

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

BEFORE SHRI SHAMIM YAHYA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 3529/MUM/2019
Assessment Year: 2011-12**

The ITO – 28(3)(4), Room No. 320, 3 rd Floor, 6 th Tower, Vashi Railway Station Complex, Vashi, Navi Mumbai - 400703	Vs.	Shri Vithob Damodar Nayak, R-385, TTC Industrial Area, Rabale, MIDC Rabale, Navi Mumbai - 400701 PAN: AIDPN8193L
(Appellant)		(Respondent)

Revenue by : Shri Jeetendra Kumar (DR)

Assessee by : None

Date of Hearing: 20/10/2020
Date of Pronouncement: 29/10/2020

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue against the order dated 29.03.2019 passed by the Commissioner of Income Tax (Appeals)-26 (for short 'the CIT(A), Mumbai, for the assessment year 2011-12, 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. In this case, assessment was reopened on the basis of information received from the Sales Tax Department through Directorate General of Income Tax (DGIT) (Investigation), Mumbai to the effect that during the previous year the assessee had obtained bogus entries for Rs. 21,23,584/- from Swastik Trading Co., a bogus entity which used to provide accommodation entries without supplying goods after taking commission. Accordingly, the AO made

addition of 25% of the said amount to the income of the assessee and passed assessment order u/s 143 (3) r.w.s. 147 of the Act. The assessee challenged the assessment order before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee restricted the addition to 12.5% of the alleged bogus purchases. Aggrieved by the impugned order passed by the Ld. CIT (A), the revenue is in appeal before this Tribunal.

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

- “1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in directing the A.O. to restrict the addition of bogus purchases to 12.5% of Rs. 21,23,584/- as against addition of 25% of Rs. 21,23,584/- made by the Assessing Officer on account bogus purchases without appreciating the fact that parties from whom these purchases were made proven accommodation entry providers, as concluded by Sales Tax Authorities pursuant to the investigation carried out by them?*
2. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in not considering the latest Apex Court decision in the case of N.K. Proteins Ltd. Vs DCIT (769 of 2017), wherein the Hon’ble Supreme Court has confirmed 100% addition made on account of bogus purchases?”*

4. This case was fixed for hearing on 20.10.2020. On the said date, the case was called for hearing, however, none appeared on behalf of the assessee. Since, the assessee did not appear despite service of notice, we decided to dispose of this appeal on the basis of material on record after hearing the Departmental Representative (DR). Accordingly, we asked the Ld. DR to argue the department’s appeal.

5. The Ld. DR submitted before us that the Ld. CIT (A) has wrongly restricted the addition to 12.5% without appreciating the fact that the assessee could not establish the genuineness of the purchases. The Ld. DR

further pointed out that the Ld. CIT (A) has restricted the addition ignoring the fact that as per the enquiry conducted by Maharashtra Sales Tax Authorities the said bogus entity did not sell any material to anybody. The Ld. DR further submitted that since the findings of the Ld. CIT (A) are contrary to the ratio laid down by the Hon'ble Apex Court in the case of N.K. Protein Ltd. vs. DCIT in SLP (Civil) No. 769/2017 the same is liable to be set aside.

6. We have heard the Ld. DR and perused the material on record including the cases relied upon by the parties and the authorities below. The Ld. CIT (A) has restricted the addition to 12.5% of the alleged bogus purchases by following the ratio laid down by the Hon'ble Gujarat High Court in the case of *CIT vs. Simit P. Sheth* 356 ITR 451 (Guj. The concluding para of the Ld. CIT (A) reads as under:-

“6.1 Ground No 1 to 3 of the appeal are against addition of Rs. 5,30,896/- being 25% of non- genuine purchases of Rs. 21,23,584/- As per the investigations carried out by the Sales Tax Authorities, the aforementioned party was found to be involved in giving accommodation entries only without actually supplying the goods. The logical inference is that the purchases made by the appellant would also be in the nature of accommodation entries only. To verify the same, the AO had made enquiries by Issuing notices u/s 133(6) which were returned unserved by the postal authorities. During the scrutiny assessment the appellant furnished details of purchases and corresponding sales However, the appellant could not produce the party before the AO in spite of opportunity being given. The appellant also failed to produce delivery challans or transportation details. The onus of proving the genuineness of such purchases is on the appellant which the appellant had not been able to discharge fully. When the hawala party had admitted on oath that it had given accommodation entries only without actually supplying the goods, the genuineness of purchases made from these parties will have to be considered taking this into consideration while examining the documentation submitted by the appellant in support of its claim. The documentary evidences such as purchase bills, payments by cheques, etc. would all have been orchestrated to present a facade of genuineness and does not necessarily mean that their purchases from these parties are genuine. The Courts have held that payment by cheque by itself is not sacrosanct so as to prove genuineness of purchases when the surrounding circumstances are suspect. However, the appellant has shown

onward sales which has not been doubted by the Assessing Officer. Since there can be no sales without corresponding purchases, the only logical explanation is that the appellant would have made purchases from undisclosed parties in the grey market at lower rates and purchases were shown as being made from the impugned parties to suppress its profits. In such a situation, the various Courts including the Hon'ble Gujarat High Court in the case of CIT vs Simit P. Sheth, 356 ITR 451 have held that not the entire purchases but only the profit element embedded in these purchases was to be disallowed and accordingly held that 12.5% of the purchases will be reasonable as profit on margin against the bogus purchases. In view of this decision of Hon'ble ITAT 'H' Bench, Mumbai, the addition made by the AO is restricted to 12.5% of the total alleged bogus purchases amounting to Rs. 21,23,584/- which should sufficiently cover the profit element embedded in the impugned purchases. The appellant's grounds of appeal are 'Partly Allowed'."

7. In the present case the AO has not doubted the sales. The assessee could not establish the genuineness of the transaction to the satisfaction of the AO during assessment proceedings. From the facts of the case it can be concluded that assessee had made purchases from grey market. Under these circumstances, the AO had no option but to make addition on estimate basis. So far as the percentage of addition is concerned, the Hon'ble Gujarat High Court in the case of *CIT vs. Simit P. Sheth* (supra), has upheld the addition of 12.5% of the total amount of bogus purchases sustained by the ITAT, holding that only profit element embedded in such purchases could be added to the income of the assessee. Since, the Ld. CIT (A) has restricted the addition to 12.5% by following the ratio laid down by the Hon'ble Gujarat High Court, we do not find any reason to interfere with the findings of the Ld. CIT (A). Further, the facts of the case relied upon by the Ld. DR are different from the facts of the present case. Hence, in our considered view, the addition of 12.5% is reasonable to meet the ends of justice. We therefore, uphold the findings of the Ld. CIT (A) and the dismissed the revenue's appeal.

In the result, appeal filed by the revenue for assessment year 2011-2012 is dismissed

Order pronounced on 29th October, 2020 under rule 34 (4) of the Income Tax Appellate Tribunal Rules, 1963.

Sd/-

(SHAMIM YAHYA)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 29/10/2020

Sd/-

(RAM LAL NEGI)

JUDICIAL MEMBER

Alindra, PS

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