

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

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 81/MUM/2019 (A.Y: 2010-11)

Smt Shobhagadevi Amritlal Jain 56/72, Room No. 6 Durgadevi Street, Asma Building Mumbai-400 004 PAN: ADLPJ7969H	v.	Income Tax Officer – 19(3)(3) Room No. 224, Matru Mandir Tardev Road, Mumbai – 400 007
(Appellant)		(Respondent)

Assessee by : Shri Dhaval Shah
Department by : Shri Udaya B. Jakke

Date of Hearing : 30.01.2020
Date of Pronouncement : 27.02.2020

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the assessee against the order of the Learned Commissioner of Income Tax (Appeals)-53, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 19.11.2018 for the A.Y. 2010-11.
2. The assessee in the grounds of appeal challenged the order of the Ld.CIT(A) in sustaining the reopening of assessment made u/s. 147 of the Act. Assessee also contested the addition made by the Assessing Officer

towards unexplained investment in respect of bogus purchases estimating the profit element from such purchases at 12.5%.

3. Briefly stated the facts are that, the assessee engaged in the business of trading in Ferrous and non-Ferrous metals filed return of income on 18.09.2010 declaring income of ₹.1,71,967/-. Return was processed u/s. 143(1) of the Act and subsequently reopened by issue of notice dated 19.09.2014 u/s. 148 of the Act based on the information received from the DGIT (Inv) Mumbai, stating that assessee has availed accommodation entries from various dealers without purchase of any materials from them. In the course of re-assessment proceedings assessee was required to prove the genuineness of the purchases made from three parties as mentioned in the Assessment Order. Assessing Officer also issued notices u/s. 133(6) of the Act to the said parties which were returned unserved. The assessee produced purchase bills, corresponding sale details, ledger account of the above parties, payment details and submitted that the purchases made are genuine and they cannot be treated as bogus. Not convinced with the submissions of the assessee the Assessing Officer treated the purchases as non-genuine and he was of the opinion that assessee had obtained only accommodation entries without there being any transportation of materials and the assessee might have made purchases in the gray market.

However, Assessing Officer estimated the profit element at 12.5% from such purchases treated as non-genuine and added to the income of the assessee. The Ld.CIT(A) sustained the addition and he rejected the contentions of the assessee that the reopening of assessment is bad in law.

4. Before us, the Ld. Counsel for the assessee in so far as the reopening is concerned it is submitted that this ground is not pressed. Accordingly, the grounds raised challenging reopening of assessment are dismissed.

5. Coming to the merits, Ld. Counsel for the assessee reiterated the submissions made before the lower authorities. Ld. Counsel for the assessee further referring to Page No. 154 of the Paper Book submitted that quantum of purchases has wrongly been taken by the Ld.CIT(A) at ₹.5,74,28,190/- as against the correct purchases of ₹.3,15,63,588/-as per the books of accounts. Ld. Counsel for the assessee also placed reliance on the decision of the Hon'ble Bombay High Court in the case of Pr.CIT v. M/s. Mohommad Haji Adam & Co. in Income Tax Appeal No. 1004 of 2016 dated 11.02.2019 and submitted that the Gross Profit declared in genuine purchases may be adopted even for non-genuine purchases.

6. Ld. DR vehemently supported the orders of the authorities below.

7. We have heard the rival submissions, perused the orders of the authorities below. In so far as the contention of the assessee that the Ld.CIT(A) has wrongly taken the purchases at ₹.5,74,28,190/- instead of ₹.3,15,63,588/-, on a perusal of the order of the Ld.CIT(A) as well as the Assessment Order we find that the purchases adopted by the Ld.CIT(A) is as quantified in the Assessment Order where the Assessing Officer disallowed 12.5% of the non-genuine purchases of ₹.5,94,27,590/-. The very same purchases of ₹.5,94,27,590/- were adopted by the Ld.CIT(A) and therefore the contention of the assessee that the Ld.CIT(A) has wrongly taken the quantum of purchases at ₹.5,94,27,590/- is not supported by any evidences. Further, we also noticed that this fact was never disputed by the assessee either before the Assessing Officer or before the Ld.CIT(A), except merely making a statement before us assessee could not lead any evidences to prove that the purchases taken by the Assessing Officer as well as Ld.CIT(A) were not as per Books of Accounts.

8. The Assessing Officer adopted the profit element from the purchases treated as non-genuine at 12.5% as parties could not confirm the purchases and the Assessing Officer was of the view that the

assessee purchased the goods from other suppliers without bills and which is commonly known as gray market. Therefore, Assessing Officer came to the conclusion that as the assessee obtained only accommodation entries and purchased materials in the gray market and he is of the opinion that assessee has recorded purchases in the Books of Accounts and therefore it would be justifying if the profit element embedded in such purchases is taken as profit earned from purchases shown to have been made from the non-genuine purchases accordingly the profit element was estimated at 12.5%. Ld.CIT(A) sustained the action of the Assessing Officer considering the submissions and evidences produced before him observing as under: -

“5.5. It is an undisputed fact that the assessing officer identified party based on information received from Investigation Wing. On his part, the AO has also gone into the issue by sending 133(6) notices. And deputing an inspector to serve the notices and make inquiries. However, as far as the evidence submitted by the appellant is also concerned, the appellant has filed his own books, purchase bills/challans, ledger accounts and has its own bank statement to further his argument. The fact that the payments are being made through cheques is not something that is being doubted. In fact, the contentious issue is that this party which is indicated by the Sales Tax Department through a procedure which appears to be technically correct on paper, are in fact engaged in false billing for a fee/commission. The onus of proving the entire transactions to be genuine is definitely on the tax payer, when it is making the claim of purchase and especially in light of the doubt that has been raised by the enquiries conducted by the Sales Tax Department, the onus is even more on the tax payer to show that as far as he is concerned, he has discharged his tax related liabilities in an accurate manner. So therefore, while on one hand the AO may not have a clinching proof but the primary responsibility which is ensued on the tax payer has also not been discharged in terms of establishing the genuineness of the transaction. Merely filing copies of his own ledger accounts and bank accounts does in no way establish that the party actually existed and genuinely supplied material, but then considering that the books

of accounts have not been disputed, purchases have not been proved as bogus and neither cheques have been shown to be received back as cash by the appellant, I am of the considered view that in the context of the situation, the cause of justice would be served by looking at the gross profit margins being declared by the appellant. The Hon'ble Gujarat High Court in the case of CIT vs. Bholanath PolyFab Pvt. Ltd. (2013) 355 ITR 290 and thereafter in the case of CIT vs. Simit P. Sheth (2013) 219 Taxman 85 (Guj) has held that in such facts and circumstances, not entire purchase price but only profit element embedded in such purchases can be added. The finding of the Hon'ble Gujarat High Court in the case of CIT vs. Simit P. Seth is as under :-

"We are broadly in agreement with the reasoning adopted by the Commissioner (Appeals) with respect to the nature of disputed purchases of steel. It may be that the three suppliers from whom the assessee claimed to have purchased the steel did not own up to such sales. However, the vital question while considering whether the entire amount of purchases should be added back to the income of the assessee or only the profit element embedded therein was to ascertain whether the purchases themselves were completely bogus and non-existent or that the purchases were actually made but not from the parties from whom it was claimed to have been made and instead may have been purchased from grey market without proper billing or documentation.

In the present case, the Commissioner of Income-tax (Appeals) believed that when as a trader in steel the assessee sold certain quantity of steel, he would have purchased the same quantity from some source. When the total sale is accepted by the Assessing Officer, he could not have questioned the very basis of the purchases. In essence, therefore, the Commissioner (Appeals) believed the assessee's theory that the purchases were not bogus but were made from the parties other than those mentioned in the books of account.

That being the position, not the entire purchase price but only the profit element embedded in such purchases can be added to the income of the assessee. So much is clear by the decision of this court. In particular, the court has also taken a similar view in the case of CIT v. Vijay M. Mistry Construction Ltd. [2013] 355 ITR 498 (Guj) and in the case of CIT v. Bholanath Poly Fab (P.) Ltd. [2013] 355 ITR 290 (Guj). The view taken by the Tribunal in the case of Vijay Proteins Ltd. v. Asstt. CIT [1996] 58 ITD 428 (Ahd.) came to be approved.

If the entire purchases were wholly bogus and there was a finding of fact on record that no purchases were made at all,

counsel for the revenue would be justified in arguing that the entire amount of such bogus purchases should be added back to the income of the assessee. Such were the facts in the case of Pawanraj B. Bokadia (supra).

This being the position, the only question that survives is what should be the fair profit rate out of the bogus purchases which should be added back to the income of the assessee. The Commissioner adopted the ratio of 30 per cent of such total sales. The Tribunal, however, scaled down to 12.5 per cent. We may notice that in the immediately preceding year to the assessment year under consideration the assessee had declared the gross profit at 3.56 per cent of the total turnover. If the yardstick of 30 per cent, as adopted by the Commissioner (Appeals), is accepted the gross profit rate will be much higher. In essence, the Tribunal only estimated the possible profit out of purchases made through non-genuine parties. No question of law in such estimation would arise. The estimation of rate of profit return must necessarily vary with the nature of business and no uniform yardstick can be adopted."

5.6. *I 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.*

5.7. *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. This is not a case of trading where one to one correspondence between purchase and sales can be shown. Therefore, in fact and circumstances of the case, in this particular case, it is considered most appropriate to adopt 12.5% profit which can take care of the rotation of capital utilized for such transaction. Hence in the light of finding of the Hon'ble Gujarat High Court in the case of CIT vs. Simit P. Sheth, 12.5% profit is found to be appropriate for ascertainment of taxable income related to such transaction. The assessing officer has made disallowance @ 12.5%. The same is reasonable and is sustained. However, it is seen that the total of the impugned purchases as per the list mentioned in the assessment order is only Rs.5,74,28,190 and not Rs.5,94,27,590 as taken by the assessing officer. Thus prima facie, contention of appellant is correct. The assessing officer is directed to verify and consider the correct amount of purchases claimed during the year from the impugned parties, and re-compute the disallowance. Subject to above, the Ground of Appeal No. 4 is dismissed."*

9. We agree with the view of the lower authorities that there should be an estimation of profit element from these purchases and should be estimated reasonably as the assessee could not conclusively prove that the purchases made are from the parties as claimed, especially in the absence of any confirmations from them. We are also not inclined to adopt the Gross Profit rate as shown on genuine purchases as the Gross Profit% was said to have been shown at 0.68% which is far less than the Gross Profit rate of the industry in trading of iron and steel. In the circumstances, keeping in view the nature of business of the assessee i.e. trader in iron and steel it would be justified if the profit element embedded in those purchases are estimated at 4%. Accordingly, we direct the Assessing Officer to estimate the profit element from the non-genuine purchases at 4% and restrict the disallowance of purchases to 4% and compute the income accordingly.

10. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on the 27th February, 2020

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER
Mumbai / Dated 27/02/2020
Giridhar, Sr.PS

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

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.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum