

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "D", MUMBAI**

**BEFORE SHRI RAJESH KUMAR (AM) AND SHRI RAM LAL NEGI (JM)**

**ITA No. 4647/MUM/2017  
Assessment Year: 2012-13**

M/s Rajshri Productions Pvt. Ltd., Bhavana 1 <sup>st</sup> Floor, 442, Veer Savarkar Road, Prabhadevi, Mumbai - 400025 PAN: AAACR4139G	<b>Vs.</b>	The Asstt. Commissioner of Income Tax -16(1), Room No. 439, Aayakar Bhavan, M.K. Road, Mumbai - 400020
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by : Shri Ajay Shekhari &  
Dilkhush Malesha (ARs)

Revenue by : Shri D.G. Pansari (DR)

Date of Hearing: 21/02/2019  
Date of Pronouncement: 17/05/2019

**ORDER**

**PER RAM LAL NEGI, JM**

This appeal has been filed by the assessee against the order dated 24.04.2017 passed by the Commissioner of Income Tax (Appeals)-6 (for short 'the CIT (A), Mumbai, pertaining to the assessment year 2012-13, whereby the Ld. CIT(A) has partly allowed the appeal filed by the assessee against the assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

2. Brief facts of the case are that the assessee engaged in the business of production of feature films and TV serials, filed its return of income for the assessment year under consideration declaring loss of Rs. 5,36,15,816/-. The AO completed the assessment u/s 143(3) of the Act determining the loss at Rs. 5,12,63,270/- after making addition of Rs. 22,78,097 on account of bogus purchases made by the assessee during the previous year and making

disallowance of Rs. 74,443/- under section 14A read with Rule 8D of the Act. In the first appeal the CIT(A) restricted the addition made on account of bogus purchases to 12.5% of the total amount of bogus purchases, however, confirmed the disallowance made u/s 14A read with Rule 8D. Still aggrieved, the assessee is in appeal before the Tribunal.

3. The assessee has challenged the impugned order passed by the Ld. CIT (Appeals), on the following grounds:-

1. *"On the facts and circumstances of the case and in law Ld Commissioner of Income Tax (Appeals) - 6 [hereinafter referred to as "Ld CIT (A)"] erred in partially confirming the action of l,d AO in holding that the Appellant has made purchases of Rs.20,88,520/- from parties found to be bogus and estimated the suppressed profit at 12.5% of the said purchases made from the alleged bogus parties of Rs.20.88,520/-, thus sustaining the addition to the extent of Rs.2,61,065/-.*

2. *On the facts and circumstances of the case and in law 14 CIT (A) failed to give due weight to the positive evidence such as payment by account payee cheques and furnishing of Income Tax PAN and Mobile No. of the parties and erred in sustaining the aforesaid addition purely on the basis of suspicion, surmises and conjectures.*

3. *Without prejudice to the above Grounds of Appeal, the Appellants respectfully submit that the Ld CIT (A) erred in not appreciating that Ld AO failed (i) in not providing reasonable opportunity to the Appellant to cross examine the parties and to provide and/or give access to material evidence/documents/statements on oath of the parties on the basis of which they were held to have provided bogus bills and (ii) in treating the case adversely against the Appellant just for the reasons of the absence of the parties at the available address of the parties.*

4. *On the facts and circumstances of the case and in law Ld CIT (A) erred in confirming the disallowance of Rs.74,443/- U/s 14A r.w.r.8D(2)(iii) in addition to expenses of Rs.4 1,915/- already disallowed by the Appellant in*

*computation of income u/s 14A, total disallowance thus amounting to Rs.1,16,358/- as against dividend income of Rs. 1,62,062/- which is highly unjustified and harsh and further there is no nexus between the expenses of Rs.74,443/- disallowed by Ld AO and the exempt dividend income.*

*5. Without prejudice to Ground of Appeal No.4 Ld CIT (A) erred in confirming the action of Ld AO who erred in taking the average value of investment at Rs. 1,48,88,555/- for working out the 0.5% disallowance as per rule 8D(2)(iii). The Ld AO ought to have worked out the 0.5% disallowance at Rs. 36,008/- on the average value of investments at Rs.72,01,755/- after giving the deduction and excluding the value of Debentures & bonds, non trade investments (Income from which is taxable) and shares in strategic associate companies on which no dividend is received.”*

4. Vide ground No 1 to 3 the assessee has challenged the action of the Ld. CIT(A) in sustaining addition of 12.5% of the total amount of bogus purchases amounting to Rs. 2,61,065/-. The Ld. counsel for the assessee submitted that the Ld. CIT (A) has wrongly sustained the addition of 12.5% of the total amount of bogus purchases ignoring the evidence on record such as payment by account payee cheques, PAN Nos. and Mobile Nos. of the parties from whom, the purchases were made. The Ld. counsel further pointed out that the Ld. CIT (A) has failed to appreciate that the AO had not provided an opportunity to the assessee to cross examine the parties and the material/statement on the basis of which the addition was made. The Ld. counsel further submitted that since the impugned order is based on surmises and conjectures, the same is liable to be set aside.

5. On the other hand, the Ld. Departmental Representative (DR) submitted that as per the information received from the DGIT (Inv.), M/s Nirmal Trading Company and M/s Pradeep Enterprises were engaged in providing bogus bills to the parties on commission basis. Since, the assessee has shown purchases

amounting to Rs. 22,78,097/- from the said parties during the previous year, the AO made addition of the said amount to the income of the assessee. Since, the Ld. CIT (A) has already restricted the addition to 12.5% of the said amount, there is no merit in the contention of the assessee that the Ld. CIT (A) has wrongly sustained the addition of 12.5% of the total amount of bogus purchases.

6. We have heard the rival submissions and also perused the material on record. We notice that the Ld. CIT (A) has sustained the addition to the extent of 12.5% after taking into consideration the decision of the Hon'ble Gujarat High Court in the case of *Bholanath Polyfab Pvt. Ltd., CIT vs. Simit P Sheth 38 taxman.com 385 (Guj)* and other cases in which the Hon'ble Courts have held that in the case of bogus purchases, only the profit element embedded in such purchases could be added to the assessee's income. In the case of *Simit P Sheth* (supra), the Hon'ble High Court upheld the addition of 12.5% of the total amount of bogus purchases holding that the Tribunal has only estimated the possible profit out of the purchases made through non-genuine parties. In the present case since the assessee has failed to establish the genuineness of the question purchases by adducing cogent and convincing evidence, the Ld. CIT(A) has sustained addition of 12.5% of the total amount of bogus purchases. We further notice that the AO has not rejected the sales. Since, the AO has not rejected the sales, purchases cannot be denied as there cannot be any sale without purchase. However, the AO has not mentioned the description of articles/goods in respect of which the assessee had obtained bogus bills from hawala dealers in order to estimate the possible profit in terms of the judgment of the Hon'ble Gujarat High Court discuss above. Under these circumstances, we deem it appropriate to restrict the addition to 12.5% minus gross profit shown by the appellant in the interest of justice. Since, the authorities below have not mentioned the gross profit shown by the assessee, we set aside this issue to the file of AO for determined the addition to be made by reducing the

percentage of gross profit from the addition of 12.5% made by the Ld. CIT (A). We accordingly modify the order of the Ld. CIT(A) and allow this ground of appeal for statistical purposes.

7. Vide Ground No. 4 & 5 the assessee has challenged the action of the Ld. CIT (A) in confirming the disallowance of Rs. 74,443/- u/s 14A read with rule 8D(2) (iii) in addition to expenses of Rs. 41,915/- already disallowed by the assessee in the computation of its income. The Ld. counsel for the assessee submitted before us that the assessee had earned a dividend income of Rs. 1,62,062/- against which the authorities below have computed the disallowance of Rs. 1,16,358/- which is unjustified and not in accordance with the settled principles of law. The Ld. counsel without prejudice contended that since the AO has erred in taking the average value of investment at Rs. 1,48,88,555/- for working out 0.5% disallowance as per rule 8D(2)(iii) instead of the average value of investment at Rs. 72,01,755/- after giving deduction and excluding the value of debentures and bonds non-trade investments, the Ld. CIT (A) ought to have restricted the disallowance to Rs. 36,000/-. The Ld. counsel further submitted that as per the settled law only expenses proportionate to the exempt income earned could be disallowed under section 14A of the Act. Since, the findings of the Ld. CIT(A) are not in accordance with the settled law, the same is liable to be set aside.

8. On the other hand, the Ld. DR relying on the order passed by the Ld. CIT (A) submitted that since the disallowance has been made in accordance with the provisions of law, there is no infirmity in the order of the Ld. CIT (A).

9. We have heard the rival submissions and also gone through the material on record in the light of the rival contentions of the parties. We notice that in the present case the AO has computed the average value of investments for the purposes of determining the disallowance under Rule 8D(2)(iii) of the Income Tax Rules, ignoring the fact that some of the investment did not earn exempt income. The Hon'ble Supreme Court in the case of *Maxopp Investment Ltd. vs.*

*CIT 402 ITR 640(SC)* has categorically held that the AO can only disallow the expenses proportionate to earning exempt income. Since, the working of the authorities below are not in accordance with the principles of law laid down by the Hon'ble Supreme court, we set aside the findings of the Ld. CIT(A) and send this issue back to the AO for determining the same afresh in accordance with law after affording a reasonable opportunity of being heard to the assessee. Needless to state that, AO shall exclude investments which did not yield dividend.

In the result, appeal filed by the assessee for assessment year 2012-2013 is allowed for statistical purposes.

Order pronounced in the open court on 17<sup>th</sup> May, 2019.

Sd/-  
(RAJESH KUMAR)  
ACCOUNTANT MEMBER

Sd/-  
(RAM LAL NEGI)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 17/05/2019

Alindra, PS

**आदेश 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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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