

**IN THE INCOME TAX APPELLATE TRIBUNAL
“H” Bench, Mumbai**

**Before Shri Ravish Sood, Judicial Member
and Shri N.K. Pradhan, Accountant Member**

**ITA Nos.6536/Mum/2018
(Assessment Year: 2009-10)**

Krutharth Atul Shah
(Prop. K.V. Industries)
A-1203, Balaji Garden
Sector 11, Koperkhairane,
Navi Mumbai – 400 709

ITO 28(2)(1), 3rd Floor, Tower No.6,
Vashi Station Complex, Vashi,
Navi Mumbai – 400 703
Vs.

PAN – ARPPS3575G

(Appellant)

(Respondent)

**ITA Nos.5938/Mum/2018
(Assessment Year: 2009-10)**

ITO 28(2)(1), 3rd Floor, Tower No.6,
Vashi Station Complex,
Vashi, Navi Mumbai – 400703

Krutharth Atul Shah
(Prop. K.V. Industries)
A-1203, Balaji Garden
Sector 11, Koperkhairane,
Navi Mumbai – 400709
Vs.

PAN – ARPPS3575G

(Appellant)

(Respondent)

Appellant by: Shri N.R. Agarwal, A.R
Respondent by: Shri V. Vinod Kumar, D.R

Date of Hearing: 06.11.2019
Date of Pronouncement: 08 .11.2019

ORDER

PER BENCH:

The present cross appeals are directed against the order passed by the CIT(A) - 26, Mumbai, dated 30.08.2018, which in turn arises from the order passed by the A.O under

Sec.143(3) r.w.s 147, dated 12.03.2015. As a common issue is involved in the captioned appeals, therefore, the same are being taken up and disposed off together by way of a consolidated order. The assessee has assailed the impugned order by raising before us the following grounds of appeal:

“Ground No. 1 The learned CIT (Appeals) erred in making the addition of Rs.11,70,005/- on count of Bogus Purchases by estimating addition @ 18% inspite of fact that all payments to suppliers are by account payee cheques & quantity details were filed with him.

Ground No. 2 The learned CIT (Appeals) erred in ignoring the fact that Gross Profit declared on impugned purchases was 12.46 % which was higher than overall Gross Profit of 9.19%.”

2. On the other hand the revenue has challenged the order of the CIT(A) on the following grounds of appeal:

- “1. On the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in restricting the addition of Rs.65,00,031/- made by the Assessing Officer on account of non-genuine/unproved purchases to 18%, without appreciating the fact that assessee had failed to discharge the onus to establish the genuine of the transactions and also failed to furnish corroborative evidences in support of his claim and without considering the latest Apex Court decision in the case of N.K. Proteins Ltd. wherein it was held that addition on the basis of bogus purchase could not be restricted to certain percentage when entire transaction was found as bogus.
2. The appellant prays that the order of the Ld. CIT(A) on the above grounds be reversed and that of the Assessing Officer be restored.
3. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary.”

3. Briefly stated, the assessee who is a dealer (whole seller) of solvents & chemicals had filed its return of income for A.Y. 2009-10 on 29.09.2009, declaring his total income at Rs.16,57,230/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the Act. On the basis of information received from the Sales tax department that the assessee as a beneficiary had obtained bogus purchase bills from certain hawala dealers, his case was reopened under Sec.147 of the Act.

4. During the course of the assessment proceedings, it was observed by the A.O that the assessee had claimed to have made purchases aggregating to Rs.65,00,031/- from the following 5 tainted parties:

Name of the Hawala Party	F.Y.	Amount of Bogus bill	TIN
M/s Poiner Trading	2008-09	Rs. 6,14,016/-	27430617262V
M/s S.R. Enterprises	2008-09	Rs. 7,92,480/-	27110256404V
M/s Sumukh Corporation	2008-09	Rs. 8,86,080/-	27040238546V
M/s Chetan Chemical	2008-09	Rs.13,86,975/-	27330152396V

Corporation			
M/s International Trade	2008-09	Rs.28,20,480/-	27300371972V
Total		Rs.65,00,031/-	

Observing, that the abovementioned parties were involved in the business of issuing bogus purchase bills to various parties without carrying out any actual sales, the assessee was called upon by the A.O to substantiate the authenticity of its purchases made from them. In reply, the assessee in order to substantiate the genuineness of the purchases claimed to have been made from the aforementioned parties produced before the A.O his 'stock register'. Also, it was submitted by the assessee that the payments to the aforementioned parties towards purchase consideration was made through banking channels. In the meantime, the A.O in order to verify the genuineness of the purchase transactions issued notices under Sec.133(6) to aforesaid parties, which however were returned back by the postal authorities. In the backdrop of the aforesaid facts, the A.O directed the assessee to produce the aforesaid parties for necessary verification before him. However, the assessee failed to comply with the direction of the A.O and did not produce either of the abovementioned parties for necessary verification before him. The A.O holding a conviction that the assessee had not made any genuine purchases from the aforementioned parties, disallowed the aggregate value of purchases of Rs.65,00,031/- which were claimed by the assessee to have been made from them. On the basis of his aforesaid deliberations the income of the assessee was assessed at Rs.81,64,340/-.

5. Aggrieved, the assessee carried the matter in appeal before the CIT(A). Insofar the observation of the A.O that the assessee had not made any genuine purchases from the aforementioned 5 parties, the CIT(A) was in agreement with the view taken by him. In fact, the CIT(A) held a conviction that the documents submitted by the assessee in support of its claim of having made genuine purchases were orchestrated to present a facade of genuineness and no genuine purchases were made by the assessee from the aforementioned parties. At the same time, the CIT(A) was of the view, that as the sales of the material claimed by the assessee to have been purchased from the aforementioned parties was accounted for by the assessee, therefore, it could safely be concluded that the assessee had purchased the goods not from the aforementioned parties but from the open/grey market. On the basis of his aforesaid observations, the CIT(A) was of the view that the addition in the hands of the assessee was liable to be restricted only to the extent of the profit element embedded in

making of such purchases by the assessee from the open/grey market. Accordingly, the CIT(A) taking cognizance of the fact that the G.P rate of the assessee for the last 3 years ranged from 8.47% to 17.68%, therefore, he confined the addition to the extent of 18% of the aggregate value of the purchases of Rs.65,00,031/-.

6. That both the assessee and revenue being aggrieved with the order of the CIT(A) have carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee submitted, that the sustaining of the addition in respect of the aforesaid unproved purchases by the CIT(A) to the extent of 18% of the aggregate value of the impugned purchases was on the exorbitant side. It was averred by the Id. A.R, that the addition in respect of the aforesaid unproved purchase transactions was liable to be restricted only to the extent of the G.P rate of the assessee in respect of its genuine purchase transactions. It was further submitted by the Id. A.R that while for the G.P rate of the assessee in respect of its total purchase transactions was 10.65%, however, the G.P. rate in respect of the purchases made from the aforementioned 5 parties worked out at 11.08%. In order to drive home his aforesaid claim the Id. A.R had drawn our attention to Page 43 of the assessee's 'Paper book' (for short 'APB'). In order to support of his aforesaid contention the Id. A.R had relied on the judgment of the Hon'ble High Court of Bombay in the case of Pr. Commissioner of Income Tax -17 Vs. Mohommad Haji Adam & Co.(ITA No.1004 of 2016, dated 11.02.2019).

7. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the order passed by the A.O. It was submitted by the Id. D.R, that as the assessee had failed to substantiate the genuineness of the purchase transactions, therefore, the A.O had rightly disallowed the entire value of purchases which were claimed by the assessee to have been made from them. In the backdrop of the aforesaid facts, it was submitted by the Id. D.R, that the order of the CIT(A) may be set aside and that of the A.O be restored. In order to drive home his contention that the A.O had rightly disallowed the entire value of purchases of Rs.65,00,031/- that were claimed by the assessee to have been made from the aforementioned parties, the Id. D.R had relied on the order passed by the **Hon'ble Supreme Court** while dismissing the 'Special Leave Petition' (SLP) of the assessee in the case of **N.K. Proteins Ltd. Vs. DCIT [SLP(C)..CC No. (5)769 of 2017]**.

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. As is discernible from the orders of the lower authorities, we find that the assessee had failed to substantiate the authenticity of the purchases which were claimed to have been made from the aforementioned 5 parties. Insofar the documentary evidence which was produced by the assessee to substantiate the veracity of the purchase transactions under consideration, we are in agreement with the view taken by the lower authorities that the same does not inspire any confidence. Accordingly, in our considered view, the lower authorities had rightly concluded that the assessee had not made any genuine purchases from the aforementioned parties. At the same time, as the goods claimed by the assessee to have been purchased from the aforementioned parties form part of the accounted sales of the assessee, therefore, we are in agreement with the view taken by the CIT(A) that the addition in respect of the said unproved purchase transactions was liable to be restricted only to the extent of the profit element embedded in making of such purchases from the open/grey market. As regards the reliance placed by the Id. D.R on the order passed by the **Hon'ble Supreme Court** while dismissing the 'SLP' of the assessee in the case of **N.K. Proteins Ltd. Vs. DCIT [SLP(C)..CC No. (5)769 of 2017]**, the same in our considered view being distinguishable on facts would not assist its case. In the case of N.K. Proteins Ltd. (supra) search proceedings were conducted on the assessee, in the course of which certain signed blank cheques and vouchers of the parties from whom the assessee had claimed to have been making purchases were found. It was thus in the backdrop of the aforesaid factual matrix, that the revenue had held that the cash deposited in the bank accounts of the said respective supplier parties was the undisclosed income of the assessee, and the purchases claimed to have been made from them was bogus. In our considered view, the facts involved in the case of the present assessee are absolutely distinguishable as against the peculiar facts as had emerged in the case of N.K. Proteins Ltd. (supra).

9. Insofar the quantification of such profit element is concerned, we find that the **Hon'ble High Court of Bombay** in its recent judgement in the case of **Pr. Commissioner of Income Tax-17 Vs. M/s Mohhomad Haji Adam & Company (ITA No. 1004 of 2016, dated 11.02.2019)**, while upholding the order of the Tribunal, had observed, that the addition in the

hands of the assessee as regards the bogus/unproved purchases was to be made to the extent of bringing the G.P rate of such purchases at the same rate as that of the other genuine purchases. The Hon'ble High Court while concluding as hereinabove, had observed as under:

"8. In the present case, as noted above, the assessee was a trader of fabrics. The AO found three entities who were indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied. The finding of the CIT(A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by the assessee and the sale declared. That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trade. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases. The decision of the Gujarat High Court in the case of N.K. Industries Ltd. (supra) cannot be applied without reference to the facts. In fact in paragraph 8 of the same Judgment the Court held and observed as under-

"So far as the question regarding addition of Rs.3,70,78,125/- as gross profit on sales of Rs.37.08 Crores made by the Assessing Officer despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 is concerned, we are of the view that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6 % gross profit is taken into account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price. We have to reduce the selling price accordingly as a result of which profit comes to 5.66% Therefore, considering 5.66 % of Rs.3,70,78,125/- which comes to Rs.20,98,62 1.88 we think it fit to direct the revenue to add Rs.20,98,621.88 as gross profit and make necessary deductions accordingly. Accordingly, the said question is answered partially in favour of the assessee and partially in favour of the revenue."

9. In these circumstances, no question of law, therefore, arises. All Income Tax Appeals are dismissed, accordingly. No order at costs."

As such, the Hon'ble jurisdictional High Court, had observed, that the addition in respect of purchases which were found to be bogus in the case of the assessee before them, who was a trader, was to be worked out by bringing the G.P. rate of such bogus purchases at the same rate as that of the other genuine purchases. We thus respectfully following the aforesaid judgment of the Hon'ble High Court 'set aside' the matter to the file of the A.O, with a direction to restrict the addition insofar the bogus/unproved purchases aggregating to Rs.65,00,031/- in the case before us are concerned, by bringing the G.P. rate on the amount of such bogus purchases at the same rate as that of its other genuine purchases. Needless to say, the assessee in the course of the 'set aside' proceedings shall furnish the requisite details before the A.O, who shall after making necessary verifications restrict the additions in terms of our aforesaid observations. The order passed by the CIT(A) is 'set aside' and the matter is restored to the file of the A.O to give effect to our aforesaid directions.

10. Accordingly, in terms of our aforesaid observations the appeal of the assessee is partly allowed for statistical purposes, while for the appeal of the revenue is dismissed.

Order pronounced in the open court on 08.11.2019

Sd/-
(N.K. Pradhan)
ACCOUNTANT MEMBER
मुंबई Mumbai; दिनांक 08.11.2019
PS. Rohit

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

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.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai