

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

BEFORE SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
&
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No.5560 & 5558/Mum/2018
(Assessment Years :2010-11 & 2011-12)

ITO-29(2)(1) Building NO.C-10 2 nd Floor Room No.201 Pratyakshkar Bhawan Bandra Kurla Complex Bandra (East) Mumbai-400 080	Vs.	Ketan Dhirajlal Gada 519/6, Prakash Kunj 2 nd Floor, N.S.Road Mulund(West) Mumbai-400 080
		PAN/GIR No.AACPG5171A
Appellant)	..	Respondent)

Assessee by	None
Revenue by	Akhtar H.Ansari
Date of Hearing	11/11/2019
Date of Pronouncement	10.12.2019

आदेश / O R D E R

PER S. RIFAUR RAHMAN (ACCOUNTANT MEMBER):

These two appeals filed by the revenue are directed against common order passed by the Ld. Commissioner of Income Tax (Appeals) -40, Mumbai, dated 21/06/2018 for the Assessment Years (AY) 2010-11 & 2011-12. Since, the facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed-off by this consolidated order. Since none appeared on behalf of the assessee on the several occasion of hearing, we choose to dispose of the appeal by hearing the revenue.

2. The revenue has, more or less filed common grounds of appeal for both Assessment Years. Therefore, for the sake of brevity, grounds of appeal filed for AY 2010-11 are reproduced as under:-

1. Whether, on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in restricting the addition of Rs. 5,47,876/- being 30% of 18,24,292/- to Rs. 2,28,036 being 12.5% of bogus purchases from hawala parties to ignoring the fact that the alleged party was included in the list of suspicious and / or hawala dealers by the Sales Tax Department?

2. Whether, on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in restricting the addition of Rs. 5,47,876/- being 30% of 18,24,292/- to Rs. 2,28,036 being 12.5% of bogus purchases from hawala parties to ignoring the fact that the notice u/s 133(6) were returned un-served and the assessee was failed to produce the parties for cross verification?

3. Whether, on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in restricting the addition of Rs. 5,47,876/- being 30% of 18,24,292/- to Rs. 2,28,036 being 12.5% of bogus purchases in view of the decision of the HonTale Supreme Court in the case of N.K. Proteins Ltd., wherein the Apex Court has dismissed the SLP filed against the High Court's decision of upholding the 100% addition made by the A.O. on account of Bogus purchases?

4. The appellant crave leave to add, to amend, alter, substitute or modify any of the above ground or add a fresh ground as and when found necessary either before or at the time of hearing.

ITA.No.5560/Mum/2018:-

3. The brief facts of the case are that, the assessee is engaged in the business of manufacturing of power resistors for the electrical & electronics industry, filed its return of income on 15/09/2010 for AY 2010-11, declaring total income of Rs.2,72,980/-. Thereafter, the case has been reopened u/s 147, 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 to reduce or suppress profits. 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 his assessment order amounting to Rs. 4,72,304/-. 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 12/02/2016 and determined total income of Rs. 8,20,270/-, after making additions towards alleged bogus purchase @ 30% of total purchases from those parties and made additions of Rs. 5,47,287/-.

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 elaborated written submissions on the issue. The sum and substance of the 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, requested Ld. CIT(A) to restrict the disallowance to the extent of 12.5% of the purchases. The Ld.CIT(A), after considering relevant submission of the assessee and also, on analysis of information collected during the

course of search 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 to 12.50% profit on alleged bogus purchases. The relevant findings of the Ld.CIT(A) are as under:-

Bholanath Polyfab Pvt. Ltd. 355 ITR 290 (Guj), where the facts of the case were that the assessee was engaged in the business of trading in finished fabrics. For the A.Y. 2005-06, the Assessing Officer held that the purchases worth Rs.40,69,546/- were unexplained. He, therefore, disallowed such expenditure claimed by the assessee and computed the total income of Rs.41,10,187/-. The issue was carried in appeal by the assessee before the Ld. CIT(A) who rejected the appeal, upon which the assessee went in further appeal before the Hon'ble Tribunal. The Hon'ble Tribunal substantially allowed the assessee's appeal. In so far as the question of bogus purchase is concerned, the Hon'ble Tribunal concurred with the Revenue's views that such purchases were made from bogus parties. The Tribunal noted that the Assessing Officer had issued notice to all parties from whom such purchases were allegedly made. Such notices were returned unserved by the postal authorities with the remark that the address was incomplete. The Inspector deputed by the Income-tax Department also could not find any of the parties available at the given addresses. The assessee was unable to produce any confirmation from any of the parties. Though the assessee had claimed to have made payment by account payee cheques, upon verification it was found that the cheques were encashed by some other parties and not by the supposed sellers.

Having come to such a conclusion, however, the Tribunal was of the opinion that the purchases may have been made from bogus parties, nevertheless, the purchases themselves were not bogus. The Tribunal adverted to the facts and data on record and came to the conclusion that the entire quantity of opening stock, purchases and the quantity manufactured during the year under consideration were

sold by the assessee. The purchases of the entire 1,02,514 meters of cloth were sold during the year under consideration. The Hon'ble Tribunal, therefore, accepted the assessee's contention that the finished goods were purchased by the assessee, may be not from the parties shown in the accounts, but from other sources. In that view of the matter, the Tribunal was of the opinion that not the entire amount, but the profit margin embedded in such amount would be subjected to tax. The Tribunal relied on its earlier decision in the case of Sanket Steel Traders vs. ITO [IT appeal Nos. 2801 & 2937 (Ahd) of 2008, dated 20-05-2011] and also made reference to the Tribunal's decision in the case of Vijay Proteins Ltd. vs. AssttCIT [1996] 58 ITD 428 (Ahd). On appeal by the Department, the Hon'ble Gujarat High Court held as follows :

"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 assessee did purchase the cloth 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 vs. CIT (2009) 316 ITR 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 vs. Kishor Amrutlal Pate/. In the result, tax appeal is dismissed".

Similarly, in yet another decision of Hon'ble Gujarat High Court in the case of CIT vs. Simit Sheth (2013) 38 Taxmann.com 385 (Guj), Hon'ble Court was seized with a similar issue where the A.O. had found that some of the alleged suppliers of steel to the assessee had not supplied any goods but had only provided sale bills and hence, purchases from the said parties were held to be bogus. The A.O. in that case added the entire amount of purchases to gross profit of the

assessee. Ld. CIT(A) having found that the assessee had indeed purchased though not from named parties but other parties from grey market, partially sustained the addition as probable profit of the assessee. The Tribunal however, sustained the addition to the extent of 12.5%. Taking into account the above facts, the Hon'ble Gujarat High Court held that since the purchases were not bogus, but were made from parties other than those mentioned in books of accounts, only the profit element embedded in such purchases could be added to the assessee's income and as such no question of law arose in such estimation. While arriving at the above conclusion, the Hon'ble Court also relied on the decision in the case of *Vijay M. Mistry Construction Ltd.* 355 ITR 498 (Guj) and further approved the decision of **Ahmedabad Bench, IT AT in the case of Vijay Proteins 58ITD 428.**

In the case of *Vijay Proteins (supra)*, the Hon'ble IT AT was seized with a case of bogus suppliers of oil cakes where 33 parties were found to be bogus by the departmental authorities even though payments were made to the said parties by cross cheques and in fact the A.O. in that case had brought adequate material on record to prove that the cross cheques had not been given to parties from whom supplies were allegedly procured but these were encashed from a bank account in the name of another entity, possibly hawala dealer. Subsequently, the money deposited in that account was withdrawn in cash almost on the same day. The Tribunal however, held that if the purchases were made from open market without insisting for genuine bills, the suppliers may be willing to sell the product at a much less rate as compared to a rate which they may charge in which the dealer has to give genuine sale invoice in respect of that sale. Keeping all such factors in mind, the Tribunal estimated an element of profit at 25% percentage of the overall purchase price accounted for in the books of accounts through fictitious invoices.

Further, in the case of *M/s. Sanket Steel Traders* (ITA No. 2801/Ahd/2008 dated 20-05-2011 it was, inter-alia, stated as under :

