

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

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 2244/MUM/2018 (A. Y: 2009-10)

M/s. Ashoka Builders 209-212, Veena Beena Turner Road, Bandra (W) Mumbai – 400 050 PAN: AABFA 3175 B	v.	The Asst. CIT Range – 19(3) Piramal Chamber Mumbai – 400012
(Assessee)		(Respondent)

Assessee by : **Shri Hari Raheja**
Department by : **Shri Rajesh Kumar Yadav**

Date of Hearing : **22.04.2019**
Date of Pronouncement : **12.07.2019**

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)–32, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 25.01.2018 for the A.Y. 2009-10.
2. Assessee challenged the order of the Ld.CIT(A) in passing an exparte order without giving sufficient and reasonable opportunity to represent the appeal. On merits assessee challenged the order of the

Ld.CIT(A) in confirming the disallowance made towards unproved purchases.

3. At the outset, Ld. Counsel for the assessee submits that the Ld.CIT(A) stated that on several occasions the case was posted and there was no compliance and the notice dated 21.12.2017 has been served on 17.01.2018 and there was no compliance and ultimately the order passed by the Ld.CIT(A) on 25.01.2018. Ld. Counsel for the assessee submits that one more opportunity should have been given by the Ld.CIT(A) to the assessee though Ld.CIT(A) stated that several opportunities were given to the assessee. As is evident from the order, notice fixing date of hearing on 17.01.2018 was served on the assessee on 17.01.2018 and the order was passed on 25.01.2018. Coming to the merits of the case the Ld.Counsel for the assessee submits that similar addition has been made during the A.Y. 2010-11 and this amounted to double addition. Ld.Counsel for the assessee submits that, at best Assessing Officer could have added the profit element in the purchases but not the entire purchases as unexplained purchases.

4. We have heard the rival submissions, perused the orders of the authorities below and the material placed before us. We have noticed from the material placed before us that through notice dated 21.12.2017

the case was fixed for hearing on 17.01.2018 and on 17.01.2018 it was adjourned to 24.01.2018 as the file is not traceable. On 24.01.2018 assessee could not appear and requested for adjournment on 29.01.2018 and the appeal adjourned to 20.02.2018. On 20.02.2018 since the file was not available the appeal was adjourned to 02.03.2018. However, the Ld.CIT(A) disposed off the appeal by order dated 25.01.2018. Taking the facts and circumstances into consideration, we are of the view that the assessee has no fault and there has been reasonable cause in appeal getting adjourned from time to time. The Ld.CIT(A) should not have disposed off the appeal exparte applying the decision of the Delhi Tribunal in the case of Multiplan India Pvt. Ltd. [38 ITD 320].

5. Coming to the merits of the case, it is the submission of the Ld.Counsel for the assessee that similar addition has been made in the A.Y. 2010-11 where the very same amount was added and the Tribunal in ITA.No. 1647/Mum/2014 dated 28.03.2018 directed the Assessing Officer to verify the fact as to whether the very same amount was added in A.Y. 2009-10 & 2010-11. On a perusal of the order of the Tribunal we notice that the Tribunal directed the Assessing Officer to examine the fact, whether this addition was already added in the A.Y. 2009-10.

6. We further find that the Assessing Officer based on the information from the Sales Tax Department treated the purchases made by the assessee from M/s. Ajay Stone and M/s. Top Bricks & Sand Suppliers at ₹.1,82,637/- and ₹.4,62,800/- respectively as non-genuine purchases for the reason that the parties have supplied only accommodation bills without delivering the goods. The Assessing Officer noticed that notices u/s. 133(6) of the Act were returned unserved and the assessee could not produce the suppliers. Thus, the entire purchases have been added as non-genuine purchases.

7. We find that the Assessing Officer accepted the sales from the said purchases as genuine without there being any purchases there cannot be any sales. The Hon'ble Gujarat High Court in the case of Bholanath Polyfab Pvt. Ltd [355 ITR 290] held that when the assessee made purchases and sold the finished goods as a natural corollary not the entire amount covered under such purchases would be subject to tax but only the profit element embedded therein. The Hon'ble High Court confirmed the order of the ITAT in estimating the profit element from purchases at 12.5%. Similar view has been taken by the Hon'ble Gujarat High Court in the case of CIT v. Simit P. Seth [356 ITR 451] and confirmed the order of the ITAT in estimating the profit element from the purchases at 12.5%. The Bombay High Court in the case of CIT v. Nikunj Eximp

[216 Taxman.com 171] held that simply because the parties were not produced the entire purchases cannot be added.

8. In view of the above decisions and taking all the facts and circumstances into consideration, we direct the Assessing Officer to estimate the profit element from such non-genuine purchases at 12.5% for the Assessment Year 2009-10. We order accordingly.

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

Order pronounced in the open court on the 12th July 2019

Sd/-
(MANOJ KUMAR AGGARWAL)
ACCOUNTANT MEMBER

Mumbai / Dated 12/07/2019
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. The Assessee
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