

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

**ITA No.5692/Mum/2018  
(Assessment Year :2009-10)**

ACIT-27(3) Room No.423, 4 <sup>th</sup> Floor Tower NO.6, Vashi Railway Station Complex, Vashi Navi Mumbai-400 703	Vs.	Virtex Engineers 3A, Ashirwad Building, Govandi Road, Chembur Mumbai-400 071
		<b>PAN/GIR No.AAAFV1343D</b>
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Revenue by	R.Bhoopati
Assessee by	Pravin N Shah
<b>Date of Hearing</b>	<b>03/10/2019</b>
<b>Date of Pronouncement</b>	<b>15/10/2019</b>

**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)-25, Mumbai, dated 13/07/2018 and it pertains to Assessment Year 2009-10.

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

i) *On the facts and circumstances of the case and in law, the Ld.CTT(A) erred in deleting the addition of Rs.23,193/- made by the Assessing Officer on account of bogus purchases, without appreciating the fact that the assessee had failed to produce bills, vouchers and other documentary evidences in support of his claim and without considering the latest Apex Court decision in the case of N.K.Protiens Ltd. wherein it is held that once disproved that the purchases are bogus then addition should be made on entire purchases and not on profit element embedded in such purchases.*

*ii) On the facts and circumstances of case and in law, the Ld.CIT(A) erred in estimating the profit from Hawala purchases by disallowing only Rs.9,878/- being 12.5% of the bogus purchases as even the basic onus of producing delivery challans, transport bills etc. were not fulfilled by the assessee.*

*(iii) The appellant prays that the order of the CIT(A) on the above grounds be reversed and that of the Assessing Officer be restored.*

*iv) The appellant craves leave to amend, modify and alter any grounds of appeal during the course of hearing of this case.*

3. The brief facts of the case are that the assessee is a partnership firm, which is engaged in the business of manufacturing of steam radiators, coolers & fabrication of machines, filed its return of income for AY 2009-10, declaring total income of Rs. 36,79,746/-. Thereafter, 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. 79,022/-. 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 12/03/2015 and determined total income of Rs. 37,12,820/-, after making additions towards alleged bogus purchase amounting to Rs. 33,071 from those parties and made additions of Rs. 33,071/-.

4. Aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has filed elaborated written submissions, on the issue, which has been reproduced at Para 4 on pages 3 to 5 of Ld.CIT(A) order. 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 12.50% profit on alleged bogus purchases. The relevant findings of the Ld.CIT(A) are as under:-

*5.3 Having considered the assessment order of the AO and the submissions of the assessee, it is seen that the main plank of assessee's arguments regarding the genuineness of the purchases was that the payment has been made by cheque/banking channels and which has not found favour with court's/Tribunal's pronouncements like in the case of M/s. Kanchwala Gems vs. JCIT [ITA No. 134/JP/2002 dated 10.12.2003 by the Hon'ble IT AT, Jaipur wherein it is held that payment by account payee cheque is not sufficient to establish the genuineness of purchases. The said decision of the ITAT, Jaipur has been affirmed by the Hon'ble Supreme Court in the case of M/s. Kachwala Gems vs. JCIT (2006) 206 CTR (SC) 585: 288 1TR 10 (5C). Thus, the main contention of the appellant does not, much water. The AO has formed his views about the bogus nature of the purchases made by the appellant from the above party on the basis of statements recorded by the Sales Tax Authorities as well as further inquiries carried out by him independently. The information received from the Sales Tax authorities was only a piece of evidence to initiate in-depth independent investigation on the issue. The appellant has not been able to establish one to one relationship/nexus between the purchases and sales. The assessee has not been able to produce the party from whom purchases have been alleged to have been made. The appellant has also failed to produce corroborative evidence in the form of transportation bills etc. to establish that the alleged purchases were actually transported to its premises and entered in the stock register. It is also a fact that the AO has not confronted the assessee with all the*

*information in his possession like statements of the alleged hawala operators. Further, the AO stopped his investigation with the return of his 133(6) notices. The AO did not go ahead with money trail of cheques debited in the appellant's bank account towards the alleged purchases though such investigation do not lead to concrete results in the case of hawala dealers and investigators often reach dead end in such cases It is not the case of the AO that the impugned purchases have conclusively been established as not having been affected at all. The AO has only found the impugned supplier as a bogus party.*

*5.3.1 In the facts and the circumstances of the case, the total purchases of Rs. 79,022/- shown to be made from the aforesaid party cannot be held to be entirely bogus and consequently peak of the credit standing in the name of the bogus party cannot be added to the returned income. It needs to be appreciated that in order to achieve the reported sales/turnover, there must be some corresponding purchases, whether effected from the alleged entry providers or from the grey market without hills. Thus, there ought to be some purchases made and hence, entire disallowance is not justified. In this regard, the ratio laid down by the Hon'ble Bombay High Court in the case of **CIT v. Nikunj Eximp Enterprises (P.) Ltd.**, 372 ITR 619 (Bombay), is quite relevant wherein Hon'ble High Court has held that -*

*"When the assessee have filed letter of confirmations of the suppliers, Bank statements highlighting the payment entries through account paves cheque, copies of invoices, stock reconciliation statements before the AO; and merely because the suppliers did not appear before the AO, one cannot conclude that the purchases were nut made by the assessee. The AO cannot disallow the purchases on the basis of suspicion because the suppliers were not produced before them."*

*5.3.2 In view of the discussion as above, it is clear that materials purchased and sold by the appellant cannot be doubled though it is not possible for the assessee to establish one to one nexus/link between purchases and sales. However, the fact of the matter remains that these transactions are not verifiable from the party in question as it could not be established that purchases had been effected from the party in question. Thus, the purchase prices shown on the invoices produced could not be subjected to verification and as such it was difficult to establish the correctness of the purchase prices paid for the materials purchased. In the absence of any such verification as to the correctness of the price paid for the materials purchased by the appellant, the purchase price paid as mentioned on the invoices/bills cannot be accepted as the correct price paid for the goods purchased from such parties. In view of the same, the possibility of over-invoicing of the materials purchased to reduce the profit cannot be ruled out. Therefore, the gross profit rate shown by the appellant for the year under consideration cannot be relied upon. In the circumstances, the correct approach in such transactions would be to estimate the additional benefit or profit earned on these purchases and not to disallow the entire purchases from the aforesaid*

party. In my view either the purchases from such party is over invoiced or the purchases were actually made but not from the party from which it was claimed to have been made and instead may have been purchased from grey market without proper billing or documentation.

5.3.3 In many judicial pronouncements on the issue, the Courts have taken a consistent view that in case of non-existent parties from which the purchases are shown to have been made, only a part of such purchases can be disallowed, particularly in such cases where the corresponding sales are not doubted. Alternatively, the profit embedded in such sales against the alleged bogus purchases should be brought to tax.

5.3.4 In the case of CIT-1 Vs Simit P. Sheih, JTA no. 553 of 2012, order dated 16/01/2013, while deciding a similar issue, the Hon'ble High Court of Gujarat has held that:

"We are broadly in agreement with the reasoning adopted by the Commissioner (Appeals) with respect to the nature of disputed purchases of steel. It may be that the three suppliers from whom the assessee claimed to have purchased the steel did not own up to such sales. However, vital question while considering whether the entire amount of purchases should be added back to the income of the assessee or only the profit element embedded therein was to ascertain whether the purchases themselves were completely bogus and non-existent or that the purchases were actually made but not from the parties from whom it was claimed to have been made and instead may have been purchased from grey market without proper billing or documentation. In the present case, CIT believed that when as a trader in steel the assessee sold certain quantity of steel, he would have purchased the same quantity from source. When the total sale is accepted by the Assessing Officer, he could not have questioned the very basis of the purchases. In essence therefore, the Commissioner (Appeals) believed assessee's theory that the purchases were not bogus but were made from the parties other than those mentioned in the books of accounts. That being the position, not the entire purchase price but only profit element embedded in such purchases can be added to the income of the assessee. So much is clear by decision of this Court. In particular Court has also taken a similar view in case of Commissioner of Income Tax-IV vs. Vijay M Mistry Construction **Ltd.** vide order dated 10.01.2011 passed in Tax Appeal No. 1090 of 2009 and in case of **Commissioner of Income Tax-I vs. Bholanath Poly Fab Pvt. Ltd.** vide order dated 23.10.2012 passed in Tax Appeal No.63 of 2012. The view taken by the Tribunal in case of Tribunal in case of Vijay Proteins Pvt Ltd. Vs- CIT reported in 53 ITD 428 came to be approved."

5.3.5 Similarly, while dealing with an identical issue, in the case of CIT **Vs. Bholanath Poly Fab (P) Ltd.**, I.T.A. No. 63 of 2012, in the order dated 23/10/2012, the Hon'ble High Court of Gujarat has held as under: -

*"We are of the opinion tht the Tribunal committed no error. Whether the purchases themselves were bogus or whether the parties from whom such purchase were allegedly made were bogus is essentially a question of fact. The Tribunal having examined the evidence on record came to the conclusion that the assessee did purchase the cloth and sell the finished goods. In that view of the matter, as natural corollary, not the entire amount covered under such purchase but the profit element embedded therein would be subject to tax. This was the view of this court in the case of Sanjay Oilcake Industries v. CIT [2009] 316 ITR 274 (Guj). Such decision is also followed by this court in a judgment dated August 16, 2011, in Tax Appeal No.679 of 2010 in the case of CIT v. Kishor Amrutlal Patel. In the result, tax appeal is dismissed."*

*(emphasis supplied)*

*5.3.6 In view of the facts and circumstances of the case and the judicial pronouncements cited above, what can be disallowed or taxed in the instant case, is the excess profit element embedded in such purchases shown to have been made from aforesaid party. As narrated earlier, the AO in this case has held that the parties from whom the purchases were made by the appellant were found to be bogus, estimations ranging from 12.5% to 25% have been upheld by the Hon'ble Gujarat High Court, depending upon the nature of the business.*

*53.6.1 In a number/series of recent cases, involving the issue of bogus purchases carried out in a organized manner through some hawala operators and the modus operand] unearthed by the Maharashtra Sales tax department, the Hon'ble Mumbai Tribunal has estimated the G.P addition in the hands of the purchasers on account of such bogus purchases as 12.5%. Some of which are listed below:*

- i) Smt. Kiran Navin Dvshi in ITA No, 2601/Mum/2016 dated 18.01.2017.*
- ii) Ashwin Purshoiam Bajaj & Anr. Vs ITO & Anr., in ITA No.4736/Mum/2014,5207/Mum/2014,dated:14-12-2016.*
- iii) ITO & Anr. Vs. Manish Kanji Patel & Anr., in ITA No. 7299/Mum/2014, 7154/Mum/2012 & 7300/Mum/2014, 7627/Mum/2014, dated: 18-05-2017.*
- iv) Metropolitan Eximchem Ltd., ITA No. 2935/Mum/2015, dated:29-03-2017.;*
- v) Ronak Meml Industries vs. ITO, ITA No. 722/Mum.2017 dtd. 104.09.2017;*
- vi) ITO vs. Jugraj R. Jain, ITA No.2571/Mum/2016 & 2572/Mum/2016 dtd. 02.08.2017;*
- vii) B.J.Exports vs. Asstt Commissioner of Income tax, ITA No, 5442-5444/Mum/2016 dated 13.09.2017;*
- viii) Batliboi Environmental Engineering Ltd. vs. Deputy Commissioner of Income-tax, ITA No. 2840 & 3482/M/2015 dated 15.03.2017;*

ix) *Deputy Commissioner of Income-tax & Anr. Vs. Re mi Process Plant & Machinery Ltd. & Anr.*, ITA No. 1721/M/2015, 1817/M/2015 dated 21.03.2017.

x) *Smt Usha B. Agarwal vs. ITO*, ITA No. 7034/Mum/2016, dated 01.09.2017.

*5.3.7 In view of the above discussed factual matrix and precedents, I am of the view that estimation of 12.5% as profit embedded in impugned purchases shown from the alleged hawala party and adding the same to the total income returned, would meet the ends of justice. Therefore, I direct the AO to estimate profit @ 12.5% of the alleged bogus purchases, which works out to Rs. 9,878/-(@ 12.5% of Rs, 79,022/-) and restrict the addition to Rs. 9,878/-. The appellant gets a relief for the balance amount of Rs. 23,193/-. Thus, the grounds of appeal No. 3 & 4 of the appellant are partly allowed.*

5. We have heard Ld. Counsels for both the sides, perused the material available on record and gone through orders of the authorities below along with certain judicial precedents. We find that the Ld. AO has made additions towards alleged bogus purchases on pack credit basis, 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 made addition towards bogus purchase on pack credit balance of parties,

whereas the Ld.CIT(A) has scaled down estimation of profit to 12.50% 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.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)  
ITAT, Mumbai