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

BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER &
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA NO.6661 /MUM/2018 : A.Y : 2009-10

M/s. Reliance Forge (India) **109/6, Dr. M G Mahimtura** **Marg, Ground Floor** **3rd Kumbharwada Lane** **Mumbai – 400 004**	vs.	**Income Tax Officer,** **Ward 19(3)(1)** **Mumbai**

PAN NO: AAEFR7494P

Assessee by : None
Revenue by : Shri Satishchandra Rajore

Date of Hearing : 26/02/2020
Date of Pronouncement : 02/03/2020

O R D E R

PER R.C. SHARMA, ACCOUNTANT MEMBER

This is an appeal filed by the assessee against the order of CIT(A)-6, Mumbai dated 06/06/2018 for A.Y.2009-10 in the matter of order passed u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961.

2. In this appeal assessee is aggrieved for confirming addition of 12.5% of alleged bogus purchases made by the assessee.

3. Nobody appeared on behalf of the assessee inspite of issuance and service of notice and no adjournment petition was also filed by assessee, therefore, Bench decided to dispose the appeal after considering the contention of ld. DR and material placed on record.

4. We have gone through the orders of the authorities below and found from record that AO got information from Sales Tax Department regarding assessee involved in taking accommodation bill without physical delivery of the goods. Accordingly, assessment was reopened and during the course of re-assessment proceedings, AO made detailed enquiry with regard to the alleged purchases and found that purchases were not genuine, accordingly, AO added only 12.5% of alleged bogus purchases in assessee's income by following the decision of Gujarat High Court in case of Simit P Sheth 356 ITR 451.

5. By the impugned order, CIT(A) confirmed the action of the AO after observing as under:-

> *"8.3 I have carefully considered the facts of the case, discussion of the AO in the assessment order, oral contentions and submissions of the appellant and material available on record. In the present case, there is overwhelming evidence in the form of information with regard to the suppliers, given by the Sales tax authorities that they were engaged only in issuing hawala bills and no goods were ever supplied by them. After weighing the evidence pros and cons, I find that the appellant has not reconciled the purchases with the items sold and failed to reconcile 1:1 of the items purchased and sold. Onus is always on the appellant to prove as to how the material purchased was firstly obtained. I record a finding of fact here that the appellant failed to furnish crucial evidences like proof of delivery of purchases, transport challans and goods inward register at godown etc., either before the Ld. AO or before me. Thus, it can be safely presumed that either they are non-existent or even if they did exist, they were not backed by sufficient evidence to undergo the test of scrutiny.*
>
> *8.3.1 The supplier was in fact the appellant's witness and the Ld. AO was not required to force their attendance. It was for the appellant to produce them as per Civil Procedure Code which applies on all fours to the income-tax proceedings. It is trite that once a transaction is shown to be of the nature of income, the onus shifts to the assessee to show that the same is not taxable. It can thus safely be assumed that the appellant has grossly failed in his duty to mitigate the burden cast upon it in so far as proving the genuineness of the transaction from the said parties are concerned.*

8.3.2 In this regard, it is also pertinent to mention that while dealing with the concept of burden of proof, onus of proving is always on the person who makes the claim and not on the Revenue. While dealing with the issue of deciding the burden of proof, Hon'ble Supreme Court in the cases of CIT Vs. Durgaprasad More 82 ITR 540 and Sumati Dayal Vs. CIT 214 ITR 801 has held that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not real and that Taxing Authorities are entitled to look into surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. The Hon'ble Court also held that, it is no doubt, true that in all cases in which a receipt is sought to be taxed as income the burden lies on the department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden to prove that it is not taxable because it falls within exemption provided by the Act, lies upon the assessee. In the case of Durgaprasad More (supra), the Honorable Court went on to add that a party who relies on a recital in a Deed has to establish the truth of this recital, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party who relied on those recitals. If all that an assessee who wants to evade tax has to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. The Hon'ble Court further held that the Taxing Authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.

8.3.3 The onus to prove that apparent, is not the real one, is on the party who claims it to be so, as held by the Hon'ble Supreme Court in the case of CIT v. Daulat Ram Rawatmull [1973] 87 ITR 349 and CIT v. Durga Prasad More (supra). In the latter case, it has been held by the Apex Court that though an apparent statement must be considered real until it was shown that there were reasons to believe that apparent was not the real, in a case where an authority relied on self serving recitals in documents, it was for the party to establish the proof of those recitals; the taxing authorities were entitled to look into the surrounding circumstances to find out reality of such recitals.

8.3.4 It is also a settled legal proposition that if no evidence is given by the party to whom the burden is cast, the issue must be found against him. Therefore, onus is always on a person who asserts a proposition or fact, which is not self-evident. The onus, as a determining factor of the whole case can only arise if the Tribunal, which is vested with the authority to determine, finally all questions of fact, finds the evidence pro & con, so evenly balanced that it can come to no conclusion, then, the onus will determine the matter. There cannot be any doubt that onus as a determining factor comes into play where, either there is no evidence on either side, or where it is equally worthless or where it is equally balanced. It is imperative

to mention here that where such is not the case and all available evidence is considered, without reference to the onus and without relying on the circumstances that onus lies on a particular party, the issue is determined on facts and the onus cannot be said to have influenced the decisions. However, in the instant case, the appellant has miserably failed to lead evidence.

8.3.5 In the present case, AO concluded that the assessee indulged in non-genuine transaction and intention of indulging in such activity is to suppress the true profits and to reduce the tax liability. Therefore, an addition on account of a higher margin of profit is air and equitable. In the decision of Hon'ble Gujarat High Court in the case of CIT vs. Simit Sheth 356 ITR 451 (Guj) wherein also it is 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 AO 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 concluded that no question of law arose in such estimation. As far as assessee's reliance on various decisions of Hon'ble Apex Court and Hon'ble ITAT are concerned, it is stated that they have been delivered in respect of specific facts of those cases and thus cannot be generalized.

*8.3.6 The facts of the present case are exactly similar to the above case. The appellant made purchases from eight parties who are said to be hawala operators, who are indulged in providing bogus bills without supply of any material. Under these circumstances, as the appellant could not prove his claim of purchases debited to the profit & loss account, there is no other way to the AO, but to estimate the profit element embedded on such purchases. As stated earlier, the facts of the present case are exactly similar to the cited case and respectfully following the above cited decision, the action of the AO in estimating the addition @12,5% on the total purchases from the eight parties is **confirmed.** The AO, in the assessment order, has further mentioned that the AR of the assessee had agreed for the addition of 12.5% of hawala purchases. Therefore, the assessee should not have had any grievance at all to file this appeal. Accordingly, Ground Nos.4, 5, 6 & 7 of the appeal are treated as **dismissed.”***

6. Against the above order of CIT(A), assessee is in further appeal before us.

7. From the record we found that after reopening assessment, AO made detailed enquiry by issue of notice to the suppliers and found that assessee has taken accommodation bill of the purchases. Thereafter, considering the reply filed by AO, AO only added profit element in such alleged bogus purchases which works out at 12.5%. Against which assessee approached to the CIT(A). The CIT(A) has dealt with threadbare vide para 8.3 to 8.3.6 of his appellate order. In this, the CIT(A) has observed that before the AO, assessee himself has conceded for addition of 12.5% of hawala purchases, therefore, assessee should not have any grievance at all to file appeal before him. Thereafter, CIT(A) has considered various judicial pronouncements on the issue and after applying the same to the facts of the case, confirmed the addition to the extent of 12.5% of the alleged bogus purchases. Nothing was placed before us so as to persuade us to deviate from the findings of the CIT(A). Accordingly, we do not find any reason to interfere in the order of CIT(A) for upholding addition of 12.5% of alleged bogus purchases.

8. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on this 02/03/2020

Sd/-	**Sd/-**
(PAWAN SINGH)	**(R.C.SHARMA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 02/03/2020
Karuna 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