

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

BEFORE SHRI SHAMIM YAHYA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 1423/MUM/2019
Assessment Year: 2009-10**

The Income Tax Officer – 28(1)(2), Room No. 328 3 rd Floor, Tower No. 6, Vashi Railway Station Complex, Vashi, Navi Mumbai - 400703	Vs.	M/s Arfat Steel Metal Industries, Plot No. 30, Pawane Village, Navi Mumbai PAN: AAJFA3696D
(Appellant)		(Respondent)

Revenue by : Shri Michael Jerald (DR)
Assessee by : Shri Dharan Gandhi (AR)

Date of Hearing: 23/07/2020
Date of Pronouncement: 29/07/2020

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue against the order dated 12.12.2018 passed by the Ld. Commissioner of Income Tax (for short 'the (CIT (A) 26, Mumbai, for the assessment year 2009-10, whereby the Ld. CIT A) has partly allowed the appeal filed by the assessee against the assessment order passed u/s 143 (3) r.w.s.147 of the Income Tax Act, 1961 (for short the 'Act').

2. Brief facts of the case are that the assessee engaged in the business of manufacturing of containers, filed its return of income for the assessment year under consideration declaring total income of Rs. 18,92,710/-. Subsequently, the AO received an information from Sales Tax Authorities, Maharashtra through DGIT (Inv.), Mumbai, to the effect that during the year relevant to the assessment year under consideration, the assessee obtained bogus bills amounting to Rs. 1,84,20,250/- from 10 bogus parties identified by the Sales Tax Department, Maharashtra, which used to issue bogus bills on commission

basis without supplying any goods. On the basis of the said information, the case was reopened u/s 147 after issuing notice u/s 148 of the Act. In response thereof the assessee submitted that return of income already filed may be treated as return filed in response to the notice u/s 148 of the Act. Thereafter AO issued notice u/s 143 (2) and 142 (1) of the Act. The assessee filed some of the details and contended that the purchases were genuinely made. In order to verify the genuineness of the transactions, AO issued notice to the parties concerned u/s 133 (6) of the Act which were returned un-served. The assessee also failed to produce the parties. Accordingly, the AO after hearing the assessee computed the peak of the cumulative outstanding of all the parties which was found to be Rs. 1,14,14,020/- and treating the same as unexplained expenditure added the said amount to the income of the assessee u/s 69C of the Act. In the first appeal, the Ld. CIT (A) restricted the addition to 12.5% of the total amount of bogus purchases determined by AO. Against the said findings, the revenue is in appeal before the Tribunal.

3. The revenue has challenged the order of the Ld. CIT (A) on the following grounds:

“1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in directing the A.O. to restrict the disallowance of bogus purchases to 12.5% of total bogus purchases amounting to Rs. 1,84,20,250/- as against addition on peak credit basis amounting to Rs. 1,14,14,020/- made by the assessing officer on account of bogus purchases without appreciating the fact that parties from whom purchases were made to proven accommodation entry providers, as concluded by Sales Tax Authorities pursuant to the investigation carried out by them?”

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in not considering the latest Apex Court decision in the case of N.K. Proteins Ltd. vs. DCIT (769 of 2017), wherein the Hon’ble Supreme Court has confirmed 100% addition made on account of bogus purchases?.”

4. The Ld. Departmental Representative (DR) submitted before us that the Ld. CIT (A) has wrongly restricted the addition to 12.5% of the total amount of bogus purchases determined by the AO. The assessee had obtained bogus bills in order to avoid disallowance u/s 40A(3) of the Act. Further, the payments against the said bogus purchases were made by the cheques and received back in cash. Hence, keeping in view, the *modus operandi* adopted by the assessee, the AO has rightly made addition of the peak of the cumulative outstanding of all the above parties treating the same as unexplained expenditure u/s 69C of the Act.

5. On the other hand, the Ld. counsel for the assessee submitted that the findings of the Ld. CIT (A) are based on the ratio laid down by the Hon'ble High Court of Gujarat in the case of *CIT vs. Simit P. Sheth 356 ITR 451 (Guj)*, wherein the Hon'ble High Court has upheld the findings of the Tribunal holding that in the cases of bogus purchases not the entire purchase but only the profit element embedded in purchases are required to be disallowed. Since, the findings of the Ld. CIT (A) are in accordance with the law laid down by the Hon'ble Gujarat High Court, there is no merit in the appeal of the revenue.

6. We have heard the rival submissions of the parties and also perused the material on record including the cases relied upon by the authorities below. The Ld. CIT (A) has restricted the addition made by the AO to 12.5% of the total amount of bogus purchases shown by the assessee. The findings of the Ld. CIT (A) are as under:-

“6.1 Ground No. 1 of the appeal is against addition of Rs. 1,14,14,020/- being peak credit as unexplained expenditure u/s 69C of the Act against total alleged bogus purchases amounting to Rs. 1,84,20,250/-. As per the investigations carried out by the Sales Tax Authorities, the aforementioned parties were found to be involved in giving accommodation entries only without actually supplying the goods. The logical inference is that the purchases made by the appellant would also be in the nature of accommodation entries only. To verify the same, the AO had made enquiries by issuing notices u/s

133(6) which were returned unserved by the postal authorities. This party was found to be non-existent at the address given by the appellant. The appellant also failed to provide the latest addresses of the party. During the scrutiny assessment the appellant furnished details of purchases and corresponding sales. However, the appellant could not produce the party before the AO in spite of opportunity being given. The appellant also failed to produce delivery challans or transportation details. The onus of proving the genuineness of such purchases is on the appellant which the appellant had not been able to discharge fully. When the hawala party had admitted on oath that it had given accommodation entries only without actually supplying the goods, the genuineness of purchases made from these parties will have to be considered taking this into consideration while examining the documentation submitted by the appellant in support of its claim. The documentary evidences such as purchase bills, payments by cheques, etc. would all have been orchestrated to present a façade of genuineness and does not necessarily mean that the purchases from these parties are genuine. The Courts have held that payment by cheque by itself is not sacrosanct so as to prove genuineness of purchases when the surrounding circumstances are suspect. However, the appellant has shown onward sales which has not been doubted by the Assessing Officer. Since, there can be no sales without corresponding purchases, the only logical explanation is that the appellant would have made purchases from undisclosed parties in the grey market at lower rates and purchases were shown as being made from the impugned parties to suppress its profits. In such a situation, the various Courts including the Hon'ble Gujarat High Court in the case of CIT vs Simit P. Sheth, 356 ITR 451 have held that not the entire purchases but only the profit element embedded in these purchases was to be disallowed and accordingly held that 12.5% of the purchases will be reasonable as profit on margin against the bogus purchases. In view of this decision of Hon'ble Gujarat High Court (supra), the addition peak credit of Rs. 1,14,14,020/- made by the AO is restricted to 12.5% of the total bogus purchases amounting to Rs. 1,84,20,250/- which should sufficiently cover the profit element embedded in the

impugned purchases. The appellant's ground of appeal is partly allowed.

7. Ground No. 2 of the appeal is of general in nature and the option mentioned therein was not exercised by the appellant. The ground is of academic in nature and no decision is required. For statistical purposes, this should be treated as Dismissed.'

7. The findings of the Ld. CIT (A) are based on the judgment of the Hon'ble Gujarat High Court in the case of *CIT vs. Simit P. Sheth* (supra) in which the Hon'ble Court upheld the addition of 12.5% of the total amount of bogus purchases holding that only profit element embedded in the bogus purchases are required to be added to the income of the assessee. The Ld. CIT (A) has restricted the addition in accordance with the ratio laid down by the Hon'ble Gujarat High Court. Hence, in our considered view, the order of the Ld. CIT (A) is well reasoned and does not warrant interference. Hence, we uphold the findings of the Ld. CIT (A) and dismiss the revenue's appeal.

In the result, appeal filed by the revenue for assessment year 2009-2010 is dismissed.

Order pronounced on 29th July 2020 under Rule 34(4) of the Income Tax Appellate Tribunal Rules, 1963.

Sd/-
(SHAMIM YAHYA)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 29/07/2020

Alindra, PS

Sd/-
(RAM LAL NEGI)

JUDICIAL MEMBER

आदेश 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.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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