

**IN THE INCOME TAX APPELLATE TRIBUNAL
“ SMC ” BENCH, AHMEDABAD**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No. 268/Ahd/2018

(अधीक्षण वर्ष/Assessment Year :2013-14)

Trushar Parimal Shah 354, Madhav Darshan Waghawadi Road Bhavnagar-364 002	बनाम/ Vs.	The Income Tax Officer Ward-1(3) Bhavnagar
आथयी लेखा सं./जीआइआर सं./PAN/GIR No. : AXWPS5561M		
(अपीलाथा/Appellant)	..	(आयथ / Respondent)

अपीलाथा ओर से/ Appellant by :	Shri Tushar P. Hemani, AR
आयथ का ओर से/Respondent by:	Shri Nilabra Dasgupta, Sr.DR

सुनवाई का ताराख/ Date of Hearing	29/08/2019
घोषणा का ताराख/Date of Pronouncement	01/10/2019

आदेश / ORDER

PER BENCH:

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals)66, Ahmedabad [CIT(A) in short] vide appeal no.CIT(A)-6/45/16-17 dated 15/12/2017 arising in the assessment order passed under s.143(3) of the Income Tax Act, 1961(hereinafter referred to as "the Act") dated 29/03/2016 relevant to Assessment Year (AY) 2013-14.

The assessee has raised the following grounds of appeal:-

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1. *The learned CIT(A) has erred both in law and on the facts of the case in confirming the disallowance of Rs.11,35,011/- u/s.69C of the Act by treating purchases as unexplained expenditure.*
2. *Alternatively and without prejudice, the learned CIT(A) erred in not limiting the disallowance to 25% of the purchases.*
3. *The learned CIT(A) has erred both in law and on the facts of the case in confirming the disallowance of bad debts amounting to Rs.5,20,205/-.*
4. *The learned CIT(A) has erred both in law and on the facts of the case in confirming the disallowance of VAT credit written off by the appellant of Rs.4,899/-.*
5. *Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.*
6. *The learned CIT(A) has erred in law and on facts of the case in confirming action of the ld.AO in levying interest u/s.234A/B/C of the Act.*
7. *The learned CIT(A) has erred in law and on facts of the case in confirming action of the ld.AO in initiating penalty u/s.271(1)(c) of the Act.*

The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.

2. Briefly stated facts are that the assessee an individual and engaged in the business of trading of shipping machineries, ship engine, & engine parts and mill sale.

3. The assessee in the year under consideration has shown purchases from various parties including the parties as detailed below:

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- | | |
|---------------------------|----------------|
| 1) Impex sale corporation | Rs. 8,52,507/- |
| 2) Sankalp Traders | Rs. 2,82,504/- |

4. However, the AO during the assessment proceedings found that the VAT/ CST registration of the aforesaid parties were cancelled by the VAT department effective from the financial year 2011-12. Therefore the AO held that the assessee has shown bogus purchases from the parties as mentioned above. Accordingly the impugned purchases as claimed by the assessee were treated as unexplained expenses under section 69C of the Act and added to the total income of the assessee.

Aggrieved assessee preferred an appeal to the Ld. CIT(A).

5. The assessee before the Ld. CIT(A) claimed that he has shown sales against such purchases in the books of accounts which have not been disturbed by the AO. In case the purchases are treated as bogus then the assessee should be entitled for the deduction of the sales made against such purchases.

6. The AO did not carry out any independent verification from the aforesaid parties to verify the veracity of the purchases claimed by the assessee despite having the power under the statute under section 133(6)/131 of the Act.

6.1 The AO erred in treating the impugned purchases as bogus merely on the basis of the information obtained from the website of the sales tax

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department about the cancellation of registration certificate of the parties as discussed above. As such, the impugned purchases and the corresponding sales were duly recorded in the books of accounts and there is no whisper about any defect therein.

6.2 Without prejudice to the above, the assessee submitted that even otherwise the entire amount of purchases cannot be added to the total income of the assessee treating the same as unexplained expenses under section 69C of the Act. At the most, some reasonable estimate of profit can be made to prevent the Revenue leakage if any.

7. However, the Ld.CIT (A) disagreed with the contention of the assessee by observing that the onus lies on the assessee to prove his stand that the impugned purchases were from the genuine parties. Therefore, the obligation lies on the assessee to produce the parties from whom the purchases were made in the year under consideration.

In view of the above, the Ld. CIT(A) treated the entire amount as bogus purchases after having reliance on the judgment of Honøble Supreme Court in the case of N.K.Proteins Ltd. Vs. DCIT, 2017 6TIOL-23-SC-IT and confirmed the order of the AO.

Being aggrieved by the order of the Ld. CIT(A), the assessee is in appeal before us.

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8. The Ld. AR before us submitted that the AO and the ld. CIT-A failed to appreciate that purchases made by assessee from the parties are absolutely genuine as evident from the followings.

a. Books of accounts are duly audited which is at pages 6 to 21 of the paper book.

b. Ledgers of the concerned parties containing details of underlying purchases which is at page 25 to 26 of paper book.

8.1 The documentary evidences amply prove the purchases made from the parties in question are absolutely genuine. Hence, question of making any disallowance in respect of the same does not arise at all.

8.2 Learned A.R further submitted that the corresponding ~~sales~~ have not been disputed. Thus, the factum of sales made by the assessee has not been doubted by AO at all. If the assessee had not made the underlying purchases, it would have been possible for assessee to make the corresponding sales. This shows that goods have undoubtedly been purchased by the assessee. Hence, no case of bogus purchases can be made out.

8.3 In case AO had any doubt as to the purchases, AO could have called for details from the said parties by issuing notices u/s.133(6) of the Act. However, AO chose not to do anything of such sort. Under such circumstances, assessee cannot be penalized by disallowing the entire purchases made by the assessee from the referred parties.

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8.4 Alternatively, it is a normal practice whereby purchases are actually made from unregistered dealers or other suppliers who do not issue any bills and hence, to regularize such bills, accommodation bills are obtained. Such goods but that, by itself, doesn't render concerned purchases as bogus.

8.5 In such scenario, addition should be confirmed based on some reasonable estimate. Reliance is placed on CIT vs Gujarat Ambuja Export Ltd. Tax Appeal 840 of 2013 (Annexure -A) wherein a view has been taken that addition @ 5% of alleged bogus purchases would meet ends of justice.

9. On the other hand, the Ld. DR before us vehemently supported the order of the authorities below.

10. We have heard the rival contentions of both the parties and perused the materials available on record. The AO in the instant case has treated the purchases from the 2 parties namely Impex Sales Corporation and Sankalp Traders amounting to Rs. 11,35,011/-respectively as unexplained expenses under section 69C of the Act. The primary reason for treating such purchases as unexplained expenses that the registration certificate under VAT/CST were cancelled by the sales tax department effectively from the financial year 2011-12. The informations about the cancellation of these certificates were obtained by the AO from the website of the sale tax department.

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10.1 Subsequently, the Ld. CIT(A) confirmed the order of the AO by observing that the onus lies on the assessee to justify the expenses incurred by him by producing the parties besides the documentary evidence.

10.2 The addition in the present case was made under section 69C of the Act on account of unexplained expenses. Indeed, the primary onus lies on the assessee to justify the expenses claimed by him. However from the preceding discussion, we note that the assessee has discharged his onus by furnishing the copy of the ledger of the parties where the addresses of such parties were mentioned. In case, there is any doubt on the genuineness of the transactions from the so-called parties, the AO should have exercised his power granted under these statute under section 133(6)/131 of the Act by issuing notices for the purpose of the confirmation. But the AO has not done so.

10.3 Similarly, we are not convinced with the finding of the Ld. CIT(A) that the assessee was under the obligation to produce the impugned parties. It is because, the assessee cannot under any law enforce the attendance of such parties whereas the Revenue was empowered under the statute to call upon such parties.

10.4 We also note that the assessee has claimed to have made sales against such purchases which have been admitted by the Revenue. As such in our considered view, such sales cannot be executed without having the corresponding purchases. There was no defect pointed out by

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the authorities below insofar the sales made against such purchases. Moreover, there is also no allegation regarding the genuineness of the books of accounts which were duly audited under the Income Tax Act. However, before parting we cannot ignore the practice prevailing in the business industries to purchase the goods from the grey market and subsequently justify such purchases by obtaining a purchase bill from the parties engaged in providing accommodation entries. It is because the assessee in the present case has claimed to have purchased the goods from the parties not having valid VAT/CST registration certificate though he is claiming to have purchased goods from the registered party. Moreover, there was no submission from the side of the assessee against the finding of the authorities below about the cancellation of the registration certificates of the impugned parties. In view of the above, we can presume that the actual purchases were made by the assessee from the grey market but shown in the name of impugned parties. Our presumption is also fortified as the assessee has not produced any evidence for the payment against such purchases.

10.5 We are also conscious to the fact that the assessee has already declared the GP in its books of accounts by recording the sales and the corresponding purchases. But to prevent the possible leakage of the Revenue, as the purchases from the local/grey market is normally cheaper, we are inclined to make the ad hoc addition at the rate of 10% of such purchases in order to meet the end of justice and to stop the ongoing dispute. In holding so, we find support and guidance from the judgment

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of ITAT Ahmedabad in case of ITO vs. Sun steel reported in 92 TTJ 1126 wherein it was held as under:

“At the most it, can be presumed that the assessee did not make purchases from above parties but made from other unregistered dealer and got benefit of margin of purchases from unregistered dealer. We find that to that extent an estimation of profit can be made which will be fair and reasonable under the facts and circumstances of the case. Therefore, for the above purposes we estimate Rs. 50,000 and accordingly the- order of the CIT(A) is modified and the addition to the extent of Rs. 50,000 is sustained and balance addition of Rs. 26,89,407 is deleted out of the total addition made of Rs. 27,39,407.”

In view of the above, we direct the AO to make the ad-hoc addition on such purchases as discussed above. Hence the ground of appeal of the assessee is partly allowed.

11. The 2nd issue raised by the assessee is that the Ld. CIT(A) erred in confirming the addition made by the AO for Rs. 5,20,205/- on account of bad debts.

11.1 The assessee in the year under consideration has claimed bad debt amounting to Rs. 5,20,205/- but failed to furnish the details of the parties viz a viz details of the sales made to them. Therefore the AO disallowed the same and added to the total income of the assessee.

Aggrieved assessee preferred an appeal to the Ld. CIT(A).

11.2 The assessee before the Ld. CIT(A) submitted that it has claimed the deduction with respect to the following parties:

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i	M/s Sino star minerals Ltd	Rs. 2,56,355/-
ii.	M/s Ishita Overseas	Rs. 2,63,850/-

11.3 In case of M/s Sino star minerals Ltd.

The assessee claimed to have furnished performance guarantee bond to the party amounting to USD 5500.00 only but he failed to perform the same. Therefore the party has forfeited the same equivalent to INR 2,56,355.00. The assessee accordingly claimed that such loss was incurred in the course of the business therefore the same should be allowed. The assessee in support of his contention also filed the Remittance sheet of USD and contract with Sino star minerals Ltd.

11.4 M/s Ishita Overseas

The assessee claimed that he has made the sale to the party which was duly accounted for in the books of accounts. But the party did not pay the outstanding amount. Therefore the same was claimed as bad debts. The assessee also claimed that the entry in the books of accounts of the bad debts is sufficient enough to claim the deduction for the same.

12. However, the Ld. CIT (A) disregarded the contention of the assessee by observing that the amount due from the above mentioned parties was not shown as income in earlier years. Therefore, the same cannot be allowed as bad debts. In view of the above, the Ld. CIT(A) confirmed the order of the AO.

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Being aggrieved by the order of the Ld. CIT(A) the assessee is in appeal before us.

13. The Ld. AR before us submitted as follows:

a. With respect to the amount of Rs.2,56,355/-, it is the amount remitted to Sino Star International for Performance Guarantee Bond in respect of Iron Ore Contract:

Ledger of Sino Star International is on pg.28 of P/B.

Remittance Sheet is on pgs.29-30 of P/B.

Relevant contract for supply of Iron is on pgs.31-39 of P/B.

b. Assessee had remitted USD 5500 to Sino Star International for performance guarantee bond. However, on account of failure of the assessee to honor its commitment, such bond came to be executed and the assessee had to pay the sum in question to Sino Star International. CIT(A) has not found any fault with the said factual contention raised by the assessee (Pg. 10 of CIT(A)'s order).

c. Under such circumstances, the impugned disallowance ought to have been deleted.

d. Alternatively, such sum has been paid in the normal course of business of the assessee., Hence, the same must be allowed as "business loss" u/s 28 or 37 of the Act

e. For the amount pertaining to Ishita Overseas (Rs.2,63,850/), assessee had sold goods to the said party in the past and the amount receivable was shown as debit balance in the books of accounts of the assessee for the year under consideration.

f. It is a not a case where such debit balance was shown as Loans and Advances. This also implies that the debit balance in the

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name of the said party was on account of sales made to the said party in the past.

g. However, since the assessee could not recover such outstanding dues from the said party, assessee had written off such sum as bad debts in the books of accounts. The said fact is evident from the ledger of Ishita Overseas placed on **pg.27 of P/B.**

h. Since such sum has been written off in books as irrecoverable, such bad debts are allowable in light of TRF Ltd. vs. CIT - 323 ITR 397 (SC).

i. *Alternatively*, such sum may be allowed as "**Business loss**" u/s **28 or 37** of the Act. Reliance is placed on the judgments referred in content of similar argument raised hereinabove w.r.t. sum written off in the name of Sino Star International.

j. It is submitted that certain VAT credit \was written off by the assessee in the books of accounts by debited the same to P&L a/c.

k. Such expenditure has also arisen in the normal course of business of the assessee. Hence, such sum is allowable "**Business loss**" u/s **28 or 37** of the Act. Reliance is placed on the judgments referred to hereinabove in support of similar argument raised while dealing with ground w.r.t. Bad debts.

14. On the other hand the Ld. DR vehemently supported the order of the authorities below.

15. We have heard the rival contentions of both the parties and perused the materials available on record. It is the settled law that the losses incurred by the assessee in the course of the business activities are allowable deduction either under section 37(1) or 28 of the Act. In this

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regard we draw support and guidance from the judgment of Honøble Supreme Court in case of CIT Vs. Nanital bank Ltd. reported in 55 ITR 707 wherein it was held as under:

“Under section 10(1) of the Act the trading loss of a business is deductible for computing the profit earned by the business. But every loss is not so deductible unless it is incurred in carrying out the operation of the business and is incidental to the operation. Whether loss is incidental to the operation of a business is a question of fact to be decided on the facts of each case, having regard to the nature of the operations carried on and the nature of the risk involved in carrying them out. The degree of the risk or its frequency is not of much relevance but its nexus to the nature of the business is material.”

15.1 On perusal of the contract copy between the assessee and the party namely Sino Star Minerals Ltd. which is placed on pages 32 to 38 of the paper book, we note that such agreement/contract was made for the commercial purposes. The relevant extract reads as under:

*“SELLER PADMAVATI GLOBAL SERVICES
Gujarat India*

*BUYER SINO STAR MINERALS LIMITED
SUITE 605 6/F CHINA INSURANCE
GROUP BLDG., 141 DES VOEUX RD
CENTRAL, CENTRAL HONG KONG Phone +85293448151
E-mail*

This contract is made by and between the buyer and seller whereby the Buyer agrees to buy and the Seller agrees to sell the under mentioned goods for China on the terms and conditions stated below:

*CLAUSE 1 NAME OF COMMODITY 61.00%/60.00% Iron Ore Fines
Country of Origin Incia
Part of Loading Kandla Port., INDIA*

CLAUSE 2 DELIVERY PERIOD AND QUANTITY

*Quantity 15000 Metric Tons £10% at Seller's option
Laycan Shipment before 18th September 2010*

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CLAUSE 3 SPECIFICATIONS

CHEMICAL :

Fe 61.00% Basis
Below 50.00% Rejection

SIO2 6.50% Max.

Al2O3 4.50% Max.

P 4.50% Max.

S 0.08% Max.

Moisture 0.08% Max.

PHYSICAL (SIZE)

Above 10mm 10% Max.

Below 150mm 40% Max.

CLAUSE 4 PRICE

US \$ 108.00 PDMT Fob IKANDLIA PORT, INDIA BASEED
ON THE PE 61PCI, FRACTION PRORATA.”

15.2 We further note that the impugned payment was made by the assessee in connection with such contract as evident from the copy of the ledger of M/s Sino Star Minerals Ltd. (Guarantee Bond) placed on page 28 of the PB for the previous year 2010-11 in which such payment was made. In view of the above, we hold that the assessee is eligible for the deduction of the impugned loss as incurred in the course of the business but not as bad debts under the provisions of section 36(1)(vii) of the Act.

15.3 Regarding the claim of the bad debts for the amount of Rs. 2,63,850/- due from Ishita Overseas, we note that the assessee has furnished the copy of the ledger of the party which was also consisting the address of such party. But the AO without taking any confirmation from such party whether such amount represents the sales made to it has

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disallowed the bad debts. Indeed the onus lies on the assessee to furnish the details of the sales made to the parties. But the assessee failed to furnish the same despite the enough opportunities provided by the authorities below.

15.4 However, in the case on hand, we cannot ignore the ledger copies filed by the assessee which is placed on pages 27 of the paper book while deciding the issue on hand. Accordingly, we infer that the impugned amount of the bad debts represents against the sales made by the assessee.

In view of the above, we are not convinced with the finding of the authorities below. Accordingly, we set aside the order of the Ld. CIT(A) and direct the AO to delete the addition made by him.

16. The next issue raised by the assessee is that the Ld. CIT(A) erred in confirming the addition made by the AO for Rs. 4,899/- on account of the Act VAT credit written off.

16.1 The assessee in the year under consideration has claimed the deduction for the VAT credit written of Rs. 4,899/- only but failed to furnish the supporting evidences. Therefore the same was disallowed and added to the total income of the assessee.

17. Aggrieved assessee preferred an appeal to the Ld. CIT(A) who has also confirmed the order of the AO by observing as under:

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“7.3. After considering findings of the AO and submissions of the appellate, this ground is adjudicated as under.

It is seen that the appellant had debited Rs.4,899/- to P&L A/c on account of VAT Credit written off. However, both at the assessment and appellate proceedings stage no details were given in terms of names of party and transaction in respect of which the appellant was required to collect the VAT Credit, and which could not be recovered. In the absence of these details, disallowance of VAT Credit Written off of Rs.4,899/- is upheld. This ground of appeal is rejected.”

Being aggrieved by the order of the Ld. CIT(A), the assessee is in appeal before us.

18. The Ld. AR before us submitted as under:

“ It is submitted that certain VAT credit was written off by the assessee in the books of accounts by debited the same to P&L a/c.

Such expenditure has also arisen in the normal course of business of the assessee. Hence, such sum is allowable “Business loss” u/s.28 or 37 of the Act. Reliance is placed on the judgments referred to hereinabove in support of similar argument raised while dealing with ground w.r.t.Bad debts.”

19. On the other hand, the Ld. DR vehemently supported the order of the authorities below.

20. We have heard the rival contentions of both the parties and perused the materials available on record. In the present case the assessee has claimed the deduction for the amount of VAT credit written off in the

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books of accounts. However the assessee failed to furnish the details of the parties/purchases during the assessment proceedings in relation to which the amount of VAT credit was claimed. Thus in the absence of the documentary evidence the AO made the addition which was subsequently confirmed by the Ld. CIT(A).

20.1 Indeed, the primary onus lies on the assessee for claiming the deduction of the expenses/loss written off in the course of the business. But the assessee failed to furnish the necessary details. Therefore, in the absence of any information by the assessee, it is difficult to entertain the claim of the assessee.

20.2 However, the facts of the case on hand are bit peculiar insofar there was an allegation from the authorities below that the assessee has purchased the goods from the parties whose VAT/ CST registrations were cancelled. In the absence of the assistance from the side of the assessee, we can draw an adverse inference by holding that such amount of VAT credit relates to such parties i.e. the registrations were cancelled. If that be so, then it is clear that the claim was made by the assessee on account of such VAT credit for the purchases from the parties not having valid registration number. Therefore, it is inferred that such claim of the assessee was not bona fide in the absence of contrary documentary evidence. Thus we not find any reason to interfere in the order of the Ld. CIT(A). Hence, the ground of appeal of the assessee is dismissed.

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

This Order pronounced in Open Court on 01/10/2019

-Sd-

**(KUL BHARAT)
JUDICIAL MEMBER**

-Sd-

**(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated ^(True Copy) 01/10/2019

टॉसी.नायर, व.प्र.स./T.C. NAIR, Sr. PS