

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

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 6323/MUM/2018  
Assessment Year: 2010-11**

Mehta Steel House, 47, Old  
Sonawala Building, C P Tank  
Road, Mumbai-400004.

ITO-19(2)(3), Matru Mandir,  
Vs. Tardeo Road, Aayakar Bhavan,  
Mumbai.

**PAN No. AAHFM0878R**  
**Appellant**

**Respondent**

Assessee by : Ms. Neha Paranjpe, AR  
Revenue by : Smt. Jothilakshmi Nayak, Sr. DR

Date of Hearing : 27/11/2019  
Date of pronouncement : 29/11/2019

**ORDER**

**PER N.K. PRADHAN, A.M.**

This is an appeal filed by the assessee. The relevant assessment year is 2010-11. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-7, 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. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the addition of non-genuine purchases of Rs.8,63,944/-.
  2. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the profit @ 12.5% of “non-genuine purchases” instead of difference between 12.5% and GP Ratio at 10.39% as determined by CIT(A) for two assessment years namely AY 2009-10 and 2012-13 having similar fact.
3. Briefly stated, the facts of the case are that the assessee filed his return of income for the assessment year 2010-11 on 11.10.2010 declaring total income of Rs.2,55,447/-. The return was processed u/s 143(1) of the Act. On receipt of information from the Sales Tax Department, Government of Maharashtra that the assessee had obtained bogus purchase bills amounting to Rs.69,11,551/- from three parties, the Assessing Officer (AO) issued notice u/s 148 dated 18.09.2014 to re-open the assessment. In response to it, the assessee filed a reply requesting to treat the return of income originally filed as return filed in response to notice u/s 148 of the Act. During the course of re-assessment proceedings, the AO issued notices u/s 133(6) to the said parties in order to verify the genuineness of the transaction. However, those notices issued by registered post were returned un-served by the postal authorities with the remarks ‘not known’ or ‘no such address’ or ‘left’ etc. In such a situation, the AO asked the assessee to produce the parties before him for examination. However, the assessee could not produce those parties nor furnish new address of those parties but simply furnished copies of ledger accounts in the books of the assessee, purchase bills and bank statements indicating payment made through banks.

However, the AO was not convinced with the above explanation of the AO because the assessee failed to prove the genuineness of the transaction. In the facts and circumstances of the case, the AO relying on the judgment of the Hon'ble Gujarat High Court in the case of *CIT v. Simit P. Sheth* (2013) 356 ITR 451 (Guj) estimated the profit @ 12.5% of the disputed purchases of Rs.69,11,551/- and thus brought to tax Rs.8,63,944/-.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that *vide* order dated 03.08.2018, the Ld. CIT(A) agreed with the reasons given by the AO and confirmed the disallowance of Rs.8,63,944/-.

5. Before us, the Ld. counsel of the assessee relies on the judgment dated 11.02.2019 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) and submits that the principles laid down in that case is applicable to the case in appeal.

On the other hand, the Ld. Departmental Representative (DR) submits that considering the facts and circumstances of the case, the Ld. CIT(A) has rightly confirmed the estimation @ 12.5% of the disputed purchases made by the AO and the same be affirmed.

6. We have heard the rival submission and perused the relevant materials on record. In the instant case the assessee is a firm trading in ferrous and non-ferrous metals. The notices issued by the AO u/s 133(6) were returned unserved by the postal authorities with the remarks 'not known' or 'no such address' or 'left' etc. Further, though requested, the assessee failed to produce

those parties before the AO for examination. However, during the course of assessment proceedings, the assessee filed before the AO purchase invoices, bank statements evidencing payments by account payee cheques, quantitative tally of purchases from the concerned parties and corresponding sales.

Considering the above facts, we are of the considered view that the principles laid down in *M/s Mohommad Haji Adam & Co.* (supra) are applicable 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.

7. In the result, the appeal is allowed for statistical purposes.

**Order pronounced in the open Court on 29/11/2019.**

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER  
Mumbai;  
Dated: 29/11/2019  
*Rahul Sharma, Sr. P.S.*

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

**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.

BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**