

IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH '(A)', KOLKATA

[BEFORE SHRI P.M. JAGTAP, HON'BLE VICE PRESIDENT (KZ) &
S. S. GODARA, HON'BLE JUDICIAL MEMBER]

[Through Virtual Court]

I.T.A. Nos. 1455 to 1458 /Kol/2019
Assessment Year: 2011-12 to 2014-15

M/s. S.R. Engineering Corporation.....Appellant
Stephen House, 6th Floor, Room No. 101,
56E, Hemanta Basu Sarani,
Kolkata - 700 001.
[PAN: ABSFS 6791 B]

Vs

ITO, Ward - 36(1), Kolkata.....Respondent
Kolkata - 700 069.

&

I.T.A. Nos. 1585 & 1586 /Kol/2019
Assessment Year: 2011-12 & 2012-13

ITO, Ward - 36(1), Kolkata.....Appellant
Kolkata - 700 069.

Vs

M/s. S.R. Engineering Corporation.....Respondent
Stephen House, 6th Floor, Room No. 101,
56E, Hemanta Basu Sarani,
Kolkata - 700 001.
[PAN: ABSFS 6791 B]

Appearances by:

Shri Miraj D Shah, AR appearing on behalf of the Assessee.

Shri Dhruvajyoti Ray, JCIT appearing on behalf of the Revenue.

Date of concluding the hearing : October 08, 2020

Date of pronouncing the order : October 22, 2020

ORDER

PER P.M. JAGTAP, VICE-PRESIDENT (KZ)

Out of these six appeals, four appeals are cross-appeals for A.Y. 2011-12 and 2012-13 while the remaining two appeals are the appeals of the assessee for A.Y. 2013-14 and 2014-15. Since the

common issue is involved in all these appeals, the same have been heard together and are being disposed of by a single consolidated order for the sake of convenience.

2. The assessee in the present case is a partnership firm which is engaged in the business of trading of iron products. A survey operation u/s 133A of the Income Tax Act was carried out in the case of one Shri Sanjiw Kumar Singh which was later converted into search action. A statement of Shri Sanjiw Kumar Singh was recorded on oath u/s 133A of the Act on 10.05.2016 by the Directorate of Investigation, Kolkata who admitted that he was the operator of various entities to provide bogus bills to various beneficiaries in lieu of commission. As found by the Investigation Wing, the assessee was one of such beneficiaries and had received the bogus bills from the fake entities of Shri Sanjiw Kumar Singh as under:

"A.Y. 2011-12 Rs. 2,80,75,372/-

A.Y. 2012-13 Rs. 2,87,33,384/-

A.Y. 2013-14 Rs. 48,00,838/-

A.Y. 2014-15 Rs. 15,96,000/-"

3. On the basis of the above information received from the Investigation Wing, the Assessing Officer reopened the assessments for all the relevant four years that is A.Y. 2011-12, 2012-13, 2013-14, 2014-15 and notices u/s 148 were issued by him to the assessee after recording the reasons. In reply, letters were filed by the assessee requesting that the returns filed by it originally u/s 139(1) of the Act for all the four years under consideration may be treated as the returns filed in response to the notices issued u/s 148 of the Act.

During the course of assessment proceedings, an attempt was made by the assessee to establish the genuineness of the purchases made by it from the entities of Shri Sanjiw Kumar Singh by producing the copies of purchase bills, bank statement showing payments made against the said bills, purchase ledgers etc. The assessee however could not furnish the details of how the material purchased was transported from the place of suppliers to the assessee's place and also could not produce the copies of bilties, challans etc. to establish the genuineness of the said purchases. Keeping in view this failure on the part of the assessee as well as the adverse findings of survey and search conducted in the case of Shri Sanjiw Kumar Singh, the AO treated the entire purchases made by the assessee from the entities of Shri Sanjiw Kumar Singh as bogus and the following additions were made by him to the total income of the assessee in the assessments completed for all the four years under consideration u/s 143(3) read with section 147 vide orders dated 20.12.2018:

"A.Y. 2011-12 Rs. 2,80,75,372/-

A.Y. 2012-13 Rs. 2,87,33,384/-

A.Y. 2013-14 Rs. 48,00,838/-

A.Y. 2014-15 Rs. 15,96,000/-"

4. Against the orders passed by the AO u/s 143(3) read with section 147 of the Act for all the four years under consideration, appeals were preferred by the assessee before the Ld. CIT(A) challenging the validity of the said assessments as well as disputing the additions made therein on account of the alleged bogus purchases on merit. After considering the submissions made on behalf of the assessee and perusing the relevant material available on record, the

Ld. CIT(A) did not find merit in the preliminary issue raised by the assessee challenging the validity of the assessments made by the AO u/s 143(3)/147 of the Act and upholding the validity of the said assessments for all the four years under consideration, he decided the preliminary issue against the assessee. He however found merit in the claim of the assessee that the alleged bogus purchases in question having been duly recorded in the purchase and stock registers and there being corresponding sales made from the said purchases which had not been doubted by the AO, the entire amount of purchases could not be added as income of the assessee and only the profit element embedded in the disputed transactions could at best be brought to tax in the hands of the assessee. The findings/observations recorded by the Ld. CIT(A) in this context as contained in paragraph no. 9 of the impugned order are extracted below:

"I also find that the Ld. A.O has not disturbed the sales of the appellant-firm, and there is adequate evidence that the items which were billed by the so called bogus parties were sold to actual parties. The alleged bogus party also had VAT Registration number, and it is seen that the VAT returns of the appellant have not been questioned by that Authority. This in my considered view suggest that there were actual purchases made, though given the backdrop they have been obtained in the gray market from persons who did not have VAT identities. I find that in the circumstances emanating from the case, the Ld. AO has treated the entire alleged purchases as bogus, but has not rejected the books of accounts, which in essence means that the sales have been found to be acceptable. In my considered view of the factual matrix, this would appear to be a case where purchases have been made from parties other than those mentioned in the books of accounts. These purchases were in all probability from the grey market, and accordingly bills obtained from the entry provider. I find that in such situations, Hon'ble Courts have taken a view that the entire unverified purchases are not rendered vulnerable for addition; rather only the "element of profit" embedded from such purchases ought to be considered for addition. It would be just and fair in my considered view to arrive at such percentages of the profits which would justify such addition."

5. The Ld. CIT(A) thus held that the entire unverified purchases were not vulnerable for addition and only the element of profit as embedded in the relevant transactions should be considered for the purpose of addition. To arrive at this conclusion, we relied on the following judicial pronouncements:

- "i. CIT vs Simit P Sheth 356 ITR 451 (Gujarat)*
- ii. ITO vs Sumit Jaiswal (ITA No. 1541/Kol/2016 dtd. 14.02.2018*
- iii. CIT vs M/s. Mohommad Haji Adam & Co. (I.T. Appeal No. 1004 of 2016 dtd. 11.02.2019 of Hon'ble Bombay High Court)."*

6. In order to estimate the element of profit embedded in the disputed transactions, the Ld. CIT(A) compared the gross profit and net profit rates declared by the assessee for all the four years under consideration vis-a-vis the gross profit and net profit rates declared for the subsequent four years and held that it would be fair and reasonable to estimate the element of profit embedded in the disputed transactions at 3% of the disputed purchases. He accordingly directed the AO to restrict the addition on this issue to 3% of the disputed purchases for all the four years under consideration. He thus partly allowed all the four appeals of the assessee for A.Y. 2011-12, 2012-13, 2013-14 and 2014-15 vide his four separate appellate orders all dated 30.04.2019.

7. Aggrieved by the orders of the Ld. CIT(A) for all the four years under consideration, the assessee has preferred these appeals before the Tribunal on the following grounds:

- "i. FOR THAT in the facts and circumstances of the case, the Ld. CIT(A) was not justified in law in sustaining addition to the tune of 3% of alleged disputed purchase by applying average Gross Profit Ratio in the*

appellant's case and in any event, the addition sustained by the Ld. CIT(A), is liable to be deleted in this forum.

ii. FOR THAT when the Appellate Authorities below have taken note of the fact that no sale could be effected by the assessee without purchase and whereas in your appellant's case the sales are supported by entries in corresponding Purchase Register and Stock Register, the addition in this score is not sustainable in law.

iii. FOR THAT the appellant had raised point regarding opportunity of cross examination of the alleged supplier before the CIT(A) but no such opportunity was given to the appellant.

*iv. FOR THAT the appellant's case is squarely covered by the decision of **Sliantivijay Jewels Ltd. vs. DCIT, Rg 8(3) in I. T.A./1045/Mum/2016 dated 13.04.2018.***

v. FOR THAT when the alleged disputed purchases have been accepted by the VAT Authorities in their respective Assessment Order / Audit Report, the Income Tax Authority cannot merely be relying upon statement recorded u/s 131 by one person namely 'Sanjiw Kumar Singh' whereas the suppliers are all corporate entities (who are different entities from the person whose statement was recorded) disallowed the bonafide purchases."

8. The department has also filed its appeal for A.Y. 2011-12 and 2012-13 raising the solitary common ground as under:

"That on the facts and circumstances of the case, the Ld. CIT(A) erred in giving relief to the assessee by restrict the addition at the rate of 3% of bogus purchase amounting to Rs. 2,80,75,372/- while in doing so, Ld. CIT(A), himself admitted that these purchases would have been made from grey market which is obviously in cash."

