

THE INCOME TAX APPELLATE TRIBUNAL  
“D” Bench, Mumbai  
Shri Shamim Yahya (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 7418/Mum/2016 (Assessment Year 2009-10)  
I.T.A. No. 7419/Mum/2016 (Assessment Year 2010-11)

Shri Rajiv L. Gandhi 4, bajaj Society Bajaj Road, Vile Parle West, Mumbai-400 057. (Appellant)	Vs.	ITO-25(3)(3) Mumbai  (Respondent)
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Assessee by	Shri K. Gopal
Department by	Shri Akhtar H. Ansari
Date of Hearing	17.09.2020
Date of Pronouncement	24.09.2020

O R D E R

Per Shamim Yahya (AM) :-

These are appeals by the assessee against respective orders of learned CIT(A) for concerned assessment year, wherein learned CIT(A) has sustained 12.5% disallowance for bogus purchases as under :-

A.Y. 2009-10	Rs. 16,08,143/-
A.Y. 2010-11	Rs. 26,89,122/-

2. Brief facts of the case are that assessee in this case is engaged in the business of reseller in Pharmaceuticals. The Assessment in this case was reopened upon receipt of information from the sales tax Department that assessee has made bogus purchases. The assessee submitted the purchase vouchers and the payments were made through banking channel. However the suppliers were not produced before the assessing officer. Sales in this case were not doubted. The income tax officer in this case has made 100% addition on account of bogus purchase resulting in disallowance of Rs. 1,28,65,146/- for A.Y. 2009-10 and Rs. 2,15,12,975/- for A.Y. 2010-11.

3. Upon assessee's appeal learned CIT(A) restricted the same to 12.5%

4. Against the above order assessee is in appeal before the ITAT. We have heard both the counsel and perused the records.

5. We note that the Revenue's appeal against the above order in ITA No. 7288 & 7289/Mum/2016 came up for hearing before the ITAT. The ITAT dismissed the appeal filed by the Revenue vide order dated 18.8.2017 and thus addition to the extent of 12.5% by learned CIT(A) was confirmed. Assessee's appeal in ITA No. 7418 & 7419/ Mum/2016 was separately heard by the ITAT and vide order dated 3.1.2018 the ITAT reduced the addition to the extent of 10% following assessee's own case for A.Y. 2008-09. Subsequently, the ITAT recalled its order dated 3.1.2018 in ITA No. 7418 & 7419/Mum/2016.

6. Subsequent upon recall, we have heard both the parties and perused the record. Learned Counsel of the assessee in this case submitted that Hon'ble Bombay High Court in the case of PCIT Vs. Mohammad Haji Adam (ITA No. 1004 of 2016) has held that addition for bogus purchases should be restricted to the difference between the gross profit earned on normal purchases and gross profit earned on alleged bogus purchases.

7. Upon careful consideration we find that assessee has provided the documentary evidence for the purchase. Adverse inference have been drawn due to the inability of the assessee to produce the suppliers. We find that in this case the sales have not been doubted. It is settled law that when sales are not doubted, hundred percent disallowance for bogus purchase cannot be done. The rationale being no sales is possible without actual purchases. This proposition is supported from honourable jurisdictional High Court decision in the case of Nikunj Eximp Enterprises (in writ petition no 2860, order dt. 18.6.2014). In this case the honourable High Court has upheld hundred percent allowance for the purchases said to be bogus when sales are not doubted. However in that case all the supplies were to government agency.

8. In the present case the facts of the case indicate that assessee has made purchase from the grey market. Making purchases through the grey market gives the assessee savings on account of non-payment of tax and others at the expense of the exchequer.

9. We find that it is settled law that decision of Hon'ble Jurisdictional High Court is binding upon all subordinate courts and Tribunals. It was held by Hon'ble Supreme Court in the case of ACIT Vs. Saurashtra Kutch Stock Exchange Ltd. 225 ITR 234 (SC) that not following the order of Hon'ble Jurisdictional High Court, whether cited or not shall render order of ITAT containing a mistake apparent from record. We also find that recall of only ITAT order in assessee's appeal as sought by the revenue has led to an anomalous situation that disallowance on account of bogus purchase is to be done @ 12.5%.

10. This as at the date of this order is quite in conflict to the ratio laid down by honourable jurisdictional High Court in the case of M. Hazi Adam & Co.(supra). Now technicalities are pitted against the exposition of Hon'ble Jurisdictional High Court in the case of M. Haji Adam & Co. (supra). It is settled law that interest of substantial justice prevails when technicalities are pitted against the same. Moreover, we have already found that the matter is not only of technicalities but violation of jurisdiction discipline in as much as exposition of Hon'ble Jurisdictional High Court in the case of M. Haji Adam & Co. (supra) is to be ignored. We are of the considered opinion that same falls the cusp of contempt.

11. In this view of the matter we direct the Assessing Officer to restrict the disallowance in this case to the extent of difference between the gross profit earned on normal purchases and gross profit earned on alleged bogus purchases as expounded by Hon'ble Jurisdictional High Court in the decision of M. Haji Adam & Co. (supra).

12. In the result this appeal filed by the assessee stands partly allowed

Order pronounce under Rule 34(4) of the ITAT Rules on 24.9.2020.

Sd/-  
(PAVAN KUMAR GADALE)  
JUDICIAL MEMBER

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai; Dated : 24/09/2020

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//

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BY ORDER,  
(Assistant Registrar)  
ITAT, Mumbai