

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

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.06/Mum/2019
(निर्धारण वर्ष / Assessment Year: 2010-11)

ITO-26(2)(4) Room No.511, 5 th Floor, C-11, Bandra Kurla Complex, Bandra (E), Mumbai-400051.	बनाम/ Vs.	Pankaj Agarwal A/102, Twin Star CHS, Shristhi Complex, Saki Vihar Road, Powai, Mumbai-400072.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ABMPA0824F		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by:	Shri Akhtar Ali Ansari (DR)	
Assessee by:	None	

सुनवाई की तारीख / Date of Hearing: 09/01/2020
घोषणा की तारीख /Date of Pronouncement: 23/01/2020

आदेश / ORDER

PER AMARJIT SINGH, JM:

The revenue has filed the present appeal against the order dated 24.07.2018 passed by the Commissioner of Income Tax (Appeals) -38, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2010-11.

2. The revenue has raised the following grounds: -

- " (1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the disallowance to 15% of the total amount of bogus purchase transaction instead of 25% of the total amount of bogus purchase made by the AO."
2. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering that the



addition was made on the basis of information received from DIT(Inv.) and Sales Tax Department, Maharashtra with regard to bogus purchase made by the assessee from dealers without supply of actual goods."

3. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering that the hawala operators have admitted on oath before the Sales Tax Authorities that they have not sold any material to anybody."*
4. *" Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering that the assessee could not prove the genuineness and creditworthiness of the purchase transactions during the course of assessment proceedings."*
5. *"The Ld. CIT(A) failed to uphold the decision of Hon'ble Apex Court in the case of N K proteins Ltd. vs. DCIT in SLP(Civil) No.769/2017 dated 16.01.2017 where 100% of addition was confirmed by the Apex Court."*
6. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the fact that applicability of provisions of section 40A(3) attracts 100% bogus purchases to be held as profit."*

3. The brief facts of the case are that the assessee filed his return of income on 15.10.2010 declaring total income to the tune at Rs.5,82,980/-. The return was processed u/s 143(1) of the I.T. Act, 1961. Thereafter, the case of the assessee was reopened u/s 147 of the Act after recording the reasons. Accordingly, notice u/s 148 of the Act dated 19.03.2015 was issued and served upon the assessee. In pursuance of the notice, the assessee filed the return of income which he had already filed. Thereafter, notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. The assessee is an individual and is the proprietor of Fractal Fashion & Fastline Apparels engaged in the business of Export of garments items. The case of the assessee was reopened on the basis of an information received from the DGIT(In.) Mumbai in which it was conveyed that the



assessee has taken the bogus purchase entries from the following two parties in sum of Rs.4,43,393/-.

S. No.	Name of Party	Amounts(Rs.)
1	V. M. Udyog	45136
2	Bhumi Sales Corporation	398257
	Total	4,43,393

Thereafter, the AO raised the addition to the extent of bogus purchase in sum of Rs.4,43,393/-. The total income of the assessee was assessed to the tune of Rs.6,93,828/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who partly allowed the claim of the assessee. The revenue was not satisfied, therefore, the revenue has filed the present appeal before us.

4. All the issues are in connection with the restriction of the addition of bogus purchase to the extent of 15%. We have heard the argument advanced by the Ld. Representative of the Department and has gone through the case file carefully. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record: -

“9.4 I have carefully perused the submissions of the appellant and the assessment order passed by the AO for the year under consideration. As can be seen, information was available before the AO as obtained through enquiry by the Investigation Authorities from the Sales Tax Department which demonstrated that certain parties including the suppliers from who appellant claimed to have made purchases are providing bogus bills for accommodation entries without physical delivery of goods. Therefore, in the aforesaid. context, the appellant was required to prove the genuineness of the purchases made from the aforesaid panics. As could be seen, though the assessee submitted certain details of the alleged purchases but no delivery challan., goods receipt notes, stock register, details of transportation/ freight charges have been produced to evidence physical receipt of goods by the appellant from the said alleged parties which is of utmost significance in the wake of statement by the key persons of the alleged hawala concerns that only paper purchase bills were issued to the purchasers



by the parties without involving physical delivery of goods to the buyers. The appellant has merely stated without any documentary evidence that as far as Lorry receipt is concerned, the as the purchase made is of zips, the question of delivery challan does not arise.

9.4.1 Further in the present facts and circumstances of the case, it is observed that the aforesaid purchases are supported by dubious bills with subsequent entries in the books of accounts. The claim of the appellant that the payments have been made by the a/c payee cheque also does not make his claim bonafide in view of the judicial pronouncement made by the Hon'ble ITAT, Jaipur in the case of M/s. Kachwala Gems vs. JCIT (ITA No.134/JP/2002 dated 10.12.2003), affirmed by the Hon'ble Supreme Court (2006) 206 CTR (SC) 585: 288 ITR 10 (SC), wherein it has been held that even payment by account payee cheque is not sufficient to establish the genuineness of purchases. Support is drawn from the decision of the Hon'ble Calcutta High Court in the case of CIT vs. Precision Finance Pvt. Ltd. 208 ITR 465 Cal. (1994). It was held that transaction through bank is not sufficient to transaction as bonafide. Merely

because the money is transferred through the bank account does not prove that the money transacted is explained. It is essential to prove the creditworthiness of the persons or genuineness of the transactions. Merely furnishing of particulars is not enough. It was held that mere payment by account payee cheque is not sacrosanct nor can it make a non genuine transaction genuine. The ratio laid down in the case of Precision Finance is squarely applicable to the facts and circumstances in the present case of the appellant as well which is commensurate with the information received by the AO from the Investigation Wing. It is a fact that payment is made through banking channels but it is also a fact that on deposit of such money in these so called suppliers' bank accounts cash is withdrawn on the same day or immediately thereafter and after retaining their commission amount, the balance is returned to the purchasers.

9.4.2 The onus is on the appellant to prove satisfactorily the identity of the so called suppliers and genuineness of transactions, when he has claimed the purchases to have been made from the aforesaid alleged suppliers/parties to be genuine. Production of suppliers assumes importance in view of specific information available with the Department provided by the Sales Tax authorities that the concerned parties from whom the appellant claimed to have purchased the goods have actually admitted of providing accommodation entries 84 bogus purchase bills.

9.4.3 As the parties could not be served with the notice u/s. 133(6) at the given address and there is no confirmation of purchases that could



be filed by the appellant at any time during the course of assessment and the appellate proceedings, it is held that the appellant has not been able to discharge his onus to prove the claim of such purchases as being genuine and bonafide. Considering the fact that the appellant has claimed to have made purchases from these alleged parties, the appellant is expected to know the address and whereabouts of the alleged bogus suppliers/parties and provide the present address to the AO when the AO brought to the notice of the appellant that service of notice u/s.133(6) by the postal authorities was not successful as the parties were not found in the address given in the purchase invoices presented by the appellant. In the given facts and circumstances, it is not tenable on the part of the appellant to take the plea that the Assessing Officer ought to have made further enquiries. It cannot be argued that the AO has not made enquiries from the banking channels about cash withdrawals from the bank account of the aforesaid parties when the appellant failed to furnish the bank details of the aforesaid parties during the course of assessment as well as appellate proceedings. It is seen from the assessment order that the AO had given sufficient opportunity to the appellant even after the notices u/s.133(6) could not be served on the aforesaid parties on the address available in the purchase invoice submitted by the appellant and there was no response from the appellant. Accordingly, it cannot be said that the AO did not give reasonable opportunity of being heard to the appellant.

9.4.4 The Appellant had neither produced any detail with respect to his ledger account in the books of the suppliers/parties duly confirmed by the parties nor had produced their bank statements wherein the payment made by the appellant for the transactions are reflected and immediate withdrawal of cash is not there. Therefore, in the absence of any cogent material, the purchases were not regarded as genuine purchases by the AO. The fact remains that the appellant has not been able to controvert the findings that the aforesaid parties declared as hawala parties by the Sales Tax Department is not real and, therefore, the purchases of the appellant from these aforementioned parties are not established.

9.4.5 In view of the above, to summarize, the contention of the AO is that the appellant has not been able to give any convincing or cogent explanation as to how these goods happened to come in the possession of the appellant. In the light of the above facts and circumstances, the appellant cannot take a stand that only on the basis of information received from the Sales Tax Department the AO ignoring all the facts and figures and not analyzing the case properly considered those purchases as bogus which was unjustified and bad in law is not well founded. It is observed that the AO has called for the relevant documents and examined them with reference to the information



received and on the basis of verification carried out of the materials on record and taking note of the documentary evidences which were required for evaluation but not produced, the AO arrived at the conclusion to disallow the purchases and make addition to total income. The case is considered on the basis of facts and merits and not just on the report given by the Sales Tax Department to the IT department.

9.4.6 In the present facts and circumstances of the case, as the sales turnover is not disputed, applying the logical corollary that there cannot be sales without purchases of materials it is a case wherein the appellant only took bills from the above parties to record in the books of the appellant the higher price mentioned in the alleged purchase invoices to inflate expenses and reduce the profits of its business though the purchases were made from open market. Taking into account the benefit of lower price in the grey market due to non-levy of sales tax, and being financed from sources on which no income-tax has been levied and taking into account the inflation in the purchase price accounted in the books of the appellant as per the purchase invoices issued by the alleged suppliers/parties and considering the entire material on record, in my considered opinion, estimating the profit embedded in the alleged purchases would be justified. It is observed from the audit report in Form 3 CD, that the appellant has declared GP ratio at 24.21% and NP ratio at 3.81%. Considering these factors and the entire facts and circumstances of the case discussed above, the profit embedded in the said bogus purchases worked out at 15% of Rs.4,43,393/- over and above the profit declared in the return filed for the assessment year under consideration is considered reasonable and justified. The Assessing Officer is directed to restrict the addition to total income to the same amount of Rs.66,509/-. Accordingly the grounds of appeal are partly allowed.

10. In the last ground of appeal the appellant craved for leave to add, alter, amend, any grounds of appeal mentioned hereinabove.

10.1 The appellant has not added and altered any of the above mentioned grounds of appeal. Accordingly, such mention by the appellant in its ground is treated as general in nature, not needing any specific adjudication and is accordingly disposed off."

5. On appraisal of the above mentioned order, we noticed that the CIT(A) has decided the matter of controversy on the basis of the decision of Hon'ble Bombay High Court in the case of CIT Vs. Nikunj Eximp Enterprises Pvt, Ltd. and on the basis of the decision of Hon'ble Gujarat High Court in the case of CIT Vs. Simit P. Sheth ITA. No.553



of 2012 dated 16.01.2013 and CIT Vs. Bholanath Poly Fab (P) Ltd. ITA. No.63 of 2012 dated 23.10.2012. The CIT(A) has also gone through the case and restricted the addition to the extent of 15% of Rs.4,43,393/- of the bogus purchase i.e. of Rs.66,509/-. However, at the time of argument, the Ld. Representative of the assessee has no objection to restrict the addition to the extent of 15% of the bogus purchase. Anyhow, it seems quite justifiable to restrict the addition to the extent of 15% of the bogus purchase. We nowhere found any illegality and infirmity in the order passed by CIT(A) in question. Taking into account all the facts and circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, all these issues are decided in favour of the assessee against the revenue.

7. In the result, the appeal filed by the **revenue is hereby ordered to be dismissed.**

Order pronounced in the open court on 23/01/2020

Sd/-

Sd/-

(SHAMIM YAHYA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 23/01/2020

Vijay Pal Singh/Sr.PS

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER



ITA No. 06/M/2019
A.Y.2010-11

आदेश की 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,

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**