9. We have heard the arguments of both the sides and also perused the relevant material available on record. As regards the common issue raised in the appeals of the assessee for all the four years under consideration relating to the gross profit rate of 3% adopted by the Ld. CIT(A) for estimating the income of the assessee as embedded in the disputed transactions, the learned counsel for the assessee has submitted that gross profit rate of 2.41%, 2.86%, 3.59%

and 3.83% was declared by the assessee for A.Y. 2011-12, 2012-13, 2013-14 and 2014-15 respectively and since the gross profit rate so declared by the assessee by itself was quite fair and reasonable keeping in view the nature of the business of the assessee of trading of iron products, the additional GP rate of 3% adopted by the Ld. CIT(A) is excessive and unreasonable as the same would give a net profit of more than 3% which is far excessive than the net profit earned in the business of trading of iron products. He has contended that the same, therefore, needs to be reduced at some reasonable extent. We are unable to accept this contention of the learned counsel for the assessee. It is observed that even though the claim of the assessee as regards the quantum of purchases in question cannot be disputed because of the corresponding sales made by the assessee and accepted by the AO, the fact remains to be seen is that the bills produced by the assessee in support of the said purchases were found to be bogus and therefore, the claim of the assessee at least valuwisewise could not be fully verified. Such unverifiable element involved in the purchases in question called for addition and the same can be to the extent of percentage of purchases which can be estimated by a reference to the gross profit rates. The resultant net profit, in our opinion, is not relevant in this context. In so far as the gross profit rate is concerned, it is observed that the assessee for the immediately succeeding three years that is A.Y. 2015-16, 2016-17 and 2017-18 wherein the turnover shown by the assessee was comparable to the four years under consideration was 6.14% as against the average GP rate of 3.17% declared by the assessee for all the four years under consideration. The average GP rate declared by the assessee for all the four years under consideration thus was less by about 3% than

the average GP rate declared by the assessee for the immediately succeeding three years. Keeping in view this factual position, we are of the view that the additional GP rate of 3% adopted by the Ld. CIT(A) as the profit element embedded in the disputed purchases for all the four years under consideration was quite fair and reasonable and we do not find any justifiable reason to interfere with the same. All the four appeals of the assessee are accordingly dismissed.

10. As regards the solitary common issue involved in the appeals of the Revenue for A.Y. 2011-12 and 2012-13, the Ld. DR has submitted that the bills produced by the assessee in support of its claim for the purchases in question having been found to be bogus, the inevitable conclusion is that the said purchases would have been made by the assessee from grey market as agreed even by the Ld. CIT(A) in his impugned orders and since payments against the said purchases made from grey market must have been made in cash, the provisions of section 40A(3) are clearly attached. The learned counsel for the assessee, on the other hand, has submitted that the claim of the assessee for the purchases in question is doubted because of the wrong doing made by the concerned supplier and since the genuineness of the said purchases is finally accepted keeping in view the corresponding sales made by the assessee, no adverse inference can be drawn against the assessee regarding applicability of section 40A(3) of the Act especially when there is nothing to show that the said purchases were made by the assessee from the grey market and payments against the same were made in cash. He has submitted that the payments against the said purchases, on the other hand, were made by the assessee by cheques as established on the basis of the

relevant bank statements and, therefore, the provisions of section 40A(3) cannot be involved. After taking into consideration all the facts of the case as well as the submissions made by the Id. Representatives of both the sides, we are inclined to accept the contention of the learned counsel for the assessee. It is observed that even though a possibility was expressed by the Ld. CIT(A) about the purchases in question having been made by the assessee from the grey market, there is no evidence whatsoever available on record to show that the said purchases were actually made by the assessee from the grey market and payments against the same were made in cash as alleged by the Ld. DR. In our opinion, this case is therefore not a fit case where the provision of section 40A(3) can be invoked and that too for the first time at this stage before the Tribunal. We, therefore, find no merit in the appeals of the Revenue for both the years under consideration for A.Y. 2011-12 and 2012-13 and dismiss the same.

11. In the result, all the four appeals of the assessee and both the appeals of the revenue are dismissed.

Order Pronounced in the Open Court on 22nd October, 2020.

Sd/-
(S.S. Godara)
JUDICIAL MEMBER

Sd/-
(P.M. JAGTAP)
VICE PRESIDENT

Dated: 22/10/2020
Biswajit, Sr. PS

Copy of order forwarded to:

1. M/s. S.R. Engineering Corporation, Stephen House, 6th Floor, Room No. 101, 56E, Hemanta Basu Sarani, Kolkata – 700 001.
2. ITO, Ward – 36(2), Kolkata.
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Assistant Registrar
ITAT, Kolkata