

**IN THE INCOME TAX APPELLATE TRIBUNAL "SMC", BENCH MUMBAI
BEFORE G. MANJUNATHA, ACCOUNTANT MEMBER
&
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

**ITA No.5336/Mum/2018
(Assessment Year :2010-11)**

ITO,WARD-1(4) Room No.11 6 th Floor, Ashar IT Park B-Wing, Wagle Industrial Estate, Thane(W)-400 604	Vs.	Luke Martin Fernandes B-2/104, Raunak Park CHS Ltd., Kokani Pada Pokharan road No.2 Thane West-400 606
		PAN/GIR No.AAFPF7705G
(Appellant)	..	(Respondent)

Revenue by	R.Bhoopati
Assessee by	None
Date of Hearing	03/10/2019
Date of Pronouncement	15/10/2019

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

This appeal filed by the revenue is directed against, the order of the Commissioner of Income Tax (Appeals)-3, Nashik, dated 20/06/2018 and it pertains to Assessment Year 2010-11.

2. The revenue has raised the following grounds of appeal:-

1, "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in not appreciating the law correctly that once the purchases are unverifiable/not genuine/bogus, the same should have been disallowed in entirety?"

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in law by not appreciating the fact that the assessee could not establish the genuineness of the purchases from the non-existent vendors?

3. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in law by not appreciating the fact that the onus to justify the claim of expenses is on the assessee and the same has foiled to discharge it in relation to the purchases made from the non-existent vendors?*

4. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in law by ignoring, the fact that the assessee could not substantiate its claim of purchases from non-existent vendors by means of relevant supporting documents related to movement and delivery of goods, stock register, etc. to arrive at disallowance at 25% of the purchases from the non-existent vendors?*

5. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in not appreciating the law correctly that once the purchases are unverifiable / not genuine / bogus, the same should have been disallowed in entirety, particularly in view of the ratio of the decision of the Hon'ble Gujarat High Court in Tax Appeal No. 242 of 2003 dated 20/06/2016 in the case of N.K. Proteins Ltd. against which the SLP was dismissed by the Hon'ble Apex Court?.*

6. *The appellant craves leave to add, amend, alter or delete any ground of appeal.*

7. *The order of the CIT(A) may be vacated and that of the assessing officer may be resorted.*

3. The brief facts of the case are that the assessee is an individual engaged in the business of manufacturing machinery spare parts and labour job works, filed its return of income for AY 2010-11 on 15/10/2010, declaring total income of Rs. 4,07,045/-. Subsequently, the case has been reopened u/s 147, on the basis of information received from DGIT, investigation, Mumbai, as per which, Sales Tax Authorities of Government of Maharashtra had taken actions against number of Hawala dealers, who had issued bogus purchase bills to various parties in Mumbai to reduce or suppress profits. As per list of beneficiaries, the assessee is one of the beneficiary, who had taken accommodation bills of bogus purchases from various parties as listed by the AO in his

assessment order amounting to Rs. 5,17,512/-. The case was selected for scrutiny and the assessment has been completed u/s. 143(3).r.w.s. 147 of the I.T.Act, 1961 on 24/12/2013 and determined total income of Rs. 9,24,557/-, after making 100% additions towards alleged bogus purchase from those parties and made additions of Rs. 5,17,512/-.

4. Aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has reiterated its submissions made before the AO. The sum and substance of the arguments of the assessee before the Ld.CIT(A) are that purchase from the above party is genuine, which is supported by necessary evidences. Therefore, no additions could be made on the basis of information received from third party. The Ld.CIT(A), after considering relevant submission of the assessee and also, on analysis of information collected during the course of search and also by following the decision of Hon'ble Gujarat High Court, in the case of CIT vs. Simith P. Sheth (356 ITR 451) scaled down addition to 25% profit on alleged bogus purchases. The relevant findings of the Ld.CIT(A) are as under:-

7. I have carefully considered the appellant's submissions, observations of the AO in the assessment order and the facts of the case. The appellant had shown purchases amounting to Rs. 5,17,512 from various parties which appeared in The list of Sales-tax Department who had indulged in Hawala transactions i.e. providing only bills without there is being any actual purchase or sale transaction.

7.1. Before the case is discussed, it is important to know the background in which the case of the appellant was selected for scrutiny. As per Section 3 of the MVAT Act, 2002, every registered dealer, is liable to pay tax on a sale transaction with a purchasing dealer whose turnover of sales or purchases has exceeded rupees five lakh. The selling dealer

issues a tax invoice, which shows the amount of tax recovered from the purchasing dealer. The sale made by the selling dealer needs to be accounted in his turnover of sales while filing the tax return and pay the due taxes. Further, the purchasing dealer is also entitled to claim by way of a set off under Section 48 the Tax paid on his purchases as ITC (Input Tax Credit). The Sales Tax Authorities found that a large number of selling dealers had neither filed their returns nor paid the Taxes collected by them from purchasing dealers. The Sales Tax Authorities denied the benefit of set-off of Input Tax Credit to purchasing dealers, who went into appeal before Hon'ble Bombay High Court against the said orders. The same was rejected by the Bombay High Court in WRIT PETITION NO.33 OF 2012 in case of M/S Mahalaxmi Cotton Ginning vs The State of Maharashtra & Ors on 11 May, 2012 and other similar cases. In the said appeals, the purchasing dealers took a plea before the High Court that as he has paid the tax to the selling dealer, he should not be denied the benefit of a set off of taxes paid, which is arbitrary. However, the State government in an affidavit before the court submitted that investigations revealed that there was an existence of large-scale Hawala racket, wherein the selling dealers merely issued tax invoices to the purchasing dealer without any sale of goods. The court did not accept the plea of the purchasing dealer and held that if the set off is allowed to the purchasing dealer though the tax has not been paid actually, it would defeat the legitimate interests of the Revenue. The Sales Tax Department recovered the tax from such purchasing dealers. The Sales Tax Department accordingly passed on the information of such purchasing dealers to the Income Tax Department to verify the purchases made by them.

7.2. In this background, the case of the assessee needs to be examined. The AO was required to examine the veracity of such purchases and to see a) whether the purchases have actually been made or not, b) the end use of such purchases and c) the genuineness of the parties from whom the purchases are made. The assessee submitted copies of the purchase bills and copy of the bank statement showing that he had made the purchases and payments are made by cheques. The assessee has also submitted details of how the material was consumed in manufacturing. It is seen that the only ground for making the addition is that the parties who have made the sales are not traceable and the assessee could not produce the parties, who have issued bills. Hence, this is not a case of bogus purchases but purchases from bogus parties, wherein the bills are taken from hawala dealers and purchases from other parties. The facts of the case are also differentiable from NK Proteins as stated by the assessee. In N K Proteins, it was established that the assessee had inflated the purchases as during search at the office premises, blank signed cheque books, vouchers, blank bill books, letter heads of various concerns were found and it was established that these concerns were floated by the assessee. Relying upon the judgment of Vijay Proteins 58 ITD 428 Ahmadabad, the ITAT restricted the addition to 25%, whereas Hon'ble Gujarat High Court held that once the purchases are bogus and

suppliers are fictitious having given only bill entries, the entire purchases should be added, which by confirmed by the Hon'ble Supreme Court by dismissing the SLP of NKPL on 16.01 2017.

7.3. From above it is apparent that the ratio of decision of N.K Protein cannot be applied in appellant's case as it is distinguishable on facts It is held by Hon'ble Supreme Court that the appellate authorities while applying the decision of the Higher Court should examine the facts of each case.

i. The decision of the Hon'ble Supreme Court in Padmasundara Rao (Deed.) and Ors. v. State of Tamil Nadu, Civil Appeal No. 2226 of 1997, order dated 13.03.2002

ii. The Hon'ble Supreme Court in The case of CIT Vs Sun Engineering Works (P) Ltd. reported in 198 ITR 297.

iii. The Hon'ble ITAT, Mumbai Bench 'G' [Third Member] in the case of M/s. Grindwell Norton Ltd. vs. DCIT [2G04] 91 ITD 412 [MUM][TM]

iv Hon'ble ITAT Mumbai in The case of Kanchan FerroMeT ITA No. 1552/Mum/2017 order dated 05 06.2017 has discussed judgment of Hon'ble Supreme Court in NK Proteins and held as under

6. The learned Counsel of the assessee pleaded that addition in this case be restricted to 12.5% of the bogus purchases as herd by the Hon'ble Gujarat High Court in the case of CIT v. Simit P.Sheth [(2013)38Taxmann385[Guj.]].

7 Per contra, learned Departmental Representative referred to the decision of The Hon'ble Gujarat High Court decision in the case of N.K Industries v. DCIT vide order dated 26.06.2016 wherein addition on account of bogus purchases were restricted to 25% by the ITAT, The Hon'ble High Court has upheld the addition of entire bogus purchases on the reasoning that such restriction of bogus claim goes against the principles of sections 68 and 69C of the Income-tax Act, 1961 SLP against the decision was dismissed by Hon'ble Apex Court vide order dated 16.01.2017.

8. Upon careful consideration, I find that the Revenue has not disputed the sales. It is settled law that when the sales are not disputed, the entire purchases to make the sales cannot be disallowed It is true that assessee has not at all been able to prove that the purchases from the parties booked on the accounts are genuine. No book and records have been shown However in the absence of any finding that sales are also bogus, the purchases to make the corresponding safes cannot be held to be completely bogus This points out to the practice that assessee had made purchases from grey market. Operating in the grey market leads to various savings on account of non-payment of various taxes by use of unaccounted money to the assessee. On a similar situation, Hon'ble Gujarat High Court in the case of Simit P Sheth (supra) has upheld the disallowance of 12.5% of the bogus purchases Since the proposition that when sales are not disputed, entire purchases cannot be held to be bogus is supported by Hon'ble

jurisdictional High Court decision in Nikunj Exim Enterprises, in my considered opinion, the interest of justice will be served if the addition in this case is restricted to 12.5% of the bogus purchases.

