



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

BEFORE SHRI RAJESH KUMAR, AM & SHRI AMARJIT SINGH, JM

ITA Nos.368 & 369/Mum/2019

(Assessment Year. 2010-11)

DCIT, Circle-2 Room No.27, 6 th Floor, B- Wing, Wagle Industrial Estate, Thane(W)-400604.	Vs.	Shri Pahadsingh L. Rajput D-8, Sujata Shopping Centre Navghar Road, Bhayander (E), Thane-401104.
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**Cross Objection Nos.08 & 09/Mum/2020
(Arising out of ITA Nos.368 & 369/Mum/2019)**

(Assessment Year.2010-11)

Shri Pahadsingh L. Rajput D-8, Sujata Shopping Centre Navghar Road, Bhayander (E), Thane-401104.	Vs.	DCIT, Circle-2 Room No.27, 6 th Floor, B- Wing, Wagle Industrial Estate, Thane(W)-400604.
PAN/GIR No.AFLPR4708L		
Appellant)	..	Respondent)

Revenue by	Shri Kumar Padmapani Bora (DR)
Assessee by	Shri Bharat Kumar/Kiran Kumar/Raj Purohit
Date of Hearing	20/01/2020
Date of Pronouncement	05/02/2020

ORDER

PER AMARJIT SINGH (J.M):

The Revenue as well as assessee have filed the above mentioned appeal as well as cross-objection against the order dated 16.11.2018 passed by the Commissioner of Income Tax (Appeals)-1, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2010-11. Since the common question of law and facts are involved in the appeal as well as cross objection, therefore, all the above said appeal and cross objection are taken up together for adjudication.

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2. The Revenue has filed present appeal against the order dated 16.11.2018 passed by the Commissioner of Income Tax (Appeals)-1, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2010-11.

3. The revenue has raised the following grounds:-



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1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in not appreciating the law correctly that once the purchases are unverifiable/not genuine/bogus, the same should have been disallowed in entirety?"
 2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in law by not appreciating the fact that in this case, credible information was received from the State Government of Maharashtra regarding bogus purchases and the assessee could not establish the genuineness of the purchases from the non-existent vendors??
 3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in law by not appreciating the fact that the onus to justify the claim of expenses is on the assessee and the same has failed to discharge it in relation to the purchases made from the non-existent vendors?
 4. Whether on the facts and in the circumstances of the ease and in law, the Ld. CIT(A) has erred in law by ignoring, the fact that the assessee could not substantiate its claim of purchases from non-existent vendors by means of relevant supporting documents related to movement and delivery of goods, stock register, etc. to arrive at disallowance at 7.61% of the purchases from the non-existent vendors?
 5. Whether on the facts and in the circumstances of the ease and in law, the Ld. CJT(A) was justified in not appreciating the law correctly that once the purchases are unverifiable / not genuine / bogus, the same should have been disallowed in entirety, particularly in view of the ratio of the decision of the Hon'ble Gujarat High Court in Tax Appeal No. 242 of 2003 dated 20/06/2016 in the case of N. K. Proteins Ltd. against which the SLP was dismissed by the Hon'ble Apex Court and also decision of Hon'ble Supreme Court in case of Kanchwala Gems V/s JCIT 288 ITR 10 (SC)?.
 6. The appellants crave leave to add, amend, alter or delete any ground of appeal.
 7. The order of the CIT(A) may be vacated and that of the assessing officer may be restored.”
4. The brief facts of the case are that the assessee filed his return of income on 14.10.2010 declaring total income to the tune of Rs.9,76,840/- for the A.Y. 2010-11. The return was processed u/s 143(1) of the Act on 05.06.2011. Thereafter, the case of the assessee was reopened on the basis of the information received from the Sales Tax Department, Maharashtra in which it was conveyed that the assessee has taken the bogus purchase entries from the Bohra Metal Industries of Rs.5,68,412/-. Notice u/s 147/148 of the Act was given. The assessee also filed



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the reply to the said notice. Thereafter, the AO issued the letter u/s 133(6) of the Act to the concerned party but the same was not served. Thereafter, the bogus purchase in sum of Rs.5,68,412/- was added to the income of the assessee. The total income of the assessee was assessed to the tune of s.15,45,250/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who restricted the addition to the extent of 7.61% of the total bogus purchase but the revenue was not satisfied, therefore, the revenue has filed the present appeal before us.

5. All the issues are in connection with the restriction of the addition of the bogus purchase to the extent of 7.61% of the bogus purchase. the Ld. Representative of the revenue has argued that the whole bogus purchase is liable to be added to the income of the assessee in accordance with law but the CIT(A) has wrongly restricted the addition to the extent of 7.61% of the bogus purchase which is not justifiable, hence, the finding of the CIT(A) is not liable to be set aside. However, on the other hand, the Ld. Representative of the assessee has strongly relied upon the order passed by the CIT(A) in question. Before going further, we deem it necessary to advert the finding of the CIT(A) on record.:-

“8.1 There cannot be any dispute about the well settled legal proposition that tax can be levied only on real income. It is elementary rule of accountancy as well as of taxation laws that the profit from business cannot be ascertained without deducting cost of purchase from sales, otherwise it would amount to levy of income tax on gross receipts or sales. Such recourse is not permissible unless it is specifically authorized under any provisions contained in the Act. The Hon'ble Jurisdictional High Court in the case of Harima Bharubhai - ITA No. 313 of 2013) has held that only the profit attributable to the unaccounted sales can be brought to tax. It is further observed that the Hon'ble Gujarat High Court in the case of Simit P Seth (38 taxmann 385) has held that not the entire purchases but only the profit element embedded in such purchases can be added to the income of the assessee. Similar view has been taken by the Gujarat High Court in the case of Mistry Construction Pvt Ltd (355 ITR 498), Bholanath Polyfab (P) Ltd. (355 ITR 290) and Vijay Proteins Ltd (58 taxmann 44).

8.2 Considering the facts of case and in view of various decisions as discussed above, it is held that only profit element of 7.61% embedded in the purchases of Rs 5,68,412/-, that is Rs 43,256/- is to be added to the income of the appellant. Accordingly, the disallowance of Rs 43,256/- is confirmed and balance amount of Rs.5,25,156/- is deleted and the above grounds of appeal are partly allowed.”



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6. On appraisal of the above said finding, we noticed that the CIT(A) has decided the matter of controversy on the basis of the decision of jurisdictional High Court in the case of **Harima Bharubhai bearing ITA. No.313 of 2013 and on the basis of the decision of Hon'ble Gujarat High Court in the case of Simit P. Seth (38 taxmann 385)**. It is specifically held that the entire bogus purchases could not be added to the income of Assessee but only the profit element embedded in such purchases can be added to the income of the assessee. Accordingly, the CIT(A) restricted the addition to the extent of profit element i.e 7.61% embedded to the bogus purchases. The facts are not distinguishable at this stage. The profit embedded in the bogus purchase has been justifiably restricted. Accordingly, we affirm the finding of the CIT(A) on these issues and decide these issues in favour of the assessee against the revenue.

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7. The Revenue has filed present appeal against the order dated 16.11.2018 passed by the Commissioner of Income Tax (Appeals)-1, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2010-11.

8. The revenue has raised the following grounds:-

1. *"Whether on the facts and in the circumstances of the case and in law, the Ld. OT(A) was justified in deleting the penalty levied u/s 271(I)(c) without properly appreciating the decisions of the Hon'ble Apex Court in the case of Mak Data Pvt. Ltd. Vs CIT (Civil Appeal No. 9772 of 2013)" and the Hon'ble Gujarat High Court decision in the case of N. K. Proteins LW, Tax Appeal No. 242 of 2003 dated 20/06/2016 against which the SLP was dismissed by the Hon'ble Supreme Court and also ignoring the fact that Department received credible information from the State Government of Maharashtra in this case".*
2. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the penalty levied u/s 271(1)(c) without appreciating the fact that there was a definite finding in the assessment order in respect of bogus purchases and of furnishing inaccurate particulars of income relating to purchases resulting into concealment of income.*
3. *The appellant craves leave to add, amend, alter or delete any ground of appeal.*
4. *The order of the CIT(A) may be vacated and that of the assessing officer may be restored."*

9. The brief facts of the present case are quite similar as narrated above while deciding in ITA. No.369/M/2019, therefore, there is no need to repeat the same.



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The AO initiated the penalty proceeding and levied the penalty in sum of Rs.5,26,923/-. After filing the appeal before the CIT(A) by assessee, the penalty was deleted, therefore, the revenue has filed the present appeal before us.

10. We have heard the rival contention and perused the material available on record. Undoubtedly, the penalty has been initiated upon an amount alleged to the bogus purchase in sum of Rs.5,68,412/-. Subsequently, the CIT(A) has restricted the addition to the extent of 7.61% of the bogus purchase of Rs.5,68,412/-. CIT(A) has decided the issue on the basis of the decision in case titled as **Ajay Loknath Lohia Vs. ITO dated 05.10.2018**. No penalty is leviable in view of the decision of the Hon'ble ITAT in the case of **Ajay Loknath Lohia Vs. ITO dated 05.10.2018** and we further fortify our view in accordance of the decision of **Hon'ble Gujarat High Court in the case titled as National Textiles Vs. CIT 2001 164 CTR 2009 (Guj)** in which it was specifically held that the no penalty is leviable on account of addition raised on bogus purchase. Taking into account all the facts and circumstances of the case, 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, we decide these issues in favour of the assessee against the revenue.

CROSS-OBJECTION NOS.08 & 09/M/2020

11. The Ld. Representative of the assessee has withdrawn the above mentioned cross-objection by making the statement, therefore, in view of the statement made by Ld. Representative of the assessee. Both the cross-objections are hereby dismissed as withdrawn.



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12. In the result, appeal filed by the Revenue stands dismissed and cross-objections filed by the assessee stands dismissed as withdrawn.

Order pronounced in the open court on this 05/02/2020

Sd/-

**(RAJESH KUMAR)
ACCOUNTANT MEMBER**

Sd/-

**(AMARJIT SINGH)
JUDICIAL MEMBER**

Mumbai; Dated 05/02/2020

Vijay Pal Singh/ 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.

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai