

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H" MUMBAI**

**BEFORE SHRI RAVISH SOOD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 3053/MUM/2019
Assessment Year: 2011-12**

M/s. Hindustan Steel India,
Shop no.32/32A, Madhav Bhuvan,
138/152, Nanubhai Desai Road, 4th
Khetwadi Lane, Mumbai-400004.

Vs. Income Tax Officer 19(1)(5),
Matru Mandir, Tardeo, 2nd floor,
Mumbai-400007.

PAN No. AACFH6648F
Appellant

Respondent

Assessee by : Shri Surendra K. Chauhan, AR
Revenue by : Shri K. Bhoopathi, DR

Date of Hearing : 13/11/2019
Date of pronouncement : 15/11/2019

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2011-12. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-3, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) r.w.s 147 of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

1. Reassessment proceedings initiated is not as per law as no materials available on record of A.O. which have direct nexus to reason to believe recorded by A.O. as belief may be subjective but reason has to objective these requirement of law have not been fulfilled by A.O, and Ld. CIT (A) has not decided the ground in this respect.

2. Ld. CIT (A) did not decide the validity of Notice issued after lapse of one month from the date of recording of reasons by. A.O. Appellant says that under the facts Notice u/s. 148 of the Act dated 02.03.2016 being issued after one month of reason recorded on 02.02.2016 is invalid as per the ratio laid by the Court.

3. No concrete, cogent and corroborative evidences, documents, copies of affirmation of vendors which have direct nexus for reopening of the case and for making additions are available on record as Ld. CIT (A) did not make available, assessment records for inspection and verification of these facts though specific requests were made by A.R. in his letter submitted at the time of hearing. Therefore, an adverse inference may be drawn against both the authorities for withholding of the evidence as per Section-114(g) of the Evidence Act and inference may be drawn In favour of the Appellant and both the orders passed by lower authorities may be set aside with deletion of the additions.

4. As stated in ground 3 above no materials furnished to the Appellant for rebuttal but the same are used against Appellant, therefore, there is fragrant violence of rules of natural justice and both the orders may be set aside on this ground also- This ground is also not decided by Ld. CIT (A) in clear terms.

5. Additions arbitrarily made as details asked for have been submitted and have been accepted and the addition are made based on suspicion, surmises, conjectures and borrowed information and opinions of other authorities without making any independent inquiries and without bringing any materials to support the same on record to support or to sustain the same by lower authorities, hence, both the orders are liable to be set aside in toto with deletion of entire of additions. In any case as both the authorities failed to prove the inflated purchases or purchase price and without rejecting the books of accounts result the addition may be deleted or reduced substantially.

6. Judgments of Honourable Jurisdictional High Court and MSTT, Mumbai cited, referred and relied on by the Appellant are being ignored by both the authorities, the same may be considered in this appeal as the same are bound to be followed being lower forum of appeal and the decisions of the co-ordinate Benches are required to be followed as required under Article 141 and 144 of the Constitution of India.

7. In any case considering the facts and circumstances of the case, orders passed by both the lower authorities may be set aside with deletion of addition and / or sustaining the same giving substantial relief in the matter and highly oblige.

8. Penal interest levied on additional demand of tax due to addition made may be directed not to be levied.

9. Appellant crave the liberty to add or to alter or to amend or to change any grounds of appeal on or before of the hearing or at the time of hearing of the appeal.

3. Briefly stated, the facts of the case are that the assessee filed its return of income of the assessment year (AY) 2011-12 on 25.09.2009 declaring total income of Rs.2,56,110/-. The return was processed u/s.143(1) of the Act. Thereafter, the Assessing Officer (AO) received information from the Sales Tax Department, Govt. of Maharashtra that the assessee had obtained accommodation entries by availing bogus purchase bills to inflate purchases, thereby reducing the tax liabilities. The details, as found by the AO are as under:

Sr. No	Name of the Hawala Parties	Hawala PAN	Bill Amount
1.	MELANI METAL (INDIA)	AGTPJ6785E	25,87,565
2.	SAMCO STEEL & ALLOYS	AGQPJ9391R	29,84,664
	Total		55,72,229/-

Accordingly, the AO reopened the assessment by issuing notice u/s. 148 of the Act. During the course of reassessment proceedings, the AO asked the assessee to file the details like (a) Name of the Seller with current full address, (b) PAN (c) Bill and Voucher No. with date, (d) Description of goods purchased (e) Quantity (f) Rate, (g) Amount (h) Goods dispatched from (name of the place) with date (i) Mode of transportation, if by Road Vehicle No. and also payments, detailed in the annexure-A and (j) details of corresponding sales of goods.

The AO noted that the assessee could file few details but could not link purchases with corresponding sales and further failed to produce the books of accounts for verification.

On the basis of the above facts, the AO estimated the profit @12.5% on the disputed purchases of Rs.55,72,229/- which comes to Rs.6,96,528/-.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Id. CIT(A). We find that *vide* order dated 14.02.2019, the Id. CIT(A) has dismissed the appeal filed by the assessee by observing that:

“I have considered the facts of the case, AO’s contentions and appellants’ submission and also the case laws relied upon by the appellant. The assessee is engaged in the business of trading of ferrous and non-ferrous metals.

The assessee has shown purchases of Rs.55,72,229/- from various non-genuine parties as per the information received from the Investigation Wing. Sales Tax Department has found that the said concerns were not doing genuine business of purchases and sales and merely indulging providing accommodation bills. AO has denied the explanation offered by the assessee as it is seen from the details on record that barring the ledger account and cheque payment, no other documents such as lorry receipts, transportation details are produced during the course of assessment proceedings. Moreover, the fact remains that these parties have admitted in front of the Sales Tax department they have not made any sale or purchase transaction. This proves that the purchases shown to have been made by the assessee from these firms are non-genuine.

The AO after considering the submission and also giving due consideration to the fact that the assessee has recorded such purchases in the books of account that 12.5% of total amount of the said purchases, which comes to Rs.6,96,528/- (total unproved purchases being Rs.55,72,229/-) is taken as unproved/non-genuine purchases and added to the total income of the assessee. Thus, addition of the AO is confirmed and grounds of appeal nos. 2 to 6 are dismissed.”

5. Before us, the ld. counsel for the assessee submits that the assessee-firm is a trader in various items of ferrous and non-ferrous metals during the year under consideration. It is stated that the re-assessment proceedings are not properly and legally initiated by the AO as required as per terms laid down in the Act. In this respect, it is argued by him that the AO has issued notice u/s. 147/148 after one month of recording of reasons for reopening of assessment. Further, it is stated that the AO has not provided to the assessee, the information/reports of the Sales Tax Department in spite of the request made in this regard. The ld. counsel submits that the assessee has discharged its burden to prove the claim and therefore the addition of Rs.6,96,628/- made by the AO be deleted.

6. On the other hand, the ld. Departmental Representative (DR) submits that there is no irregularity on the part of the AO in issuing notice u/s.148 in the present case. It is further argued that as recorded by the AO, the assessee failed to file full details called for *vide* notice u/s.142(1) of the Act. It also stated by him that the assessee failed to produce to books of accounts before the AO for verification. Thus, the ld.

DR submits that the estimation @12.5% on the disputed purchases made by the AO and then confirmed by the Id. CIT(A) be affirmed.

7. We have heard the rival submissions and perused the relevant materials available on record. Firstly, we deal with the notice issued u/s.148 of the Act. As mentioned earlier, the AO has reopened the assessment which was processed u/s. 143(1) of the Act. The Hon'ble Supreme Court in the case of *ACIT v. Rajesh Jhaveri Stock Brokers P. Ltd.* (2007) 291 ITR 500 (SC) analyzed the distinction between the acceptance of a return u/s 143(1) and an assessment which is framed u/s 143(3) of the Act. In the former case, the AO would have much wider latitude to reopen the assessment. In the case of *Avirat Star Homes Venture P. Ltd. v. ITO* (2019) 411 ITR 321 (Bom), the Hon'ble Bombay High Court referring to the above decision has held:

“That the return had been accepted without scrutiny. The income-tax investigation had subsequently provided information about certain companies having bank accounts with a bank in Kolkata and who were involved in giving accommodation entries of various nature to several beneficiaries including the assessee. The information supplied by the Investigation Wing to the Assessing Officer formed a *prima facie* basis to enable the Assessing Officer to form a belief of income chargeable to tax having escaped assessment. The Assessing Officer perused the information supplied by the Investigation Wing and having formed the belief that income chargeable to tax had escaped assessment, could not be stated to have acted mechanically. Further, the mere fact that the assessee had asked for certain information from the Assessing Officer, which at this stage was not supplied, would not invalidate the reasons recorded by the Assessing Officer in issuing the notice. The notice was valid.”

Thus in the instant case, the AO has rightly issued notice u/s 148 for reopening the return of income processed u/s 143(1) of the Act. No irregularity has been committed by the AO in recording the reasons and then issuing the notice u/s.148 of the Act.

7.1 As mention earlier, the AO had issued notice u/s. 142(1) calling for details to be filed by the assessee and also the books of accounts to be reproduced. In response to it, the assessee failed to file the complete details. Also the assessee failed to produce before the AO the books of accounts for verification In view of the above facts, we are of the considered view that the decision of the Hon'ble Bombay High Court in the case of *Pr. CIT v. M/s Mohommad Haji Adam & Co.* (ITA No. 1004 of 2016) has relevance to the present case. In that case, during the course of survey operations in the case of entities from whom the assessee had claimed to have made purchases, the Department collected information suggesting that such purchases were not genuine. The AO noticed that the assessee had shown purchases of fabrics worth Rs.29.41 lakhs from three group concerns, namely M/s Manoj Mills, M/s Astha Silk Industries and M/s Shri Ram Sales and Synthetics. On the basis of statement recorded during such survey operations, the AO concluded that the selling parties were engaged only in supplying the bogus bills, that the goods in question were never supplied to the assessee, and therefore, the purchases were bogus. He, therefore, added the entire sum in the hands of the assessee as its additional income. The assessee carried the matter in appeal before the CIT(A), who accepted the factum of purchases being bogus. However, he compared the purchases and sales statements of the assessee and observed that the Department had accepted the sale, and

therefore, there was no reason to reject the purchases, because without purchases there cannot be sales. He, therefore, held that under these circumstances the AO was not correct in adding the entire amount of purchases as the assessee's income. He, therefore, deleted the addition refreshing it to 10% of the purchase amount. He also directed the AO to make addition to the extent of difference between the gross profit rate as per the books of accounts on undisputed purchases and gross profit on sales relating to the purchases made from the said three parties. The assessee carried the matter before the Tribunal. The Revenue also carried the issue before the Tribunal. The Tribunal allowed the appeal of the assessee partly and dismissed that of the Revenue. The Tribunal noted that the CIT(A) had not given any reasons for retaining 10% of the purchases by way of ad-hoc additions. The Tribunal, therefore, deleted such additions, but retained the portion of the order of the CIT(A) to that extent he permitted the AO to tax the assessee on the basis of difference in the GP rates. In further appeal before the Hon'ble Bombay High Court, the Revenue referred to the decision of the Division Bench of the Hon'ble Gujarat High Court in the case of N.K. Industries Ltd. v. DCIT in Tax Appeal No. 240 of 2003 and connected appeals decided on 20.06.2016 and also pointed out that the SLP against such decision was dismissed by the Hon'ble Supreme Court. The Hon'ble Bombay High Court held :

“8. In the present case, as noted above, the assessee was a trader of fabrics. The A.O. found three entities who were indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the

entire purchase amount should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied. The finding of the CIT(A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by the assessee and the sales declared. That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases. The decision of the Gujarat High Court in the case of N.K. Industries (supra) cannot be applied without reference to the facts. In fact in paragraph 8 of the same Judgment the Court held and observed as under-

“ So far as the question regarding addition of Rs.3,70,78,125/- as gross profit on sales of Rs.37.08 Crores made by the Assessing Officer despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 is concerned, we are of the view that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6 % gross profit is taken into account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price. We have to reduce the selling price accordingly as a result of which profit comes to 5.66 %. Therefore, considering 5.66 % of Rs.3,70,78,125/- which comes to Rs.20,98,621.88 we think it fit to direct the revenue to add Rs.20,98,621.88 as gross profit and make necessary deductions accordingly. Accordingly, the said question is answered partially in favour of the assessee and partially in favour of the revenue.”

We find that the facts in the instant case are similar to the above decision. Following the same, we set aside the order of the Ld. CIT(A) and direct the AO to restrict the additions limited to the extent of bringing the

G.P. rate on disputed purchases at the same rate of other genuine purchases. We direct the assessee to file the relevant documents/evidence before the AO. Needless to say, the AO would give reasonable opportunity of being heard to the assessee before finalizing the order.

8. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 15.11.2019

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;
Dated: 15.11.2019

Subhankar, PS

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,
(Dy. /Assistant Registrar)
ITAT, Mumbai