

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 5580/MUM/2018  
Assessment Year: 2011-12**

M/s Spectra Solutions C/o.  
Silicon Infotech,  
New Satguru Nanik Industrial  
Estate, Gala No. 1, Jay Coach  
Naka, New Western Express  
Highway Goregaon,  
Mumbai-400063.

**PAN No. AANFM8588J  
Appellant**

ITO, Ward-22(3)(4),  
Vs. Room No. 304, 3<sup>rd</sup> floor,  
Piramal Chambers,  
Parel, Mumbai-400012.

**Respondent**

**ITA No. 5841/MUM/2018  
Assessment Year: 2011-12**

ITO, Ward-22(3)(4),  
Room No. 304, 3<sup>rd</sup> floor,  
Piramal Chambers,  
Parel, Mumbai-400012.

**Appellant**

M/s Spectra Solutions C/o.  
Vs. Silicon Infotech,  
New Satguru Naik Industrial  
Estate, Gala No. 1, Jay Coach  
Naka, New Western Express  
Highway Goregaon,  
Mumbai-400063.

**PAN No. AANFM8588J  
Respondent**

Assessee by : Mr. Divyesh Fotaria, AR  
Revenue by : Mr. V. Vinod Kumar, DR

Date of Hearing : 18/02/2020  
Date of pronouncement: 26/02/2020

ORDER

PER N.K. PRADHAN, A.M.

The captioned cross appeals- one by the assessee and one by the Revenue – are directed against the order of the Commissioner of Income Tax (Appeals)-34, Mumbai and arise out of the assessment completed u/s 143(3) r.w.s. 147 of the Income Tax Act 1961 (the 'Act'). As common issues are involved, we are proceeding to dispose them off by this consolidated order for the sake of convenience.

2. Briefly stated, the facts of the case are that the assessee filed its return of income for the assessment year (AY) 2011-12 on 30.09.2011 declaring total income of Rs.14,11,527/-. The return was processed u/s 143(1) of the Act. On receipt of information from the Sales Tax Department, Government of Maharashtra that the assessee had obtained bogus purchase bills of Rs.43,61,066/- from one entry provider i.e. M.K. Impex, the Assessing Officer (AO) reopened the return by issuing notice u/s 148 dated 06.03.2014 to the assessee. In response to it, the assessee asked the AO to provide him a copy of the reasons recorded for reopening the assessment. The AO has mentioned that in response to the notice u/s 148 dated 06.03.2014, the assessee e-filed its revised return of income on 17.04.2014, declaring the same total income of Rs.14,11,527/-. The AO has mentioned in his assessment order dated 31.03.2015 that *vide* an order dated 16.02.2015, all the objections raised by the assessee have been disposed off and the said order was duly served on the assessee. The AO has extracted a copy of the said order at page 3-11 of his assessment order.

During the course of re-assessment proceedings, the AO issued notice u/s 133(6) to M.K. Impex to verify the genuineness of the said purchases. However, the said notice was returned un-served by the postal authorities with the remarks "left place". This fact was communicated to the assessee *vide* notice u/s 142(1) dated 24.03.2015. Thereafter, the AO requested the assessee to produce the said party to prove the genuineness of the purchases. Also the AO allowed further time upto 30.03.2015 to produce the said party. However, the assessee failed to produce the said party before the AO for verification.

The AO has recorded that the assessee submitted before him bank statements arguing that payments have been made through cheques. However, as recorded by the AO the assessee could not produce any delivery challan, lorry receipt, the mode of transport of goods, evidence of payment of octroi (if any), stock register etc. from the alleged supplier in support of its claim that purchases have been made genuinely from the said party.

In view of such facts, the AO relying on the affidavits, depositions and statement of hawala operators, made a disallowance of Rs.43,61,066/- u/s 69C of the Act.

3. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that *vide* order dated 12.07.2018, the Ld. CIT(A) directed the AO to restrict the disallowance to 25% of the disputed purchases on the following reasons :

"5.7. In view of the above, it is an admitted fact that DGIT(Inv.) has given information with regard to certain hawala dealers who are engaged in

accommodation entries without actually supplying the goods. The appellant is one of the beneficiary and has received such accommodation bills from one of the hawala operator totaling to Rs.43,61,066/-. The A.O. attempted to verify such party by making independent enquiries u/s. 133(6) of the I.T. Act, 1961. However, the notice was returned by the postal authorities with the remarks "Left Place". The onus shifted on the appellant particularly in the background of finding of DGIT(INV.), Mumbai. The appellant filed certain details such as purchase bills, ledger account, bank statement etc. However, some of the specific details required to establish the genuineness of purchase such as evidence of transportation of goods, entry of goods in the stock register, one to one consumption pattern of alleged purchase items, confirmation from the parties concerned etc. could not be submitted before the A.O. Nor the Principal Officer of the concerned party was produced before the A.O. for examination. However, it is also a fact that the A.O. has not questioned the total sale component and if there is a sale, there should be purchase. In this case, the issue under consideration which is based on identical facts was decided by my learned predecessor for the A.Y.2009-10 vide order No. CIT(A)-34/ITO-22(3)(4)/IT-249/2015-16 dated 13.10.2017 wherein 25% disallowance was made on purchases. Since the facts and circumstances of the instant appeal are identical to that of A.Y. 2009-10, the A.O. is directed to restrict the disallowance to 25% of the entire purchases of Rs.43,61,066/-."

4. Before us, the Ld. counsel for the assessee files a copy of the order of the ITAT 'G' Bench, Mumbai in assessee's own case for AY 2009-10 (ITA No. 473/Mum/2018 filed by the assessee) and (ITA No. 35/Mum/2018 filed by the Revenue) and submits that the order of the Tribunal directing the AO to restrict the disallowance to "12.5% of the bogus purchases as reduced by to gross profit rate already declared by the assessee on these transactions" be followed, as the facts are similar.

5. On the other hand, the Ld. Departmental Representative (DR) submits that in the instant case, the disallowance of the full amount of Rs.43,61,066/- made by the AO be restored because of the facts brought out at length by the AO in his assessment order dated 31.03.2015.

6. We have heard the rival submissions and perused the relevant materials on record. As mentioned earlier, the assessee filed its return of income on 30.09.2011, which was then processed u/s 143(1) of the Act. The AO reopened the said return by issuing notice u/s 148 dated 06.03.2014 on the basis of information received from the Sales Tax Department, Government of Maharashtra that the assessee had obtained bogus purchase bills of Rs.43,61,066/- from M.K. Impex. The Hon'ble Supreme Court in the case of *ACIT v. Rajesh Jhaveri Stock Brokers P. Ltd.* (2007) 291 ITR 500 (SC) analyzed the distinction between the acceptance of a return u/s 143(1) and an assessment which is framed u/s 143(3) of the Act. In the former case, the AO would have much wider latitude to reopen the assessment. In the case of *Avirat Star Homes Venture P. Ltd. v. ITO* (2019) 411 ITR 321 (Bom), the Hon'ble Bombay High Court referring to the above decision has held :

“that the return had been accepted without scrutiny. The income-tax investigation had subsequently provided information about certain companies having bank accounts with a bank in Kolkata and who were involved in giving accommodation entries of various nature to several beneficiaries including the assessee. The information supplied by the Investigation Wing to the Assessing Officer formed a *prima facie* basis to enable the Assessing Officer to form a belief of income chargeable to tax having escaped assessment. The Assessing Officer perused the information supplied by the Investigation Wing and having formed the belief that income chargeable to tax had escaped assessment, could not be stated to have acted mechanically. Further, the mere fact that the assessee had asked for certain

information from the Assessing Officer, which at this stage was not supplied, would not invalidate the reasons recorded by the Assessing Officer in issuing the notice. The notice was valid.”

Thus in the instant case, the AO has rightly issued notice u/s 148 for reopening the return of income processed u/s 143(1) of the Act. Therefore, the 1st ground of appeal is dismissed.

6.1 Now we deal with the 2<sup>nd</sup> ground of appeal filed by the assessee and the cross appeal filed by the Revenue together. As mentioned earlier, the notice u/s 133(6) issued by the AO to M.K. Impex in the address filed by the assessee was returned un-served by the postal authorities with the remarks “Left Place”. On a request made by the AO to produce the above party for examination, the assessee failed to do so. As recorded by the AO, the assessee failed to file any delivery challan, lorry receipt, documents regarding mode of transport of goods, evidence of payment of octroi, (if any), stock register before him for verification. However, as recorded by the AO, the assessee filed copies of bank statements stating that payments have been made through cheques and therefore, the genuineness of the purchases cannot be doubted.

During the course of hearing on 18.02.2020, having regard to the facts and circumstances of the instant case and the order of the Tribunal in assessee’s own case for AY 2009-10 (supra), we brought to the notice of both the parties the relevance of the decision of the Hon’ble Bombay High Court in the case of *Pr. CIT v. M/s Mohommad Haji Adam & Co.* (ITA No. 1004 of 2016). In that case, during the course of survey operations in the case of entities from whom the assessee had claimed to have made purchases, the Department collected information suggesting that such purchases were not genuine. The

AO noticed that the assessee had shown purchases of fabrics worth Rs.29.41 lakhs from three group concerns, namely M/s Manoj Mills, M/s Astha Silk Industries and M/s Shri Ram Sales and Synthetics. On the basis of statement recorded during such survey operations, the AO concluded that the selling parties were engaged only in supplying the bogus bills, that the goods in question were never supplied to the assessee, and therefore, the purchases were bogus. He, therefore, added the entire sum in the hands of the assessee as its additional income. The assessee carried the matter in appeal before the CIT(A), who accepted the factum of purchases being bogus. However, he compared the purchases and sales statements of the assessee and observed that the Department had accepted the sale, and therefore, there was no reason to reject the purchases, because without purchases there cannot be sales. He, therefore, held that under these circumstances the AO was not correct in adding the entire amount of purchases as the assessee's income. He, therefore, deleted the addition refreshing it to 10% of the purchase amount. He also directed the AO to make addition to the extent of difference between the gross profit rate as per the books of accounts on undisputed purchases and gross profit on sales relating to the purchases made from the said three parties. The assessee carried the matter before the Tribunal. The Revenue also carried the issue before the Tribunal. The Tribunal allowed the appeal of the assessee partly and dismissed that of the Revenue. The Tribunal noted that the CIT(A) had not given any reasons for retaining 10% of the purchases by way of ad-hoc additions. The Tribunal, therefore, deleted such additions, but retained the portion of the order of the CIT(A) to that extent he permitted the AO to tax the assessee on the basis of difference in the GP rates. In further appeal before the Hon'ble Bombay High Court, the Revenue referred to the decision of the

Division Bench of the Hon'ble Gujarat High Court in the case of N.K. Industries Ltd. v. DCIT in Tax Appeal No. 240 of 2003 and connected appeals decided on 20.06.2016 and also pointed out that the SLP against such decision was dismissed by the Hon'ble Supreme Court. The Hon'ble Bombay High Court held :

"8. In the present case, as noted above, the assessee was a trader of fabrics. The A.O. found three entities who were indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied. The finding of the CIT(A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by the assessee and the sales declared. That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases. The decision of the Gujarat High Court in the case of N.K. Industries (supra) cannot be applied without reference to the facts. In fact in paragraph 8 of the same Judgment the Court held and observed as under-

" So far as the question regarding addition of Rs.3,70,78,125/- as gross profit on sales of Rs.37.08 Crores made by the Assessing Officer despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 is concerned, we are of the view that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6 % gross profit is taken into account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price. We have to reduce the selling price accordingly as a result of which profit comes to

5.66 %. Therefore, considering 5.66 % of Rs.3,70,78,125/- which comes to Rs.20,98,621.88 we think it fit to direct the revenue to add Rs.20,98,621.88 as gross profit and make necessary deductions accordingly. Accordingly, the said question is answered partially in favour of the assessee and partially in favour of the revenue.”

We find that the facts in the instant case are similar to the above decision. Following the same, we set aside the order of the Ld. CIT(A) and direct the AO to restrict the addition limited to the extent of bringing the G.P. rate on disputed purchases at the same rate of other genuine purchases.

7. In the result, the appeal filed by the assessee as well as the Revenue are partly allowed.

**Order pronounced in the open Court 26/02/2020.**

Sd/-  
(C.N. PRASAD)  
JUDICIAL MEMBER  
Mumbai;

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Dated: 26/02/2020  
Rahul Sharma, Sr. P.S.

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Assistant Registrar)  
**ITAT, Mumbai**