

IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
&
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
ITA No.7456/Mum/2018
(Assessment Year: 2009-10)

Menora Associates 101, Titan House M.P. Vaidya Marg Ghatkopar(E) Mumbai-400 077	Vs.	ITO-27(1)(1) 4 th Floor, Tower No.6 Railway Station Commercial Complex Vashi, Navi Mumbai Mumbai-400 703
PAN/GIR No.AAOFM4205F		
Appellant)	..	Respondent)

Revenue by	Smt. Jyotilakshmi Nayak, DR
Assessee by	None
Date of Hearing	21/01/2020
Date of Pronouncement	29/01/2020

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

This appeal filed by the assessee is directed against, the order of the Ld. Commissioner of Income Tax (Appeals)-25, Mumbai, dated 03/10/2018 and it pertains to Assessment Year 2009-10.

2. The assessee has raised the following grounds of appeal:-

1. The Id CIT (A) erred in law and in facts that the defaults on the part of the suppliers under the provisions of the MVAT Act, would not be sufficient for treating purchase as bogus purchase.
2. The Id CIT (A) erred in sustaining the addition of Rs- 14, 10,765/- i.e. 12.5% of purchases of Rs, 1,12, 86,116/- which is highly excessive and unjustified.

3. The Id CIT (A) has erred in law and in facts in alleging that purchases are bogus purchases without bringing on record any independent and reliable evidence.

4. The Id CIT (A) has erred in facts that the Firm has show a profit of 26% of the total revenue. As per section 44AD of the Income Tax Department expects the constructions firms to report net profit of 8%.

5. The appellant craves leave to revise, modify, alter or delete any of the Grounds of Appeal or to add new Grounds of Appeal, Prayer-

i) Addition of Rs. 14,1G,765/- be deleted,

ii) Any other relief, as deemed fit, may be allowed.

3. The brief facts of the case are that the assessee is a partnership firm, which is engaged in the business of construction contracts, filed its return of income for AY 2009-10 on 04/09/2009, declaring total income at Rs.2,94,17,271/-. Thereafter, the case has been reopened u/s 147 of the Act, on the basis of information received from DGIT, investigation, Mumbai, as per which, Sales Tax Authorities of Government of Maharashtra had taken actions against number of Hawala dealers, who had issued bogus purchase bills to various parties in Mumbai and other places. As per list of beneficiaries, the assessee is one of the beneficiary, who had taken accommodation bills of bogus purchases from various parties as listed by the AO in para 4 of his assessment order amounting to Rs. 1,12,86,116/-. The case was selected for scrutiny and the assessment has been completed u/s. 143(3).r.w.s. 147 of the I.T.Act, 1961 on 26/03/2015 and determined total income of Rs. 3,08,28,040/-, after making 12.50% additions towards alleged bogus purchase from those parties and made additions of Rs.14,10,765/-.

4. Aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee neither appeared nor filed any details in support of its case. The

Ld.CIT(A), after considering relevant submission of the assessee and also, by following the decision of Hon'ble Gujarat High Court, in the case of CIT vs. Simith P. Sheth (356 ITR 451) has upheld addition made by the AO towards 12.50% profit on alleged bogus purchases. The relevant findings of the Ld.CIT(A) are as under:-

5.2 Having considered the assessment order of the AO and appellant's statement of facts, it is seen that the main plank of assessee's arguments regarding the genuineness of the purchases was that the payment has been made by cheque/banking channels which has not found favour with courts/Tribunals pronouncements like in the case of the M/s. Kanchwala Gems vs. to be appreciated that in order to achieve the reported must be some corresponding purchases, whether effected from the alleged entry providers or from the grey market without bills. Thus, there ought to be some purchases made and hence, entire disallowance is not justified. In this regard the ratio laid down by the Hon'ble Bombay High Court in the case of C/T v. Nikunj Eximp Enterprises (P.) Ltd., is quite relevant wherein Hon'ble High Court has held that -*

"When the assessee have filed letter of confirmations of the suppliers, Sunk statements highlighting the payment entries through account payee cheque, copies of invoices, stock reconciliation statements before the AO; and merely because the suppliers did not appear before the AO, one cannot conclude that The purchases were not made by the assessee. The AO cannot disallow the purchases on the basis of suspicion because the suppliers were not produced before them."

5.2.2 In view of the discussion as above, it is clear that materials purchased and sold by the appellant cannot be doubted though it is not possible for the assessee to establish one to one nexus/link between purchases and sales. However, the fact of the matter remains that these transactions are not verifiable from the party in question as it could not be established that purchases had been effected from the party in question. Thus the purchase prices shown on the invoices produced could not be subjected to verification and as such it was difficult to establish the correctness of the purchase prices paid for the materials purchased. In the absence of any such verification as to the correctness of the price paid for the materials purchased by the appellant, the purchase price paid as mentioned on the invoices/bills cannot be accepted as the correct price paid for the goods purchased from such parties. In view of the same, the possibility of over-invoicing of the materials purchased to reduce the profit cannot be ruled out therefore, the gross profit rate shown by the appellant for the year under consideration cannot be relied Upon. In The circumstances, the correct approach in such transactions would be to estimate the' additional benefit or profit earned on these purchases and not to disallow the entire purchases from the aforesaid party. In my view either the purchases from such parties over invoiced or

the purchases were actually made but not from the party from which IT was claimed to have been made and instead may have been purchased from grey market without proper billing or documentation.

5.2.3 *In many judicial pronouncements on the issue, the Courts have taken a consistent view that in case of non-existent parties from which the purchases are shown to have been made, only a part of such purchases can be disallowed, particularly in such cases where the corresponding sales are not doubted. Alternatively the profit embedded in such sales against the alleged bogus purchases should be brought to tax.*

5.2.4 *In the case of CIT-1 Vs Simit P. Shet, ITA No. 553 of 2012, order dated 16/01/2013, while deciding a similar issue, the Hon'ble High Court of Gujarat: has held that;*

"We are broadly in agreement with the reasoning adopted by the Commissioner (Appeals) 'with respect to the nature of disputed purchases of steel. It may be that the three suppliers from whom the assessee claimed to have purchased the steel did not own up to such sales. However, the question while considering whether the entire amount of purchases should be added back to the income of the assessee or only the profit element embedded therein was to ascertain whether the purchases themselves were completely bogus and non-existent or that the purchases were actually made? but not from the parties from whom it was claimed to have been made and instead may have been purchased from grey market without proper billing or document. In the present case, CIT believed that when as a trader in steel the assessee sold certain quantity of steel, he would have purchased the quantity from some source. When the total sale is accepted by the Officer, he could not have questioned the very basis of the purchases. In essence therefore, the Commissioner (Appeals) believed assessee's Theory that the purchases were not bogus but were made from the parties other than those mentioned in the books of accounts. That being the position, not the entire purchase price but only profit element embedded in such purchases can be added To the income of the assessee. So much is clear by decision of this Court, In particular, Court has also taken a similar view in case of Commissioner of Income Tax-IV vs. Vijay M Mistry Construction Ltd vide order dated 20.01.2011 passed in Tax Appeal No. 1090 of 2009 and in case of Commissioner of Income Tax-I vs. Bholanath Poly Fab Pvt. Ltd. vide order dated 23.10.2012 passed in Tax Appeal No. 63 of 2012. The view taken by The Tribunal in case of Vijay Proteins Pvt. Ltd. Vs. CIT reported in 58 ITD 428 came to be approved."

5.2.5 *Similarly, while dealing with an identical Issue, in the case of CIT, Vs. Bholanath Poly Fab (P) Ltd., I.T.A. No. 63 of 2012, in the order dated 23/10/2012. the Hon'ble High Court of Gujarat has held as under:-*

"We are of the opinion that the Tribunal committed no error. Whether the purchases themselves were bogus or whether the

parties from whom such purchases were allegedly made were bogus is essentially a question of fact. The Tribunal having examined the evidence on record came to the conclusion that the assesses did purchase the doth and sell the finished goods. In that view of the matter, as natural corollary, not the entire amount covered under such purchase. But the profit element embedded therein would be subject to tax. This was the view of this court in the case of Sanjay Oilcake Industries v. CJT [2009] 316 FTR 274 (Guj). Such decision is also followed by this court in a judgment dated August 16,2011, in Tax Appeal No.679 of 2010 in the case of CIT v, KishorAmmtlat Pntel In the result, tax appeal is dismissed." (emphasis supplied)

5.2.6 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 party from whom the purchases were made by the appellant was 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,

5.2.6.1 In a number/series of recent cases, 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, Kiran Navin Doshi in ITA No. 2601 /Mum/2016 dated 18.01.2017.
- ii) Ashwin Purshotam Bajaj & Anr, Vs ITO & Anr.. 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/2014 & 7300/Mum/2014, 7627/Hum/2014, dated: 18-05-2017.
- iv) Metropoliran Eximchem Ltd., ITA No. 2935/Mum/2015, dated;29-03-2017.
- v) Ronak Metal Industries vs. ITO, ITA No. 722/Mum,2017 dated 04.09.2017;
- vi) ITO vs. Jugraj R, Jain, ITA No. 2571/Mum/2016 & 2572/M/2016 dated 02.08.2017;
- vii) B. J. Exports vs. Asstt. Commissioner of Income tax, ITA No. 5442-5444/Mum/2016 dated 13.09.2017;
- viii) Eatliboi Environmental Engineering Lid. v\$. Deputy Commissioner of Income-tax, ITA No, 2840 & 3482/M/2015 dated 15-03.2017;
- ix) Deputy Commissioner of Income-tax & Anr. Vs. Retni Process Plant & Machinery Ltd. & Anr., ITA No. 1723/M/2015, 1817/M/2015 dated 21.03.2017.
- x) Smt. Usha B. Agarwal vs. ITO NO. 7034/Mum/2016, dated 01.09,2017.

5.2.7 In view of the above discussed factual matrix and precedents, I am of the view that the AO is justified in estimating the profit element calculated @ in impugned purchases of Rs. 1,12,86,116/- shown from the alleged hawala parties and adding the same to the total income returned. The assessment order of the AO is a well-reasoned and a speaking order giving in detail the reasons for his fall¹ estimation and therefore, I do not see any reason to take a view in the matter different from the one taken by the AO. The action of the AO in estimation of 12.5% GP and making an addition of Rs. 14,10,765/- is sustained. Thus, the grounds of appeal No. 1, 2 & 4 are dismissed.

5. None appeared for the assessee. We have heard the Ld. DR, perused the material available on record and gone through orders of the authorities below. We find that the Ld. AO has made additions towards 12.50% profit on alleged bogus purchases, on the ground that the assessee is one of the beneficiary of accommodation entries of bogus purchase bills issued by Hawala dealers. According to the Ld. AO, although assessee has filed certain basic evidences, but failed to file further evidence in the backdrop of clear finding by the Sales Tax Department, Maharashtra that those parties are involved in providing accommodation entries without actual delivery of goods. The Ld. AO had also taken support from the investigation conducted during the course of assessment proceedings, as per which notice issued u/s 133(6) to the party were returned un-served by the postal authorities. Therefore, he came to the conclusion that purchase from the said party is bogus in nature. It is the contentions of the assessee before the lower authorities that purchase from the above party are supported by necessary evidences. It has furnished all possible evidences, including books of accounts; stock details and bank statement to prove that payment against said purchases have been made through proper banking channels.

6 Having considered arguments of the Ld. DR and also, material available on record, we find that both the sides failed to prove the

case in their favour with necessary evidences. Although, assessee has filed certain basic evidences, but failed to file further evidences to conclusively prove purchases to satisfactions of the Ld.AO. At the same time, the Ld. AO had also failed to take the investigation to a logical conclusion by carrying out necessary enquires, but he solely relied upon information received from investigation wing, which was further supported by information received from Maharashtra Sales Tax Department. Under these circumstances, it is difficult to accept arguments of both the sides. Further, in a situation where purchase is made from alleged hawala dealers, various High Courts and Tribunals had considered an identical issue in light of investigation carried out by the Sales Tax Department and held that in case purchases claims to have made from alleged hawala dealers, only profit element embedded in those purchases needs to be taxed, but not total purchase from those parties. The Hon'ble Gujarat High Court, in the case of CIT vs Simith P.Sheth 356 ITR 451 had considered a similar issue and held that at the time of estimation of profit from alleged bogus purchases no uniform yardsticks could be adopted, but it depends upon facts of each case. The ITAT, Mumbai, in number of cases had considered an identical issue and depending upon facts of each case, directed the Ld.AO to estimate profit of 10 to 15% on total alleged bogus purchases. In this case, considering the nature of business of the assessee the Ld. AO has estimated 12.50% profit, which was confirmed by the Id. CIT (A) and which is further supported by the decisions of various high courts. We, therefore, considering facts and circumstances of this case and consistent with view taken by the Co-ordinate Bench in number of cases, are of the considered view that the Id. CIT(A) has rightly confirmed addition made by the AO towards 12.50% profit on

alleged bogus purchases. Hence, we are inclined to uphold order of the Id. CIT(A) and dismiss appeal filed by the assessee.

7. In the result, appeal filed by the assessee is dismissed.

Order pronounced in the open court on this 29 /01/2020

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 29/01/2020

Thirumalesh Sr.PS

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