

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

BEFORE SHRI R.C.SHARMA, ACCOUNTANT MEMBER

**ITA No. 143/Mum/2019
(Assessment Year: 2011-12)**

I.T.O.-26(1)(1), Building No. C-11, Room No. 703, 7 th Floor, Pratyakshakar Bhavan, Bandra Kurla Complex, Bandra (East), Mumbai- 400051.	Vs.	Shri Anish Ahmed Chaudhary, Shalimar Trading Co., Shop No. 6A, Kothari Compound, Khairani Road, Saki Naka, Mumbai-400072.
PAN/GIR No. ACUPC 2967 N		
(Appellant)	..	(Respondent)

Revenue by	Shri Akhtar H Ansari (DR)
Assessee by	None
Date of Hearing	14/01/2020
Date of Pronouncement	20/01/2020

आदेश / ORDER

PER: R.C. SHARMA, A.M.

This is the appeal filed by the revenue against the order of the Id. CIT(A)-38, Mumbai dated 16/07/2018 for the A.Y. 2011-12 in the matter of order passed U/s 143(3) r.w.s. 147 of the Income Tax Act, 1961 (in short, the Act).

2. In this appeal, the only grievance of the revenue relates to Id. CIT(A)'s order giving further relief of G.P. declared by the assessee in respect of alleged bogus purchases.

3. Rival contentions have been heard and record perused. In this case, the A.O. reopened the assessment on obtaining information from the Sales Tax department with regard to assessee having taken bogus bills with regard to purchases. After making detailed enquiry and verifying the facts, the A.O. made addition by estimating profit at 12.5% of alleged bogus purchases. By the impugned order, the Id. CIT(A) after considering various judicial pronouncements and the facts of the case, directed for reducing the G.P. of 12.5% by the percentage of G.P. already declared by the assessee on the very same purchases. The precise observation of the Id. CIT(A) was as under:

“7 I have considered the facts of the case, oral contentions and written submissions of the appellant as against the observation/findings of the AO in the assessment order of the AO. The contentions/submissions of the appellant are being discussed and decided as under:

7.1 The only ground raised in this appeal is with regard to disallowance of notional profit @ 12.5% on bogus purchases of Rs.44,97,483/- from 5 parties amounting to Rs.5,62,185/-. I have carefully considered the facts of the case and submissions of the Id.AR. I have also gone through the decisions relied on by the Ld.AR. As seen from the facts of the case the AO has reopened the assessment based on the information received from the Sales Tax Department through DIT(Inv.), Mumbai with regard to non-payment of VAT by some of the sellers whose registration was cancelled later, having observed that those are the non-existent sellers and they have not made any sales except the bogus invoices issued in their names. When the Sales Tax

Department has. made enquiries some of the sellers have admitted before them that they have not made any sales but given the invoices. However, the assessee have argued before the Income Tax Authorities that they have made the payments through bank cheques to the sellers and received the material. Their argument was that unless the AO proves positively that the material was not delivered to the assessee and the payment made through the bank channels have been bogus or the amounts paid in the names of the suppliers have come back to the purchaser-assessee, the AO cannot make any addition to total income. It is seen in the instant case that even though the AO has made efforts to reach the suppliers by issuing notices u/s. 133(6) which have come back unserved due to non-availability of the so-called suppliers at the given address, or served but not responded in some cases, the appellant has not conclusively proved that the appellant has received the material and the amounts paid through cheques have not come back to the appellant. However, as the AO has not doubted the sales disclosed by the appellant he has to allow the purchases since there cannot be any sales without the purchase of the material. The only possibility is that the appellant might have inflated its purchases by taking into account the invoices in the names of the bogus suppliers. The presumption is that the material might have been purchased from grey market at a lower rate and made good the entries with bogus bills to reduce the profits. Under similar circumstances the Honble High Court of Gujrat in the case of Simit P Seth, 2013 (356 ITR 451) had an occasion to deliver its judgment by confirming the decision of the ITAT which has estimated the disallowance at 12.5% of the disputed bogus purchases to meet the ends of justice. The head-note of the lecisum is reproduced as under-

Section 145 of the Income-tax Act, 1961 - Method of accounting - Estimation of Profits [Bogus purchases] - Assessment year 2006-07 - Assessee was engaged in business of trading in steel on wholesale basis - Assessing Officer having found that some of alleged suppliers of steel to assessee had not supplied steel to assessee but had only provided sale bills, held that purchases made from said parties were bogus - He, accordingly, added entire amount of purchases to gross profit of assessee - Commissioner (Appeals) having found that assessee had indeed made purchases, though not from named parties but other parties from grey market, sustained addition to extent of 30 per cent of purchase cost as probable profit of assessee - Tribunal however, sustained addition to extent of 12.5 per cent - Whether since purchases were not bogus but were made from parties other than those mentioned in books of account, only profit element embedded in such purchases could be added to assessee's income - Held, yes - Whether hence, order of Tribunal needed no interference - Held, yes [Paras 6, 7 & 9] [In favour of assessee]". (emphasis supplied).

- 7.2 *In the instant case, no doubt, the AO has made efforts to examine the so-called suppliers by issuing notices u/s. 133(6) but could not succeed since such parties were not available at the given/revised address. Therefore, the AO was prevented by a reasonable cause from giving an opportunity to the appellant to cross-examine the outcome of his enquiry. With regard to the information received from DIT(Inv.), Mumbai the summary of the communication was already passed on to the appellant while communicating reasons for reopening. Even though the AO could not prove substantively that the amounts given to the sellers in cheques form 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. Even though there are catena of cases by the jurisdictional ITAT which have decided the issue in*

the favour of the assessee, they are not uniform in all the cases as they were decided as per the facts and circumstances of that particular case before them. I am of the opinion that the facts and circumstances of the present case are more akin to the case decided by the Hon'ble Gujrat High Court in the case of Simit P Seth (supra.). Respectfully following the above decision, and the ratio laid down that the yardstick for computing the profit embedded in such transactions will vary according to the nature of business, taking into account the business activity of the present appellant that of trading in all kinds of scraps and the average gross profit ratio being 8.26% ($8.27+6.84+8.13+9.79=8.26\%$), for four assessment years, 2009-10 to 2012-13 while for the current assessment year in appeal, GP ratio is 8.13% and NP ratio is 4.50%, I hereby adopt 9% to work out the profit embedded in the alleged transaction of Rs.44,97,483/- which comes to Rs.4,04,773/-. The AO is directed to restrict the addition to Rs.4,04,773/- to total income declared in the return filed. The ground is partly allowed."

4. I have gone through the orders of the authorities below and found that after considering various judicial pronouncements and specially the decision of the Hon'ble Gujarat High Court in the case of CIT Vs Simit P Sheth 365 ITR 0451 wherein it has been held that once the sale is accepted by the A.O., the very basis of purchases could not be questioned. Not the entire purchase price could be disallowed but only the profit element embedded in such purchases could be added to the income of the assessee. For the current A.Y. in appeal, the G.P. ratio is 8.13% and NP ratio is 4.50%, accordingly he adopted 9% to work out the profit embedded in the alleged transaction of bogus

purchases. The detailed findings so recorded by the Id. CIT(A) has not been controverted, accordingly, I do not find any reason to interfere in the order of the Id. CIT(A) for restricting the addition to the extent of 9%, thereby giving further relief of GP already declared by the assessee.

5. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 20th January, 2020.

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 20/01/2020
*Ranjan

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