

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

BEFORE SHRI RAJESH KUMAR (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 3795/MUM/2017
Assessment Year: 2009-10**

M/s Tirath Exports, 101-02, Shreeji Darshan, Tata Road 1 & 2, Opera House, Mumbai - 400004 PAN: AAFT2225J	Vs.	The Income Tax Officer 19(3)(5),
(Appellant)		(Respondent)

Assessee by : Shri Bharat P. Shah (AR)
Revenue by : Shri Amit Pratap Singh (DR)

Date of Hearing: 14/01/2020
Date of Pronouncement: 20/03/2020

ORDER

PER RAM LAL NEGI, JM

The assessee has filed the present appeal against the order dated 20.03.2017 passed by the Commissioner of Income Tax (Appeals) (for short 'the. CIT (A) 30, 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 trading in diamonds, filed its return of income for the assessment year under consideration declaring the total income at Rs. 7,42,220/- which was processed u/s 143 (1) of the Act. A search and seizure action was carried out on Shri Bhanwarlal Jain and his group concerns on 03.10.2013 by the DGIT (Inv.), Mumbai. During the course of search, it came to the notice that during the year relevant to the assessment year under consideration the assessee had

obtained accommodation entries from bogus concerns of Shri Bhanwarlal Jain and others amounting to Rs. 2,94,49,268/-. Accordingly, the case of the assessee was reopened u/s 147 of the Act, after issuing notice u/s 148 and the AO determined the total income of the assessee at Rs. 30,98,160/- after making an addition of Rs. 23,55,940/- i.e, 8% of the total amount of non genuine purchases shown by the assessee. In the first appeal, the Ld. CIT (A) restricted the addition to 3% of the total amount of bogus purchases. Still aggrieved, the assessee is in appeal before this Tribunal.

3. The assessee has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds of appeals:

1. *“Whether commissioner of Income Tax (Appeals) is correct in law and in fact in holding assessment as valid when objection raised by assessee against the re opening of assessment was not disposed off by the assessing officer before starting assessment proceeding.*
2. *Whether commissioner of Income Tax (Appeal) is correct in law and in fact in upholding assessing officer decision of purchases made by assessee from certain parties as bogus purchases without independent verification u/s 133(6)(131.*
3. *Whether commissioner of Income-tax (Appeal) is correct in law in law fact in upholding the addition profit margin of Rs. 8,83,478/- on purchases of Rs. 2,94,49,268/-.*

4. Before us, the Ld. counsel for the assessee submitted that the assessee does not want to press ground No 1 and 2 of the appeal. Hence, we dismiss ground No. 1 and 2 of this appeal as not pressed.

5. Vide ground No 3 the assessee has challenged the action of the Ld. CIT(A) in sustaining the addition of 3% of the total amount of non-genuine purchases determined by the AO. The Ld. Counsel submitted that the AO has made addition only on the basis of information received from DGIT (Inv.). The parties have given affidavit regarding genuineness of sales which were submitted before the AO during the assessment proceedings. The AO did not issue notice u/s 131 or 133 (6) to any of the five parties and no enquiry was

conducted by the AO. The Ld. counsel relying on the decision of the coordinate Bench in the case of *Simoni Gems vs. DCIT*, ITA No. 747, 748, 789, 750, 751, 752/Mum/2018 for the AY 2007-08 to 2013-14, submitted that the Mumbai Tribunal has deleted the addition made in the similar circumstances. The Ld. counsel further submitted that the view taken by the ITAT in the aforesaid case was followed in *Varma International vs. ITO* in ITA No. 7316, 7317/Mum/2016 and *Unique Trading Pvt. Ltd. vs. DCIT* in ITA No. 0341/Mum/2016. The Ld. counsel further pointed out that in the present case gross profit (GP) on alleged bogus purchases is more than the GP on regular profit. Without prejudice, the Ld. counsel further submitted that the Hon'ble Bombay High Court in the case of the *Principal Commissioner of Income Tax vs. M/s Mohommad Hajji Adam and Co.*, Income Tax Appeal No 1004, 1013,1059,1064,1015,1095,1204,1012 of 2016, restricted the addition to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases. The Ld. counsel accordingly submitted that the present case may be decided in accordance with the ratio laid down by the Hon'ble High Court in the said case.

6. On the other hand, the Ld. departmental representative supporting the order passed by the Ld CIT(A) submitted that since the Ld. CIT(A) has already restricted the addition to 3% of the total amount of bogus purchases, there is no infirmity in the said order to interfere with.

7. We have heard the rival submissions of the parties and perused the material on record including the cases relied upon by the Ld. counsel for the assessee and the cases referred and relied upon by the authorities below. The Hon'ble jurisdictional High Court has dealt with the issue of addition on account of bogus purchases in the case of *Principal Commissioner of Income Tax vs. M/s Mohommad Hajji Adam and Co.* (*supra*) and upheld the decision of the ITAT holding as under:

“8. In the present case, as noted above, the assessee was a trader of fabrics. The A.O. found three entities who were indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such

basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied. The finding of the CIT (A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by the assessee and the sales declared. That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases. The decision of the Gujarat High Court in the case of N.K. Industries Ltd. (supra) cannot be applied without reference to the facts. In fact in paragraph 8 of the same judgment the Court held and observed as under:-

“So far as the question regarding addition of Rs. 3,70,78,125/- as gross profit on sales of Rs. 37.08 Crores made by the Assessing Officer despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 is concerned, we are of the view that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6% gross profit is taken into account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price. We have to reduce the selling price accordingly as a result of which profit comes to 5.66%. Therefore, considering 5.66% of Rs. 3,70,78,125/- which comes to Rs. 20,98,621.88 we think it fit to direct the revenue to add Rs. 20,98,621.88 as gross profit and make necessary deduction accordingly. Accordingly, the said question is answered partially in favour of the assessee and partially in favour of the revenue.

9 In these circumstances, no question of law, therefore, arises. All Income Tax Appeals are dismissed, accordingly. No order as to costs.”

8. As contended by the Ld. counsel for the assessee in the present case, the gross profit of bogus purchases is more than the gross profit on regular profits.

The Hon'ble High Court has upheld the findings of the Tribunal restricting the addition to the extent of bringing the GP rate on purchases at the same rate of other genuine purchases. Hence, respectfully following the ratio laid by the Hon'ble jurisdictional High Court in the case of *Pr. CIT vs. M/s Mohommad Haji Adam & Co* (supra), we set aside the impugned order passed by the Ld. CIT(A) and remit the appeal back to the file of AO for computing the addition if any in the light of the ratio laid down by the Hon'ble High Court after affording a reasonable opportunity of being heard to the assessee.

In the result, appeal filed by the assessee for assessment year 2009-2010 is allowed for statistical purposes.

Order pronounced in open court on 20th. March, 2020.

Sd/-
(RAJESH KUMAR)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 20/03/2020

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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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