

IN THE INCOME TAX APPELLATE TRIBUNAL "C"
BENCH, MUMBAI
BEFORE SHRI R. C. SHARMA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. Nos. 1114 to 1116/Mum/2018
(निर्धारण वर्ष / Assessment Years: 2008-09, 2010-11 & 2011-12)

Omkar Metal & Alloys Corporation Room No.47, Balkrishna Niwas, 2 nd Floor, 2 nd panjarapole Lane, Mumbai-400004.	<u>बनाम/</u> Vs.	ITO-19(2)(4) Matru Mandir, Nana Chowk, Mumbai-400007.
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ITA. Nos. 2119 to 2121/Mum/2018

(निर्धारण वर्ष / Assessment Years: 2008-09, 2010-11 & 2011-12)

ITO-19(2)(4) Matru Mandir, Nana Chowk, Mumbai-400007.	<u>बनाम/</u> Vs.	Omkar Metal & Alloys Corporation Room No.47, Balkrishna Niwas, 2 nd Floor, 2 nd panjarapole Lane, Mumbai-400004.
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स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAFO4997N

(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
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Assessee by:	Shri N. M. Porwal
Revenue by:	Shri Kumar Padmapani Bora (DR)

सुनवाई की तारीख / Date of Hearing: 23/01/2020
घोषणा की तारीख /Date of Pronouncement: 03/03/2020

आदेश / ORDER

PER AMARJIT SINGH, JM:

The assessee as well as revenue have filed the above mentioned appeals against the different order passed by the Commissioner of Income Tax (Appeals)-30, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Ys.2008-09, 2010-11 & 2011-12. Since common grounds



are involved in all the years under consideration, all the appeals are being taken up together for adjudication by this consolidated order.

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2. The assessee has filed the present appeal against the order dated 10.01.2018 passed by the Commissioner of Income Tax (Appeals)-30, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y.2008-09.

3. The brief facts of the case are that the assessee filed its return of income on 29.09.2008 declaring total income to the tune of Rs.14,37,550/-. The return was processed u/s 143(1) of the Act. The case of the assessee was reopened u/s 147 of the Act. Notice u/s 148 of the Act dated 27.03.2015 was issued and served upon the assessee. Subsequently, the notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. The assessee is a firm engaged in the business of traders ferrous and non-ferrous metals. The case of the assessee was reopened on the basis of information received from the DGIT(Inv.) Wing, Mumbai in which it was conveyed that the assessee has taken the bogus purchase entries from the 12 parties.

After the reply of the assessee, the AO made the addition to the extent of 12.5% of bogus purchase i.e. in sum of Rs.77,78,371/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who restricted the addition to the extent of 6.5%. The assessee was not satisfied, therefore, the assessee has filed the present appeal before us. The revenue has also filed the appeal to sustain the addition to the extent of 12.5%.



4. The grounds raised by revenue reads as under.:-

“1 "Whether in the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in not confirming the addition in view of the decision of the Hon' ble Supreme Court dated 10.01.2017 in the case of N K. Proteins Ltd. wherein the Hon'ble Supreme Court confirmed the entire addition on account of bogus purchases?"

2 "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in confirming the addition at 6.5% profit rate on total purchases of Rs. 6,22,26,968/- made by the assessee from parties when during the investigation made by sales tax department of Maharashtra Government, it was conclusively proved beyond doubt that these parties are only into providing accommodation entries and do not do any real business.?"

3) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in not appreciating the fact that during the investigation made by sales tax department of Maharashtra Government, directors/ Prop/Partners of such parties have accepted on oath that they are providing only accommodation entries and not doing any real business, the treatment of such purchases as being genuine does not hold ground?"

4) The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the AO be restored.

5) The appellant craves leave to amend or alter or add a new ground which may be necessary.”

5. The grounds raised by the assessee reads as under.:-

“1 On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeal) erred in

(a) confirming addition to the extent of Rs. 4044753/- which is made on account of estimation of profit @ 6.5% on alleged bogus purchases of Rs.62226968/- and added to the total income of the Appellant

(b) estimating rate of profit at 65% on alleged bogus purchases over and above gross profit declared at the rate of 4.91% by the appellant on such purchases.



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2. *On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeal) erred in*

(a) *confirming action of the Assessing Officer of rejection of books of accounts of the appellant by invoking provisions of section 145(3) of the Act.*

(b) *assuming that the learned authorised representative of the appellant stated that he is not pressing these grounds of appeal, hence dismissed and not being pressed which is contrary to the facts of the case.*

3. *On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeal) erred in*

(a) *arriving at the conclusion that the appellant failed to reconcile alleged bogus purchases with the item sold, which is contrary to the facts of the case on record.*

(b) *The learned Commissioner of Income tax (Appeals) failed to consider statement of purchases and corresponding sales filed in paper book submitted before him at the time of hearing of appeal.*

4. *On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming and failed to appreciate that*

(a) *Proceeding initiated under section 147 /148 of the Act is on the basis of reason to suspect and not on reason to believe.*

(b) *There is no new tangible material in possession of the Assessing Officer which Justify issuance of notice u/s 148 of the Act*

(c) *The initiation of proceeding under section 147 of the Act and issuance of notice under section 148 is bad in law and contrary to the provisions of the Act and liable to be cancelled / annulled*

(d) *assuming that the learned authorised representative of the appellant stated that he is not pressing these grounds of appeal. hence dismissed and not being pressed which is contrary to the facts of the case*

5. *On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming order made under section 143(3) rws 147 of the Act by the learned Assessing Officer which is illegal, bad-in-law, ultra vires and without allowing reasonable opportunity of the hearing, without appreciating the facts,*



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submission and evidences in their proper perspective, without providing copies of material used against the appellant and without providing cross examination, is liable to be annulled.

6. *On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming charging of interest under section 234A, 234B, 234C and 234D of the Act.*

7. *The appellant craves leave to add, amend, alter and/or vary any of the grounds of appeal before or at the time of hearing."*

6. The Ld. AR also raised the addition grounds challenging reopening of the assessment.

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating that the purchases made by the appellant were duly supported by bills and payments were made by account-payee cheques. Parties confirmed the transactions. There was no evidence to show that the amount was recycled back to the appellant, particularly, when it was found that the appellant also shown sales out of purchases made from various alleged bogus suppliers which were also accepted by Revenue. The appellant relies on the Hon'ble Supreme Court judgment in the case of Pr. CIT, Surat vs Teja Rohit Kapadia.

2. The Revenue erred in not appreciating that in the case of the Hon'ble Mumbai Tribunal judgment in the case of Shree Sundha Steels P. Ltd, where on almost identical facts, the Hon'ble Tribunal reduced the G.P. percentage to 2% when M/s. Shree Sundha Steels Pvt. Ltd have shown G.P. of 2.39% in respect of total sales as against G.P. percentage of 4.91% declared by the appellant in respect of total sales.

Therefore, Hon'ble Tribunal ought to delete the entire addition because the Appellant has already declared G.P. percentage of 4.91% which is more than percentage of G.P. 4.39% in the case of M/s. Shree Sundha Steels Pvt. Ltd.

The Appellant craves leave to add, to amend, alter or vary the Grounds of Appeal either before or at the time of hearing of the Appeal."

7. The precise grounds raised by assessee reads as under.:-



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“1. Because, in any view, the assessment framed u/s.143(3) r.w.s.147 of the Income-tax Act, 1961 is without jurisdiction, void ab-initio as the assessee challenges validity of the assessment order on the ground that the ITO who had passed the assessment order did not have the authority of law to act as the A.O. and to pass the impugned assessment order.

2. Because, in any view, the A.O. has to record reasons showing due application of mind before taking recourse to reassessment proceedings, A. O. Having initiated reassessment proceedings simply stating that Sales-tax Department, Maharashtra has unearthed a scam regarding issue of hawala bills or accommodation entries by several parties in Mumbai without giving list of both hawala parties as well as list of beneficiaries and without any independent evidence/corroborative material as to how the assessee partnership firm could be linked to the activity of hawala bills, accommodation entries which has led to escapement of income. Belief must be independently formed in the context of the material obtained that there is escapement of income.

3. The Department erred in not appreciating that the reasons must indicate the material (whatever reasons), which form the basis of reopening of assessment and its reasons which would evidence the linkage/nexus to the conclusion that income chargeable to tax has escaped assessment. There must be live linkage between material coming to the notice of A.O. and formation of belief regarding escapement of income. Mere obtaining material by itself does not result in reason to believe that income has escaped assessment.

Because, in any view, the A.O. failed to confront the material gathered by him to the assessee partnership firm u/s.142(3) of the Income-tax Act, 1961, issuance of notice u/s.148 was not valid.

The Department erred in not appreciating that the assessee partnership was filing its return of income with ITO15(1)(3), Mumbai and, therefore, Notice u/s.148 dated 15th September, 2014 issued by ITO-15(1)(1), Mumbai for initiating proceedings u/s.147 without there being any valid transfer order u/s.127 by transferring jurisdiction of the assessee partnership firm from ITO-15(1)(3), Mumbai to ITO-15(1)(1), Mumbai as on 15th September, 2014 was without jurisdiction in the following facts and circumstances:-

(a) Subsequently, ITO-15(1)(1), Mumbai transferred the assessment records to ITO-19(2)(4), Mumbai. By necessary implications, he admitted that the jurisdiction did not vest in him.



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(b) If any A.O. issued a notice to the assessee u/s.148 of the Act for initiating proceedings u/s.147 of the Act, without having jurisdiction over the assessee, such a notice is void, ab-initio.

(c) Finally, Assessment Order dated 10th March, 2016 has been passed by ITO-19(2)(4) without there being any valid transfer order u/s.127 transferring jurisdiction of the assessee partnership from ITO-15(1)(1), Mumbai to ITO19(2)(4), Mumbai.

6. The Ld. CIT(A) erred in not appreciating that the purchases made by the appellant were duly supported by bills and payments were made by account-payee cheques. There is no evidence to show that the amount was recycled back to the appellant, particularly, when it was found that the appellant has shown sales out of purchases made from various alleged bogus suppliers which were also accepted by Revenue. The appellant relies on the Hon'ble Supreme Court judgment in the case of Pr. CIT, Surat vs Teja Rohit Kapadia.

7. The Revenue erred in not appreciating that in the case of the Hon'ble Mumbai Tribunal judgment in the case of Shree Sundha Steels P. Ltd, which is in the same line of business i.e. ferrous and non-ferrous metals, the Hon'ble Tribunal reduced the G.P. percentage to 2% when M/s. Shree Sundha Steels Pvt. Ltd have shown G.P. of 2.39% in respect of total sales as against G.P. percentage of 4.91% declared by the appellant in respect of total sales in the same line of business. Therefore, Hon'ble Tribunal ought to delete the entire addition because the Appellant has already declared G.P. percentage of 4.91% which is more than percentage of G.P. 2.39% in the case of M/s. Shree Sundha Steels Pvt. Ltd.”

8. We have heard the argument advanced by the Ld. Representative of the parties and perused the record. The brief facts of the case are that assessee is engaged in the business of trading in ferrous and non-ferrous metals. The AO got an information from the Sales Tax Department regarding assessee taken purchase bills which was alleged to be bogus. Accordingly, the AO reopened the assessment and after making inquiry added 12.5% of the alleged bogus purchases in the assessee's income in all the years under consideration. By impugned order by the CIT(A) after considering various judicial pronouncements directed the AO to restrict the



addition to the extent of 6.5% of alleged bogus purchases. The precise observation of CIT(A) read as under.:-

“7.9 The appellant made purchases from eleven parties who are said to be hawala operators, who is indulged in providing bogus bills without supply of any material. Independent inquiries conducted revealed that no such party is existing in the given address. When asked to produce the party during the assessment proceedings by the AO, appellant expressed his inability to do so. In the present case, A.O. estimated the profit percentage on bogus purchases as 12.5%. The simple issue to be decided is whether the percentage adopted by the AO is correct in the line of business i.e. trading in ferrous and non-ferrous metals. As noticed above, in the similar circumstances of bogus purchases, Hon'ble Gujarat High Court estimated the additional advantage towards tax benefit (10% and the profit margin (2.5%) totaling to 12.5%. In the present case on perusal of copies of the invoices furnished by the appellant in the bill the percentage of VAT levied is @ 4%. Applying the same logic, the profit margin should be adopted @ 2.5%. In view of the above, in my considered opinion, applying the logic of the above said case the profit percentage embedded on such purchases is restricted to 6.5% (i.e. 4% of VAT levied + 2.5% towards profit margin), that will meet the ends of the justice. Taking all the facts into consideration and applying the logic of Simit P. Sheth case, the A.O. is defected to restrict the estimation @ 6.5% on the non-genuine purchases of Rs. 6,22,26,968/-. Appeal on Ground No. 1 is treated as 'Partly Allowed'.”

9. It was argued by Ld. AR that all the documents in support of the purchases were furnished to the AO during the course of assessment proceedings and the AO after considering the same and also the material on record, expressed his view that the explanation is not I tenable for the reason that the Sales Tax Department has certified these parties to be non-genuine operators. When the bills bearing VAT No. allotted by Sales Tax Department the further enquiry should have been made from Sales Tax Department. Just because their names appear in the list it cannot be concluded that the said purchases from the suppliers are bogus. The A.O. should have called for KYC details. It is stated that since the period of more than six years has elapsed, the assessee being businessman cannot keep