"3. At the time of hearing before us, it is submitted by the Learned Counsel that the addition sustained is excessive. In support of this contention he referred to the decision of the Tribunal in the case of *ITO vs. Sun Steel 92 TTJ (Ahd) 1126* wherein the Tribunal has sustained the addition of Rs.50,000/- on account of bogus purchases. However, we find that the facts in the above case were different. In the above case, the assessee has shown purchases of Rs.27,39,410/-, sale of Rs.28,17,207/- and Gross Profit at Rs.94,740/-. The Assessing Officer made the addition of Rs.27,39,407/- for bogus purchases. If the above sum is added to the Gross Profit, the Gross Profit works out Rs.2,83,41,247/- which was more than the sale itself. The Tribunal held that it is impossible that the Gross Profit is more than the sale itself. The Tribunal also found that the assessee has maintained the quantitative details in respect of materials purchased and sold. Considering peculiar facts of that case, the Tribunal arrive at the conclusion that it would be fair and reasonable to estimate the addition at Rs.50,000/- as against the addition of Rs.27,39,407/- made by the Assessing Officer. However, the Learned Commissioner of Income-tax (Appeals) considering the facts of the assessee's case, has sustained the addition at 12.5%. While doing so, he has also relied upon the decision of the Tribunal in the case of *M/s. Vijay Proteins Ltd. 55 TTJ (Ahd) 76*. In the case of *M/s. Vijay Proteins Ltd.* the Tribunal has sustained the addition of 25% of the bogus purchases. However, considering the facts of the assessee's case the CIT(A) restricted the disallowance to 12.5% as against 25% made in the case of *M/s. Vijay Proteins Ltd.* From these facts it is evident that the CIT(A) has sustained the addition at 12.5% of the non-genuine purchases considering the facts of the assessee's case. We, therefore, do not find any justification to interfere with the order of the CIT(A) in this regard. The same is sustained."

After considering the facts and the arguments of both the sides, we are of the opinion that it would meet ends of justice, if the disallowance is sustained at 12.5% of the purchase from these two

parties. The Assessing Officer is directed to work out the disallowance accordingly."

Reliance is also placed on the decision of ITAT, Mumbai in the case of Ratnagiri Stainless (P.) Ltd. Vs. Income-tax Officer, 5 (3) (1), Mumbai[2017] 80 taxmann.com 265 (Mumbai - Trib.)/ [2017] 164 ITD 136 (Mumbai - Trib.), head note of which reads as under :-*

Section 69C, read with section 147, of the Income-tax Act, 1961 - Unexplained expenditure (Reassessment) - Information was received by Assessing Officer from DGIT (Inv.), Mumbai that there were some parties who were engaged in hawala transactions and were involved in issuing bogus bills for sale of material without delivery of goods, and that assessee was beneficiary of hawala/ accommodation entries from 28 entry providers - Assessing Officer reopened assessment and assessee was asked to produce parties and also file documents to substantiate its claim of purchase etc. - Assessee did not submit documentary evidence to show that there was movement of goods and notices issued to 28 parties were returned unserved - Thus, he concluded purchases were not genuine purchases and further, Assessing Officer made gross profit additions at rate of 12.5 per cent over total purchases - Whether, on facts, there was tangible material which clearly indicated assessee to be beneficiary of purchase entries from 28 bogus entry providers and, thus, reopening was justified - Held, yes - Whether further since directors of 28 entities had admitted of issuing only invoices for sake of entry without delivery of goods Assessing Officer was justified in treating it as bogus purchases - Held, yes -Whether ends of justice will be met if GP ratio of 12.5 per cent on alleged bogus purchases was added to income of assessee against which credit for declared GP ratio on alleged bogus purchases be granted by Assessing Officer after verification - Held, yes [Paras 10 and 11] [Partly in favour of assessee]

In the body of the order, honourable tribunal has observed as under: -

- *It was observed by the Assessing Officer that these parties just issue bogus bills in lieu for earning commission without actual supply of goods. In an sworn Affidavit Cum Declaration filed before Sales Tax Investigation Branch, Mumbai, and in deposition before the Assistant Commissioner of Sales tax, Investigation Branch, Mumbai, the directors of the said 28 entities have admitted of issuing only invoices for sake of entry without delivery of goods.*
- *Notices under section 133(6) were issued by the Assessing Officer to all the above 28 parties. All these notices except one notice were either returned un-served or were not replied to. Only one party, categorically stated that they have not supplied any material to the assessee concern. The Assessing Officer asked the assessee to produce the parties but the assessee failed to produce the parties. The parties were not produced even before Commissioner (Appeals). The assessee also failed to produce suppliers, transporters or brokers before the Assessing Officer for verification and enquiry.*
- *The assessee was not able to discharge burden cast under section 106 of 1872 Act as the assessee did not produce the original documents before the Assessing Officer and file documents for showing movement of goods from supplier to assessee and from assessee to customer as evidence although it in its reply that said documents are being filed. The assessee filed delivery challan in one case only and that too there was no mention of transportation details. The assessee did not file confirmations from these parties nor transportation details of the material purported to be purchased from these suppliers were furnished. The parties were also not produced before the authorities below. The only party who responded to notice under section 133(6) issued by the Assessing Officer namely Ranakpur deposed against the assessee. The assessee did not ask for cross examination of Ranakpur. The assessee has to first discharge its primary onus cast under law and if the same stood duly discharged which is not rebutted by authorities, but despite that then also the authorities proceed to put assessee to prejudice solely*

