

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

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 6371/MUM/2018 (A.Y: 2009-10)

Income Tax Officer- 31(2)(4) 105, C-13, Pratyakshakar Bhavan Bandra Kurla Complex Bandra (E), Mumbai - 400 051	v.	Shri Narendra R. Bohra Prop. M/s. Veena Industries 203, 2 nd Floor, Amar Business Centre Ram Mandir Road, Goregaon (W) Mumbai – 400 014 PAN: AAAPB7696M
(Appellant)		(Respondent)

Assessee by	:	Shri Suresh Patni
Department by	:	Shri R. Bhoopathi
Date of Hearing	:	05.12.2019
Date of Pronouncement	:	05.12.2019

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the revenue against the order of the Learned Commissioner of Income Tax (Appeals)–42, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 28.08.2018 for the A.Y. 2009-10 in restricting the disallowance to 12.5% of purchases of ₹.6,45,920/- as against entire purchases disallowed as non-genuine/bogus by the Assessing Officer.

2. Briefly stated the facts are that, the assessee is engaged in the business of "Manufacturer of turned parts & Screws of Brass & Iron Steel" filed return of income on 12.09.2009 declaring income of ₹.5,04,830/- for the A.Y. 2009-10 respectively. The return was processed u/s.143(1) of the Act. Subsequently, Assessing Officer received information from the DGIT(Inv.), Mumbai about the accommodation entries provided by various dealers and assessee was also one of the beneficiary from those dealers. The assessments were reopened U/s. 147 of the Act based on the information received from DGIT(Inv.), Mumbai, that the assessee has availed accommodation entries from M/s. Nirma Trading Co., & M/s.Manohar Metal (India) who are all providing accommodation entries without there being transportation of any goods. In the re-assessment proceedings, the assessee was required to prove the genuineness of the purchases of ₹.3,02,579/- and ₹.3,43,341/- made from the aforesaid parties respectively which were referred to in the Assessment Order. Assessing Officer also issued notices u/s. 133(6) of the Act to the above parties and the notices were returned by postal authorities with the remark "Not Known" / Unclaimed. The assessee contended that purchases made to the party is through cheques and therefore the purchases made are genuine. Assessee also requested for cross examination of the dealers on whose statement the Assessing Officer is relying on. Not convinced

with the submissions of the assessee the Assessing Officer treated the purchases as non-genuine and he was of the opinion that assessee had obtained only accommodation entries without there being any transportation of materials and the assessee might have made purchases in the gray market. It is the finding of the Assessing Officer since the purchases made by the assessee and claimed as expenses in his Profit and Loss Account are not genuine, the purchases to that extent remained unverifiable and rejected the Books of Accounts. He also observed that the dealers from whom the assessee made purchases have not responded to the notices and the assessee did not produce the parties for verification. Therefore, Assessing Officer treated purchases of ₹.6,45,920/- as non-genuine and added to the income of the assessee for the A.Y. 2009-10.

3. On appeal the Ld.CIT(A) considering the facts of the case and evidences, various submissions of the assessee and various decisions of Hon'ble High Courts restricted the disallowance to the extent 12.5% of the non-genuine purchases for the A.Y. 2009-10.

4. Ld. DR supported the order of the Assessing Officer and the Ld.Counsel for the assessee strongly placed reliance on the order of the Ld.CIT(A). It is further submitted that the tax effect is also less than

₹.50 Lacs. However, the Ld. DR submitted that the assessment was reopened based on the information from the DGIT(Inv.), Mumbai which is an external agency and therefore it falls under the exception in the circular of the CBDT.

5. We have heard both parties and perused the orders of the authorities below. On a perusal of the order of the Ld.CIT(A), we find that the Ld.CIT(A) considered this aspect of the matter elaborately with reference to the submissions of the assessee and the averments in the Assessment Order and considering the nature of the business of the assessee and also various decisions of High Courts restricted the disallowance to 12.5% of the non-genuine purchases for the A.Y. 2009-10, while holding so, the Ld.CIT(A) observed as under: -

"6.3.10 In the present case, as discussed above, the STA, GOM has conducted an enquiry with regard to the vendors it was found that these parties exist on papers only. The adverse evidence and material, relied upon in the order which militate against the version of the appellant were disclosed to the appellant. The appellant had ample opportunity to rebut the findings with supporting documents and evidence Thus, the onus was always on the appellant to prove the genuineness of the purchases.

6.3.11 Further, the principles of natural justice cannot be used to the advantage of person who wants to defeat the very purpose of justice. The Hon'ble Supreme Court in the case of Chairman, Board of Mining Examination vs. Ramjee AIR 1977 SC 965 has held that Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating." And, it is held in the case of Kishanlal Agarwal vs Collector of Customs, AIR 1967 Cal 80 that "So long as the party charged has a fair and reasonable opportunity to see., comment and criticise the evidence, statement, or record on which the charge is being made against him, the demands and the test of natural justice are satisfied. Cross-

examination in that sense is not the technical cross examination in a Court of law in the witness box."

6.3.12 Therefore the plea of the appellant that the AO should have allowed the appellant to cross examine the parties is not only misleading but a concerted effort to protract the litigation to infinity as it is fully aware of fact that the parties in question are not only bogus but also by this time untraceable. Moreover, during the course of the assessment proceeding, the appellant nowhere requested for cross examining the parties who had given the statement before the sale tax authority.

6.3.13 In my view there is no violation of principles of natural justice and the plea of the appellant that the witnesses should be offered for cross-examination, cannot be considered bonafide.

*6.3.14 Another argument of the appellant in support of the genuineness of the purchase transaction is that all the payments are made through account payee cheques and payment transactions can be verified from copy of bank statement as submitted before the AO In my view such an argument is fallacious There are judicial precedents on this issue wherein it is held that the transaction cannot be held to be genuine merely because the payment is made by cheques. The Hon'ble Supreme Court of India in the case of CIT vs P Mohanakala&Ors. (2007) 291 ITR 0278 has held that "The transactions though apparent were held to be not real one. May be the money came by way of bank cheques and paid through the process of banking transaction but that itself is of no consequence" The Hon'ble jurisdictional High Court of Bombay in the case of Naresh K Pahuja vs. Income Tax Appellate Tribunal: (2015) 375 ITR 0526 (Bom) has held that "mere routing of a gift through a banking channel would not by itself establish that the gift is genuine and the genuineness or non-genuineness of the gift would have to be established by other evidence " And the Hon'ble High Court of Karnataka *n the case of CIT &Ors. vs. Saravana Constructions (P.) Ltd. (2012) 72 DTR 0258, has held that 'there is no presumption that merely because the payment is made by cheque, it is a genuine transaction. First it has to be found out whether the transaction in question is genuine and only thereafter the assessee would be entitled to the benefit of disallowance"*

6.3.15 In the light of above decisions, it can be concluded that it is mandatory for the appellant to establish the genuineness of transaction by independent supporting evidences The payment by way of bank cheques or payment through the process of banking transaction in itself is of no consequence. Therefore, in my view, purchase transaction in the present case cannot be considered genuine merely because the payments were made through account payee cheques

6.3.16 It is settled law that onus lies on the assessee to prove the genuineness of any expenditure which is claimed as deduction in computing its taxable income. "Prima facie onus to prove genuineness of purchases is on assessee." [CIT v. Korlay Trading Co Ltd (1998) 232 ITR 820(Cal.)(HC)]. Therefore, the onus in the present case squarely lies on the appellant to prove the genuineness of purchase. The appellant has placed reliance on purchase invoices, and the bank statements reflecting the payments. Except for purchase invoice, which itself is not found to be genuine as per information received from the DGIT(Inv), Mumbai and which itself is a subject matter of dispute in the present proceedings, there is no independent third party evidence to support the purchase from the stated hawala dealers. All the evidence are relating to the purchase and sale of goods were within the special knowledge of the appellant. The onus to produce the same as per s 106 the Evidence Act was upon the appellant when the facts lay within the special knowledge of the assessee which it failed to establish, a statutory presumption can be drawn against it in view of the s. 105 of the Evidence Act.

6.3.17 In the present case the AO has conducted independent enquires and shown that the parties in question were not genuine dealers and the stated hawala dealers have admitted this fact before the Sales Tax Authorities. The appellant has also failed to produce the parties for verification and to rebut the charges. On identical facts rejecting the contention of the petitioner that if the details have been provided as sought by the Assessing Officer including the identification of the parties, the nature of the dealings and the transactions, monies paid, then this is a case where the primary onus has been discharged and that unless and until the revenue is able to demonstrate and prove the negative by producing contrary material the assessee must succeed, the Hon'ble jurisdictional High Court of Bombay in the case of Umakant B. Agrawal vs. Deputy CIT (2014) 369 ITR 0220 (Bom) has held that

"These are not matters which were to the knowledge of the Assessing Officer and the assessee was called upon to clarify them. It was a matter solely to the know/edge of [ne appellant. It was personal to him. It was the assertion of the appellant and winch was being probed, however, in greater details. It was a clear case where the onus which was resting on the assessee in law, has not been discharged by producing the details with regard to the matters which are to the personal knowledge only of the assessee

6.3.18 In the present case, as discussed earlier, the appellant failed to produce the parties for verification or to file confirmation of accounts from the parties. The appellant has not produced any independent third-party evidence in form of other incidental expenses incurred on transport / delivery of the material/goods either from its own books of account or that of the supplying dealer which may support the claim of

the appellant in respect of transport / delivery of goods purchased. The Hon'ble Tribunal in the case of DCIT vs. Shn Rajeev G. Kalathil (Mum) (Trib) (ITA No. 6727/M/2012 dt.20/08/2014, Bench D' AY 2009-10) (2015) 67 SOT 0052 (Mumbai)] (URO) has held that transportation of good to the site is one of the deciding factor to be considered for resolving the issue However, the appellant has not produced any independent third-party evidence either before the AO or before me, which could prove the physical delivery of goods to the appellant. Further it is clearly mentioned in the Tax Audit Report in Form 3CB that "The assessee has not maintained day-to-day Stock A/c of material purchased & Consumed" and hence it was not possible for me to verify the Opening & Closing Stock Purchases and Raw Material Consumed since the assessee has Not maintained day-to-day Stock A/c and Stock Register of its business And it is also noticed that though the appellant challenged the observation of the AO that the books of accounts were not produced by the appellant and the matter was remanded to the AO by my predecessor and the appellant could not produced the stock register before the AO hence without stock register the AO could not verify the purchases The appellant has not disputed the above finding of the AO.

6.3.19 *The Hon'ble Supreme Court of India in the case of Commissioner of Income Tax vs Durga Prasad More (1971) 82 ITR 0540 (SC) has held that*

"It is true that, an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals, other-wise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is 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. A little probing was sufficient in the present case to show that the apparent was not the real The taxing authorities were not required to put on blinkers while looking at the documents produced before them They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents."

6.3.20 *In the present case, the adverse evidence and material relied upon in the order to reach the finality, was disclosed to the assessee However, the appellant could not establish the genuineness of the transaction either on the basis evidence in support of delivery of goods at the time of purchase, or by producing the parties from whom the purchase were made.*

6.3 21 *However it is also a contention of the appellant that it is a tiny unit having no specialized / organized purchase department and*

materials were purchased as and when required. The appellant further contended that the he has included all the purchases and sales in the Profit and loss account and when sales are taken as income, it necessitates deduction for cost of expenses incurred for the production. Before me, the appellant. has also submitted the comparison of GP and Purchases to Turnover Ratio for preceding and succeeding years in support of claim, that the purchases are genuine.

AY	Gross Profit (G P) Ratio	Purchases	Turnover	Purchases / Turnover Ration
2007-08	27.78	34,33,488	65,18,920	52.66
2008-09	27.62	34,29,832	67,43,026	50.86
2009-10	26.29	30,03,077	66,30,019	45.29
2010-11	26.70	31,78,291	74,95,476	42.40
2011-12	27.06	54,03,265	92,14,109	56.65
	27.09	36,89,591	73,20,310	49.97

6.3.22 I have considered the submission of the appellant The Hon'ble ITAT in the case of M/s Packwell Services in ITA No. 6544/Mum/2016, observing that there was no finding to show ratio of consumption to manufacturing is abnormal or consumption or manufacturing is not in accordance with manufacturing or production data, has held that the addition of the entire purchases as bogus is not justified, and relying on the decision of the Hon'ble High Court of Gujarat in the case of Simit P Sheth held that 12.5% disallowance of bogus purchases on account of the gross profit accruing to the appellant will serve the end of justice.

6.3.23. The facts of the case are similar. The Purchases/ Turnover Ratio for the year under consideration is lower than the ratio for the preceding years and the averages ratio for preceding and succeeding years. Therefore, in light of the above decisions, it will be reasonable to estimate the profit embedded in the accommodation entries of bogus purchases @ 12.5% of the purchase amount

6.3.25 Thus taking in to account the entirety of the facts, the profit embedded in accommodation entries of bogus purchase is estimated @ 12.5% of the purchase amount of Rs 6,45,920/-for AY 2009-10 and an addition of Rs. 80,740/- to the total income of the appellant is sustained. The appellant gets relief of Rs.5,65,180/-.

6.3.26 Accordingly, the aforesaid the ground of appeal is partly allowed.”

6. On a careful perusal of the order of the Ld.CIT(A) and the reasons given therein, we do not find any infirmity in the order passed by the Ld.CIT(A). None of the findings and observations of the Ld.CIT(A) have been rebutted with evidences by the revenue and thus we do not see any infirmity in the order passed by the Ld.CIT(A) in sustaining the addition/disallowance to the extent of 12.5% of the purchases for the A.Y.2009-10. Grounds raised by the Revenue are dismissed.

7. In the result, appeals filed by the Revenue are dismissed.

Order pronounced in the open court on the 05th December, 2019

Sd/-
(MANOJ KUMAR AGGARWAL)
ACCOUNTANT MEMBER

Mumbai / Dated 05/12/2019
Giridhar, Sr.PS

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

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum