

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

I.T.A. No. 4801/Mum/2018 (Assessment Year 2009-10)

Milan Tube Tools Corporation 116, Nagdevi Street Nagdevi, Mumbai-400 003. (Appellant)	Vs.	ACIT-17(2) Aayakar Bhavan Mumbai (Respondent)
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I.T.A. No. 5029/Mum/2018 (Assessment Year 2009-10)

ACIT-17(2) Aayakar Bhavan Mumbai (Appellant)	Vs.	Milan Tube Tools Corporation 116, Nagdevi Street Nagdevi, Mumbai-400 003. (Respondent)
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PAN : AAAFM3296Q

Assessee by	None
Department by	Shri Akhtar Ansari
Date of Hearing	14.09.2020
Date of Pronouncement	17.09.2020

O R D E R

Per Shamim Yahya (AM) :-

These are appeals by the revenue and assessee arising out of the order of learned CIT(A) dated 20.6.2018 pertain to A.Y. 2009-10.

2. In the appeal by the Revenue is aggrieved that the learned CIT(A) has reduced the addition for bogus purchase of Rs. 12,77,831/- done @ 11.05% by the Assessing Officer by sustaining 5.25%.

3. In the cross appeal assessee has challenged the order of learned CIT(A) on following grounds :-

1. On facts and in law, the learned Commissioner of Income-tax (Appeals) (hereinafter referred to as the "Ld. CIT(A)") had failed to appreciate that the jurisdictional conditions precedent to issue of notice u/s.148 not complied, the assessment made u/s. 143(3) r.w.s. 147 is bad-in-law.

2. On facts and in law, the Ld. CIT(A) had erred in holding that the proceedings u/s. 147 are not bad-in-law.
  3. On facts and in law, the Ld. CIT(A) had erred in confirming the addition of Rs.6,07,114/- being the Gross Profit @ 5.25% of the alleged purchases of Rs. 1,15,64,080/- without appreciating the fact that the appellant has already shown the gross profit @ 13.97%, 23.83%, 11.22%, 11.79% & 17.03% from M/s. A.P. Enterprises, M/s.Vidhi and Vrushti Trade Pvt. Ltd., M/s. Pushti Impex, M/s.Paras (India) and M/s. Kavish International respectively, on the said purchases. Under the facts and circumstances of the matter, the Id. CIT(A) ought to have directed the learned Assessing Officer (LAO) to delete entire addition made by LAO.
  4. On facts and in law, the Ld. CIT(A) had erred in confirming the addition of Rs.6,07,114/-without appreciating the fact that neither statements of the person concerned was given to the appellant nor any opportunity to cross examine the person was given to the appellant, which is against the principles of natural justice.
  5. On facts and in law, the Ld. CIT(A) had erred in confirming the addition in the absence of delivery challans, transport receipt, other receipts, etc. without appreciating the submissions made by the appellant in this regard. Under the facts and circumstances of the matter, the Ld. CIT(A) ought to have deleted the said addition.
  6. On facts and in law, the Ld. CIT(A) had failed to appreciate that Sales-tax paid challan and confirmations of M/s.A.P. Enterprises, M/s.Vidhi and Vrushti Trade Pvt. Ltd. and M/s.Kavish International were also submitted before him. Under the facts and circumstances of the matter, the Ld. CIT(A) ought to have deleted the said addition.
4. The assessee's business has not been mentioned in the assessment order. The assessment was reopened upon information from sales tax department that assessee has made purchases from bogus dealers. The AO made 11.05% addition of the bogus purchase on the basis of past 3 years GP rate amounting to Rs. 12,77,831/-.
  5. Upon assessee's appeal learned CIT-A has noted that the sales has not been doubted. The assessee also stated that he has already shown sufficient profit on the impugned sales at a higher rate. Accordingly placing reliance upon several case laws and up on the facts of the case he sustained 5.25% disallowance out of the bogus purchases.

6. Against above order revenue and assessee are in appeal before the ITAT. We have heard learned Departmental Representative and perused the record. 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 the facts of the present 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.

7. In the case of M. Hazi Adam & Co. (ITA No. 1004 of 2006 dated 11.2.2019, Hon'ble Bombay High Court has held that the disallowance in the case of bogus purchase should be restricted to difference between the gross profit earned by the assessee on genuine purchases and the said bogus purchases. In this view of the matter the assessee ground that he has already shown sufficient profit on the impugned purchase is acceptable. The Assessing Officer is directed to examine the claim of the assessee and grant the necessary relief in accordance with the above decision of Hon'ble Bombay High Court.

8. In the result, this appeal filed by the Revenue stands dismissed and appeal by the assessee stands partly allowed.

Order pronounced under rule 34(4) of the ITAT Rules on 17.9.2020.

Sd/-  
(PAVAN KUMAR GADALE)  
JUDICIAL MEMBER

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai; Dated : 17/09/2020

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