

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

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

ITA NO. 2569/MUM/2017 (A.Y: 2009-10)

Smt. Pushpa Nareshkumar Dhanania 24, Saraswati Sadan 1 st Floor, 113 Keshavji Naik Road Fort, Mumbai – 400 009 PAN: ADWPD 7778 D	v.	Income Tax Officer Ward No. 17(2)(5) Mumbai
(Appellant)		(Respondent)

Assessee by : Shri Haresh P. Shah
Department by : Shri Chaitanya Anjaria

Date of Hearing : 06.06.2019
Date of Pronouncement : 31.07.2019

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)–28, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 10.01.2017 for the A.Y. 2009-10 in sustaining the addition made by the Assessing Officer on alleged bogus purchases @12.5%.
2. Briefly stated the facts are that, the assessee is engaged in the business of trading in Pipe Fittings, filed return of income on 25.09.2009

declaring income of ₹.3,50,210/- and the return is processed u/s. 143(3) of the Act. Subsequently, Assessing Officer received information from the DGIT (Inv.), Mumbai and the Sales Tax Department about the accommodation entries provided by various dealers and assessee was also one of the beneficiary from those dealers. The assessment was reopened u/s. 147 of the Act based on the information received from DGIT(Inv.), Mumbai, that the assessee has availed accommodation entries from various dealers who are all providing accommodation entries without there being transportation of any goods. In the reassessment proceedings, the assessee was required to prove the genuineness of the purchases made from various parties which were referred to in the Assessment Order. The assessee produced ledger accounts of the purchase parties, purchase bills, payment details to purchase parties. Assessee also submitted that corresponding sales of materials purchased from the said parties had offered to tax. It was contended that there cannot be no sales without any purchase and therefore submitted that the purchases made are genuine. 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. It is

the finding of the Assessing Officer that the purchases cannot be treated as genuine for the following reasons: -

(i) The assessee has not made available the details of transportation of the material purported to have purchased from the aforesaid hawala dealer, such as transportation receipts, delivery challans.

(ii) The assessee has not furnished any ledger account confirmation from the aforesaid dealer.

(iii) The assessee has also not furnished any details as to how the items purchased from the aforesaid hawala dealer were utilized/consumed in the process of its business, including the sales made with the details of the parties.

(iv) In the audit report itself, it has been stated that the no stock records are maintained.

(v) Notices u/s 133(6) of the IT Act issued to all the above 15 alleged hawala parties. Out of 15, notices in 12 cases were returned unserved. The reply of one party i.e. M/s Shriti Enterprises has been received in this office, Mr. Jignesh Bhatt, proprietor of M/s Shriti Enterprises vide his letter dated 10.03.2015 categorically denied any transaction with Smt. Pushpa N. Dhanania, proprietary of M/s P. N. Forge Industries.

(vi) The deduction of VAT in the Bill also does not bolster the case of the assessee. It is because of the fact that such deduction does not prove genuineness of a particular transaction in terms of supply of material. Such deduction is basically linked with the payment aspect only and cannot establish the purpose for which payment is made.

(vii) The production of invoice is of no help to the assessee, since in the activity of accommodation entry, such documents are meticulously maintained both by the entry provider and entry seeker. It is also not important whether the amount is small or big and whether the assessee is having loss or profit. There may be number of reasons for seeking the accommodation entry as it leads to generation of the cash in the hands of assessee.

(viii) The onus was upon the assessee to prove the genuineness of the expenditure claimed as it was the assessee, which has made the claim.

(ix) The Sales Tax Department, being a statutory authority, has certified that the aforesaid parties are Hawala Operators after conducting independent enquiries.

(x) The contention that the payment are made by account payee cheque is not a fool proof method of substantiating the assessee's claim and is not sufficient to establish the genuineness of the purchases. Reliance is placed on Kachwal Gems Vs. Jt. CIT (2007) 288 ITR 10 (SC).

(xi) It is well-settled law that strict rules of evidence do not apply to I.T Act and the real test with regard to genuineness of the transaction is "Preponderance of Probabilities" and not "Beyond reasonable doubt". Reliance is placed on C. Vasantlal & Co. Vs. CIT (1962) 45 ITR 206 (SC), Chaturbhuji Panauj AIR 1969 (SC) and Sumati Dayal Vs. CIT (1995) 214 ITR 801 (SC). One has to consider the totality of facts, surrounding circumstances and human probability for arriving at a conclusion as held in CIT Vs. Durga Prasad 82 ITR 540 (SC) and Sumati Dayal Vs. CIT (1995) 214 ITR 801 (SC).

However, Assessing Officer estimated the profit element at 12.5% from such purchases treated as non-genuine and added to the income of the assessee following the decision of the Hon'ble Gujarat High Court in the case of CIT v. Bholanath Poly Fab Pvt. Ltd., [355 ITR 29] and the decision of the Mumbai Bench of this Tribunal in the case of Shri Madhukant B. Gandhi v. ITO in ITA.No. 1950/Mum/2009 dated 23.02.2010. On appeal the Ld.CIT(A) sustained the addition made by the Assessing Officer.

3. Before me, Ld. Counsel for the assessee reiterated the submissions made before the lower authorities. Ld. Counsel for the assessee further invited my attention to the Page No. 153 of the Paper Book and submitted that assessee had already shown gross profit ratio between 6.23 to 7.23 for the A.Ys. 2008-09 to 2011-12 and the five years average gross profit ratio is almost similar to the gross profit ratio of the A.Y. 2009-10, and no addition shall be made.

4. Ld. DR vehemently supported the orders of the authorities below.

5. Heard rival submissions, perused the orders of the authorities below. It is the finding of the Assessing Officer that the assessee could not furnish complete details including the details of corresponding sales of goods to link the purchases with the supporting bills, vouchers, stock

register etc. It is the finding of the Assessing Officer that assessee was also not maintaining stock register and in tax audit report the same has been reported by auditor. On a perusal of the 3CD report it is observed that under Item No. 28 the auditors have stated that stock records are not maintained by the assessee.

6. The Hon'ble Bombay High Court in the case of Pr.CIT v. M/s.Mohammad Haji Adam & Co. in Income Tax Appeal No. 1004 of 2016 dated 11.02.2019 observed that the Tribunal correctly restricted the addition limited to the extent of bringing the Gross Profit rate on purchases at the same rate of other genuine purchases. While holding so, the Hon'ble High Court observed as under:

“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.

5 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. Following the decision of the Hon'ble Bombay High Court (supra), I direct the Assessing Officer to restrict the addition/disallowance only to

the extent of bringing the Gross Profit rate on alleged bogus purchases at the same rate of the other genuine purchases declared by the assessee after calling for the details and verification of records. The assessee is directed to furnish the necessary information in this regard.

8. In the result, appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on the 31st July, 2019

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER
Mumbai / Dated 31/07/2019
Giridhar, Sr.PS

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