

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

**ITA No.637/Mum/2019
(Assessment Year: 2007-08)**

Hicon Constructions B-201, Leo Apartment 24 th Road Khar(W) Mumbai-400 052	Vs.	DCIT, Central Circle-5(1) Air India Building 19 th Floor Nariman Point Mumbai-400 021
PAN/GIR No.AAEFH3281J		
(Appellant)	..	(Respondent)

Revenue by	Shri Ashish Kumar, DR
Assessee by	None
Date of Hearing	29/01/2020
Date of Pronouncement	10/02/2020

आदेश / ORDER

PER G.MANJUNATHA (A.M):

This appeal filed by the assessee is directed against, the order of the Ld. Commissioner of Income Tax (Appeals)-53, Mumbai, dated 28/11/2018 and it pertains to Assessment Year 2007-08

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

1. *The Commissioner of Income Tax (Appeals) - 53, Mumbai [hereinafter referred to as "the Ld. CIT(A)"] erred in upholding the reassessment proceedings under section 147 of the Act without appreciating the facts and circumstances of the case.*

2. *The Ld. CIT(A) erred in upholding the disallowance of Rs,2,80,195/- being 25% of the alleged bogus purchases under section 69C of the Act without appreciating the facts and circumstances of the case.*

3. *The Ld. CIT(A) failed to appreciate that the above addition is merely based of the information received from the sales tax department and statement of third partly without providing the Appellant an opportunity to cross examine the same. Thus, the disallowance of Rs.2,80,195/- under section 69C of the Act is against the principle of natural justice and the same may be deleted.*

3. The brief facts of the case are that the assessee is a partnership firm which is engaged in the business of builder and developer, filed its return of income for AY 2007-08 on 1/10/2009. A search and seizure action u/s 132 of the Act was carried out on the group companies of Hicon Group on 24/02/2009. The assessment has been completed u/s 143(3) r.w.s. 153C on 30/12/2010 assessing the total income of Rs. 26,61,580/-. Subsequently, 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 3 of his assessment order amounting to Rs. 11,20,777/-. The case was selected for scrutiny and the assessment has been completed u/s. 144 r.w.s. 147 of the I.T.Act, 1961 on 19/02/2015 and determined total income of Rs. 37,82,360/-, after making 100% additions towards alleged bogus purchase from those parties and made additions of Rs. 11,20,777/-.

4. Aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has challenged reopening of assessment on the ground that there is no nexus between reasons and escapement of income. The assessee

had also challenged addition towards bogus purchases with certain additional evidence. The additional evidences filed by the assessee has been forwarded to AO for his comments and the AO vide his remand report dated 13.01.2017, commented as to why additional evidence filed by the assessee cannot be accepted. 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 various decisions, scaled down addition towards bogus purchases to 25% profit on such alleged bogus purchases. The relevant findings of the Ld.CIT(A) are as under:-

6.3 On merits it is noted that the Tax Audit Report states that quantitative accounts are not maintained. The income and profits reflected in audited accounts and returns of income filed are as tabulated below.

	AY 2007-08	AY 2008-09	AY 2009-10	AY 2010-11
<i>Project Income</i>	17,96,996	25,44,757	33,86,92,450	-
<i>Other Income</i>	51,049	-	-	20,45,457
<i>Total Income</i>	18,48,045	25,44,757	33,86,92,450	20,45,457
<i>Profit before appropriation</i>	12,65,6 18	19,44,836	9,95,4 1,860	152,170
<i>Salary to</i>	5,58,748	8,00,000	10,00,000	1,13,368

partners				
Net Profit	7,06,870	11,44,836	9,85,41,860	38,802
NP as % of income	38.20%	44.96%	29.09%	1.89%
Addition to construction cost (including purchases] during the year	4,49,43,797 (2,83,61,309)	636,18,918 (3,86,00,898)	6,32,12,585	3-21,82,195 (57,29,669)
Disallowance	11,20,777	2,88,45,497	-	1,94,04,551

6.4. Perusal of details called also shows that in AY 2009-10, the audited accounts showed on money received as Rs.4.86 crores against which expenditure as per seized documents was claimed as Rs. 4.87 crores. If the on-money is included in project sales, the profit disclosed on the project comes down to 25.6%, However, the disallowance made by the assessing officer results in net profit on project at 38.22%. This certainly is quite high and out of industry norms. This, in my view, suggests that the purchases are made, but from elsewhere.

6.5. Even if materials have been purchased,, they are not purchased from these parties and may be in cash from un-disclosed parties. By purchasing from the grey market, the appellant would have benefitted by the savings of taxes. Direct statement of shri Gupta applies to purchases from only two entities via. Muni Trade P, Ltd and Yashobhumi Traders P. Ltd. from whom purchases claimed are Rs 2.88 crores. The balance purchases of Rs 1.94 crores are disallowed based on pattern noted on bills and receipt 1 am guided by the ratio of decision of the Hon'ble Gujarat High Court in the case of CIT Vs Simit P. Sheth pronounced on 16.1.2013 in tax appeal No.5531 of 2012 wherein the Hon'ble Court have held that when the total sale is accepted by the AO, then the entire purchases cannot be added to the income of the **appellant**. The Hon'ble

*Court have, therefore, held that fair profit ratio would be **needed to be added** back to the income of the assessee.*

*6.6. Thus in the facts of the **case**, considering the high level of net profit disclosed, it is deemed proper to restrict the disallowances at 25%. The disallowances are therefore restricted to Rs.2,80,195/- in AY 2007-08, Rs. 72,11,374/- in AY 2008-09 and Rs.48,51,140/- in AY 2010-11, **Grounds of appeal no 2 on merits are partly allowed as above.***

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. In so far as legal ground taken by the assessee challenging reopening of assessment, we find that there is sufficient materials in the possession of the AO to form reasonable belief of escapement of income in form of information from DGIT(Inv), which was further supported by sales tax report on suspicious dealers, which is sufficient to reopen assessment and hence, we reject legal ground taken by the assessee.

6. In so far as addition towards alleged bogus purchases, we find that the Ld. AO has made 100% additions towards 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.

7 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 100% profit, whereas the Id. CIT(A) has restricted addition to 25% profit on alleged bogus purchases. Although, both authorities have considered different rate of profit for addition towards alleged bogus purchase, but no one could support said addition with necessary evidences or any comparable cases. Therefore, considering facts and circumstances of this case and consistent with view taken by the Co-ordinate, we direct the Id. AO to estimate 12.50% profit on alleged bogus purchases.

8. In the result, appeal filed by the assessee is partly allowed.

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.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai