

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

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

ITA NO.3011/MUM/2018 (A.Y: 2010-11)

Income Tax Officer – 19(3)(3) Room No. 219, 2 nd Floor Matru Mandir, Tardev Road Mumbai – 400 007	v.	Shri Shripal G. Jain 88-92, 1 st Pathan Street Mumbai – 400 004 PAN: ADLPJ8781H
(Appellant)		(Respondent)

Assessee by : **Shri Rajesh Chamaria**
Department by : **Shri Chaudhary Arunkumar Singh**

Date of Hearing : **22.08.2019**
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)–30, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 05.02.2018 for the A.Y.2010-11 in partly sustaining the addition made towards bogus purchases.

2. Briefly stated the facts are that, the assessee is engaged in the business of "Trading in Ferrous & Non-Ferrous metals" filed return of income on 01.09.2010 for the A.Y.2010-11 declaring income of

₹.10,08,604/- and the return was processed u/s. 143(1) of the Act and the assessment was completed u/s. 143(3) of the Act on 21.03.2013. In the course of the assessment proceedings the Assessing Officer noticed that assessee has made purchases of ₹.1,01,70,054/- from M/s. Naman Metal and required the assessee 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 ledger copies and submitted that the purchases made are genuine. Not convinced with the submissions of the assessee the Assessing Officer treated the purchases from M/s. Naman Metal 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 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 bill. Therefore, the Assessing Officer invoking the provisions of section 69C of the Act treated the purchases of ₹.1,01,70,054/- made from M/s. Naman

Metal 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 estimated the Gross Profit element from such purchases at 6.5% following various Hon'ble High Court's decisions, against which the Revenue is in appeal.

3. Ld. Counsel for the assessee strongly placed reliance on the order of the Ld.CIT(A) and the Ld. DR strongly placed reliance on the order of the Assessing Officer.

4. We have heard the rival submissions, perused the orders of the authorities below. Considering the evidences furnished by the assessee and the submissions, the Ld.CIT(A) concluded that only the profit element in the purchases have to be considered when the sales have been accepted by the Assessing Officer. He followed the decision of the Hon'ble Gujarat High Court in the case of CIT v. Simit P. Sheth [356 ITR 451] and various other decisions and also considering the nature of business of the assessee, restricted the profit element embedded on such purchases to 6.5%, while holding so, he observed as under: -

"8.3 On perusal of the material on record it is noticed that, in the appellant's case, Ld. A.O. has made independent verifications by issuing notices u/s. 133(6) of the I.T. Act which were returned unserved, and there was an overwhelming evidence in the form of statement of supplier given before the Sales tax authorities that it was engaged only in issuing hawala bills and no goods were ever supplied by them.

8.4. After weighing the evidences pros and cons, I find that the appellant has not reconciled the purchases with the items sold and failed to reconcile one to one of the items purchased and sold. Onus was always on the appellant to prove as to how the material purchased was firstly obtained. I record a finding of fact here that no proof outstanding demand delivery of purchases has been filed either before the Id. Assessing Officer or before me. Thus, it can be safely presumed that either they are non-existent or even if they did exist, they were not backed by sufficient evidences to undergo the test of scrutiny.

8.5. 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 party is concerned.

8.6 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 me claim and not on the Revenue as being made out by the Ld. AR in his submission. 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 540 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.

8.7 *The onus to prove that apparent, is not the real one, is on the party who claims it to be so, as held by the Hon'ble Supreme Court in the case of CIT v. Daulat Ram Rawatmull [1973] 87 ITR 349 and CIT.v. Durga Prasad More (supra). In the latter case, it has been held by the Apex Court that though' an apparent statement must be considered real until it was shown that there were reasons to believe that apparent was not the real, in a case where an authority relied on self serving recitals in documents, it was for the party to establish the proof of those recitals; the taxing authorities were entitled to look into the surrounding circumstances to find out reality of such recitals.*

8.8 *It is also a settled legal proposition that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. Therefore, onus is always on a person who asserts a proposition or fact, which is not self evident. The onus, as a determining factor of the whole case can only arise if the Tribunal, which is vested with the authority to determine, finally all questions of fact, fines the evidence pro & con, so evenly balanced that it can come to no conclusion, then/the onus will determine the matter. There cannot be any doubt that onus as a determining factor comes into play where, either there is no evidence on either side, or where it is equally worthless or where it is equally balanced, It is imperative to mention, here that where such is not the case and ail available evidence is considered, -without reference to the onus and without relying on the circumstances that onus lies on a particular party, the issue is determined on facts and the onus cannot be said to have influenced the decisions. However, in the instant case, the appellant has miserably failed to lead evidence and hence, onus is a determining factor.*

8.9 *Having gone through the case laws cited in support of the appellant in his submissions, it is seen that in none of those cases so much of investigation was done including those by another Government authority, viz., Maharashtra Sales Tax authority before whom affidavit was filed stating that only bogus bills were supplied without delivery of goods. Notices sent: u/s 133(6) were returned unserved with remarks "No such address", 'not known',left". Further, the appellant failed to. produce, the parties when specifically asked to do so.*

