

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "SMC", MUMBAI**

BEFORE SHRI S. RIFAUH RAHMAN (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 5821/MUM/2018
Assessment Year: 2010-2011
&
ITA No. 5822/MUM/2018
Assessment Year: 2011-2012**

The ITO-33(1)(5), C-12, 703, Pratyakshakar Bhavan, BKC, Mumbai - 400051	Vs.	Shri Harshadrai M. Padia, Khyati Hydraulics, 13, Gopal Kunj, Sarojini Naidu Road, Kandivali (West), Mumbai - 400067 PAN: AABPP1488Q
(Appellant)		(Respondent)

Revenue by : Shri C.S. Sharma (DR)
Assessee by : None

Date of Hearing: 24/09/2019
Date of Pronouncement: 30/09/2019

ORDER

PER RAM LAL NEGI, JM

These appeals have been filed by the revenue against the orders dated 08.06.2018 and 11.06.2018 passed by the Commissioner of Income Tax (Appeals)-45 (for short 'the CIT(A), Mumbai, for the assessment years 2010-11 and 2011-12 respectively, whereby the Ld. CIT(A) has partly allowed the appeals filed by the assessee against the assessment order passed u/s 143 (3) r.w.s 147 of the Income Tax Act, 1961 (for short the 'Act'). Since, both the appeals pertain to the same assessee, the same were clubbed, heard together and are being disposed of by this common and consolidated order for the sake of convenience.

ITA No. 5821/MUM/2018 (Assessment Year: 2010-2011)

The brief facts of the case are that the assessee an individual and proprietor of M/s Khyati Hydraulics engaged in the business of manufacture

and sale of hydraulic valves and fittings, filed its return of income for the assessment year under consideration declaring the total income at Rs. 5,61,670/-. The return was processed u/s 143 (1) of the Act. Subsequently, the AO received information from DGIT (Inv.) that the assessee during the previous year had obtained bogus bills from eight hawala dealers amounting to Rs. 14,16,580/- to show purchases, without actual purchasing goods. On the basis of the said information, the AO reopened the assessment after issuing notice u/s 148 of the Act, to the assessee after recording the reasons for reopening of the return. Accordingly, the AO issued notice u/s 142 (1) and 143 (2) of the Act. In response thereof the authorized representative of the assessee appeared before the AO furnished the details and discussed the case. The assessee pleaded that that the purchases were genuine and the goods were actually supplied by the parties. However, AO rejecting the contention of the assessee made addition of 25% of the total amount of bogus purchases and determined the total income of the assessee at Rs. 9,15,820/-.The assessee challenged the assessment order before the CIT(A). The Ld. CIT(A) after hearing the assessee restricted the addition to 12.5%. Against the said order, the revenue is in appeal before the Tribunal.

2. The revenue has challenged the impugned order passed by the Ld. CIT (A) on the following effective ground:-

“Whether on the facts and in the circumstances of the case and in law, the Ld .CIT (A), Mumbai is correct in restricting 12.5% of the tented purchases without appreciating the fact that none of the purchase parties have been produced for verification u/s 133(6)/ 131 of the I.T. Act, 1961?”

3. This appeal was fixed for final hearing on 24.09.2019. On the said date, when the case was called out for hearing none appeared on behalf of the assessee. As per the record notice to the assessee sent by the registry through registered post on 27.08.2019 has not been received back un-served. We

accordingly presume that the assessee has not appeared despite service of notice. We therefore, decided to dispose of the case on the basis of the material available record after hearing the Ld. Departmental representative (DR). Accordingly, we allowed the Ld. DR to argue the appeal on behalf of the revenue.

4. The Ld. DR submitted before us that since the assessee had failed to discharge the onus of proving genuineness of the transaction of purchase by adducing cogent evidence, the Ld. CIT(A) ought to have confirmed the addition made by the AO in accordance with the law laid down by the Hon'ble Gujarat High Court in the case of *N.K. Proteins Ltd. [1996] 58 ITD 428*. The Ld. DR further submitted that Since the AO has made the addition considering the profit embedded in the questioned transaction, the order of the Ld. CIT(A) is erroneous and the same is liable to set aside.

5. We have carefully gone through the relevant record including the cases relied upon by the authorities below. We are convinced from the material on record that the assessee has failed to establish the genuineness of the purchases in question by adducing cogent and convincing evidence. The notices issued by the AO were received back un-served. The assessee also failed to produce the parties before the AO for verification. Hence, in our considered view, the AO has rightly concluded that the assessee has not made the questioned purchases from the parties mentioned in the books of account of the assessee. But, the AO has not rejected the sale of the goods so purchased. The aforesaid facts give rise to the conclusion that the assessee had purchased the goods in question from grey market and evaded the tax applicable during the relevant period. Under these circumstances, the AO had no option but to make an addition on estimation basis considering the applicable rate of VAT or other taxes and the profit embedded in the said transaction. In the first appeal the Ld. CIT(A) has restricted the addition to 12.5%, holding that the estimate reached at by the AO is on much higher side. The operative part of the decision of the Ld. CIT (A) reads as under:-

“4.1 I have considered the assessment order including the case laws copy enclosed along with the form 35. The AO observed in the assessment order that the assessee produced the details but as per the hawala parties statement, the purchases did not make from them. During the appellate proceedings the appellant filed copies of purchase bills and copy of bank statements. It is noticed that on account of non-availability of the suppliers at the given address and non-production of delivery challans, octroi bills, the AO held that the assessee arranged bills to suppress the true profits and estimated the profit on alleged bogus purchases at 25% of such disputed purchases. In this regard, it is found that many Benches of ITAT and Hon’ble High Courts have held that when purchases are supported by sufficient documentary evidences then merely because of non-appearance before the AO, one cannot conclude that the purchases were not made by the appellant.

4.2 Though, it may be a fact that appellant was not able to produce the concerned parties before the Assessing Officer, fact remains that the appellant produced bank account statement, purchase bills, etc. to prove the genuineness of the purchases. Merely relying upon the information from the Sales Tax Department, the Assessing Officer could not have treated the 25% of purchases as bogus. The appellant has brought documentary evidences on record to prove genuineness of such transactions, the action of the Assessing Officer in ignoring them cannot be accepted. When the payment to the concerned parties are through proper banking channel and because that there is the payments made were again routed back to the assessee, it doesn’t mean that the assessee did not make any purchase, so that the addition of 25% of bogus purchases of 14,16,580 which is Rs. 3,54,145 is on higher side in the facts of the case. As the assessee already declared the GP @ 22.05% so keeping in view the totality of facts and circumstances of the case, the disallowance made by the AO is restricted to 12.5% of such purchases of Rs. 14,16,580 which comes to Rs. 1,77,073. The AO is directed to modify the addition accordingly. The appellant gets part relief. This ground is partly allowed.

4.3 The assessee also contested the interest charged u/s 234A/B/C of the Act. Interest is mandatory and consequential in nature and dismissed.

The Ld CIT(A) has restricted the addition to 12.5%, basically on the ground that the addition of 25% is on higher side. In the case *CIT vs. Simit P. Seth 356 ITR 451(Guj)*, the Hon'ble Gujrat High Court has upheld the decision of the Tribunal and sustained the addition 12.5% of the total amount of bogus purchases determined by the Tribunal, holding that only profit element embedded in such purchases can be added to income of the assessee. Hence, in our considered view, the order passed by the Ld. CIT(A) is based on the principles of law laid down by the Hon'ble Gujarat High Court in the said case. On the other hand the law relied upon by the Ld. DR is distinguishable on facts. Hence, we do not find any infirmity in the order of the Ld. CIT (A) to interfere with. Accordingly, we uphold the order of the Ld. CIT (A) and dismiss the sole ground of the revenue's appeal and direct the AO to make addition of 12.5% of the total amount of questioned purchases.

ITA No. 5822/MUM/2018 (Assessment Year: 2011-2012)

The facts and the issues involved in the present case are identical to the facts of the case and the issues involved in the assessee's own case for the assessment year 2010-11 discussed above, except the amount of bogus purchases determined by the AO. Hence, we do not consider it necessary to narrate the facts of the present case. In the present case also the Ld. CIT(A) restricted the addition to 12.5% from 25% estimated by the AO. The revenue has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

“Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A), Mumbai is correct in restricting 12.5% of the tented purchases without appreciating the fact that none of the purchase parties

have been produced for verification u/s 133(6)/ 131 of the I.T. Act, 1961?

2. Since, we have dismissed the revenue's appeal raised on the identical grounds in a similar set of facts in assessee's own case for the assessment year 2010-11 aforesaid, our decision in the said case would *Mutatis mutandis* apply in this case. We accordingly, direct the AO to make addition of 12.5% of the total amount of bogus purchases in question to the income of the assessee.

In the result, appeals filed by the revenue for assessment year 2010-11 and 2011-12 are dismissed.

Order pronounced in the open court on 30th September, 2019.

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 30/09/2019

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai