

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

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. Nos. 4709/Mum/2018

(निर्धारण वर्ष / Assessment Years: 2011-12)

Ashok Industrial Corporation 18, Shop No.4, C.P. Tank Road, N.D. Rd, Mumbai-04.	<u>बनाम/</u> Vs.	ITO 19(1)(2) Mumbai.
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आयकर अपील सं/ I.T.A. No. 4710/Mum/2018

(निर्धारण वर्ष / Assessment Years: 2010-11)

Ashok Industrial Corporation 18, Shop No.4, C.P. Tank Road, N.D. Rd, Mumbai-04.	<u>बनाम/</u> Vs.	ITO 19(1)(2) Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AA-EFA5524H		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Sashank Dundu
Revenue by:	Shri Chaitanya Anjaria (DR)

सुनवाई की तारीख / Date of Hearing: 03/09/2019

घोषणा की तारीख /Date of Pronouncement: 12/09/2019

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the above mentioned appeals against the different order passed by the Commissioner of Income Tax (Appeals) -6, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Ys.2010-11 & 2011-12.

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2. The assessee has filed the present appeal against the order dated 22.05.2018 passed by the Commissioner of Income Tax (Appeals) -6, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2010-11.

3. The assessee has raised the following grounds: -

"1. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeal) erred in

(a) arriving at the conclusion that purchases made of Rs. 1,02,87,771/- from parties mentioned in assessment order are not genuine and not made from them but from other sources.

(b) Confirming estimation of profit element 12.5% on alleged non genuine purchases of Rs. 1,02,87,771/- which is over and above the gross profit declared @7.24% in books of accounts.

(b) Confirming addition of Rs.12,85,971/- made by the Assessing Officer to the total income of the appellant.

2. The CIT (A) failed to appreciate that the AO did not carry out any independent enquiry himself and did not point out any defect in the evidence furnished by the Appellant. Therefore, the addition is liable to be deleted.

3. The CIT (A) failed to appreciate that the AO had not provided the Appellant any material on which he placed his reliance in making the impugned addition thereby violating the principles of natural justice. The CIT (A) ought to have provided such material to the Appellant before adjudicating on the impugned addition. Therefore, the addition is not justified.

4. The appellant craves leave to add, amend, alter and / or vary any of the grounds of appeal before or at the time of hearing."

4. The brief facts of the case are that the assessee filed its return of income on 14.10.2010 declaring total income to the tune of Rs.98380/- for the A.Y.2010-11. The return was processed u/s 143(1) of the I.T. Act, 1961. The case of the assessee was reopened on the basis of information received from the DGIT (Inv.), Mumbai in which it was conveyed that the



assessee has taken the bogus entry of purchase in sum of Rs.1,02,87,771/- from the following 22 parties.

Name of the Party	Amount
M/s. Raj Deep Metal	328186
M/s. Redrose Steel P. Ltd.	425467
M/s. Rishika Metal Sales P. Ltd.	413293
M/s. Nimesh Steel P. Ltd.	644535
M/s. K.V. Trading Co.	280059
M/s. Kankuru Tubes & Metal P. Ltd.	711664
M/s. Prakash Steel Metal	612393
m/s. Ridhi Sales Corporation	433777
M/s. Sunrise Enterprises	557118
M/s. Chair Impex Trading P. Ltd.	323856
M/s. Alok Trading Co.	523764
M/s. Goodluck Impex India	132940
M/s. Deeplok Metal alloy P. Ltd.	506542
M/s. RK Steel & Marcantile P. ltd.	559875
M/s. Radius Alloys Pvt. Ltd.	383681
M/s. Harshil Ferromer P. Ltd.	400256
M/s. Suraj Steel India	688246
M/s. Excel Industrial Corporation	560431
M/s. Jagdish Enterprises	110479
M/s. Ujwal Enterprises	837585
M/s. Aniket Industries	403644
M/s. Shalaka International	395980
Total	10287771



5. After the reply of the assessee, the AO restricted the addition to the extent of 12.5% of the bogus purchase i.e. to the tune of Rs.12,85,971/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who confirmed the addition to the extent of 12.5% of the bogus purchase, therefore, the assessee has filed the present appeal before us.

6. We have heard the argument advanced by the Ld. Representative of the parties and perused the record. At the very outset, the Ld. Representative of the assessee has argued that the case of the assessee has duly been covered by the decision of **Hon'ble ITAT in the assessee's own case for the A.Y.2009-10 in ITA. No.647/M/2017 dated 12.05.2017**, therefore, the addition is liable to be restricted to the extent of 2% of alleged bogus purchase. However, on the other hand, the Ld. Representative of the Department has refuted the said contentions. The copy of order dated 12.05.2017 in the assessee's own case for the **A.Y.2009-10 in ITA. No.647/M/2017** is on the file and relevant finding is hereby reproduced as under: -

“3. It was argued by learned AR Mr. Shashank Dundu that merely on the information received from DGIT(Inv.), regarding the Sales Tax Department finding Hawala dealers involved in bogus transactions, AO made an addition of Rs.23,64,585.6/- @12.5% of the total alleged Bogus Purchases amounting to Rs.1,89,16,685/-, to the total income of the Assessee. He invited our attention to the copies of the purchase bills filed before the AO. As per learned AR, the stock Register also shows recording of all the purchases in the regular books of accounts. Copies of sales bills have also not been doubted by the AO and CIT(A).

4. My attention was also invited by learned AR to the bank statement evidencing the payments through Account Payee Cheques. Attention was also invited to the ledger copies of purchase parties in assessee's books. Challenging the reopening, it was contended by learned AR that AO had not provided any reason or further information w.r.t. making the addition. The information from the Sales Tax Department is the sole



basis for the addition. AO had not called the parties for enquiry, hence the burden of proof lies on the AO.

5. Learned AR further contended that CIT(A) erred in making the following statements as provided in the CIT(A)'s Order: -

Reliance was placed on the decision of CIT v. Simit P. Sheth(Supra) by the CIT(A)(Pg.17, Para 6.11, CIT(A)) , since the addition in the said case is based on 2 factors i.e. the GP average % and the VAT % paid. In the current case the VAT has been paid by the Assessee, and he cannot be punished for the misdeeds of the vendors. - That the appellant had not fully reconciled the purchases with the items Sold and failed to reconcile 1:1 of the items purchased and sold (pg.14, para6.4, CIT(A)). In the current case, the assessee has produced and matched all the details as mentioned in the written submissions before the CIT(A)(Pg.6, Para4, Point 11, Sr. no. 2, CIT(A).

6. Inviting my attention to the AO's order, learned AR argued that in the instant case the AO had not called for any attendance of any of the suppliers. He had the right to summon any person u/s 131 in case of suspicion, which was not chosen by AO to be exercised.

7.It was argued by Mr. Sashank Dundu that the onus of proof is always on the person who makes the claim. In the instant case, the burden of proof has shifted on the department since, the onus has been discharged by assessee after providing all the details of the cycle of the alleged bogus transactions i.e. from purchase to sale.

8. Relying on the decision of Bombay Tribunal in case of Shri Rajeev G. Kalathil in ITA No.6727/Mum/2012, learned AR contended that addition on the ground that one of the suppliers was declared a hawala dealers by the VAT Department was not justified. It is a good starting point for making further investigation and take it to a logical end, but the AO left the Job at the initial point itself. Suspicion of the highest degree cannot take place of evidence.

9. My attention was also invited to the various judicial pronouncements by the Bombay Tribunal, wherein addition so made was deleted by the Tribunal.

10. In view of the above discussion, learned AR contended that no addition is warranted with respect to the purchases which have been sold and on which due profit has been declared by the assessee.

11. On the other hand, learned DR relied on the order of the AO and CIT(A) and contended that CIT(A) have very reasonably estimated the profit at 6.5% of such purchases and no further relief is warranted.



12. I have considered rival contentions and carefully gone through the orders of the authorities below and found from record that in respect of alleged bogus purchases AO estimated profit at 12.5%. By the impugned order, CIT(A) restricted the addition to the extent of 6.5%. I found that since sales are accepted, the purchases cannot be rejected solely based on the information from sales tax department. Purchases cannot be added once sales are accepted and the books of accounts are not rejected. (ITO v. Shri Deepak Popatlal Gala ITA No. 5920/M/2013 ITATMumbai). In view of the decision of Bombay High Court in case of Nikunj Eximp Enterprises Pvt. Ltd., 216 Taxman 171 where Sales are supported by purchases and payment was made through banks, merely because suppliers had not appeared before the AO, purchases could not be rejected as bogus. 13. Keeping in view the above discussion and the totality of facts and circumstances of the case as well as the judicial pronouncements cited by learned AR during the course of hearing before us, I direct the AO to restrict the addition to the extent of 2% of such alleged purchases. I direct accordingly.”

7. Respectfully following the order passed by co-ordinate bench, we set aside the finding of the CIT(A) on the issue and restrict the addition to the extent of 2% of alleged bogus purchase. Accordingly, the claim of the assessee is hereby partly allowed.

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8. The facts of the present case are quite similar to the fact of the case as narrated above while deciding the ITA. No.4710/M/2018, therefore, there is no need to repeat the same. However, the figure is different. The matter of controversy is also the same. The finding given above while deciding the appeal of the assessee bearing ITA. No.4710/M/2018 is quite applicable to the facts of the present case as mutatis mutandis. Accordingly, we restrict the addition to the extent of 2% of the alleged bogus purchase. The present appeal is partly allowed.



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9. In the result, the appeals filed by the assessee are hereby partly allowed.

Order pronounced in the open court on 12/09/2019.

Sd/-

(SHAMIM YAHYA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 12/09/2019
Vijay Sr. P.S.

Sd

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER



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A.Y. 2011-12 & 2010-11

आदेश की 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//

(Sr. Private Secretary)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai