

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

**BEFORE SHRI MAHAVIR PRASAD (JM) AND
SHRI S. RIFAUR RAHMAN (AM)**

**ITA No. 6833/MUM/2018
Assessment Year: 2009-10**

The Income Tax Officer – 27(1)(1) Mumbai	Vs.	M/s. Associated Chemicals A/103, Gurudv Apartments, Ramchandra Chemburkar Marg, Chembur, Mumbai- 400071 PAN- AAE FA7 487 K
(Appellant)		(Respondent)

Assessee by : Shri S. Michael Jerald (DR)
Revenue by : Shri Viraj Mehta

Date of Hearing: 05/11/2019
Date of Pronouncement: 07/11/2019

ORDER

PER MAHAVIR PRASAD, JM

This appeal has been preferred by the Revenue against the order of Ld. CIT(A)-25/IT-113/2015-16 dated 04.09.2018 arising out of assessment order dated 28.03.2015 and Revenue has taken following grounds of appeal:-

“1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 2,40,240/- made by the Assessing Officer on account of bogus purchases, without appreciating the fact that the assessee had failed to produce bills, vouchers and other documentary evidences in support of his claim and without considering the latest Apex Court decision in the case of N K Protein Ltd. wherein it is held that once it is proved that the purchases are bogus then addition should be made on entire purchases and not on profit element embedded in such purchases.

2. On the facts and circumstances of the case, the Ld. CIT(A) erred in estimating the profit from Hawala purchases by disallowing only Rs. 34,320/-

being 12.5% of the bogus purchases as even the basic onus of producing delivery challan, transport bills etc., were not fulfilled by the assessee.

3. *The appellant prays that the order of the CIT(A) on the above grounds be reversed that of the Assessing Officer be restored.*

4. *The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary.”*

2. Facts of the case are as emanated from appellate order:-

“2.1. *During the year under consideration, appellant has made purchases of Rs. 8,89,60,514/-. Out of the same, goods worth Rs. 2,74,560/- has been purchased from M/s Monarch Enterprise of Rs. 2,74,560/-.*

2.2. *It is submitted that copy of invoices and Ledger copy were already submitted to substantiate the purchases. Further, materials are purchased at the prevailing market price and are consumed/ utilized for making of furniture by the Firm during the year.*

2.3. *Appellant had paid to the above party through proper banking channel with an account payee cheques.*

2.4. *It is pertinent to note that, the Appellant had made direct purchases from the above Party and the Assessee's Bank Statements also clearly reflects about the payments made to the above party from time to time.*

2.5. *Ld. AO did not produce the basis and Evidence on what and how the above Party name has been reflected as Fictitious.*

2.6. *It is submitted that the appellant had paid the VAT dues for and on account of the failure of the non-payment of VAT by the above Party, as the same was made Statutorily Liable to be discharged for the above Party's Obligation within the Provisions of Section 48(5) of the VAT Act and just because of the above said Party's Financial crisis of Problem might not had paid its VAT dues Or even Just there may be Change of Mind of the said Party, to Enrich himself by taking wrong acts, does not make the Genuine transactions of the appellant as Bogus.*

2.7. *Kindly also note that, the above Party was also having a Valid VAT No 27390395445V issued by the concerned Government department after due examination.*

2.8. *Further, in absolute terms as a percentage alleged bogus purchase comes to almost negligible 0.31 %, out of total purchases hence on the basis of the declaration made by the party, the same cannot be regarded as non- genuine / bogus transactions.*

2.9. *Appellant had purchased raw materials and as such the above material was consumed for making specialty chemicals and the corresponding Sales are already taken as Sales and offered as Income through revenue account, being credited as Sales to the Profit & Loss account.*

2.10. From the above all facts and circumstances, taken together clearly reflects that the appellant had made genuine purchases from the above party.

2.11. Without prejudice it is submitted that Ld. AO has made 100% addition. It is submitted that an adhoc 3-5% be added if your honors do not agree with the above submission and arguments of the appellant. Hon. Mumbai Tribunal has in many cases sustained addition of 12.5% less GP % offered. In our case, since appellant has already offered GP of 34.96%, and hence no addition should be made.”

3. Against the order of the Ld. AO assessee preferred first statutory appeal before the Ld. CIT(A) who revisited all the issues and submissions made before him and he accepted the contention of the assessee and partly allow the appeal of the assessee.

4. Now Revenue has come before us. We have gone through the impugned order and heard both the parties Ld. CIT(A) has mentioned several orders of the High Court and Co-ordinate Benches wherein similar facts and circumstances Tribunal as estimated the gross profit addition in the hands of the purchaser on account of such bogus purchases @ 12.5%. In the case of Shri Ashwin Purshotam Bajaj vs. ITO in ITA No. 4736/Mum/2014 Co-ordinate Bench has held as follows:-

“9. We have considered the rival contentions and also perused the material available on record. We have observed that the assessee is an individual running a proprietorship firm namely M/s The Shoe Box INC Retail Store of footwear, bags, belts, wallets and leather goods, boutique etc. having shops at different places, and office at Mumbai. Information was received by the AO from the Sales Tax Authorities, Government of Maharashtra that the assessee has made bogus purchases to the tune of Rs. 1.13 crores from following four parties who are in the list of hawala dealers giving accommodation entries without supplying any goods :-

S No.	Name of parties	TIN	Financial Year	Amount
1.	Rohit Enterprises	27020680974V	2009-10	Rs. 8,84,584
2.	Deep Enterprise	27750595164V	-do-	Rs. 18,09,710
3.	Kwality Enterprises	27790284742V	-do-	Rs. 60,33,496

4.	V3 Enterprises	27860613194V	-do-	Rs. 26,16,988
	Total			Rs. 1,13,44,778/-

The AO issued notices u/s 133(6) of the Act to the above stated parties to seek relevant information/documents but the notices were returned un-served. The assessee was asked by the AO to produce these four parties but the assessee could not produce the parties from whom the purchases were made. The AO made additions u/s 69C of the Act of the peak credit outstanding to be payable to these four parties during the year to the tune of Rs.1,31,88,227/- as against purchases of Rs.1,13,44,778/-. The credit for purchases from these four parties of Rs.1,13,44,778/- are appearing in the books of accounts of the assessee. The assessee has to discharge the primary onus as to the genuineness and bonafide of the transaction of purchase of goods. It is observed that the A.O. has made addition of the entire purchases amount to Rs. 1.13 crores by making additions of Rs. 1,31,88,227/- being peak credit payable during the year for purchases to these parties which included balance of Rs.18,43,451/- for purchases made in the earlier year, while the AO has, however, not doubted the sales made by the assessee against these purchases. The assessee has reconciled the quantitative details of the stock reflected in these purchases with quantitative details of stock as per sale invoices. The A.O. has doubted the purchases from these four alleged accommodation entry providers being hawala dealers as concluded by Sales Tax Department of Government of Maharashtra to be bogus purchases, that these four parties only provided accommodation bills and the goods were never supplied by these parties and the assessee allegedly made purchases from some other parties for which payments were made through undisclosed income. Thus, the A.O. observed that the assessee has purchased the material from someone else while bogus bills were organized by these hawala dealers, hence, section 69C of the Act was invoked by the AO and additions were made by the AO. The conclusion of the Id. CIT(A) that the assessee has purchased material from some other dealers but quantitative reconciliation of the stock was duly done by the assessee of the sale and purchase and hence the profit element in this accommodation entries are to be added to the income cannot be faulted. The Id. CIT(A) restricted the addition by estimating GP ratio of 12.5% of Rs. 1,13,44,778/- being purchases from these alleged four accommodation entry providers. We do not find any infirmity in the well reasoned order of the Id. CIT(A) whereby net profit was estimated which was a reasonable estimation made by learned CIT(A) and we sustain/ affirm the order of learned CIT(A). In the result, we dismiss both the appeal of the assessee as well of Revenue. We order accordingly.

10. In the result, the appeal filed by the assessee in ITA No. 4736/Mum/2014 and the appeal filed by the Revenue in ITA No. 5207/Mum/ 14 for the assessment year 2010-11 are dismissed.”

In the case of Smt. Kiran Navin Doshi vs. ITO in ITA No. 2601/Mum/2016 Co-ordinate Bench has held as follows:-

"6.3.1 We have heard the learned D.R. for Revenue and perused and carefully considered the material on record. We find that the learned CIT(A) has addressed this issue in detail and after considering the submissions of the assessee, the AO's findings and various judicial pronouncements on this issue, has held that since the direct one to one relationships between purchases and sales have not been established, bringing the profit element embedded in the impugned purchase estimated @12.5% thereof, i.e. ₹5,15,377/- to tax in the hands of the assessee would meet the ends of justice. The learned CIT(A) at paras 7 to 7.31 of the impugned order has considered and decided the issue as under: -

7. After taking into consideration the AO's findings and the appellant's submissions and order sheet notings, as well as the facts of the case, decision on the ground raised by the appellant, is made here under:-

7.1. All the above grounds of appeal are in respect of addition of Rs.41,23,015/- on account of alleged bogus purchases made by the appellant from certain parties. Therefore, all the grounds are being taken up together for disposal. Briefly stated, assessee is a proprietor of M/s. Citizen Steel Corporation and engaged in the business as wholesaler dealer in iron and steel. Ld. AO made the addition on the basis of information received from Sales Tax Department, Govt. of Maharashtra regarding parties who are only providing accommodation entries without doing any actual business. Consequent investigation revealed these parties as "hawala operators".

7.2 The Ld. AO conducted independent inquiries by issuing notices U/s. 133(6) of the IT. Act 1961, but the notices were returned unserved as no such firms or parties existed at the given addresses. The appellant was asked to submit the details of purported purchases made from these parties and the assessee was also required to produce the parties concerned for verification. The assessee produced certain evidences, but failed to produce the parties concerned for verification.

73. The Ld. AO observed that these hawala operators were providing only accommodation entries and the appellant was also in the list of beneficiaries. The Ld. AO has also held that payment through banking channel does not prove that purchases are genuine, and considering the nature of hawala transactions, production of purchase invoices etc also does not prove that purchases are genuine. The appellant could not even produce details such as transportation of such goods, such as mode of transportation of goods through a particular carrier i.e. truck or tempo, etc, thus it has been held by the Ld. AO that the assessee has failed to furnish any cogent evidence to substantiate the delivery of goods. Moreover the assessee has not produced the parties concerned for verification. Accordingly, the Ld. AO treated the amount of Rs. 41,23,015/- as bogus purchases and added back to the, total income of the appellant. Even during appellate stage, no fresh evidences have been submitted.

74 The appellant was asked to submit the details of purported purchases made and to show cause why the same should not be disallowed as bogus purchases. The Ld. AO observed that the appellant failed to furnish the supporting documentary evidence to support that the purchases were actually made by them from these parties such as transportation documents, inward register etc.

The Investigation Wing of Mumbai had provided a list of hawala bill racketeers who were involved in issuing bills and also the list of beneficiaries. The Sales Tax Department of Mumbai had investigated all these cases thoroughly and prepared a list of such hawala operators and their beneficiaries which have been uploaded in their Website. The Ld. AO observed that these hawala operators were providing only accommodation entries and the appellant was also in the list of beneficiaries. Accordingly, the Ld. AO treated the amount of Rs. 41,23,015/- as bogus purchases and added back to the total income of the appellant.

7.5 At assessment stage, opportunity was given to assessee to produce the parties for verification, but the assessee failed to do so. The supplier was in fact the appellant's witness and the Ld. AO was not required to force its attendance. It was for the appellant to produce it as per Civil Procedure Code which applies on all fours to the income-tax proceedings. It is trite that once a transaction is shown to be of the nature of income, the onus shifts to the assessee to show that the same was not taxable. It can thus be safely assumed that the appellant has grossly failed in its duty to mitigate the burden cast upon it in so far as proving the genuineness of the transaction from the said parties is concerned.

7.6 In this regard it is also pertinent to mention that while dealing with the concept of burden of proof, onus of proving is always on the person who makes the claim and not on the Revenue. While dealing with the issue of deciding the burden of proof, Hon'ble Supreme Court in the cases of CIT Vs. Durgaprasad More 82 ITR S40 and Sumati Dayal Vs. CIT 214 ITR 801 has held that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not real and that Taxing Authorities are entitled to look into surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. The Hon'ble court also held that, it is no doubt, true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden to prove that it is not taxable because it falls within exemption provided by the Act, lies upon the assessee. In the case of Durgaprasad More (Supra), the Hon'ble Court went on to add that a party who relies on a recital in a Deed has to establish the truth of this recital, otherwise it will be very easy to make self serving statements in documents either executed or taken by a party who relied on those recitals. If all that an assessee who wants to evade tax has to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. The Hon'ble Court further held that the Taxing Authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look in to the surrounding circumstances to find out the reality of the recitals made in those documents.

6.3.2 On an appreciation of the facts on record and the findings rendered by the learned CIT(A) in the impugned order (supra), we find that apart from raising these grounds (supra), the assessee has failed to place on record any material evidence to controvert the findings of the learned CIT(A). In this view of the matter, we uphold the order of the learned CIT(A) on this issue of bringing to tax in the assessee's hands the profits embedded in the bogus purchase @ 12% of the purchase cost i.e. Rs.5,15,377/-, since the direct one to one

relationship/nexus between the said purchases and sales have not been established by the assessee. Consequently ground No. II (iii to vii) is dismissed.

7. In the result, the assessee's appeal for A.Y. 2009-10 is dismissed."

In the case of ITO vs. Manish Kanji Patel in ITA No. 7299/Mum/2014, 7154/Mum/2012 & 7300/Mum/2014 Co-ordinate Bench has held as follows:-

"9. We find that in the instant case the facts are similar to the judgment by Hon'ble Gujarat High Court, we find that entire bogus purchases and entire amount of bogus purchase cannot be the gross profit of the assessee. We find that the purchases were not bogus but were made from the parties other than those mentioned in the books of account. The Assessing Officer has not disputed the sales of the assessee and quantity of sales of closing stock. The assessee has though disputed the addition but no evidence is produced and no document is produced to show that purchases were made from Navkar Enterprises and Shreeji Impex. That being the position, not entire purchase price but only the profit element embedded in such purchases could be added to the income of the assessee. We therefore estimated the possible profit out of purchase made through non-genuine parties. The estimation rate of profit return must be necessary vary with the nature of business and no uniform yardstick could be added. We found that in the instant case stock and sales and the quantity-wise stock and purchases / sales were tallied to the last KG therefore, we directed to take the A.O. 12% of the sales as gross profit accordingly re-compute the business of the assessee. We find that CIT(A) has directed to take the G.P. @ 10% of the sales but to cover up all the decisions of the books of accounts. We modify the order of the CIT(A). We direct him to take the 12.5% sales gross profit accordingly the Departmental appeal is partly allowed."

In parity with the above said Co-ordinate Bench orders, we dismiss the appeal of the Revenue.

5. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 07/11/2019.

Sd/-
 (S. RIFAUR RAHMAN)
 ACCOUNTANT MEMBER

Sd/-
 (MAHAVIR PRASAD)
 JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 07/11/2019

आदेश 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//

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आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**