

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

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

**ITA No. 5691/MUM/2018
Assessment Year: 2011-12**

The Assistant Commissioner of Income Tax – 27(3), R. No. 423, 4 th Floor, Tower No. 6, Vashi Railway Station, Vashi, Navi Mumbai - 400703	Vs.	Shri Sameer V. Juthani, 3, Satyam Industrial Estate, Off B.K.S.D. Marg, Govandi, Deonar, Mumbai - 400088 PAN: AAAPJ8632K
(Appellant)		(Respondent)

Revenue by : Shri R. Bhoopathi (DR)

Assessee by : Shri Bhupendra Shah (CA)

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

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue against the order dated 03.07.2018 passed by the Commissioner of Income Tax (Appeals)-25 (for short 'the CIT(A), Mumbai, for the assessment year 2010-11, whereby the Ld. CIT(A) has partly allowed the appeal 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').

2. Brief facts of the case are that the assessee, proprietor of M/s Subham Products, engaged in the business of manufacturing engineering goods, filed its return of income declaring the total income of Rs. 39,00,961/-. The return was processed u/s 143(1) of the Act. Subsequently, it came to the notice of the AO that the assessee had shown purchases amounting to Rs. 30,18,095/- from seven bogus parties declared by the Sales Tax Department, Maharashtra

which used to provide accommodation bills without supplying any goods. Accordingly, the AO issued notice u/s 148 of the Act and served upon the assessee. 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 purchases were genuinely made from the aforesaid parties, however the AO rejecting the contention of the assessee, treated the questioned purchases as bogus transaction and made addition of said amount to the income of the assessee and determined the total income of the assessee at Rs. 10,19,030/-. 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. 6,34,676/- 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. 3,77,262/- being 12.5% of bogus purchases as even the basic onus of producing transport bills, delivery challans etc. were not fulfilled by the assessee."

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 action of the Ld. CIT (A) is not in accordance with the principle of law laid down by the Hon'ble Gujarat High Court, the same is liable to set aside.

5. On the other hand the Ld. counsel for the assessee relying on the decision of the Ld. CIT(A) submitted that since the assessee has discharged the primary onus of establishing genuineness of the purchases by submitting the documentary evidence, the AO has wrongly made 100% addition of the alleged bogus purchases. Placing reliance on the judgment of the Hon'ble Bombay High Court in the case of *CIT vs. Nikunj Eximp Enterprises Pvt. Ltd*, the Ld. counsel submitted that merely because the assessee could not produce the parties before the authorities below, it could not be concluded that the goods were not purchased. The Ld. counsel further submitted that in any case the Ld. CIT (A) has rightly restricted the addition to 12.5% of the total amount of the alleged bogus purchases and there is no merit in the revenue's appeal.

6. We have carefully gone through the relevant record including the cases relied upon by the authorities below. We are convinced from the evidence 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. We further notice that, the AO has not rejected the sale of the goods so purchased. The above-mentioned 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. 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:-

“5.3.6 In view of the facts and circumstances of the case and the judicial pronouncements cited above, what can be disallowed or taxed in the instant case, is the excess profit element embedded in such purchases shown to have been made from aforesaid party. As narrated earlier, the AO in this case has held that the parties from whom the purchases were made by the appellant were found to be bogus, estimations ranging from 12.5% to 25% have been upheld by the Hon’ble Gujarat High Court, depending upon the nature of the business.

5.3.6.1 In a number /series of recent case, involving the issue of bogus purchases carried out in a organized manner through some hawala operators and the modus operandi unearthed by the Maharashtra Sales Tax Department, the Hon’ble Mumbai Tribunal has estimated the G.P addition in the hands of the purchasers on account of such bogus purchases as 12.5%. Some of which are listed below:-

- i) Smt. KiranNavinDoshi in ITA No. 2601/Mum/2016 dated 18.01.2017.*
- ii) AshwinPurshotam Bajaj & Anr. Vs. ITO, in ITA No. 4736/Mum/2014, 5207/Mum/2014, dated 14-12-2016.*
- iii) ITO & Anr. Vs. Manish Kanji Patel & Anr., in ITA No. 7299/Mum/2014, 7154/Mum/2012 & 7300/Mum/2014, 7627/Mum/2014, dated 18.05.2017.*
- iv) Metropolitan Eximchem Ltd. ITA No. 2935/M/2015, dated 29-03-2017.*
- v) Ronak Metal Industries vs. ITO, ITA No. 722/Mum/2017 dtd. 04.09.2017.*
- vi) ITO vs. Jugraj R. Jain, ITA No. 2571/Mum/2016 & 2572/M/2016 dtd. 02.08.2017.*
- vii) B.J. Exports vs. Asst. Commissioner of Income Tax, ITA No. 5442-5444/Mum/2016 dated 13.09.2017.*
- viii) Batliboi Environment Engineering Ltd. vs. Deputy Commissioner of Income Tax, ITA No. 2840 & 3482/M/2015 dated 15.03.2017.*
- ix) Deputy Commissioner of Income Tax & Anr. Vs. Remi Process Plant & Machinery Ltd. & Anr. ITA No. 1723/M/2015, 1817/M/2015 dated 21.03.2017.*

x) *Smt. Usha B. Agarwal vs. ITO, ITA No. 7034/Mum/2016 dated 01.09.2017.*

5.3.7 In view of the above discussed factual matrix and precedents, I am of the view that estimation of 12.5% as profit embedded in impugned total income returned, would meet the ends of justice. Therefore, I direct the AO to estimate profit @ 12.5% of the alleged bogus purchases, which works out to Rs. 3,77,262/- (@ 12.5% of Rs. 30,18,095/-) and restrict the addition to Rs. 3,77,262/-. The appellant gets a relief for the balance amount of Rs. 6,34,676/."

7. The Ld CIT(A) has restricted the addition to 12.5%, basically on the ground that the addition of total amount of bogus purchases is on much higher side. In the case of *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 of 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.

In the result, appeal filed by the revenue for assessment year 2011-2012 is dismissed.

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

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 11/10/2019

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