8.10. *With regard to the claim of the appellant that the parties are not offered for cross-examination by the appellant, it is to be noted that the right of cross-examination is not automatic, but it would be incumbent only in a situation where the appellant is able to prima facie demonstrate that the onus cast on him to establish his version of affairs is based on primary evidence. In this case, the appellant had failed to lead any primary evidence, viz. GRNs, octroi receipts, delivery challans, etc. which would show-that the supplies were indeed made. In such a situation, the AO is justified in drawing the inference that the purchases aggregating to Rs. 1,09,65,922/- are*

not genuine. As regards the issue of the denial of the cross examination, in the case of GTC Industries Ltd. vs. Assistant Commissioner of Income-tax [1998] 65. ITD 380 (BOM), it was held as under: -

"105. In our opinion right to cross-examine the witness who made adverse report, is not an Invariable attribute of the requirement of the dictum, "audialterampartem" The principles of natural justice do not require formal cross-examination. Forma! cross-examination is a part of procedural justice. It is governed by the rules of evidence and is the creation of Court. It is part of legal and statutory justice, and not a part of natural justice, therefore, it cannot be laid down as a general proposition of law that the revenue cannot rely on any evidence which has not been subjected to cross-examination.

8.11 Hon'ble Gujarat High Court in the case of CIT vs. Simit Sheth (2013) 38 Taxmann.com 385 (Guj), Hon'ble Court (which was relied by the AO for making the addition) was seized with a similar issue where the A.O. had found that some of the alleged suppliers of steel to the assessee had not supplied any goods but had only provided sale bills and hence, purchases from the said parties were held to be bogus. The A.O. in that case added the entire amount of purchases to gross profit of the assessee. Ld. CIT(A) having found that the assessee had indeed purchased though not from named parties but other parties from grey market, partially sustained the addition as probable profit of the assessee. The Tribunal however, sustained the addition to the extent of 12.5%. Taking into account the above facts, the Hon'ble Gujarat High Court held that since the purchases .were not bogus, but were made from parties other than those mentioned in books of accounts; only the profit element embedded in such purchases could be added to the assessee income and as such .no question of law arose in such estimation. While arriving at the above conclusion, the Hon'ble Court also relied on the decision in the case of Vijay M. Mistry Construction Ltd. 355 ITR 498 (Guj) and further approved the decision of Ahmedabad Bench, ITAT in the case of Vijay Proteins 58 ITD 428.

8.12. As the AO concluded that the appellant, has not-purchased from those parties, but considering the facts of the case that the goods have been sold and the assessee offered the profit on sale for taxation, treated the purchases are from the grey market at a lower price which carries higher margin of profit than the one offered to tax. Hon'ble Gujarat High Court in the case of CIT vs. Simit Sheth 356 ITR 451 (Guj) wherein also it is found that some of the alleged suppliers of steel to the assessee had not supplied any goods but had only provided sale bills and hence/ purchases from the said parties were held to be bogus. The AO in that case added the entire amount of purchases to gross profit of the assessee. Ld. CIT(A) having found that the assessee had indeed purchased though not

from named parties but other parties from grey market, partially sustained the addition as probable profit of the assessee. The Tribunal however, sustained the addition to the extent of 12.5%. Taking into account the above facts, the Hon'ble Gujarat High Court held that since the purchases were not bogus, but were made from parties other than those mentioned in books of accounts, only the profit element embedded in such purchases could be added to the assessee's Income and as such no question of law arose in such estimation. The tribunal for arriving the profit embedded in the transactions @ 12.5% held as under:-

"Having heard the submissions of both sides, we have been informed that the malpractice of bogus purchase is mainly to save 10% sales tax etc., It has also been informed that in this industry about 2.5% is the profit margin. Therefore, respectfully following the decisions of the co-ordinate bench pronounced on identical circumstances, we hereby direct that the disallowance is required to be sustained at 12.5% of the purchase from those parties. With these directions, we hereby decide the grounds of the rival parties which are partly allowed."

8.13. The appellant made purchases from three parties who are said to be hawala operators, who is indulged in providing bogus bills without supply of any material. Independent inquiries conducted revealed that no such parties are existing in the given address. When asked to produce the parties during the assessment proceedings by the AO, appellant expressed, his inability to do so. In the present case, A.O. estimated peak balance and added to the total income of the assessee. The simple issue to be decided is what percentage should be adopted which is the correct percentage of profit embedded in the line of business i.e. dealer in ferrous and non-ferrous metals. As noticed above, in the similar circumstances of bogus purchases, Hon'ble Gujarat High Court estimated the additional advantage towards tax benefit (10% and the profit margin (2.5%) totaling to 12.5%, In the present case on perusal of copies of the invoices furnished by the appellant in the bill the percentage of VAT levied is @ 4%. Applying the same logic, the profit margin should be adopted @ 2.5%, In view of the above, in my considered opinion, applying the logic of the above said case the profit percentage, embedded on such purchases; is restricted to 6.5% (i.e., 4% of VAT levied + 2.5% towards profit margin), that will meet the ends of the justice. Taking all the facts into consideration and applying the logic of Simit P. Sheth case, the A.O. is directed to restrict the estimation @ 6.5% on the non genuine purchases of Rs.1.06,76,869/-. Appeal on Ground No. 1 is treated as "Partly Allowed."

5. On a careful perusal of the order of 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 of the Ld.CIT(A) have been rebutted with evidences by the Revenue. Thus, we sustain the order of the Ld.CIT(A) in estimating the profit element at 6.5% in such purchases and reject the grounds raised by the Revenue.

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

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

Sd/-
(MANOJ KUMAR AGGARWAL)
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