rs. 1,Q3,50,862/- is sustained and balance addition of Rs. 3,10,52,585/- is deleted. The grounds 5-21 of appeal are partly allowed.

4. None, appeared for the assessee. We have heard the Ld. DR, perused the material available on record and gone through the orders of the authorities below. The appeal has been intially disposed of by the Tribunal and directed the AO to estimate profit @12.5% on alleged bogus purchases. The assessee has filed miscellaneous application before the Tribunal, and requested to recall the order of the Tribunal on certain points. The Tribunal vide its order dated 01/03/2019 in M.A. No.48 & 49/Mum/2018 recalled the order on the ground that there is error in so far as facts recorded in respect of findings of the Ld. CIT(A) that the Ld. CIT(A) has scaled down estimation of profit @12.5%, whereas the correct facts as borne out from the records was that the Ld. CIT(A) has scaled down additions made by the AO @25%, except this there is no substantial changes in facts brought out by the Tribunal of its order dated 04/08/2017. During the current proceedings, the assessee neither appeared nor filed any details to controvert the findings of the fact recorded during course of earlier proceedings. We further noted that the additions made by the AO towards alleged bogus purchases from certain parties is on the basis of report of the DGIT(Inv.) which was further supported by the report of M-Vat Department, Govt. of Maharashtra, where certain parties admitted that they are involved in the providing accommodation entries without their being any business activity. Even during the course of assessment proceedings, when the AO called upon the assessee to justify the

purchases with necessary evidences, the assessee could able to furnish purchase bills and payment proof, but could not file further evidences in the backdrop of clear findings from the AO that the parties from whom purchases claimed to have been made are non-existence on the basis of 133(6) notices issued during the course of assessment proceedings, where all notices issued to above parties are returned unserved with remark 'not known' or 'left'. Further, when the AO called upon the assessee to produce the parties in person, the assessee failed to do so. All these evidences, goes to prove an undoubted fact that the purchases from above parties are not supported by necessary evidences and also the assessee is not able to place necessary record before the AO and prove genuineness of the purchases. Under these facts, it is difficult to accept the argument of the assessee that purchases from above parties are genuine in nature. At the same time, it is difficult to accept the finding of the AO that purchases from above parties are non-genuine merely for the reason that parties were not responded 133(6) notices or the assessee could not produce them before the AO for examination. The assessee, at best could produce whatever he can file but non-appearance of parties or nonproduction of parties before the AO is not in the hands of the assessee, more particularly after a gap of long period. Further, the AO neither pointed out any discrepancy in the books of accounts or other evidence filed by the assessee nor made out a case of sales outside books of accounts. In absence of any incorrectness in books of account or other evidence filed by the assessee, merely for the reason of nonappearance of parties before the AO in response to 131/133(6) notices, the AO has drawn adverse inference to hold that

purchases from above parties are non-genuine without carrying out further verification to ascertain true nature of transactions between the parties. Under these facts, it is difficult to accept the arguments of the Ld. AO that purchases from above parties are not genuine and the assessee has failed to prove the purchases to the satisfaction of the AO with necessary evidences. In this factual background, the only option left with us is to settle the dispute between the parties by taking note of certain judicial precedence. Therefore, we are of the considered view that to end dispute between the parties a reasonable amount of profit may be estimated in alleged/Hawala purchases. Further the Hon'ble Gujarat High Court in the case of Simit P. Seth vs CIT (2013) 356 ITR 451(Guj) had considered identical issue and held that in case of alleged bogus purchases only profit element embedded in those purchases needs to be taxed but not whole purchases from so called alleged/Hawala dealers. Further, the Court held that depending upon the fact of each case, a reasonable amount of profit needs to be estimated. The ITAT Mumbai, in number of cases, after considering the facts of each case has directed the AO to adopt 12.5% to 15% profit on alleged bogus purchases. In this case, on perusal of facts available on record, the assessee is engaged in the business of manufacturing of steel products. Considering the nature of business carried out by the assessee and also taken support from the judicial precedence, where it was held that only profit element embedded in bogus purchases needs to be taxed, we are of the considered view that the AO is incorrect in making additions towards 100% alleged bogus purchases from the so called Hawala/suspicious dealers. Although, the ld. CIT(A) has accepted the fact that only profit element

embedded in bogus purchases, needs to be taxed but yet adopted 25% profit without bringing on record any comparable cases of similar nature. Therefore, considering the nature of business carried out by the assessee and also consistent with view taken by the Co-ordinate Bench of ITAT Mumbai, in number of cases, we deem it appropriate to scale down additions made by the AO towards alleged bogus purchases to the extent of 12.5% of such purchases. Accordingly, we direct the AO to estimate 12.5% profit on alleged bogus purchases.

5. The next issue that came up for our consideration from assessee's appeal is validity of reopening of assessee. We find that although the assessee has challenged validity of reopening of assessment, we find that the AO has reopened the assessment on the basis of information received from DGIT(Inv.) which was further supported by report of M-Vat, Govt. of Maharashtra which suggest escapement of income within the meaning of section 147 of the Act. Therefore, there is no merit in the argument of the assessee is that the assessment has been reopened without their being any tangible material, accordingly, reject the ground taken by the assessee challenging the reopening of assessment.

ITA No.3435/Mum/2016

6. The facts and issues involved in this appeal are identical to the issues which we have already considered in ITA No.3434/Mum/2016 for AY 2009-10. The reasons given by us in preceding paragraph shall mutatis mutandis apply to this appeal also, therefore, for the detailed reasons recorded in preceding paragraphs in ITA

NO.3434/Mum/2016 for AY 2009-10, we direct the AO to estimate 12.5% profit on alleged bogus purchases.

7. As regards, the reopening of assessment reasons given by us in preceding paragraph in ITA No..3434/Mum/2016 shall apply to this appeal also. Therefore, we reject the ground taken by the assessee challenging validity of reopening of assessment.

8. As a result, both appeals filed by the are partly allowed.

Order pronounced in the open Court on 28/06/2019.

Sd/-	**Sd/-**
(Saktijit Dey)	(G. Manjunatha)
न्यायिक सदस्य /JUDICIAL MEMBER	**लेखा सदस्य** / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 28/06/2019

Shekhar, P.S/,**नि.स.**

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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