



IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, ACCOUNTANT MEMBER

ITA no.2940/Mum./2019
(Assessment Year : 2011-12)

Wood Shape Works
201, Lotus Court
New Jain Derasar Lane
Haridas Nagar, Borivali (W)
Mumbai 400 092
PAN – AAAPW3675R

..... Appellant

v/s

Income Tax Officer
Ward-32(3)(2), Mumbai

..... Respondent

Assessee by : None
Revenue by : Ms. Vidisha Kalra

Date of Hearing – 08.08.2019

Date of Order – 25.10.2019

ORDER

PER SAKTIJIT DEY, J.M.

Aforesaid appeal by the assessee is directed against order dated 25th March 2019, passed by the learned Principal Commissioner of Income Tax, Mumbai, under section 263 of the Income-tax Act, 1961 (for short "*the Act*") pertaining to the assessment year 2011-12.

2. Brief facts leading to filing of the present appeals are, the assessee company is engaged in the business of trading in ferrous and non-ferrous metals. For the assessment year 2011-12, the assessee filed its return of income on 27th September 2011, declaring total income of ₹ 31,370. The return of income filed by the assessee was initially processed under section 143(1) of the Act. Subsequently, on the basis of information received from the DGIT (Inv.), Mumbai, and the Sales Tax Department, Government of Maharashtra, the Assessing Officer found that the purchases worth ₹ 17,64,347, claimed to have been made from three parties during the year are non-genuine as the concerned parties were identified as hawala operators providing accommodation bills, the Assessing Officer re-opened the assessment under section 147 of the Act. In the course of assessment proceedings, the Assessing Officer called upon the assessee to prove the genuineness of purchases made through supporting evidence. In response, the assessee filed copy of the ledger account of the selling dealers appearing in its books, copy of purchase bills, copy of bank statement showing payments made for the material purchases, stock statement showing movement of stock, quantitative details of purchases and sales, etc. After verifying the evidences furnished by the assessee, the Assessing Officer was of the view that the assessee

was not able to establish on record that purchases were made from the declared source. Thus, he held that purchases made by the assessee cannot be accepted as genuine. However, he also observed that the assessee had effected the purchases from some other sources as the entire quantity of the stock was sold by the assessee. Thus, he observed, in such circumstances, only the profit margin embedded in such purchases has to be brought to tax. Accordingly, relying upon certain judicial precedents, including the decision of the Hon'ble Gujarat High Court in CIT v/s Simit P. Sheth, [2013] 356 ITR 451 (Guj.), he estimated the profit margin on the non-genuine purchases @ 17% and added back to the income of the assessee. After completion of the assessment as aforesaid, learned Principal CIT called for the assessment records for examination. After examining the assessment records, he was of the view that the assessment order passed by the Assessing Officer by estimating the income on non-genuine purchases @ 17% is erroneous and prejudicial to the interests of Revenue because once the Assessing Officer has concluded that the purchases are bogus, he could not have estimated the income on such purchases. Accordingly, he issued a notice under section 263 of the Act directing the assessee to explain why the assessment order should not be revised. In response to the show cause notice, though, the assessee furnished its reply objecting to the initiation of proceedings

under section 263 of the Act, however, learned Principal CIT was not convinced with the submissions of the assessee. Learned Principal CIT observed, the Assessing Officer having received specific information in respect of the non-genuine purchases made by the assessee did not carry out the necessary enquiry which was required to be done. While coming to such conclusion, he specifically referred to the decision of the Hon'ble Supreme Court in N.K. Proteins Ltd. v/s DCIT, [2017] 250 taxmann.com 22 (SC), wherein the Hon'ble Supreme Court confirmed the decision of the lower authorities in making 100% addition on account of non-genuine purchases. Thus, ultimately, the learned Principal CIT concluded that the assessment order passed is erroneous and prejudicial to the interests of Revenue and set it aside with a direction to the Assessing Officer to make fresh assessment after conducting enquiries in the light of the decision which may be available before him including the decision of the Hon'ble Supreme Court in N.K. Proteins Ltd. (supra). Further, he observed, if the purchases are held as bogus, entire purchases have to be added back.

3. When the appeal was called for hearing no one was present for the assessee to represent the case despite issuance of hearing notice. Therefore, we proceed to dispose off the appeal ex parte qua the assessee after hearing the learned Departmental Representative and on the basis of material available on record.

4. The learned Departmental Representative strongly relying upon the observations of learned Principal CIT submitted, once the Assessing Officer came to the conclusion that the purchases made by the assessee were bogus, the entire purchases should have been added to the income of the assessee instead of restricting the addition to the profit margin of 17%. She submitted, the Assessing Officer fell into error by restring the addition to the profit element.

5. We have considered the submissions of learned Departmental Representative and perused material on record. Undisputedly, on the basis of information received by the Department from the Sales Tax Authorities indicating that certain parties from whom the assessee claimed to have made purchases have been identified as hawala operators, the Assessing Officer re-opened the assessment under section 147 of the Act. During the re-assessment proceeding, the Assessing Officer called upon the assessee to furnish supporting evidences to prove the purchases. It is evident, in response to the query raised by the Assessing Officer, the assessee did produce some evidences which of-course was not enough to satisfy the Assessing Officer regarding the genuineness of the transactions. Therefore, the Assessing Officer himself conducted enquiry by issuing notices under section 133(6) of the Act to the concerned parties. Thus, from the aforesaid facts it is very much clear that the Assessing Officer has not

overlooked the information/material available on record. Therefore, allegation of learned Principal Commissioner that while completing the assessment the Assessing Officer overlooked the materials on record or has not made enquiry is without any basis. A reading of the impugned order of learned Principal Commissioner certainly gives an impression that certain judicial precedents including the decision of the Hon'ble Supreme Court in N.K. Proteins Ltd. (supra) have triggered the exercise of power under section 263 of the Act. In our view, the decisions referred to by learned Principal Commissioner have been rendered in the context of specific facts involved therein, hence, cannot apply uniformly to all the cases. Pertinently, in the decision of N.K. Proteins Ltd. (supra), in course of search conducted in the premises of the assessee incriminating material such as various cheque books in the name of different parties were recovered. Thus, on the basis of such facts the Hon'ble Supreme Court upheld the addition of the entire purchases. However, the facts involved in the present appeal are different as the basis of addition is the information received from outside source i.e., the Sales Tax Department. Even otherwise also, no fault can be found with the Assessing Officer in making addition by estimating profit on the non-genuine purchases, as the assessee was able to co relate the purchases with sales and the doubt, if any, was only with regard to the source of purchases. It is

relevant to observe, the decision of the Assessing Officer in making disallowance @ 17% is in tune with the view expressed in various judicial precedents rendered in similar nature of dispute including the decisions of the Tribunal and the Hon'ble Jurisdictional High Court. In fact, the Hon'ble Jurisdictional High Court in Mohommad Haji Adam & Co. (supra) has held that even if the purchases are found to be bogus, however, the entire purchases cannot be added if the sales are not doubted or disputed. The Hon'ble Jurisdictional High Court held that in such circumstances, the addition can be made by applying the gross profit rate of normal purchases. Thus, in our considered opinion, the decision of the Assessing Officer in making addition applying the profit rate is in consonance with various judicial precedents available on the issue. Therefore, it cannot be considered to be an erroneous as it is a possible view. Moreover, the allegation of learned Principal Commissioner that the Assessing Officer has overlooked the material on record and has not made any enquiry which ought to have been made, appears to be on wrong assumption of facts, hence, not tenable. In view of the aforesaid, we hold that in the given facts and circumstances of the case, the assessment order passed cannot be held as erroneous and prejudicial to the interests of Revenue. That being the case, exercise of power under section 263 of the Act to revise the assessment order is neither justified nor valid. Accordingly,

we are inclined to quash the impugned orders passed by learned Principal Commissioner under section 263 of the Act. Grounds raised by the assessee are allowed.

6. In the result, assessee's appeal is allowed.

Order pronounced in the open Court on 25.10.2019

Sd/-
N.K. PRADHAN
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 25.10.2019

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai