

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 1033/MUM/2019 (A.Y: 2009-10)

ACIT – 19(2) Room No. 207, 2 nd Floor Matru Mandir, Tardev Road Mumbai – 400 007	v.	M/s. Kwalitiy Tubes Room No. 9, 105, Ratna Sadan 2 nd Pathan Street 5 th Kumberwada Mumbai – 400 004 PAN: AADFK5452D
(Appellant)		(Respondent)

Assessee by : **None**
Department by : **Ms. Arju Garodia**

Date of Hearing : **10.02.2020**
Date of Pronouncement : **29.09.2020**

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the revenue against the order of the Learned Commissioner of Income Tax (Appeals) – 5, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 27.08.2018 for the Assessment Year 2009-10.
2. Revenue has raised the following grounds in its appeal: -

1. *"Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in restricting the addition to @6.5% of total bogus purchases and computing the profit for the purpose of section 28 of the I.T. Act, 1961 taking in to consideration the bogus bills against which no goods have been received?"*

2. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in restricting the addition to @6.5% of total bogus purchases in presuming that the purchase have been made from unknown parties whereas bills have been received from hawala dealer?"*

3. *"Ld. CIT(A) erred in restricting the addition to @6.5% of total bogus purchases that purchases have been made from unknown parties without clarification how the payment was made and whether section 69 of the IT Act, 1961 will be applicable or not?"*

4. *Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in not considering the order of the Hon'ble supreme court in the case M/s N.K. Protein Ltd Vs DCIT(SLA-CC Nos. 769 of 2017 dt. 16.01.2017) , which is on the similar issue of bogus purchases and when the apex court order was already the law of the land when the Ld. CIT(A) has pronounced its order on 27.08.2018?"*

5. *The appellant craves leave to amend or alter or add a new ground which may be necessary."*

3. Briefly stated the facts are that the assessee is engaged in the business of trading in ferrous and non-ferrous metals, filed its return of income for the A.Y.2009-10 on 26.09.2009 declaring income of ₹.25,19,400/- and the return was processed u/s. 143(1) of the Act. Subsequently, Assessing Officer received information from the DGIT(Inv.), Mumbai about the accommodation entries provided by various dealers as referred in the Assessment Order and assessee was also one of the beneficiary from those dealers. The assessment was

reopened U/s. 147 of the Act based on the information received from DGIT(Inv.), Mumbai, that the assessee has availed accommodation entries from three parties namely M/s. Smeeta Impex Pvt. Ltd., M/s. Yoam Metallic Trading Pvt. Ltd., and M/s. Saurav Metal & Tools Impex which are said to be providing accommodation entries without there being transportation of any goods. In the reassessment proceedings, the assessee was required to prove the genuineness of the purchases made from the parties as mentioned in the Assessment Order. In reply assessee furnished copy of ledger account, copy of invoices, copy of delivery challans, proof of transportation, copy of bank statement, note on tally between sales and purchases, note on stock and submitted that the purchases made from the above said parties are genuine.

4. Not convinced with the submissions of the assessee the Assessing Officer treated the purchases as non-genuine and he was of the opinion that assessee had obtained only accommodation entries. Assessing Officer observed that the notices issued u/s. 133(6) of the Act to the parties reveals that the claim of expenses on account of purchases made from the parties are not genuine and the assessee has not produced the parties before him. Therefore, Assessing Officer treated purchases of ₹.77,74,120/- made from the parties mentioned in Assessment Order as

non-genuine. However, the Assessing Officer estimated the profit element from such purchases at 12.5% and disallowed ₹.9,34,265/- while computing the income. On appeal the Ld.CIT(A) considering the evidences and various submissions of the assessee restricted the disallowance to the extent 6.5% of the non-genuine purchases.

5. Ld. Counsel for the assessee reiterated the submissions made before the lower authorities. Ld. DR vehemently supported the orders of the Assessing Officer.

6. We have heard the rival submissions, perused the orders of the authorities below. On a perusal of the order of the Ld.CIT(A), we find that the Ld.CIT(A) considered this aspect of the matter elaborately with reference to the submissions of the assessee and the averments in the Assessment Order and restricted the disallowance to 6.5% of the non-genuine purchases. While holding so the Ld.CIT(A) observed as under: -

"4.3. Decision:

I have considered the facts of the case and submissions of the appellant. In this case, the AO received information from the DGIT(Investigation), Mumbai that the assessee had entered into hawala transactions for purchases total amount of Rs.74,74,120/- from the three parties namely Smeeta Impex P. Ltd., Yoam Metalilic Trading P. Ltd. and Saurav Metal & Tools Impex P. Ltd. The AO observed that the assessee had obtained accommodation entries of bogus purchases from the above mentioned hawala parties and

hence, the AO made addition of Rs.9,34,265/- @12.5% of non-genuine purchases.

During the appellate proceedings, the appellant has stated that the AO erred in the addition of Rs.9,34,265/- @12.5% of total purchases being non-genuine without appreciating the facts that the expenditure incurred on 11 purchases were duly accounted in the books of account of the appellant. It is also stated that the appellant has proved the purchases made during the year with supporting evidence. This addition are made merely on conjecture and surmises and merely on the basis of certain investigation carried out by the Sales Tax Department without providing the appellant an opportunity to cross examine the persons. The appellant has submitted details and documents regarding its claim which is available on record. Further, the appellant has relied on the decision of the Ld.CIT(A), Mumbai in assessee's own case for A.Y. 2011-12 on the same issue.

I have carefully considered the submissions made by the appellant and facts of the case. During the year under consideration, the AO issued notice u/s 133(6) to the aforesaid parties which could not be served as the parties were not available at the given address and there was a crushing evidence in the Form of statements some of the suppliers given before the Sales Tax Authorities that it was engaged only in issuing hawala bills and no goods were ever supplied by them. In this regard, the AO made an addition of Rs.9,34,265/ @12.5% of total purchases on the estimation basis of profit embedded in the bogus purchase. The assessee has objected to the addition and submitted that the expenditures incurred on purchases were duly accounted in the books of account of the appellant and it had furnished all the required documents before the AO to show that the total purchases amounting to Rs.74,74,120/ are genuine. In this case, it appears that the ' assessee could not substantiate its claim with supporting documents although the onus of the proof is on the assessee. It is also submitted that the AO has not considered the submission of the assessee as the AO has made addition on estimation basis. In the circumstances, the issue to be decided is what is the correct percentage of profit in the line of business in the assessee's case as the assessee company is engaged in the business of trading in ferrous and non ferrous metals. It is submitted by the assessee that 12.5% profit percentage is very high in this business activity. Further, the appellant has relied on the decision of the Ld.

CIT(A) on the same issue in the assessee's case for AY 2011-12. The relevant portion of tile order is as under: -

"5.10 The appellant made purchases from nine parties who are said to be hawala operators, who is indulged in providing bogus bills without supply of any material. Independent inquiries conducted revealed that no such party is existing in the given address. In the present case, AO added the entire purchases of Rs. 2,13,137/-. The simple issue to be decided is what is the correct percentage of profit in the line of business i.e. trading in ferrous and non ferrous metals. As noticed above, in the similar circumstances of bogus purchases, Hon'ble Gujarat High Court estimated the additional advantage towards tax benefit (10% and the profit margin 2.5% totaling to 12.5%; In the present case on perusal of copies the invoices furnished by the appellant in. the bill the percentage of VAT levied is @ 4%. Applying the same logic, the profit margin should be adopted @2.5%. In view of the above, in my considered opinion, applying the logic of the above said case the profit percentage embedded on such purchases is restricted to 6.5% (i.e. 4% of VAT levied + 2.5 % towards profit margin) that will meet the ends of the justice. Taking all the facts into consideration and applying the logic of Simit P. Sheth case, the AQ is directed to restrict the estimation (oj 6.5% on the rion genuine purchases of Rs.631,22,978/-. Appeal on grounds no. 1 and 2 are treated as partly allowed"

In view of the above decision of Ld. CIT(A) in the assessee's own case for AY 2011-12, facts and circumstances of the case, the AO's estimation of profit on the impugned purchases @12.5 is-not justified. Hence, taking all the facts into consideration, the addition is restricted to 6.5% on the non-genuine purchases. Therefore, the AO is directed to calculate the addition @6.5% of non-genuine purchases of Rs.74,74,120/- that will meet the ends of justice. Thus, the grounds of appeal No. 1 & 2 are allowed."

7. On a careful perusal of the order of the Ld.CIT(A) and the reasons given therein, we do not find any infirmity in the order passed by the

Ld.CIT(A) in restricting the addition/disallowance to the extent of 6.5% of the purchases. Grounds raised by the revenue are dismissed.

8. In the result, appeal of the Revenue is dismissed.

9. Before parting, we noticed that this appeal was heard on 10.02.2020 and the pronouncement is delayed due to lockdown in view of COVID-19 pandemic. The pronouncement is as per Rule 34(5) of Income Tax Appellate Tribunal Rules, 1963 and Hon'ble Bombay High Court decision vide orders dated 15.04.2020 and 15.06.2020 extending the time bound periods specified by Hon'ble High Court by removing the period under lockdown. This aspect was also dealt with in detail by the Mumbai Bench of the Tribunal in case of DCIT v. JSW Steel Vide order dated 14.05.2020 in ITA.No. 6264/Mum/2018.

Order pronounced on 29.09.2020 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER
Mumbai / Dated 29/09/2020
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum