

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI
Before Shri Shamim Yahya (AM) & Shri Pawan Singh (JM)

ITA No. 6132/Mum/2018(Assessment year : 2010-11)

Income-tax Officer Ward 12(3)(1), Mumbai	vs	M/s Krish Micro System Pvt Ltd 204, Spring Leaf CHSL, Lokhandwala, Kandivali (E) Mumbai 400 101 PAN : AACCK6090R
APPELLANT		RESPONDEDNT

Appellant by	Ms. Samatha Mulla mudh (DR)
Respondent by	None
Date of hearing	15-10-2019
Date of pronouncement	23-10-2019

ORDER

Per Pawan Singh, JM :

1. This appeal by revenue is directed against the order of Id. CIT(A)-21, Mumbai dated 31.07.2018 for Assessment Year 2010-11. The revenue has raised the following grounds of appeal:

"1. Whether on facts and circumstances of the case, the CIT(A) was justified in restricting the addition on account of bogus purchases to 12.5% of such bogus purchases without appreciating that the onus on the assessee to establish genuineness of such purchase especially when the suppliers were found to be hawala parties providing accommodation entries?

2. Whether on facts and circumstances of the case and in law, the CIT(A) was correct in restricting the addition on account of bogus purchases to 12.50% of such purchases without giving any reasonable justification for the same, and ignoring the justification of adding 100% of Bogus purchases on the basis of information received from DGIT(Inv) Mumbai?

3. "Whether on facts and circumstances of the case and in law, the CIT(A) was right in restricting the addition to 12.50% on account of bogus purchases without taking into consideration the decision of the Hon'ble Supreme Court in the case

of M/s N.K. Proteins Vs Dy. CIT No. 769 of 2017 dated 16.01.2017(SC) wherein the 100% disallowance on bogus purchases was upheld?"

4. "Whether on facts and circumstances of the case and in law, the CIT(A) erred in not relying on judgment of Hon'ble Allahabad High Court in the case of CIT Vs Shri Ganesh Rice Mills(294 ITR 316) without appreciating that the facts of the case are similar to those of the assessee?"

2. Brief facts of the case are that the assessee is a contractor of electronic device, filed return of income for AY 2010-11 on 12-10-2010 declaring total income at Rs.1,39,820/-. The return of income was processed under section 143(1). The assessment was re-opened under section 147 and after recording reasons for reopening in respect of bogus purchases of Rs.2,29,201/- and Rs.1,59,116 from Hawala dealers M/s Shyam Corporation and M/s Jain Corporation respectively. Notice u/s 148 dated 31-03-2016 was issued and served on the assessee. The reasons for reopening of the assessment was also supplied to the assessee. The Assessing Officer after serving notices under section 143(2) & 142(1) proceeded for re-assessment. The assessing officer observed that information was received in office of DGIT(Inv), Mumbai and subsequently from the sales-tax department, Mumbai regarding suspicious parties, who were only providing accommodation entries without doing any actual business. From the list supplied by the sales-tax department, the following parties were appearing in the list of bogus parties from whom the assessee was shown to have made purchases:-

	Name of the parties	Bill amount (Rs.)
1	Shyam Corporation	2,29,201
2	Jain Corporation	1,59,116
	Total	3,88,317

3. The assessee was asked to substantiate the purchases and issued show-cause notice as to why the aforesaid transaction should not be treated as non-genuine. The assessee filed its explanation and furnished the copy of ledger account and proof of payment through cheques. Notices u/s 133(6) were also issued to the above parties, In the case of Shyam Corporation, the notice was returned by the postal authorities with the remark, “left”. In case of M/s Jain Corporation, the assessee stated that the said party was not available at the given address and not traceable.
4. The assessee was also asked to furnish its explanation on the purchases purported to have been made from the aforesaid parties and also that why the expenditure claimed in respect of bogus purchases shown to have made from the aforesaid dealer should not be disallowed as the notice issued to M/s Shyam Corporation returned unserved; and the assessee stated that M/s Jain Corporation was not found at the given address and not traceable. The assessing officer therefore observed that the genuineness of the transactions were remained unproved. The assessee, in its reply furnished copies of ledger a/c's of the purchase parties; purchase invoice; and payment details to purchase parties. However, the

assessee has not produced the details of the delivery challan / transport receipt and bank statement of the suppliers before the AO. The Assessing Officer did not accept the explanation furnished by assessee and noted that –

- (i) the assessee has not made available the details of transportation of the material purported to have been purchased from the aforesaid hawala dealer, such as transportation receipts;
- (ii) the assessee has not furnished any ledger account confirmation from the aforesaid dealer;
- (iii) 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;
- (iv) 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 a number of reasons for seeking the accommodation entry as it leads to generation of the cash in the hands of assessee.

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

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

(vii) The contention that the payments 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)*.

(viii) 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)*, *Chaturbhuj 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)*.

(ix) The purchases from hawala operator falls within the ambit of the term 'colorable devices' and the Hon'ble Supreme Court observed

in the case of McDowell and Co. Ltd. Vs. CTO 154 ITR 148 that *"Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious method. It is obligation of every citizen to pay the taxes honestly without resorting to subterfuges.*

- (x) The Sales Tax Department made a finding and uploaded on its website the name of entities which are involved in giving bogus bills only after carrying out a detailed enquiry and investigation.
4. The Assessing Officer after considering the material available before him and the submission made by assessee concluded that the assessee has shown Gross Profit (GP) @ 58.07%. Therefore, the assessing officer made the disallowance of those purchases shown from the said parties @ 58.07% and worked out the disallowances of Rs. 225,495/- out of total alleged bogus purchases of Rs. 3,38,317/- in assessment order dated 21.12.2016 passed under section 143(3) r.w.s 147.
5. On appeal, the Id. CIT(A) reduced/ restricted the addition/ disallowances to the extent of 12.5% of the alleged bogus purchases, being the profit element embedded in such bogus purchases, by relying upon the decisions of Hon'ble Gujarat High Court in the case

of CIT vs Simit P Sheth (2013) 356 ITR 451 (Guj) and in the case of Bholanath Poly Fab Pvt Ltd (2013) 355 ITR 290 (Guj). Aggrieved, the revenue has filed this appeal.

6. None appeared on behalf of the assessee. However, we find from record that an adjournment application dated 14-10-2019 from assessee's counsel is placed on record which was rejected as nobody was present to press the application. We found that the matter could be disposed of on the basis of material available on record. Therefore, we heard the submissions of the ld. departmental representative (DR) for the revenue.
7. The Ld. DR heavily relied upon the order of the assessing officer. The ld DR submits that the investigation wing of the sales tax department as well as Income tax department made dull flagged inquiry to unearthed the modus operandi adopted by the hawala dealers. The hawala dealers were issuing the bogus bills without delivery of any goods. The assessee is one of the beneficiaries of such hawala trading activities. The assessee obtained bogus bills to inflate the expenses and to reduce the profit. The ld. DR submits that entire addition was liable to be sustained by ld CIT(A). The ld. DR prayed for restoring the order of the assessing officer.

8. We have considered the submissions of the Id. DR for the revenue and perused the record. The assessing officer made the disallowance of those purchases shown from the said parties @ 58.07% on the basis of GP declared by assessee and worked out the disallowances of Rs. 2,25,495/- out of total alleged bogus purchases of Rs. 3,38,317/-, while passing the assessment order. The Id. CIT (A) restricted the additions/ disallowance to the extent of 12.5% by holding that the assessing officer has not made any independent inquiries. The Id CIT(A) further concluded that in case the assessee failed to produce the evidences that the goods were purchased at the arms length price, which would indicate that the purchases were made from the gray market without insisting of the genuine bills and in such cases suppliers would be willing to sell at much less rate as they would have charged otherwise and that the goods have been purchased from the grey market. Therefore, the profit element embedded on such purchases would be equal to the difference of bogus purchases and the genuine price. On the basis the Id CIT(A) restricted the disallowance to the extent of 12.5%. We find that the decision arrived at by the Ld.CIT(A) in restricting the addition to the extent of profit element embedded in such bogus purchases is in conformity with the decision of the Hon'ble Gujarat High Court in CIT vs Simit P Sheth (2013) 356

ITR 451 (Guj) and. No other contrary decision has been brought to our notice by the Ld. DR so as to enable us to come to a different conclusion than the one arrived at by the Ld. CIT(A). Therefore, in this view of the matter, we uphold the order of the Ld.CIT(A) and dismiss the appeal filed by the revenue.

9. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 23-10-2019.

Sd/- (Shamim Yahya) ACCOUNTANT MEMBER	Sd/- (Pawan Singh) JUDICIALMEMBER
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Mumbai, Dt : 23 October, 2019

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Asstt. Registrar, ITAT, Mumbai