

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

**BEFORE SHRI SHAMIM YAHYA, HON'BLE ACCOUNTANT MEMBER AND
SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER**

**ITA NOs. 478 & 479/MUM/2019
(A.Ys: 2010-11 & 2011-12)**

DCIT – 10(2)(1) 5 th Floor, Room No. 509 Aayakar Bhavan, M.K. Road Mumbai – 400 020	v.	M/s. LDS Infotech Pvt. Ltd., 707, 7 th Floor, Sahar Windfall Sahar Plaza Complex Andheri Kurla Road, J.B. Nagar Andheri(E), Mumbai – 400 059 PAN: AAACL4239K
(Appellant)		(Respondent)

**CO.NOs. 10 & 11/MUM/2020
[ARISING OUT OF ITA NOs. 478 & 479/MUM/2019
(A.Ys: 2010-11 & 2011-12)]**

M/s. LDS Infotech Pvt. Ltd., 707, 7 th Floor, Sahar Windfall Sahar Plaza Complex Andheri Kurla Road, J.B. Nagar Andheri(E), Mumbai – 400 059 PAN: AAACL4239K	v.	DCIT – 10(2)(1) 5 th Floor, Room No. 509 Aayakar Bhavan, M.K. Road Mumbai – 400 020
(Appellant)		(Respondent)

Assessee by : **Shri Subhash S. Shetty,
Shri R.N. Vasani &
Shri V.H. Vasani**

Department by : **Shri Michael Jerald**

Date of Hearing : **22.01.2020**

Date of Pronouncement : **28.02.2020**

ORDER

PER C.N. PRASAD (JM)

1. These appeals and cross objections are filed by the Revenue and assessee against the common order of the Learned Commissioner of Income Tax (Appeals)–51, Mumbai [hereinafter in short “Ld.CIT(A)”] dated 06.11.2018 for the A.Ys. 2010-11 & 2011-12.

2. In both the appeals Revenue has raised the following identical grounds except for figures: -

“1. *“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in restricting the addition to 25% of bogus purchase of Rs. 1,06,18,400 despite upholding that the assessee company is unable to substantiate its purchase from the claimed suppliers who had been already established hawala dealers from Sales Tax Department and investigation wing of the Income Tax Department?”*

2. *“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in restricting the addition to 25% of bogus purchase despite upholding that the assessee could not produce primary documents before the Assessing officer or during the appellate proceedings which can establish beyond doubt the correlation between the items purchased and then corresponding sales?”*

3. *“On the facts and circumstances of the case and in law, whether the Ld.CIT(A) is correct in not following the ratio of the decision of the Apex Court on the issue of bogus purchases in the case of N.K. Proteins Ltd Vs. DCIT [2017] 84 taxmann.com 195 (SC), dated 16.01.2017 wherein it has been held that the addition on the basis of undisclosed income could not be restricted to certain percentage when entire transaction was found bogus?”*

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 any grounds or add a new ground.”*

3. Briefly stated the facts are that, the assessee engaged in the business of trading in computer software, hardware and annual maintenance contract & training in computer applications and filed its return of income on 01.10.2010 & 29.09.2011 declaring income of ₹.53,08,190/- and ₹.53,32,720/- for the A.Ys. 2010-11 & 2011-12 respectively and the returns were processed u/s. 143(1) of the Act. Subsequently, Assessing Officer received information from the Sales Tax Department, Mumbai about the accommodation entries provided by various dealers and assessee was also one of the beneficiary from those dealers. The assessments were reopened U/s. 147 of the Act based on the information received from Sales Tax Department, Mumbai, that the assessee has availed accommodation entries from various dealers who are appeared as hawala dealers in the website of the Sales Tax Department, Mumbai who are said to be providing accommodation entries without there being transportation of any goods. In the re-assessment proceedings, the assessee was required to prove the genuineness of the purchases made from the above parties which are referred in the Assessment Order. The assessee vide letter dated 06.08.2015 produced purchase bills, purchase orders issued, sales invoices for subsequent sale of items purchased and relevant bank statement highlighting payments for purchase made, and submitted that the purchases made are genuine.

Assessee further vide letter dated 06.11.2015 submitted that the purchases from the bogus parties were genuine and products purchased were sold; as there cannot be sale of nonexistent purchases the purchases are fully allowable.

4. 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. It is the finding of the Assessing Officer since the purchases made by the assessee and claimed as expenses in his Profit and Loss Account are not genuine, the purchases to that extent remained unverifiable and rejected the Books of Accounts. Assessing Officer observed that the notices issued u/s. 133(6) of the Act and summons u/s. 131 of the Act to the parties were returned unserved with a remark "Not known" and the assessee has not produced the parties before the Assessing Officer. Therefore, Assessing Officer treated purchases of ₹.1,06,18,400/- and ₹.51,65,318/- for A.Y. 2010-11 and 2011-12 respectively as non-genuine and added to the income of the assessee. On appeal the Ld.CIT(A) considering the evidences and various submissions of the assessee restricted the disallowance to the extent 25%

of the non-genuine purchases. The revenue as well as the assessee filed appeals and cross objection against the order of the Ld.CIT(A) in partly deleting and sustaining the disallowance of purchases.

5. Before us, the Ld. Counsel for the assessee reiterated the submissions made before the lower authorities. He 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 Assessing Officer may be directed to estimate the Gross Profit on the non-genuine purchases to similar percentage as shown in the genuine purchases for the purpose of disallowance.

6. Ld. DR vehemently supported the orders of the Assessing Officer.

7. We have heard the rival submissions, perused the orders of the authorities below. Assessing Officer treated entire purchases made from various concerns which appeared as hawala dealers and the Ld.CIT(A) restricted the same to 25% of the alleged bogus purchases. The Hon'ble Bombay High Court in the case of Pr.CIT v. M/s. Mohommad Haji Adam & Co. (supra) held that the Tribunal correctly restricted the addition limited to the extent of bringing the Gross Profit rate on purchases at the same

rate of other genuine purchases. While holding so, the Hon'ble High Court observed as under:

All these appeals arise out of common Judgment of the Income Tax Appellate Tribunal. The facts in all these appeals being same, we make it from ITXA No. 1004 of 2016. The revenue - appellant has raised following questions for our consideration

“(a) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in not confirming the addition made by the Assessing Officer on account of bogus purchases shown to have been made through hawala transactions from certain parties who were only providing accommodation sale bills?”

(b) Whether on the facts and in the circumstances of the case and in law, where evidently no purchases were made from these parties who were issuing only bogus accommodation bills and this finding has been accepted by the CIT(A) and the ITAT, the ITAT, without any evidence, was justified in presuming that there must have been purchases and thereupon giving huge relief to the assessee?”

(c) Whether on the facts and in the circumstances of the case and in law, the order of the Hon'ble ITAT is perverse as no reasonable person acting judicially and properly instructed in the relevant law could arrive at such a finding on the evidence on record?”

2 *The issues relate to the Assessment Year ("A.Y." for short) concerning the respondent - assessee who is a trader of fabrics. During the survey operations in case of the entities from whom the assessee had claimed to have made purchases, the department collected information suggesting that such purchases were not genuine. The Assessing Officer ("A.O." for short) noticed that the assessee had shown purchases of fabrics worth Rs.29.41 Lacs (rounded off) from three group concerns, namely, M/s Manoj Mills, M/s Astha Silk Industries and M/s Shri Ram Sales & Synthetics. On the basis of the statement recorded during such survey operations, the A.O. 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.*

3 *The assessee carried the matter in the appeal before the Commissioner of Appeals who accepted the factum of purchases being bogus. However, he compared the purchases and sales statement 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 A.O. 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 A.O. 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.*

4 The assessee carried the matter before the Tribunal. The Revenue also carried the issue before the Tribunal. The Tribunal in the impugned Judgment 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 A.O. to tax the assessee on the basis of difference in the GP rates.

5 Learned counsel Mr Chhotaray for the Revenue strenuously contended that the CIT(A) and the Tribunal committed serious error. In the present case when it was established that the purchases are bogus, the entire amount should have been added to the income of the assessee. There is no question of granting any relief in the facts of the case. In this context he relied on a decision of the Division Bench of Gujrat High Court in the case of N.K. Industries Ltd. Vs Dy. C.I.T. in Tax Appeal No. 240 of 2003 and connected appeals decided on 20th June, 2016. In such judgment the Court had observed as under –

“The Tribunal in the case of Vijay Proteins Ltd. Vs. CIT had observed that it would be just and proper to direct the Assessing Officer to restrict the addition in respect of the undisclosed income relating to the purchases to 25 % of the total purchases. The said decision was confirmed by this Court as well. On consideration of the matter, we find that the facts of the present case are identical to those of M/s Indian Woolen Carpet Factory (supra) or M/s Vijay Proteins Ltd. In the present case the Tribunal has categorically observed that the assessee had shown bogus purchases amounting to Rs.2,92,93,288/- and taxing only 25 % of these bogus claim goes against the principles of Sections 68 and 69C of the Income Tax Act. The entire purchases shown on the basis of fictitious invoices have been debited in the trading account since the transaction has been found to be bogus. The Tribunal having once come to a categorical finding that the amount of Rs.2,92,93,288/- represented alleged purchases from bogus suppliers it was not incumbent on it to restrict the disallowance to only Rs.73,23,322/”

6 Counsel pointed out that the S.L.P. against such decision was dismissed by the Supreme Court.

7 On the other hand, Ms Khan learned counsel for the assessee opposed the appeals contending that the Tribunal has given proper reasons. The assessee was a trader. Even if the purchases are found to be bogus, entire purchase amount cannot be added by way of assessee's income. 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 Ltd. (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.”

9. *In these circumstances, no question of law, therefore, arises. All Income Tax Appeals are dismissed, accordingly. No order as to costs.*

8. Following the decision of the Hon'ble Bombay High Court (supra), we direct the Assessing Officer to restrict the addition/disallowance only to the extent of bringing the Gross Profit rate on alleged bogus purchases at the same rate of the other genuine purchases declared by the assessee after calling for the details and verification of records. The assessee is directed to furnish the necessary information in this regard.

9. In the result, appeals of the revenue are dismissed and cross objections filed by the assessee are partly allowed as indicated above.

Order pronounced in the open court on the 28th February, 2020

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER
Mumbai / Dated 28/02/2020
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