

**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 NOS. 5878 & 5879/MUM/2018  
(A.Ys: 2010-11 & 2011-12)**

M/s. Sanghvi Metals 72, C.P. Tank Road Mumbai – 400 004  <b>PAN: AAAFS7992M</b>	v.	Income Tax Officer – 19(3)(2) Matru Mandir, Tardev Road, Mumbai – 400 007
<b>(Appellant)</b>		<b>(Respondent)</b>

**Assessee by : None**  
**Department by : Shri Ram Tiwari**  
  
**Date of Hearing : 19.09.2019**  
**Date of Pronouncement : 29.10.2019**

**ORDER**

**PER C.N. PRASAD (JM)**

1. These appeals are filed by the assessee against different orders of the Ld. Commissioner of Income–tax (Appeals)–2, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 10.07.2018 for the A.Ys. 2010-11 and 2011-12.
2. Assessee has raised several grounds in his appeal. Ground No.1 is in respect of sustaining the reopening of assessment u/s. 147 of the Act

and all other grounds on merits in estimating the profit element on alleged bogus purchases @12.5%.

3. Briefly stated the facts are that, the assessee is engaged in the business of "Trading activity of Ferrous and Non-Ferrous Metals", filed return of income declaring income of ₹.1,38,241/- and ₹.24,104/- on 08.09.2010 & 19.09.2011 for the A.Ys. 2010-11 & 2011-12 respectively and the returns were 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 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 from the above parties and claimed as expenses in his Profit and Loss Account are not genuine, the purchases to that extent remained unverifiable as the notices issued u/s. 133(6) of the Act were returned unserved by the Postal Authorities. He also observed that the dealers from whom the assessee made purchases stated that they have issued only accommodation bills. Therefore, he rejected the Books of Accounts of the assessee by invoking the provisions of section 145(3) of the Act and estimated the profit element at 12.5% from such purchases treated as non-genuine and added to the income of the assessee.

4. On appeal the Ld.CIT(A) upheld the reopening of the assessment and sustained the action of the Assessing Officer in estimating the profit element at 12.5% of the non-genuine purchases.

5. In spite of issue of notice none appeared on behalf of the assessee nor any adjournment was sought by the assessee. Therefore, we proceed to dispose off these appeals on hearing the Ld. DR on merits.

6. Ld. DR vehemently supported the order of the Ld.CIT(A).

7. We have heard Ld. DR, perused the orders of the authorities below. In so far as the reopening of assessment is concerned, we are of the view that the assessment was reopened based on the information received from the DGIT(Inv.) and therefore, we are of the view that there are tangible materials came on record after passing intimation u/s.143(1) of the Act. In the case of CIT v. Rajesh Jhaveri Stock Brokers (P) Ltd. [291 ITR 500], the Hon'ble Supreme Court held that intimation u/s.143(1)(a) is not an assessment and upheld the validity of the notice issued u/s 148 and the reopening of assessment. Their Lordships clarified the matter as under:

*“17. The scope and effect of section 147 as substituted with effect from 1-4-1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied firstly the Assessing Officer must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso.”*

In the case of Kone Elevator India P. Ltd. v. ITO [340 ITR 454 (Mad)], CIT v. Ideal Garden Complex P. Ltd. [340 ITR 609 (Mad)], it is held that in the case of return of income processed u/s 143(1), the only condition to be satisfied for reopening is taxable income has escaped assessment and the assessee's plea that no fresh material before the Assessing Officer warranting reopening, is not relevant.

In view of the above position of law, the Ld. CIT(A) has rightly confirmed the reopening done by the Assessing Officer by issuing notice u/s 148 of the Act.

8. In the circumstances, we hold that since the assessment was reopened based on tangible materials and information coming into the possession of the Assessing Officer at later stage, we hold that the reopening of assessment u/s 147 of the Act is valid, hence the ground raised by the Assessee against reopening of assessment is dismissed.

9. Coming to the merits of the case, 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 the order of the Hon'ble Gujarat High Court in the case of CIT v. Simit P. Sheth [356 ITR 451]

restricted the disallowance to 12.5% of the non-genuine purchases, while holding so, the Ld.CIT(A) observed as under: -

*“3.3. The submissions and case laws relied by the Ld. counsel for the appellant have been carefully considered. When the expenditure has been claimed by the assessee, the onus is on the assessee to prove the genuineness of the same. As it is the claim of the assessee that he has made purchases from the said parties, the AO had requested the assessee to produce the parties for verification. However, the assessee failed to do so. As the parties from whom the purchases were supposed to have been made were not found existing, the genuineness of the purchases from such non existing parties was not established.*

*3.3.1. Coming to the addition, the Hon'ble ITAT, Ahmedabad “C” Bench in the case of Vijay Proteins Ltd. vs. ACIT 58 ITD 0428 held that in similar circumstances, 25% of the purchase price accounted through fictitious invoices has to be disallowed. The Hon'ble High Court of Gujarat in the case of Sanjay Oil cakes v/s CIT 316 ITR 0274 dealt with similar case where some of the alleged suppliers who had issued bills to the assessee were not genuine as they were not traceable. The goods must have been received from other parties. The likelihood of the purchase price of these alleged purchases being inflated could not be ruled out and therefore the Hon'ble High Court has upheld the decision of CIT(A) and the ITAT disallowing 25% of the payments made to such parties. The Hon'ble High Court of Gujarat in the case of CIT vs. Simit P. Sheth 356 ITR 0451 held that once the sale is accepted by the AO, the very basis of purchases could not be questioned. Not the entire purchase price could be disallowed but only the profit element embedded in such purchases could be added to the income of the assessee. The estimation varies with the nature of business and no uniform yardstick could be adopted. Given the facts and circumstances of the instant case, I find it reasonable to estimate the gross profit on the alleged bogus purchases at 12.5%.*

*3.3.2. The action of the AO in making an addition of 12.5% of the alleged bogus purchases is confirmed. These grounds of appeal are dismissed.”*

10. 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 assessee and thus we do not see any infirmity in the order passed by the Ld.CIT(A), except in sustaining the addition/disallowance to the extent of 12.5% of the purchases. Taking the totality of facts and circumstances into consideration and the nature of business carried on by the assessee we direct the Assessing Officer to restrict the disallowance/addition to 6% of the bogus purchases.

11. Ground Nos. 8 to 11 are consequential and need no adjudication. Hence the same are restored to the file of the Assessing Officer.

12. In the result, both appeals of the assessee are partly allowed.

Order pronounced in the open court on the 29<sup>th</sup> 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**