

THE INCOME TAX APPELLATE TRIBUNAL  
"D" Bench, Mumbai  
Shri Shamim Yahya (AM) & Shri Ramlal Negi (JM)

I.T.A. No. 7196/Mum/2017 (Assessment Year 2010-11)

M/s. Riddhi Siddhi Construction 15, Veena Dalvai Industrial Estate, Oshiwara, SV Road Jogeshwari West Mumbai-400 102.  PAN : AAHFR9554M (Appellant)	Vs.	DCIT-15(3) C-13, Room No. 409, BKC Mumbai.  (Respondent)
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Assessee by	Shri Devendra Jain
Department by	Shri V. Vinod Kumar
Date of Hearing	10.09.2020
Date of Pronouncement	16.09.2020

ORDER

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned CIT(A) dated 14.6.2017 and pertains to A.Y. 2010-11.

2. The grounds of appeal read as under :-

1. In the facts and circumstances of the case and in law, the Learned CIT(A) has erred in upholding the addition of Rs. 56,17,397/- being alleged hawala purchases, merely on the basis of alleged statement given to sales tax department, without providing an opportunity to cross examine those parties, disregarding the law laid down by Honorable Supreme Court in the case of Kishanchand Chellaram v. CIT (1980) 125 ITR 713 and Andaman Timber Industries v. Commissioner of Central Excise (Civil Appeal No. 4228 of 2006.) and Bombay High Court in the case of H. R. Mehta v. ACIT (2016) 72 taxmann.com HO(Bombay) and CIT v. Ashish International (Bom HC -IT APPEAL NO.4299 OF 2009).
2. Without prejudice to ground no. 1, in the facts and circumstances of the case and in law, the Learned CIT(A) has erred in upholding the addition of the whole of the purchases of Rs. 56,17,397/- being alleged hawala purchases, disregarding the fact that without consumption of materials, corresponding sales would not have been possible.

3. In the facts and circumstances of the case and in law, the Learned CIT(A) has erred in upholding the disallowance of purchases of Rs. 21,19,723/- being purchase of steel pipes made from M/s Asian Steel, disregarding the fact that the said party is not even being declared a hawala dealer by the sales tax department and without consumption of materials, corresponding sales would not have been possible.
  4. In the facts and circumstances of the case and in law, the Learned CIT(A) has erred in upholding the disallowance of Rs. 10,99,818/-in respect of labour charges paid to Siddharth Constructions.
  5. In the facts and circumstances of the case and in law, the Learned CIT(A) has erred in upholding the disallowance of wages paid of Rs. 1,10,44,091/- u/s 40(a)(ia).
3. At the outset it is noted that there is delay of 71 days in filing the appeal. The reasonable cause has been attributed to the delay due to change in counsel.
  4. Upon careful consideration and hearing both the parties, we condone the delay.
  5. Brief facts of the case are as under :-

The assessee is a Firm engaged in the business of Civil Construction and Labour contracts. The assessee had filed its return of income for AY 2010-11 on 15/10/2010 declaring a total income of Rs. 38,98,750/-. The assessee had declared a turnover of Rs. 10.08 crores and had claimed purchases of Rs. 2.67 crores. During the appellate proceedings, the AO sought to make enquiries about the purchases claimed by the assessee and notices under section 133(6) were issued to some of the sellers. However, these notices were returned unserved by the postal service with the remarks 'not known' or there was no compliance. The AO noted that the following four parties also appeared in the list of hawala dealers as identified by the Sales Tax Department, Mumbai:-

Sl. No.	Name of the Party	Amount of Purchase (in Rs.)
1	Suraj Tube Corporation	19,86,005
2	Chanchal Tube Corporation	22,72,653

3	Sidhivinayak Steel	9,25,579
4	Paras Sales Corporation	4,33,160
	Total	56,17,397

The AO confronted the assessee regarding the above vide notice under section 142(2) dated 01/02/2013. In this notice the AO had listed all the concerns where the notices under section 133(6) could not be served and the assessee was directed to establish the identity of such persons and also to establish the genuineness of the transactions with these persons. Thereafter the AO again issued a show cause notice to the assessee dated 01/03/2013 mentioning that there has been no response to the earlier notice from the assessee/In response the assessee could only claimed that it is not able to locate the purchase parties due to change of addresses but claimed that it has the ledger accounts of all the suppliers.

6. The AO examined the reply of the assessee threadbare. The AO noted that in respect of M/s Paras Sales Corporation the assessee has no supporting evidence such as purchase invoices, delivery receipts, challans etc. The AO also noted that the proprietor of this concern Shri Ashwin Mehta had given a deposition before the sales tax authorities dated 10/08/2011 mentioning that he has not carried out any actual transaction of purchase and sale of goods. The AO has attached a copy of his deposition as Annexure-4 of the order of assessment. The AO noted that the other three concerns are operated from the same premises and it was noted that the three parties have given a common affidavit to the Sales Tax Department dated 18/04/2011 admitting that they have not carried out any genuine activity of sale or purchase of goods and that they have merely given accommodation bills. The affidavit also mentions the modus operandi of these persons. The AO has attached a copy of this affidavit as Annexurc-3 to the order of assessment. In view of the above discussion is the AO held that the assessee has only obtained accommodation entries from these four hawala dealers and after discussing the case laws especially those relating to the test of human probabilities, the AO held that the alleged

purchase of Rs. 56,17,397/- to be bogus and the same was added to the taxable income of the assessee.

7. The AO also noted that yet another purchase of Rs. 21,19,723/- had been claimed by the assessee as made from one M/s Asian Steel, Pune. The AO issued a notice under section 133(6) to this party for confirmation of the facts. This supplier has responded to the same and has categorically denied having carried out any transactions with the assessee. The AO confronted the assessee with this fact but there was no response from the assessee. Accordingly the AO held that the purchase of Rs. 21,19,723/- is also bogus and the same was added to the income of the assessee.

8. The AO also noted that the assessee has claimed to have made purchases or had made Labour payments to the following two concerns also:

Sl. No.	Name the Party	Nature of Expense	Amount (Rs.)	Remarks of postal authorities
1	M/s Swastik Metals	Purchases	5,00,004	Not Known
2	M/s Siddharth Constructions	Labour	10,99,8187-	Not known

The AO noted that notices under section 133(6) issued to the above two parties had been returned back by the postal Department as 'not known'. The AO duly confronted the assessee about these facts but there was no response. The assessee was also not able to file any documentary evidence to support the above expenses. In view of the same, the AO disallowed the total expense of Rs. 15,99,822/-also.

9. Further the AO also noted that the assessee has claimed to expenses relating to labour. The assessee has debited a sum of Rs. 2,15,22,925/- under the head 'wages and labour' and the assessee has also claimed an expenditure of Rs. 2,55,40,252/- under the head 'labour charges'. The Assessing Officer noted that while the assessee has deducted TDS in respect of labour

charges paid at Rs. 2,55,40,252/-, the assessee had not deducted the relevant TDS in many cases and respect of the other had of expense i.e. 'wages & labour'. The AO noted that during the previous year the assessee had made aggregate payments exceeding Rs. 50,000/- to 127 labour parties. The amount involved was Rs. 1,10,44,091/-. The AO issued necessary show-cause to the assessee as to why this amount net be disallowed as an expense for non-deduction of TDS under section 194C of the Act. The assessee contended that the labour force is not contractual and therefore no TDS was done. The AO noted that these persons have been employed on a daily basis at various work sites of the assessee and there was no employer-employee relationship. The AO also noted that the assessee admittedly does labour contract work and the payment to these 127 persons was in the nature of a sub-contract only. Accordingly the AO disallowed the expense of Rs. 1,10,44,091/- and made an addition to total income of the assessee.

10. Upon assessee's appeal as regards the disallowance of alleged bogus purchases and labour expenses, learned CIT(A) referred to several case laws. He even referred to the case from Hon'ble Jurisdictional High Court in the case of Nikunj Eximp Enterprises P. Ltd. (372 ITR 619) and noted that when sales are not doubted 100% disallowance cannot be done. Despite noting so and despite the fact that the sales in case of the assessee or the consumptions are not being doubted at all, he found the said case law not applicable. Finally he relied upon Hon'ble Bombay High Court decision in the case of M/s. Shoreline Hotel Pvt. Ltd. Vs. CIT (ITA No. 964/M/2015 dt. 19.6.2015) and dismissal of SLP by Hon'ble Supreme Court in the case of N.K. Industries Ltd. Vs. DCIT (72 taxmann.com 289), he upheld the Assessing Officer's action of 100% disallowance.

11. Against this above order assessee is in appeal before us. We have heard both the counsel and perused the records. Learned Counsel of the assessee submitted that the assessee has done contract work. He referred to the contract agreement and submitted that the contract required the assessee to

provide material and works. He submitted that assessee has duly executed the contract. He submitted that no infirmity whatsoever has been found in the assessee's contract work done. Hence, he submitted that 100% disallowance in this case should not be done.

12. Per contra, learned Departmental Representative relied upon the order of learned CIT(A).

13. Upon careful consideration we find that the authorities below have treated the purchases to be bogus primarily on account of information from Sales Tax Department and non-response by the concerned suppliers to the notice of the Assessing Officer. The assessee has duly submitted the purchase invoices and payments were also done through banking channel. It also noted that the assessee has done contract work and as per the contract specification assessee was required to provide materials and labour. No discussion whatsoever is there in the orders of the authorities below regarding the disallowance of the contact work executed by the assessee. In this view of the matter ratio from Hon'ble Bombay High Court in the case of Nikunj Eximp Enterprises P. Ltd. (supra) and several other case laws are applicable, that 100% disallowance in such cases is not permissible. We further note that the decision of Hon'ble Bombay High Court relied upon by learned CIT(A) in the case of Shoreline Hotel Pvt. Ltd. (supra) was in connection with confirmation of the order by the ITAT in connection with learned CIT order under section 263 of the I.T. Act. Furthermore, the decision of N.K. Proteins Ltd.(250 ITR 22) was the dismissal of SLP by Hon'ble Supreme Court. The said decision was duly explained by Hon'ble Bombay High Court in the case of M. Haji Adam & Co. (ITA no 1004 of 20016 dt. 11/2/2019). Accordingly, in our considered opinion facts of this case indicate that assessee has done purchases from grey market. In our considered opinion 12.5% disallowance in this case would meet the end of justice. We direct accordingly.

14. On similar reasoning we disallow 12.5% of the labour expenditure in this regard.

15. Learned Counsel of the assessee fairly agreed to the above.

16. As regards the disallowance under section 40(a)(ia), we find that learned Counsel of the assessee pleaded that the assessee was not required to deduct the TDS on those labour charges as the payments were done to own employees. He submitted that this matter may be remit to the file of the Assessing Officer so that the assessee can give the necessary materials to justify the assessee's claim. We note that this issue was also remanded by the learned CIT(A) to the Assessing Officer, but we note that the Assessing Officer has not properly examined the issue. Accordingly, we remit this issue to the file of the Assessing Officer. The Assessing Officer is directed to consider the issue afresh after giving the assessee proper opportunity of being heard.

17. In the result, this appeal by the assessee is partly allowed.

Order pronounced on 16.9.2020 under Rule 34(4) of the ITAT Rules.

Sd/-  
(RAMLAL NEGI)  
JUDICIAL MEMBER

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai; Dated : 16/09/2020

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,

(Assistant Registrar)  
ITAT, Mumbai

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