

**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. 07/MUM/2019 (A.Y: 2011-12)

Income Tax Officer Ward – 26(2)(4) Room No. 511, 5 th Floor C-11, Bandra Kurla Complex Mumbai - 400051	v.	Paresh Nagindas Doshi B/6, 6 th Floor, Avanti Apartment Flank Road, Sion Mumbai - 400022 PAN: AAQPD2201G
(Appellant)		(Respondent)

CO.No. 17/MUM/2020

[ARISING OUT OF ITA NO. 07/MUM/2019 (A.Y: 2011-12)]

Paresh Nagindas Doshi B/6, 6 th Floor, Avanti Apartment Flank Road, Sion Mumbai - 400022 PAN: AAQPD2201G	v.	Income Tax Officer Ward – 26(2)(4) Room No. 511, 5 th Floor C-11, Bandra Kurla Complex Mumbai - 400051
(Appellant)		(Respondent)

Assessee by : Shri Bhupendra Shah

Department by : Shri R. Bhoopathi

Date of Hearing : 13.02.2020

Date of Pronouncement : 29.09.2020

ORDER

PER C.N. PRASAD (JM)

1. This appeal and cross objection are filed by the Revenue and assessee respectively against the order of the Learned Commissioner of Income Tax (Appeals)-38, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 30.07.2018 for the Assessment Year 2011-12.

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, the Ld. CIT(A) has erred in restricting the disallowance to 12.5% of the total amount of bogus purchase transaction instead of 25% of the total amount of bogus purchase made by the AO."*

2. *" Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering that the addition was made on the basis of information received from DIT(Inv.) and Sales Tax Department, Maharashtra with regard to bogus purchase made by the assessee from dealers without supply of actual goods."*

3. *"Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in not considering that the hawala operators have admitted on oath before the Sales Tax Authorities that they have not sold any material to anybody."*

4. *" Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering that the assessee could not prove the genuineness and creditworthiness of the purchase transactions during the course of assessment proceedings."*

5. *The Ld. CIT(A) failed to uphold the decision of Hon'ble Apex Court in the case of N K proteins Ltd. vs. DCIT in SLP(Civil) No.769/2017 dated 16.01.2017 where 100% of addition was confirmed by the Apex Court."*

6. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the fact that applicability of provisions of section 40A(3) attracts 100% bogus purchases to be held as profit."*

3. Briefly stated the facts are that the assessee is engaged in the business of manufacturing of all types of plastic articles, filed his return of income for the A.Y.2011-12 on 28.09.2011 declaring income of ₹.3,65,570/- 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 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 M/s. Shradhha trading Company which is said to be providing accommodation entries without there being transportation of any goods. In the re-assessment proceedings, the assessee was required to prove the genuineness of the purchases made from M/s. Shradhha Trading Company. In reply assessee filed copies of invoices and contended that the payments were made through account payee checks and thus the purchases made from the said party 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 are returned unserved with a remark "left" and the assessee has not produced the parties before the Assessing Officer. Therefore, Assessing Officer treated purchases of ₹.49,45,500/- made from M/s.Shradhha trading Company as non-genuine. However, the Assessing Officer estimated the profit element from such purchases at 25% and disallowed ₹.12,36,375/- while computing the income. On appeal the Ld.CIT(A) considering the evidences and various submissions of the assessee restricted the disallowance to an extent of 12.5% of the non-genuine purchases.

5. Ld. Counsel for the assessee reiterated the submissions made before the lower authorities. He also placed reliance on the order of this Tribunal in the case of ITO v. Smt. Bhikhadevi J. Patel in ITA.No. 6396/Mum/2018 and CO.No. 236/Mum/2019 dated 06.12.2019 and submitted that on identical situation the Tribunal applied the decision of the Hon'ble High Court in the case of Pr.CIT v. M/s.Mohammad Haji Adam

& Co. and held that the Gross Profit rate as shown by the assessee on genuine purchases shall be applied for non-genuine purchases. 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 following the decision of the Hon'ble Gujarat High Court in the case of Simit P. Sheth [356 ITR 451] restricted the disallowance to 12.5% of the non-genuine purchases. While holding so the Ld.CIT(A) observed as under: -

"7.3.6 After considering the entire facts and circumstances of the case, I am in agreement with the opinion of the AO that the appellant did not purchase the material from the party mentioned in the sale bills. The appellant nor any other person in the capacity of Authorized Representative have offered neither oral nor written arguments supported by documentary evidence. Appellant also failed to prove that the quantity of material in the bills was used in the manufacturing activity, In the absence of documentary evidence in support of the claim of the appellant that the alleged bogus purchases have been genuinely made from the alleged party and that the goods have been physically received is not accepted. It is inferred from the above facts that the said purchases were debited in the books of accounts with the intention to reduce the taxable profits. Under similar circumstances the Hon'ble High Court of Gujrat in the case of Simit P Seth, 2013 (356 ITR 451) had an occasion to deliver its judgment by confirming the decision of the ITAT which

has estimated the disallowance at 12.5% of the disputed bogus purchases to meet the ends of justice. The head-note of the decision is reproduced as under-

"Section 145 of the Income-tax Act, 1961 - Method of accounting - Estimation of Profits [Bogus purchases] - Assessment year 2006-07 - Assessee was engaged in business of trading in steel on wholesale basis - Assessing Officer having found that some of alleged suppliers of steel to assessee had not supplied steel to assessee but had only provided sale bills, held that purchases made from said party were bogus - He, accordingly, added entire amount of purchases to gross profit of assessee -Commissioner (Appeals) having found that assessee had indeed made purchases, though not from named party but other party from grey market, sustained addition to extent of 30 per cent of purchase cost as probable profit of assessee - Tribunal however, sustained addition to extent of 12.5 per cent - Whether since purchases were not bogus but were made from party other than those mentioned in books of account, only profit element embedded in such purchases could be added to assessee's income - Held, yes - Whether hence, order of Tribunal needed no interference - Held, yes [Paras 6, 7 & 9] [In favour of assessee]", (emphasis supplied).

7.3.7. In the instant case, no doubt, the AO has made efforts to examine the so-called suppliers by issuing notices u/s. 133(6) but could not succeed since such party were not available at the given/revised address. Therefore, the AO was prevented by a reasonable cause from giving an opportunity to the appellant to cross-examine the outcome of his enquiry. With regard to the information received from DIT(Inv.), Mumbai the summary of the communication was already passed on to the appellant while communicating reasons for reopening. Even though the AO could not prove substantively that the amounts given to the sellers in cheques form have come back to the appellant, the activities of accommodation entries in the trading community is not unheard of. Further, the investigations carried out by the Sales Tax Department,

another Government Agency, with regard to VAT violation cannot be lost sight of. Even though there are catena of cases by the jurisdictional ITAT which have decided the issue in the favour of the assessee, they are not uniform in all the cases as they were decided as per the facts and circumstances of that particular case before them. I am of the opinion that the facts and circumstances of the present case are more akin to the case decided by the Hon'ble Gujrat High Court in the case of Simit P Seth (supra.). Respectfully following this decision, I hereby direct the AO to work out 12.5% of the so-called bogus purchases in place of 25% and add back the same to the taxable income, The ground is partly 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 12.5% of the purchases. Grounds raised by the revenue are dismissed.

8. Coming to the cross objection filed by the assessee, the grounds are as under: -

"1. In the facts and circumstances of the case and in law. the learned A.O. erred in passing the order u/s. 143 r.w.s. 147 and therefore rendering the whole assessment bad in law, on the basis of borrowed satisfaction.

2. In the facts and circumstances of the case and in law. the learned A.O. erred in disallowing Rs. 12,36,375/- u/s 69C by relying upon the statements of the said supplier before the VAT Department and thereby ignoring the details furnished by the Appellant by overlooking judgment in the case Nikunj Eximp by Bombay High Court.

3) In the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (A) erred in confirming 12.5% of the said purchases which is against the judgement of Bombay high

court in the case Mohommad Haji Adam & Co. & Ors [INCOME TAX APPEAL NO. 1004 OF 2016] & followed in several cases in Mumbai ITAT that the profit rate only to the extent of differential percentage as declared on the bogus purchases and as declared on the regular purchases.

4) In the facts and circumstances of the case and in law, the learned Commissioner Assessing Officer erred in filing present appeal even though the tax effect is less than 50 lacs and no information is received from external sources."

9. On a perusal of the appeal record before us, we observe that the cross objection is filed with a delay of 18 days and the assessee has not filed any condonation petition. Since the cross objection filed by the assessee is without seeking any condonation of delay the cross objection is dismissed in limine as not maintainable.

10. In the result, appeal of the Revenue and cross objection of the assessee are dismissed.

11. Before parting, we noticed that the appeal and cross objection were heard on 13.02.2020 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