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track of the transactions of the other party with whom he has made purchases. The A.O. should have deputed ward inspector and forced the attendance of these parties. It is submitted that the A.O. failed to collect and bring on record the evidences from Sales Tax Department and not provided copies of the same to the assessee. It is submitted that observation made by the A.O. that purchases made by the appellant from the above parties are non-genuine is wrong and baseless therefore requested to delete the additions. Appellant placed reliance on the following decisions which includes:- Ramanand Sagar Vs. DCIT (256 ITR 134), CIT v. Nangalia Fabrics (P.) Ltd. 220 Taxmann 17 (Guj.), CIT Vs. M.K. Brothers (163 FR 547), Nikunj Eximp Enterprises (P.) Ltd. v. CIT 216 Taxman 171 (Born.), CIT v. M.K. Bros. 163 FIR 249 (Guj.),etc. It is also argued that the dealers are regularly assessed to tax and the purchases properly reflected in the books of account and payments are made through account payee cheques and on payment of the amount to the seller, the purchaser has no control on their affairs and there is no evidence that the cash is received back from the suppliers and the purchases cannot be treated as bogus. Appellant maintained stock register and also maintained the quantitative details. The gross profit shown during the previous year is reasonable and satisfactory in comparison to the G.P shown in the same line of business in which assessee is engaged and relied on several cases cited along with brief of the case laws of Hon'ble ITAT Benches giving relief in similar bogus purchase cases. It is stated that after addition the rate of G.P. would work out to 10% which is not possible in this line of business. The assessee has declared G.P. at the rate of 4.91% for year under consideration.



10. However the AO did not agree with the assessee's contention and he added 12.5% of alleged bogus purchase in the assessee's income. By impugned order by CIT(A) directed to restrict the addition to the extent of 6.5% of alleged bogus purchases. The Ld. AR argued that the assessee has filed all the documents and evidence to prove the genuineness of the purchases so made which comprises of:-

“(i) Copies of Ledger Accounts along with copies of purchase invoices of the specified parties.

(ii) Copies of bank statement evidencing made through proper banking channels by issuing account payee cheques in respect of all the parties highlighting the relevant entries.

(iii) Chart showing the details of purchases of the alleged parties.

(iv) Details in respect of purchases from the above named parties and the corresponding sales.

(v) Item wise and bill wise extract of stock register of entire year containing inward and outward movement of trading good dealtwith.

(vi) Copy of invoice and delivery challans issued by alleged hawala dealers for alleged purchases made.

(vii) Confirmation letter of alleged hawala dealers alongwith copy of their sale tax return and paid VAT challan.

11. As per the Ld. AR under these facts and circumstances decision of the Hon'ble Jurisdictional High Court in the case of **Pr. CIT Vs M/s Mohommad Haji Adam & Co. in ITA No. 1004 of 2016** is applicable for quantifying the addition in respect of bogus purchases. The Hon'ble Jurisdictional High Court in the case of Pr.CIT Vs M/s Mohommad Haji



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Adam & Co. in ITA No. 1004 of 2016 vide its order dated 11/02/2019 have held as under:

"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 assesses 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 Ltd. (supra) cannot be applied without reference to the facts."

12. The Coordinate Bench of the ITAT, Mumbai in the case of **Shri Rameshkumar Daulatraj Vs ITO in ITA No. 4192/Mum/2018 order dated 07/05/2019** after following the above decision of Hon'ble Bombay High Court held as under:

"9. When these facts were confronted to the learned Sr. DR, he requested for application of reasonable profit rate and according to him the profit rate applied by the AO and confirmed by CIT(A) is



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quite reasonable in view of the decision of Hon'ble Gujarat High court in the case of Smith P. Seth (supra). We have considered the rival contentions ITA No. 4192/Mum/2018 and are of the view that Hon'ble Bombay High Court in the case of Mohammad Haji Adam & Co. and Ors. (supra) has considered this issue and respectfully following the same, we direct the AO to restrict the profit rate only to the extent of differential percentage as declared on the bogus purchases and as declared on the regular purchases, Hence, we direct the AO accordingly."

13. It is clear from the above decisions that in case of bogus purchases where sales are accepted, quantitative details of purchases, sales and stock was filed with copy of delivery challans, the addition is required to be made only to the extent of lower GP declared by the assessee on bogus purchases as compared to G.P. on normal purchases. As per the G.P. statement chart placed on record we found that the GROSS PROFIT declared by assessee in respect of alleged bogus purchases was more than the GROSS PROFIT declared in the normal purchases. Under these facts circumstances, applying the judicial pronouncement laid down by Hon'ble Jurisdictional High Court as discussed above, we do not find any merits for the addition so upheld by CIT(A).

14. As we have already decided the issue on merits, we are not going into the validity of reopening of assessments u/s 147 of the I. T. Act.

15. Facts and circumstances in all the three years are same, therefore, following the reasoning given hereinabove for A.Y.2008-09, we direct the AO to delete additions in all the years under consideration.



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16. In the result, the appeals filed by the revenue are hereby dismissed and appeals filed by the assessee are hereby allowed.

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

Sd/-

Sd/-

(R. C. SHARMA)

(AMARJIT SINGH)

लेखा सदस्य / ACCOUNTANT MEMBER

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai दिनांक Dated : 03/03/2020

Vijay Pal Singh/ Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**