

**IN THE INCOME TAX APPELLATE TRIBUNAL "H", BENCH MUMBAI
BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
&
SHRI RAVISH SOOD, JUDICIAL MEMBER**

**ITA No.1809/Mum/2019
(Assessment Year: 2009-10)**

HBD Machines Manufacturing Corpn. G2/G3, Fort Chamber, Ambalal Doshi Marg Homi Mody Cross Lane No.2 Fort, Mumbai-400 001	Vs.	ITO, Ward-18(1)(5) Room No.619 & 634 Aaykar Bhawan M.K.Road Mumbai-400 020
PAN/GIR No.AACFH0879A		
Appellant)	..	Respondent)

Assessee by	Ms. Arti Sathe, AR
Revenue by	Shri R.Bhoopathi, DR
Date of Hearing	05/03/2020
Date of Pronouncement	20/05/2020

आदेश / ORDER

PER G.MANJUNATHA (A.M):

This appeal filed by the assessee is directed against order of the Ld. Commissioner of Income Tax (Appeals)-53, Mumbai, dated 20/12/2018 and it pertains to Assessment Year 2009-10.

2. The assessee has raised the following grounds of appeal:

1. The Learned Commissioner of Income Tax (A)-53 has confirmed the Income Tax Officer addition of Bogus Purchases from alleged Bogus Parties and unexplained expenditure and adding back to the total income Rs.3,80,736/-

3. The brief facts of the case are that the assessee is engaged in the business of manufacturing of centrifugal, sewage and turbine pumps, filed its return of income for Asst.Year 2009-10 on 25/09/2019, declaring loss of Rs.8,83,827/-. The case has been,

subsequently reopened u/s 147 of the Act, on the basis of information received from DGIT, investigation, Mumbai, as per which, Sales Tax Authorities of Government of Maharashtra had taken actions against number of Hawala dealers, who had issued bogus purchase bills to various parties in Mumbai and other places. As per list of beneficiaries, the assessee is one of the beneficiary, who had taken accommodation bills of bogus purchases from various parties as listed by the Id. AO in assessment order at para 2, amounting to Rs. 9,40,088/-. The case was selected for scrutiny and the assessment has been completed u/s. 143(3).r.w.s. 147 of the I.T.Act, 1961 on 26/03/2015 and determined total income of Rs. (5,03,091/-)-, after making additions of 40.50% gross profit on alleged bogus purchase from those parties and made additions of Rs. 3,80,736/-.

4. Aggrieved by the assessment order, the assessee has preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has reiterated its submissions made before the AO. The sum and substance of arguments of the assessee before the Ld.CIT(A) are that purchase from the above party is genuine, which is supported by necessary evidences. Therefore, no additions could be made on the basis of information received from third party. The Ld.CIT(A), after considering relevant submission of the assessee and also, by following the decision of Hon'ble Gujarat High Court, in the case of CIT vs. Simith P. Sheth (356 ITR 451), has upheld addition made by the AO towards alleged bogus purchases to 40.50% gross profit on total purchases from those parties. The relevant findings of the Ld.CIT(A) are as under:-

4.5. It is an undisputed fact that the assessing officer identified parties based on information received from Investigation Wing. 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 these parties which are 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 parties 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 nonexistent 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 JTD 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.

4.6. 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.

4.7. 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 a case of manufacturing and not trading and one to one identification of purchases with sales is neither shown nor is

*possible. The appellant has shown gross loss this year. The assessing officer has made disallowance @ 40.50 % and has given his reasons for the same. The same is reasonable and is sustained. Thus the **ground of appeal is dismissed.***

5. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. We find that the Ld. AO has made addition of 40.50% gross profit on alleged bogus purchases on the ground that the assessee is one of the beneficiary of accommodation entries of bogus purchase bills issued by Hawala dealers. According to the Ld. AO, although assessee has filed certain basic evidences, but failed to file further evidence in the backdrop of clear finding by the Sales Tax Department, Maharashtra that those parties are involved in providing accommodation entries without actual delivery of goods. The Ld. AO had also taken support from the investigation conducted during the course of assessment proceedings, as per which notice issued u/s 133(6) to the parties were returned un-served by the postal authorities. Therefore, he came to the conclusion that purchases from the said parties are bogus in nature. It is the contentions of the assessee before the lower authorities that purchases from the above party are supported by necessary evidences. It has furnished all possible evidences, including books of accounts; stock details and bank statement to prove that payment against said purchases have been made through proper banking channels.

6 Having considered arguments of both the parties and also, material available on record, we find that both the sides have failed to prove the case in their favour with necessary evidences. Although, assessee has filed certain basic evidences, but failed to file further evidences to conclusively prove purchases to the satisfactions of the

Ld.AO. Further, mere payment by cheque does not prove the genuineness of purchase, more particularly when other circumstantial evidence says otherwise. At the same time, the Ld. AO had also failed to take the investigation to a logical conclusion by carrying out necessary enquires, but he solely relied upon information received from investigation wing, which was further supported by information received from Maharashtra Sales Tax Department. The AO neither pointed out any discrepancies in books of accounts nor made out a case of sales outside books of accounts. In fact, the AO did not disputed sales declared for the year. Under these circumstances, it is difficult to accept arguments of both the sides. Further, in a case where purchases are considered to be purchased from suspicious/hawala dealers, various High Courts and Tribunals had considered an identical issue in light of investigation carried out by the Sales Tax Department and held that in case of purchases claims to have made from alleged hawala dealers, only profit element embedded in those purchases needs to be taxed, but not total purchase from those parties. The Hon'ble Gujarat High Court, in the case of CIT vs Simith P.Sheth 356 ITR 451 had considered a similar issue and held that at the time of estimation of profit from alleged bogus purchases no uniform yardsticks could be adopted, but it depends upon facts of each case. The ITAT, Mumbai, in number of cases had considered an identical issue and depending upon facts of each case, directed the Ld.AO to estimate gross profit of 10% to 15% on total alleged bogus purchases. In this case, considering the nature of business of the assessee the Ld. AO has estimated 40.50% gross profit, which has been upheld by the Id. Ld.CIT(A). Although, both authorities have taken uniform rate of profit for estimation of income from alleged bogus purchase, but no

one could support said rate of gross profit with necessary evidences or any comparable cases. Therefore, considering facts and circumstances of this case and consistent with view taken by the Coordinate Bench in number of cases, we are of the considered view that rate of profit adopted by the Id. AO as well as the Id. CIT(A) seems to be on higher side when compared to nature of business of the assessee and hence, to settle dispute between the parties, we direct the Id. AO to estimate 12.50% gross profit on alleged bogus purchases.

7. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on this 20/05/2020

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 20/05/2020
Thirumalesh 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.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai