

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'SMC' BENCH, MUMBAI
[BEFORE SHRI SHAMIM YAHYA, HON'BLE ACCOUNTANT MEMBER &
SHRI PAWAN SINGH, HON'BLE JUDICIAL MEMBER]**

**I.T.A. No. 4981 & 4982/Mum/2018
Assessment Year: 2010-11**

Kumary C Warriar.....Appellant
Flat No. 1102, Silver Heights, CHS,
S.N. Road, Tambe Nagar, Mulund (W),
Mumbai - 400 080.
[PAN: AACPW 1763 G]

Vs.

ITO Ward - 3(3), Kalyan.....Respondent
Mumbai.

**I.T.A. No. 5634 & 5635/Mum/2018
Assessment Year: 2011-12**

ITO Ward - 3(3), Kalyan.....Appellant
Mumbai.

Vs.

Kumary C Warriar.....Respondent
Flat No. 1102, Silver Heights, CHS,
S.N. Road, Tambe Nagar, Mulund (W),
Mumbai - 400 080.
[PAN: AACPW 1763 G]

Appearances by:

None appeared on behalf of the Assessee.

Shri Akhtar H Ansari, DR appeared on behalf of the Revenue.

Date of concluding the hearing : November 21, 2019

Date of pronouncing the order : January 16, 2020

ORDER

PER SHRI SHAMIM YAHYA, AM

These are cross-appeals by the Assessee and Revenue arising out of common order of Ld. CIT(A) for A.Y. 2010-11 and 2011-12 respectively.

2. The brief facts of the case are that the assessee engaged in the business of manufacturing of engineering goods. Pursuant to information from the Sales Tax Department that the assessee is one of

the beneficiaries of accommodation entries for obtaining bogus purchase bills, assessment was reopened. AO made disallowance on account of bogus purchases amounting to Rs. 19,11,624/- and Rs. 19,57,455/- respectively. Ld. CIT(A) proceed to hold for A.Y. 2009-10 is a non-hawala year and GP of the same is to be adopted which was 21.61%. Since assessee was disclosed 11.34% for AY 2010-11 and 11.33% for AY 2011-12, the Ld. CIT(A) granted proportionate relief, he concluded as under:

Accordingly the disallowance to the extent of quantum of suppressed GPs i.e. Rs. 5,13,461/- and Rs. 10,19,001/- out of total disallowances of Rs. 19,11,624/- and Rs. 19,57,455/-, in AY 2010-11 & 2011-12, are hereby sustained and balance amounts of Rs. 13,98,163/- (19,11,624 – 5,13,461) and Rs. 9,38,454/- (19,57,455 – 10,19,001), respectively, are deleted.

3. Against the order, the appeals are before us. We have heard the parties and perused the records.

4. We find that the assessee has provided the documentary evidence for the purchase. Adverse inference have been drawn due to the inability of the assessee to produce the suppliers. We find that in this case the sales have not been doubted. It is settled law that when sales are not doubted, hundred percent disallowance for bogus purchase cannot be done. The rationale being no sales is possible without actual purchases. This proposition is supported from honourable jurisdictional High Court decision in the case of Nikunj eximp enterprises (in writ petition no 2860 order dtd. 18.06.2014). In this case the honourable High Court has upheld hundred percent allowance for the purchase said to be bogus when sales are not

doubted. However, in that case all the supplies were to government agency.

In the present case the facts of the case indicate that assessee has made purchase from the grey market. Making purchases through the grey market gives the assessee savings on account of non-payment of tax and others at the expense of the exchequer.

5. In this case, we find that assessee has already disclosed more than 10% at gross profit. In our considered opinion, disallowance @ 5% of bogus purchase, will serve the interest of justice. Accordingly, we modify the order of Ld. CIT(A) and direct that disallowance should be done @ 5% of bogus purchases. The decision relied upon by the Learned Departmental Representative are not applicable on the facts of the case as we have already placed reliance upon the decision of Hon'ble Jurisdictional High Court as referred above.

6. In the result, appeal filed by the Revenue is dismissed and appeal by the Assessee stands partly allowed.

Order Pronounced in the Open Court on 16th January, 2020.

Sd/-

(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-

(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Dated: 16/01/2020
Biswajit, Sr. PS

Copy of the order forwarded to:

1. Kumary C. Warriar, Flat No. 1102, silver Heights CHS, S.N. Road, Tambe Nagar, Mulund (W), Mumbai - 400 080.

2. ITO-3(3), Kalyan.

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Mumbai Benches, Mumbai.

True copy

By order

Assistant Registrar
ITAT, Mumbai Benches