

**IN THE INCOME TAX APPELLATE TRIBUNAL "SMC", BENCH MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
&
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

**ITA No.473/Mum/2019
(Assessment Year: 2011-12)**

ITO-26(2)(5) Room No.506, 5 th Floor C-11, BKC Bandra (E) Mumbai-400 051	Vs.	Smt. Reshma J Khan A/9, Sharif Market, Laxmi Narayan Mandir Road, Sakinaka Andheri(E) Mumbai-400 072
		PAN/GIR No.BQOPK6495C
(Appellant)	..	Respondent)

Revenue by	Shri Ashish Kumar, DR
Assessee by	Shri M.S.Merchant, AR
Date of Hearing	27/01/2020
Date of Pronouncement	10/02/2020

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

This appeal filed by the revenue is directed against, the order of the Ld. Commissioner of Income Tax (Appeals)-38, Mumbai, dated 14/08/2018 and it pertains to Assessment Year 2011-12.

2. The revenue has raised the following grounds of appeal:

1. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the disallowance to 10% of the total amount of bogus purchase transaction instead of 12.5% of the total amount of bogus purchase made by the AO.*

2. *"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 no bogus purchase made by the assessee from dealers without supply of actual goods."*

3. *"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. *"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 credit worthiness 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."*

7. *"The appellant prays that the order of Ld. CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."*

3. The brief facts of the case are that the assessee is an individual and engaged in the business of trading sheet metal fabrication in the name and style of M/s Steel Line India, filed his return of income for AY 2011-12 on 29/09/2011, declaring total income of Rs. 6,44,360/- and said return was processed u/s 143(1) of the I.T.Act, 1961. The case has been subsequently 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 5 of his assessment order amounting to Rs. 1,90,44,057/-. 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 31/10/2016 and determined total income of Rs. 30,24,870/-, after making

addition towards 12.50% profit on alleged bogus purchase from those parties and made additions of Rs. 23,80,507/-.

4. Aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has filed elaborate written submissions, on the issue, which has been reproduced at Para 6.1 on pages 5 to 6 of Ld.CIT(A) order. The sum and substance of arguments of the assessee before the Ld.CIT(A) are that purchase from the above party is genuine, which is supported by necessary evidences. Therefore, no additions could be made on the basis of information received from third party. 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) scaled down addition made by the AO towards alleged bogus purchases to 10% gross profit on total purchases from those parties. The relevant findings of the Ld.CIT(A) are as under:-

7.4.1 However, as the AO has not doubted purchases are to be allowed since there cannot be production and sales thereof without purchase of the materials. The given facts and circumstances strongly suggest that the materials might have been purchased from grey market at a lower rate while entries in the books of appellant are made at the inflated prices stated in the bogus bills issued by the alleged suppliers to hike expenses and reduce taxable business profits- Under similar circumstances the Hon'ble High Court of Gujarat in the case of Simit . sheth 2013 (356 ITR 451) had an occasion to deliver its judgment by confirming the decision of the 1TAT which has estimated the disallowance at 12.5% of the disputed bogus purchases to meet the ends of justice. The head-note of the decision 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 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).

7.5 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 the aforesaid parties was not available at the given address. Therefore, the AO was prevented by & reasonable cause from giving an opportunity to the appellant to cross-examine the outcome of his enquiry. Regarding the information received from DIT(Invt), Mumbai the summary of the communication was already passed on to the appellant while communicating reasons for reopening. Due to non -production of the requisite documents, such as books of account, bank statements and stock register of the alleged parties, the AO was prevented from proving substantively that the amounts given to the sellers in cheques have come back to the appellant. However, the activities of accommodation entries in the trading community are not unheard of. Further, the investigations carried out by the Sales Tax Department, another Government Agency, cannot be lost sight of. Even though there are catena of cases by the jurisdictions! ITAT which have decided the issue of bogus purchase in favour of assessee, they are not uniform in all the cases as 'Judicial Authorities adjudicated the contentions and such claim of genuineness of the alleged bogus purchases as per facts and circumstances of each case placed before them. In my considered opinion the facts and circumstances of the present case are more 'akin to the case of Simit P, Sheth (supra.) Respectfully following this decision, I uphold the decision of the AO in adopting the rate of 12.5% to work out the profit embedded in the said alleged transaction. However, considering the fact that the net profit ranges between 2.20% to 3.14% in the subsequent three assessment years, 2012-13, to 2014-15 as per 44AB audit report in Form No, 3CD, of the respective assessment years, maxim laid down in the case of ACIT-14(1), Mumbai vs. Shri Kantilal C, Jain, Mumbai in ITA No. 6924, 6504 & 6505/Mom/2014, by the jurisdictional Hon'ble ITAT, Bench "A", Mumbai, in its order dated 25 September, 2017, is followed giving benefit of reducing net profit @ 2.21% already offered in the return filed for the assessment year under consideration. The AO is directed to compute the profit embedded in the 'alleged bogus purchases at 10% of Rs. 1,90,44,057/- and make addition of the same, i.e., Rs-19,04,406/- to returned income. The ground is Partly Allowed.

5. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. We find that the Ld. AO has made addition of 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 parties were returned un-served by the postal authorities. Therefore, he came to the conclusion that purchases from the said parties are bogus in nature. It is the contentions of the assessee before the lower authorities that purchases 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 have 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 the 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 case where purchases are considered to be purchased from suspicious/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 of 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 gross 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 made 12.50% profit additions, whereas the Ld.CIT(A) has scaled down addition to 10% gross profit on total alleged bogus purchase. Although, both authorities have taken different rate of profit for estimation of income from alleged bogus purchase, but no one could support said rate of gross profit with necessary evidences or any comparable cases. Therefore, considering facts and circumstances of this case and consistent with view taken by the Co-ordinate Bench in number of cases, we are of the considered opinion that the Ld. CIT(A) has taken one of the possible method and estimated 10% gross profit on alleged bogus purchases to settle dispute between

the parties and hence, we are inclined to uphold order of the Id. CIT(A) and dismiss appeal filed by the Revenue..

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

Order pronounced in the open court on this 10 /02/2020

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 10 /02/2020
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