

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 5852/MUM/2018 (A.Y: 2010-11)

Income Tax Officer – 17(3)(1) Room No. 114, 1 st Floor Aayakar Bhavan, M.K. Road Mumbai – 400 020	v.	Shri Ravi R. Agarwal 502, Appejay House Bombay Samachar Marg Fort, Mumbai – 400 023 PAN: AAJPA0019N
(Appellant)		(Respondent)

Assessee by : Shri Anil Bhomawat

Department by : Shri R. Bhoopathi

Date of Hearing : 19.09.2019

Date of Pronouncement : 29.10.2019

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the Revenue against the order of the Learned Commissioner of Income Tax (Appeals) – 28, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 03.07.2018 for the A.Y. 2010-11 in restricting the disallowance to 19.45% of the purchases as against 25% purchases disallowed as non-genuine/bogus by the Assessing Officer.

2. Briefly stated the facts are that, the assessee is engaged in the business of "Manufacturer of Flameproof Electric equipment", filed return of income on 15.10.2010 for the A.Y.2010-11 declaring income of ₹.10,31,740/- and the return was processed u/s. 143(1) of the Act. Subsequently, Assessing Officer received information from the DGIT(Inv.), Mumbai about the accommodation entries provided by various dealers and assessee was also one of the beneficiary from those dealers. The assessment was reopened U/s. 147 of the Act based on the information received from DGIT (Inv.), Mumbai, that the assessee has availed accommodation entries from various dealers who are all providing accommodation entries without there being transportation of any goods. In the re-assessment proceedings, the assessee was required to prove the genuineness of the purchases made from various parties which were referred to in the Assessment Order. The assessee produced copies of bills, bank statements, copies of VAT challans, ledger copies and submitted that the purchases made are genuine. Not convinced with the submissions of the assessee the Assessing Officer treated the purchases as non-genuine and he was of the opinion that assessee had obtained only accommodation entries without there being any transportation of materials and the assessee might have made purchases in the gray market. It is the finding of the Assessing Officer since the purchases made by the assessee and claimed as expenses in his Profit and Loss Account

are not genuine, the purchases to that extent remained unverifiable. He also observed that the dealers from whom the assessee made purchases stated that they have issued only accommodation bills. Therefore, placing reliance on various judicial pronouncements the Assessing Officer estimated the profit element at 25% of such purchases of ₹. 10,93,821/- and treated purchases of ₹.2,73,455/- as non-genuine and added to the income of the assessee. On appeal the Ld.CIT(A) considering the evidences and various submissions of the assessee restricted the disallowance to the extent 19.47% of the non-genuine purchases.

3. Ld. DR vehemently supported the order of the Assessing Officer.

4. We have heard the rival submissions, perused the orders of the authorities below. On a perusal of the order of the Ld.CIT(A), we find that the Ld.CIT(A) considered this aspect of the matter elaborately with reference to the submissions of the assessee and the averments in the Assessment Order and following various Hon'ble High Courts restricted the disallowance to 19.45% of the non-genuine purchases, while holding so, the Ld.CIT(A) observed as under: -

“4.5 The submissions of the assessee as also the documents furnished have been carefully perused. However, the same are not found to be acceptable for the following reasons:

(i) The assessee has not furnished any ledger account confirmation from the aforesaid dealer.

(ii) The assessee has not produced suppliers of disputed purchases.

(iii) The assessee has also not furnished any quantitative details as to how the items purchased from the aforesaid hawala dealer were utilized/consumed in the process of its business, including the sales made with the details of the parties”

Thereafter vide para 4.8 of his order, AO added 25% of impugned purchase.

3.1 In counter, appellant raised multiple points which are dealt with as under:

i) Additions cannot be made solely on basis of information from Sales Tax

Department:

Very Correct. But unfortunately facts indicate otherwise. The basis for addition by AO is:

- a. Involvement of suppliers in VAT scam.
- b. Failure of appellant to produce them.
- c. Failure to submit confirmations
- d. Failure to produce broker
- e. Failure to submit requisite quantitative details.

ii) Account payee cheques:

The payment only proves movement of money from A to B. It does not prove purchases. Reliance is placed on following:

I.CIT vs Precision Finance Pvt. Ltd. (1994)208 ITR 465 (Cal)

5. It is for the assessee to prove the identity of the creditors, their creditworthiness and the genuineness of the transactions. In our view, on the facts of this case, the Tribunal did not take into account all these ingredients which have to be satisfied by the assessee. Mere furnishing of the particulars is not enough. The enquiry of the Income-tax Officer revealed that either the assessee was not traceable or there was no such file and, accordingly, the first ingredient as to the identity of the creditors had not been established. If the identity, of the creditors had not been established, consequently the question of establishment of the genuineness of the transactions or the creditworthiness of the creditors did not and could not arise, The Tribunal did not apply its mind to the facts of this

particular case and proceeded on the footing that since the transactions were through the bank account, accordingly, it is to be presumed that the transactions were genuine. It was not for the Income-tax Officer to find out by making investigation from the bank accounts unless the assessee proves the identity of the creditors and their creditworthiness. Mere payment by account payee cheque is not sacrosanct nor can it make a non-genuine transaction genuine. In that view of the matter, the question before us is answered in the negative and in favour of the Revenue.

II. NIZAM WOOL AGENCY vs. CIT (1992) 193 ITR 318(ALLD)

2. Questions 1 to 5, in effect, pertain only to one issue namely, whether Indian Wool Traders is a genuine concern. The petitioner claimed to have made certain payments to the said entity mostly in cash, some by way of bearer cheques and one payment by way of a crossed cheque. The ITO felt a doubt as to the genuineness of the said concern and called upon the assessee to establish its identity and genuineness. It was found by the ITO that even one crossed cheque issued in the name of the said concern was really encashed by the partner of the assessee-firm. On a consideration of the material before him, the ITO held that it was not a genuine or existing entity. Accordingly, he disallowed the said payments. On appeal, the AAC agreed with the ITO. The assessee wanted to adduce some additional evidence which was not allowed by the AAC. On further appeal, the Tribunal did allow the assessee to adduce additional evidence. It considered the entire material under a very elaborate order. The Tribunal dealt with each and every circumstance appearing for and against the assessee and concluded that the said concern is neither genuine nor is its identity established. The ultimate finding of the Tribunal is that "Indian Wool Traders was only a convenient façade".

3. It is contended by learned counsel for the petitioner-assessee that where a payment is made by a crossed cheque, it is itself a proof positive of the genuineness and identity of the recipient. We cannot accept or recognise any such rule of law. Whether a particular entity or concern is a genuine and existing entity/concern or merely a bogus name, is a question of fact and it cannot be reduced to a rule of law.

5. The application is, accordingly, dismissed.

III. CIT & ORS. VS. SARAVANA CONSTRUCTIONS (P) Ltd (2012)
72 DTR 258 (KAR)

EXTRACTS:

9. The material on record discloses that the Tribunal has taken note of the particulars of the loan creditors for the assessment years 1998-99 to 2003-04 furnished in a paper book in the course of hearing along with the copies of ledger accounts, copies of bank statements of Lord Krishna Bank, 'ING Vysya Bank Limited, the Lakshmi Vilas Bank Limited. The same was not furnished for the perusal of the assessing authority. Further, it has observed that in the absence of the above relevant particulars, the assessing authority could have arrived at the conclusion that the alleged loan creditors were not genuine and concluded the assessments as such. Therefore, while issuing the direction, the Tribunal has directed the Assessing Authority as under:-

"Since the transactions are claimed to be by cheques the question of disallowance does not arise. However, as a matter of caution, the learned Assessing Authority is directed to allow the same after confirming that the transactions are through banking channels."

10. The grievance is that the benefit can be given only for those cheque transactions, which are found to be genuine. Merely because the transactions are through bank channels, the assessee would not be entitled to the benefit. It is true that when a cheque is issued it has to be encashed through bank only. There is no presumption that merely because the payment is made by cheque, it is a genuine transaction. First it has to be found out whether the transaction in question is genuine and only thereafter, the assessee would be entitled to the benefit of disallowance. Probably, the Tribunal while issuing direction did not notice its reasoning in the earlier part of its very same order. That is how a direction in the aforesaid manner is issued, which is not correct. Therefore, in addition to what has been stated by the Tribunal, the assessing authority shall first find out, whether the cash credit claimed represents a true and genuine transaction. If the answer is "Yes" then accept the credit otherwise not.

11 In that view of the matter, the second substantial question of law framed is answered in favour of the revenue and against the assessee.

IV. N.R. Portfolio Pvt. Ltd. (Commissioner of Income Tax Vs. N.R. Portfolio Pvt. Ltd., 206 (2014) DLT 97 (DB) (Del)) where it was held that the entire evidence available on record has to be considered, after relying upon CIT Vs. Nipum Builders and Developers, [2013] 350 ITR 407 (Delhi), wherein it has been held that a reasonable approach has to be adopted and whether initial onus stands discharged would depend upon facts and circumstances of each case. It was held that "Creditworthiness is not proved by showing issue and receipt of a cheque or by furnishing a copy of statement of bank account, when circumstances requires that there should be some more evidence of positive nature....."

iii) Sales are as per customer specified goods:

Not disputed. What is disputed is source of procurement.

iv) If sales accepted purchase cannot be doubted:

There cannot be such a general proposition of law. This would depend from case to case. There are decisions upholding 100% addition of bogus purchase without disturbing sales. Reason is that ALL purchase is not added but only bogus purchase is added. The underlying theoretical proposition is that same sales can be achieved by lesser purchase as well.

Notwithstanding, in instant case, this situation is not present. AO has questioned source of purchase and not purchase per se.

4. In appeal, it was submitted that:

- i) Transactions are through broker who is not available.
- ii) Parties are not traceable.
- iii) Ledger confirmations are not possible.

These facts are enough to warrant application of Section 145(3). I proceed to do so and reject books of accounts. However, G.P. rate applied by AO @ 25% is not only high but divorced from context. 'Assessee has shown G.P. rate of 19.47%. The same is the best yardstick to apply. The G.P. rate is directed to be reduced to 19.47% on impugned purchase. Appellant gets relief of the rest.

In the result, the appeal is Partly Allowed"

5. On a careful perusal of the order of the Ld.CIT(A) and the reasons given therein, we do not find any infirmity in the order passed by the Ld.CIT(A). None of the findings and observations of the Ld.CIT(A) have been rebutted with evidences by the Revenue and thus we do not see any infirmity in the order passed by the Ld.CIT(A) in sustaining the addition/disallowance to the extent of 19.47% of the purchases. Grounds raised by the Revenue are dismissed.

6. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on the 29th October, 2019

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER
Mumbai / Dated 29/10/2019
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file. //True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum