

IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH MUMBAI

BEFORE SHRI C. N. PRASAD, JUDICIAL MEMBER
&
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

ITA No.4889 & 4890/Mum/2017
(Assessment Year: 2009-10 and 2011-12)

ACIT- 19(2) 2nd ^d Floor, Room No.207 Matru Mandir, Grant Road Mumbai-400 007	Vs.	Mr. PAWAN KUMAR NAGARAJ MEHTA Prop: ROSE METALS No. 28-30, 1 st Floor, Gajanan Darshan, C P Tank Road, C P Tank, Mumbai-400004
		PAN/GIR No.AACPM9957E
Appellant)	..	Respondent)

ITA No.4043 & 4044/Mum/2017
(Assessment Year: 2009-10 and 2011-12)

Mr. PAWAN KUMAR NAGARAJ MEHTA Prop: ROSE METALS No. 28-30, 1 st Floor, Gajanan Darshan, C P Tank Road, C P Tank, Mumbai-400004	Vs.	ACIT- 19(2) 2nd ^d Floor, Room No.207 Matru Mandir, Grant Road Mumbai-400 007
PAN/GIR No.AACPM9957E		
Appellant)	..	Respondent)

Revenue by	Shri. Kumar Padmapani Bora-Sr. DR
Assessee by	Shri. Rajendra Kumar Jain, CA
Date of Hearing	21/11/2019
Date of Pronouncement	27 /11/2019

आदेश / ORDER

PER G.MANJUNATHA (A.M):

These cross appeals filed by the revenue as well as the assessee are directed against, common order of the Commissioner of Income Tax (Appeals)-30, Mumbai, dated 24/03/2017 for the Assessment Years 2009-10 and 2011-12.

Since, the facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed off, by this consolidated order.

ITA No.4889 & 4043/Mum/2017(Assessment Year: 2009-10)

2. The revenue has raised the following grounds of appeal in Assessment Year 2009-10:-

- “1) *Whether in the facts and in the circumstances of the case and in law, the Ld. CIT(A) is not justified in not confirming the addition in view of the decision of the Hon' ble Supreme Court dated 10.01.2017 in the case of N .K. Proteins Ltd. wherein the Hon'ble Supreme Court confirmed the entire addition on account of bogus purchases?”*
- 2) *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in confirming the addition @6.5% profit rate on total purchases of Rs. 7,66,02,9139/- made by the assessee from three parties when during the investigation made by sales tax department of Maharashtra Government, it was conclusively proved beyond doubt that these parties are only into providing accommodation entries and do not do any real business ?*
- 3) *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in not appreciating the fact that during the investigation made by sales tax department of Maharashtra Government, directors/Prop./Partners of such parties have accepted on oath that they are providing only accommodation entries and not doing any real business, the treatment of such purchases as being genuine does not hold ground?*
- 4) *The appellant prays that the order of the Ld.CIT(A) on the above grounds be set aside and that of the AO be restored.”*

Whereas, the assessee has raised the following grounds of appeal in Assessment Year 2009-10:-

- “1. *The Hon'ble Commissioner of Income Tax (Appeals) – 30, Mumbai (Hon'ble CIT-A) erred on facts and in law in confirming the disallowance made by the Asst. Commissioner of Income tax – 19(2), Mumbai (Ld.*

A.O) on account of alleged bogus purchases to the extent of Rs.49,79,190/- i.e., making an addition on ad hoc percentage of 6.50% from the ad-hoc addition of 12.5% of Rs.95,75,364/- as done by the Ld.A.O. of total alleged bogus purchases amounting to Rs.7,66,02,913/-.

2. *The appellant prays that the disallowance on account of alleged bogus purchases as confirmed by the Hon'ble CIT(A) to the extent of Rs.49,79,190/- may be deleted."*

3. The brief facts of the case extracted from Asst. Year 2009-10 are that the assessee is engaged in the business of trading in ferrous and non-ferrous metals, filed his return of income for AY 2009-10 on 25/09/2009, declaring total income of Rs. 22,25,211/-. 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. As per list of beneficiaries, the assessee is one of the beneficiaries who had taken accommodation bills of bogus purchases from three parties, viz. M/s Adino Trading Company Pvt Ltd, Shri. Mahavir Enterprises and Sikhar Metal Corporation amounting to Rs. Rs. 7,66,02,913/- as listed by the AO in assessment order para 3. 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 25/03/2015 and determined total income of Rs. 1,18,00,575/-, after making additions of Rs. 95,75,364/- being 12.50% profit on alleged bogus purchase.

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 elaborate written submissions, on the issue, which has been reproduced at Para 4 on pages 5 to 9 of Ld.CIT(A) order. The sum and substance of 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 estimation of profit from 12.50% to 6.50%. The relevant findings of the Ld.CIT(A) are as under:-

- “5. *I have given my careful consideration to the rival submissions, perused the material on record and duly considered the factual matrix of the case as also the applicable legal position.*
6. *The appellant has raised only one ‘Ground of Appeal’ which is subdivided in 8 parts i.e. part (A) to (H) and except the last two parts (Part-G & H), all the other parts deals with the main issue of addition of peak credit of ₹2,84,53,091/- u/s 69C of the Act. It is stated in the grounds that the representations made on the issue were not considered. The list issued on Mahavat Website is the list of ‘Suspicious Dealers’ and not ‘confirmed hawala dealers’. Hence there is possibility that the Sales Tax Department is tentative and not definite in its pronouncement. It is also stated that even though the registration was cancelled by the Sales Tax Department of the alleged parties, the cancellation order can bind only the persons who were parties to the cancellation proceedings, i.e. the dealers and the appellant is not a party. The AO has considered the form rather than the substance of the transactions. AO has not considered the submissions made by the appellant during the assessment proceedings. It is also submitted that if the purchase is treated as non-genuine for any reasons, the sales of the said goods cannot be assessed to tax. If the sales are genuine and profit is taxed and GP ratio is reasonable and comparable with earlier years, then the purchases should be held to be genuine. When the notices issued u/s 133(6) are returned unserved, no opportunity was given to the appellant to cross verify the traceability, which is against the principles of natural justice.*
- 6.1 *Ld. AO, made the addition of ₹2,84,35,091/-, being the peak credit worked out by merging the ledger accounts into a single account and the combined peak amount of the total non-genuine purchases of ₹5,71,13,265/- from the six parties, and added u/s 69C of the Act. Before making the addition, AO issued notices u/s 133(6) of the Act, to the concerned parties. The assessee was asked to produce the said parties from whom such purchases claimed to have been made for examination. The assessee failed to do so and also could not file the vital documents such as delivery challans, transport receipts. Assessee could not establish genuineness of purchases made. The AO, concluded that all the parties from whom purchases made were non genuine transactions to suppress the profits and to reduce the tax liability and worked out the peak balance and added the same to the total income of the appellant.*

- 6.2 *The appellant in the written submissions stated that all the purchases were made in normal course of business and against such purchases, sales were made. During the scrutiny assessment various details and documents such as copies of purchase invoices, copies of challans, copies of bank statements, copies of sales invoices, confirmation, PAN, IT return copy and ledger accounts were furnished before AO. However, without appreciating the documentary evidences, additions were made on the basis of information received from DGIT (Inv). It is submitted that all the purchases were supported by evidences in the form of bills and other documents, all the payments for purchases were made through account payee cheques, the materials purchased were used for the purpose of resale and earning the income. Addition was made based on the information received from the sales tax department. GP is consistent for the preceding three years which shows that there is no malafide intention to show less GP to evade taxes. In the subsequent years purchases was accepted and addition was made @12.5% of the total amount of purchases. It is also further submitted that in appellant's case VAT rate on the purchases was 4%. In view of the same, it is requested to consider the case on merits and delete the addition made by the assessing officer.*
- 6.3 *I have carefully considered the rival contentions on the issue. On perusal of the material on record, it is noticed that, in the appellant's case, Ld.AO has made independent verifications by issuing notices u/s. 133(6) of the Act which were returned unserved. Apart from the above, there is overwhelming evidence in the form of information with regard to the suppliers from the Sales tax authorities that they were engaged only in issuing hawala bills and no goods were ever supplied by them.*
- 6.4 *After weighing the evidence pros and cons, I find that the appellant has not reconciled the purchases with the items sold and failed to reconcile 1:1 of the items purchased and sold. Onus was always on the appellant to prove as to how the material purchased was firstly obtained. I record a finding of fact here that no proof of delivery of purchases has been filed either before the Ld. AO or before me. In the present proceedings, AR was asked to produce the parties for verification before the AO, even at this stage to examine the genuineness of the purchases. In response to the same, AR expressed his inability to do so. Thus, it can be safely presumed that either the parties are non-existent or even if exist, they were not backed by sufficient evidence to undergo the test of scrutiny.*
- 6.5 *The suppliers was in fact the appellant's witness and the Ld. AO was not required to force their attendance. It was for the appellant to produce*

them as per Civil Procedure Code, which applies on all fours to the income-tax proceedings. It is trite that once a transaction is shown to be of the nature of income, the onus shifts to the assessee to show that the same was not taxable. It can thus be safely assumed that the appellant has grossly failed in its duty to mitigate the burden cast upon it in so far as proving the genuineness of the transaction from the said party is concerned.

- 6.6 *In this regard it is also pertinent to mention that while dealing with the concept of burden of proof, onus of proving is always on the person who makes the claim and not on the Revenue. While dealing with the issue of deciding the burden of proof, Hon'ble Supreme Court in the cases of CIT vs. Durgaprasad More 82 ITR 540 and Sumati Dayal vs. CIT 214 ITR 801 has held that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not real and that Taxing Authorities are entitled to look into surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. The Hon'ble court also held that, it is no doubt, true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden to prove that it is not taxable because it falls within exemption provided by the Act, lies upon the assessee. In the case of Durgaprasad More (Supra), the Hon'ble Court went on to add that a party who relies on a recital in a Deed has to establish the truth of this recital, otherwise it will be very easy to make self serving statements in documents either executed or taken by a party who relied on those recitals. If all that an assessee who wants to evade tax has to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. The Hon'ble Court further held that the Taxing Authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look in to the surrounding circumstances to find out the reality of the recitals made in those documents.*
- 6.7 *The onus to prove that apparent, is not the real one, is on the party who claims it to be so, as held by the Hon'ble Supreme Court in the case of CIT v. Daulat Ram Rawatmull [1973] 87 TTR 349 and CIT v. Durga Prasad More (supra). It is also a settled legal proposition that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. However, in the instant case, the appellant has miserably failed to lead evidence.*

- 6.8 *As per the assessment order, AO made the addition after working out the peak credit by merging the ledger accounts into a single account and arriving the combined peak amount of credit after adding purchases and deducting the payments made date-wise. Whereas in the subsequent assessment made for the A.Y. 2009-10 the addition was made estimating the profit @12.50% of the profit margin embedded in the non-genuine purchases relying on the Hon'ble Gujarat High Court's decision in the case of Simit P. Sheth. The reasoning given by the Hon'ble Tribunal, which is confirmed by the High Court, it is stated that "the malpractice of bogus purchase is mainly to save 10% sales tax etc., It has also been informed that in this industry about 2.5% is the profit margin. Therefore, the Court directed that the disallowance is required to be sustained at 12.5% of the purchase from those parties'.*
- 6.9 *In the written submissions, Ld AR, requested for deleting the total addition. At the same time the appellant also submitted that VAT rate on the purchases is 4%, therefore even the percentage adopted @ 12.5% in the subsequent year is not justified and requested to consider the case on merits. The appellant enclosed copies of the invoices and on perusal of the same, in all the bills the percentage of VAT is levied @ 4%. Since the appellant is also in the same line of business i.e. trading in ferrous and non-ferrous metals, as per the logic the profit margin should be adopted @ 2.5%. In view of the above, in my considered opinion, if the profit percentage embedded on such purchases is restricted to 6.5%, (i.e 4% of VAT levied + 2.5% towards profit margin), that will meet the ends of justice, as the same is in tune with the logic adopted in the case of Simith P. Sheth, where the court considered the tax rate @ 10% levied in Gujarat State. Taking all the facts into consideration and applying the logic of Simit P. Sheth case, for estimating the profit element embedded on non-genuine purchases, the AO is directed to restrict the estimation @ 6.5% on the total non-genuine purchases of ₹5,71,13,265/-, made from the six parties. Appeal on Ground No. 1 (Part A to F) is treated as 'Partly Allowed'."*

5. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. We find that the Ld. AO has made additions towards 12.50% profit on alleged bogus purchases, on the ground that the assessee is 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 parties is bogus in nature. It is contentions of the assessee before the lower authorities that purchase from the above parties are supported by necessary evidences. It has furnished all possible evidences, including books of accounts; stock details and bank statement to prove payment against said purchases have been made through proper banking channels. The assessee had also taken a legal plea in light of certain judicial precedents and argued that there is a gross violation of principles of natural justice, because the AO had never furnished the statements and other information relied upon to draw adverse inference against the assessee, despite repeated requests at the time of assessment proceedings.

6 Having considered arguments of both sides 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 had filed certain basic evidences, but failed to file further evidences to conclusively prove purchases to the satisfaction of the Ld.AO. At the same time, the Ld. AO had also failed to take the investigation to a logical conclusion by carrying 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 the arguments of both the sides. In so far as argument of the Id. AR for the assessee that there is a gross violation of principles of natural justice, because the AO had never furnished the statements and other information relied upon to draw adverse inference against the assessee, despite repeated requests at the time of assessment proceedings, we find that although the assessee has requested for statements and other information relied upon by the AO, but the question of providing said information arises only when assessee discharges his obligation to file necessary evidences. If, the assessee fails to discharge its obligation, then the question of providing said information does not arise and hence, we do not

find any error in the action of the AO in not furnishing information required by the assessee and hence, the objection of the assessee is rejected and consequent case laws cited by the assessee are not considered. Further, in such situation where the purchases are considered to be bogus, 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 ranging from 10% to 15% on total alleged bogus purchases. In this case, considering the nature of business of the assessee the Ld. AO has estimated 12.50% profit, whereas the Ld.CIT(A) has scaled down estimation of profit to 6.50% on total alleged bogus purchase. Although, both authorities have taken different rate of profit for estimation of income for alleged bogus purchase, but no one could support said rate of gross profit with necessary evidences or any comparable cases. But, if you consider rate of profit adopted by the Id. CIT(A) and nature of business of the assessee, we find that the rate of profit adopted by the Id. CIT(A) seems to on far with profit earned from similar trade and also it is near to trade average. 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 view that the Id. CIT(A) has adopted reasonable rate of profit on alleged bogus purchase to end dispute between the parties and hence, we are inclined to uphold the findings of Id. CIT(A) and dismissed appeal filed by the revenue as well as the assessee.

7. In the result, appeals filed by the revenue as well as the assessee for Asst. Year 2009-10 are dismissed.

ITA No.4890 & 4044/Mum/2017(Assessment Year: 2011-12)

8. The facts and issues involved in these appeals filed by the reveune as well as the assessee for Asst. Year 2011-12 are identical to the facts and issues which we had considered in ITA. No. 4889/Mum/2017 and ITA No. 4043/Mum/2017 for Asst. Year 2009-10. The reasons given by us in preceedings paragraphs in ITA. No. 4889/Mum/2017 and ITA No. 4043/Mum/2017 for Asst. Year 2009-10 shall mutatis untandis apply to these appeals as well. Therefore, for detailed reasons recorded in preceedings paragraphs in appeals for A.Y. 2009-10, we are inclined to uphold the findings of the Id. CIT(A) and dismissed appeal filed by the reveune as well as the assessee.

9. As a result, appeals filed by the Reveune as well as the assessee for Asst. Years 2009-10 and 2011-12 are dismissed.

Order pronounced in the open court on this 27 /11/2019

Sd/-
(C.N.PRASAD)
JUDICIAL MEMBER

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 27 /11/2019
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