relying on the basis of incriminating statement recorded of third party at the back of the assessee, then certainly the right to cross examination the said third party whose incriminating statement recorded at the back of the assessee is relied upon by authorities to prejudice the assessee will become absolute. But in the instant case, primary onus cast on the assessee itself did not stand discharged by the assessee. The Assessing Officer made gross profit additions at the rate of 12.5% over the total bogus purchases of Rs.2,39,83,261/- which were held to be non-genuine by the authorities below, which addition came to Rs. 29,97,908/- which addition was confirmed by the learned Commissioner (Appeals). In such circumstances, GP ratio needs to be estimated which definitely involved some estimation/guesswork but the said estimation/guesswork should be fair, honest and rational keeping in view factual matrix of the case and cannot be arbitrarily applied at the discretion of authorities.

- The authorities below in the instant case did not make any industry comparisons to arrive at fair, honest and rational estimation of GP ratio, rather applied GP ratio of 12.5 per cent on alleged bogus purchases which estimation was in addition to the normal GP ratio declared by the assessee in return of income filed with revenue. The revenue made aforesaid additions relying on the presumption that the material was in-fact purchased from grey market at a lower rate and to cover deficiencies in record, the invoices were procured from these entry operators to reduce the profit. It was also considered that there will be savings on account of taxes while procuring material from grey market.*

- The books of account were not rejected under section 145(3) by the revenue. In the immediately preceding year i.e. assessment year 2008-09, the assessee earned GP ratio of 4.3 per cent on total turnover, while for the year under consideration GP ratio earned was 5.45 per cent. Based on facts and circumstances of the case, end of justice will be met if GP ratio of 12.5 per cent on alleged bogus*

purchases was added to income of the assessee against which credit for the declared GP ratio on the alleged bogus purchases will be granted by the Assessing Officer after verification by the Assessing Officer because of failure of the assessee to come forward to discharge primary onus cast upon him for which assessee is to be blamed and in the midst of afore-stated un-rebutted allegation against the assessee and non discharge of primary onus, the declared lower GP ratio of 5.45 per cent in the instant previous year under appeal cannot be accepted. [Para 11]

Since the facts of the assessee's case are similar, respectfully following the above decisions, the AO is directed to tax 12.5% of such purchases towards element of profit embedded in such purchases from the hawala parties. I'm not in agreement with the finding of the AO that 30% of such purchases is required to be taxed because the gross profit shown by the appellant is 30.5%. The AO has failed to appreciate that the gross profit shown by the appellant has no relationship with the amount of profit embedded in such purchases because profit embedded is related to savings to the appellant on account of purchase of goods from grey market as compared to the purchase from the registered dealers. Thus, the profit embedded has relationship with the savings on account of sales tax/excise duty etc. a part of which is passed on to the assessee

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 alleged bogus purchases @ 30% of such purchases, on the ground that the assessee 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 a purchase from the above party is 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 carry 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 revenue side. Further, 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 30% profit, whereas the Ld.CIT(A) has scaled down estimation of profit to 12.50% 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 Id. CIT(A) has taken one of the possible method for estimation of profit 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.

ITA.No.5558/Mum/2018:-

8. The facts and issues involved in this appeal are identical to facts and issues, which we have already considered in ITA.No.5560/Mum/2018. The reasons given by us in preceding paragraph in ITA No. 5560/Mum/2018 shall mutatis mutandis apply

to this appeal also. Therefore, for similar reasons, we dismiss appeal filed by the revenue.

9. As a result, both appeals filed by the revenue for AY's 2010-11 & 2011-12 are **dismissed**.

Order pronounced in the open court on this 10/12/2019.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(S.RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Mumbai; Dated 10/12/2019
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