

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

BEFORE SHRI G. MANJUNATHA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 5690/MUM/2018
Assessment Year: 2009-10**

The ITO-27(1)(1), Tower No. 6, 4 th Floor, Room No. 406, Vashi Rly. Station Complex, Vashi, Navi Mumbai	Vs.	M/s Anil Kumar Jain & Co. 190/5283, Sanmati Pant Nagar, Ghatkopar (E), Mumbai - 400075 PAN: AAGFA5482L
(Appellant)		(Respondent)

Revenue by : Shri R. Bhoopathi (AR)

Assessee by : None

Date of Hearing: 03/10/2019
Date of Pronouncement: 11/10/2019

ORDER

PER RAM LAL NEGI, JM

The revenue has filed the present appeal against the order dated 14.06.2018 passed by the Commissioner of Income Tax (Appeals)-24 (for short 'the CIT(A), Mumbai, for the assessment year 2009-10, whereby the Ld. CIT(A) has partly allowed the appeal filed by the assessee against the assessment order passed u/s 144 read with section 147 of the Income Tax Act, 1961 (for short the 'Act').

2. Brief facts of the case are that the assessee engaged in the business of trading in cloth and hosiery, filed its return of income for the assessment year under consideration declaring the total income of Rs. 4,79,654/-. Subsequently, it came to the notice of the AO that the assessee had shown purchase from Bhavi Sales Agency Pvt. Ltd., one of the bogus parties declared by the Sales Tax Department, Maharashtra. Accordingly, the AO issued notice u/s 148 of the Act. The assessee submitted that the original return submitted

u/s 139(1) of the Act be treated as the return filed in response to the notice u/s 148 of the Act. Thereafter the AO issued notices u/s 143(2) and 142(1) of the Act. In response thereof, the authorized representative of the assessee appeared and filed the details. The assessee contended that the goods were genuinely purchased from the aforesaid party, however the AO rejecting the contention of the assessee treated the questioned purchases amounting to Rs. 3,06,281/- as bogus transaction and added the said amount to the income of the assessee and determined the total income of the assessee at Rs. 8,92,890. The assessee challenged the assessment order before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee restricted the addition to 12.5% of the total amount of bogus purchases. Against the said findings, the revenue is in appeal before the Tribunal.

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

1. "On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the addition of Rs. 2,69,996/- made by the Assessing Officer on account of bogus purchases, without appreciating the fact that the assessee had failed to produce bills, vouchers and other documentary evidences in support of his claim and without considering the latest Apex Court decision in the case of N.K. Protein Ltd. wherein it is held that once it is proved that the purchases are bogus then addition should be made on entire purchase and not on profit element embedded in such purchases.

2. On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in estimating the profit from Hawala purchases by disallowing only Rs. 38,285/- being 12.5% of total purchases as even the basic onus of producing transport bills, delivery challans etc. were not fulfilled by the assessee."

4. This case was fixed for hearing on 03.10.2019. On the said date, when the case was called out for hearing, none appeared on behalf of the assessee. From the record, we observed that the assessee does not want to pursue the

appeal filed by the department as the notice issued to the assessee has received back un-served with the remarks 'left'. In view of the aforesaid facts, we decided to dispose of the appeal on the basis of material on record after hearing the Departmental Representative (DR).

5. 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 in accordance with the law laid down by the Hon'ble Gujarat High Court, the findings of the Ld. CIT (A) are erroneous and liable to set aside.

6. 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 AO received back the notice issued u/s 133(6) of the Act un-served. The assessee also failed to produce the parties before the AO for verification. Hence, in our considered view, the AO has rightly held that the assessee has not made the questioned purchases from the parties mentioned in the books of account of the assessee. On the other hand, AO has not rejected the sale of the goods in question. The above-mentioned facts give rise to the conclusion that the assessee had purchased the goods in question from grey market without paying the applicable tax. 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. However, in the present case the AO made addition of the total amount. 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:-

“Bases on the evidence in hand in the form of a report from DIT (Inv.), Mumbai the AO has asked the assessee to produce the parties along with evidence in order to verify the genuineness of the purchases transactions. The assessee instead submitted the ledger accounts of the above parties and bank statements extracts evidencing the payments through bank cheque. In this case, the onus lies on the assessee to prove the genuineness of the purchases and the assessee had to prove that the suppliers were genuinely existing. The assessee has not made any efforts to discharge the onus and failed to produce any of the parties, in spite of the opportunities given by the Ld. AO. The assessee could not satisfactorily substantiate and establish the fact that there were genuine purchases from these parties. There was a report from SIT (Inv) stating that all the seller parties as per the list supplied by them are bogus including the parties appearing in the books of the appellant company and as stated above, the assessee has not made counter submission to show that those parties are really existing. The AO has brought to tax the bogus purchases by adopting the method @ 100% of such purchases keeping in view the gain made by the appellant due to purchases of material in grey market without bills and adjusting the purchases with the invoices taken from the hawala traders under discussions. Under these circumstances the AO cannot be found fault on this count. Even though the AO could not prove substantively that the amounts given to the sellers in cheque from have come back to the appellant, the activities of accommodation entries in the trading community is not unheard of. Further, the investigations carried out by the Sales Tax Department, another Government Agency, with regard to VAT violation cannot be lost sight of. Further, as some of the names of the so-called bogus sellers out of the list supplied by the Sales Tax Department are appearing in the books of the appellant company, the link of involvement of appellant company getting bogus bills is established. Even though there are catena of cases decided by the jurisdictional ITAT which have decided the issue in favour of the assessee, they are not uniform in all the cases as they were decided as per facts and circumstances of that particular case before them.”

I am of the opinion that the facts and circumstances of the present cases are more akin to the case decided by the Hon'ble Gujarat High Court in the case of Simit P Sheth (supra). Therefore, I hereby confirm the disallowance to the extent 12.5% amounting to Rs. 38,285/- of the so-called bogus purchases made by the Ld. AO. This ground is partly allowed."

7. 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 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.

In the result, appeal filed by the revenue for assessment year 2009-2010 is dismissed.

Order pronounced in the open court on 11th October, 2019.

Sd/-
(G. MANJUNATHA)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 11/10/2019

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

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