9. It is to be borne in mind that the decision of Hon'ble jurisdictional High Court in the case of Nikunj Exim Enterprises where no addition out of the bogus purchases was confirmed, is not fully applicable on the facts of the present case. In the facts of Nikunj Exim Enterprises, the substantial sales were made to government agencies, books were not rejected and stock reconciliation was given. In The present case learned Counsel of the assessee has himself agreed for 125% disallowance out of the bogus purchases. It is further noted that dismissal of SLP by a non-speaking order does not merge the decision of Hon'ble Gujarat High Court in the case of N.K. Industries with that of Hon'ble Apex Court

7.4. With regard to the appellant's reliance on various decisions, there are large numbers of cases, wherein the appellate authorities have held that it would not be appropriate to consider that purchases were genuine only because the assessee made the payment by cheque and the assessee received bills. It is held by various courts that where the assessee could show that he has made the purchases and there are corresponding sales against these purchases, it would be appropriate to tax the possible profit out of purchases made through non-genuine parties. In view of facts slated above, I am of the considered opinion that the appellant has made purchases of Rs 5,17,512/- in the open market which were used in manufacturing and the bills were taken from the Hawala operators. Further the verification in respect of these parties could not be made and assessee has also paid Sales Tax in respect of e tainted purchases. It is not known at what price the appellant actually made the purchases from third parties. Under such circumstances the likelihood of the purchases being inflated cannot be ruled out and there is no material to dislodge such findings. In this process the appellant saved on the sales-tax / VAT and enhanced his profit by manipulating the purchases On similar facts Hon'ble Gujarat High court in the case of CIT vs Sanjay Oil Cake (2009) 316 ITR 274 and Bhole Nath 355 ITR 290 (Guj) who were manufacturer upheld disallowance of 25%. As the facts of the assessee's case are similar therefore it would be appropriate if 25% of the amount of unproved purchases of Rs 5,17,512 /-, amounting to Rs 1,29,376/- is disallowed. This addition will be over and above the profits shown by the appellant in his return of income,

5. None appeared for the assessee. We have heard the Ld. DR, perused the material available on record and gone through orders of the authorities below along with certain case laws. We find that the

Ld. AO has made 100% additions towards alleged bogus purchases, on the ground that the assessee one of the beneficiary of accommodation entries of bogus purchase bills issued by Hawala dealers. According to the Ld. AO, although assessee has filed certain basic evidences, but failed to file further evidence in the backdrop of clear finding by the Sales Tax Department, Maharashtra that those parties are involved in providing accommodation entries without actual delivery of goods. The Ld. AO had also taken support from the investigation conducted during the course of assessment proceedings, as per which notice issued u/s 133(6) to the party were returned un-served by the postal authorities. Therefore, he came to the conclusion that purchase from the said party is bogus in nature. It is the contentions of the assessee before the lower authorities that purchases from the above party are supported by necessary evidences. It has furnished all possible evidences, including books of accounts, stock details and bank statement to prove that payment against said purchases have been made through proper banking channels.

6 Having considered arguments of the Ld. DR and also, material available on record, we find that both the sides failed to prove the case in their favour with necessary evidences. Although, assessee has filed certain basic evidences, but failed to file further evidences to conclusively prove purchases to satisfactions of the Ld.AO. At the same time, the Ld. AO had also failed to take the investigation to a logical conclusion by carry out necessary enquires, but he solely relied upon information received from investigation wing, which was further supported by information received from Maharashtra Sales Tax Department. Under these circumstances, it is difficult to accept

arguments of both the sides. Further, various High Courts and Tribunals had considered an identical issue in light of investigation carried out by the Sales Tax Department and held that in case purchases claims to have made from alleged hawala dealers , only profit element embedded in those purchases needs to be taxed, but not total purchase from those parties. The Hon'ble Gujarat High Court, in the case of CIT vs Simith P.Sheth 356 ITR 451 had considered a similar issue and held that at the time of estimation of profit from alleged bogus purchases no uniform yardsticks could be adopted, but it depends upon facts of each case. The ITAT, Mumbai, in number of cases had considered an identical issue and depending upon facts of each case, directed the Ld.AO to estimate profit of 10 to 15% on total alleged bogus purchases. In this case, considering the nature of business of the assessee the Ld. AO has estimated 100% profit, whereas the Ld.CIT(A) has scaled down estimation of profit to 25% on total alleged bogus purchase. Although, both authorities have taken different rate of profit for estimation of income from alleged bogus purchase, but no one could support said rate of gross profit with necessary evidences or any comparable cases. Therefore, considering facts and circumstances of this case and consistent with view taken by the Co-ordinate Bench in number of cases, we are of the considered opinion that the Id. CIT(A) has taken one of the possible method for estimation of profit to settle dispute between the parties and hence, we are inclined to uphold order of the Id. CIT(A) and dismiss appeal filed by the Reveune..

7. In the result, appeal filed by the revenue is dismissed.

Order pronounced in the open court on this 15 /10/2019

Sd/-

(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-

(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 15/10/2019
Thirumalesh Sr.PS

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.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai