

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

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

**ITA No. 3635/MUM/2019
Assessment Year: 2009-10**

The ITO 27(1)(5), Room No. 410, 4 th Floor, Tower No. 6, Vashi Railway Station Complex, Vashi, Navi Mumbai - 400703	Vs.	Jayesh Bhupatbhai Shah, 508, 5 th Floor, Arihant Building Sudha Park, Opp., Shanti Path, Ghatkopar (E), Mumbai - 400077 PAN: AAGPS2834L
(Appellant)		(Respondent)

Revenue by : Shri Jeetendra Kumar (DR)

Assessee by : Shri N. R. Agarwal (AR)

Date of Hearing: 21/10/2020
Date of Pronouncement: 29/10/2020

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue against the order dated 25.03.2019 passed by the Commissioner of Income Tax (Appeals)-26 (for short 'the CIT(A), 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 filed its return of income for the assessment year under consideration declaring total income at Rs. 9,05,710/-. The return was processed u/s 143(1) of the Act. Subsequently, on the basis of information received from the Sales Tax Department through Directorate General of Income Tax (DGIT) (Investigation), Mumbai to the effect that the assessee had obtained bogus purchases bills amounting to Rs.

8,19,074/- from 5 parties. Accordingly, the AO made addition of peak of the hawala transactions amounting to Rs. 4,17,391/- and determined the total income of the assessee at Rs. 13,23,100/-. The assessee challenged the assessment order before the Ld. CIT (A) after hearing the assessee restricted the addition to 12.5% of the total amount of alleged bogus purchases. The revenue is in appeal against the said findings of the Ld. CIT (A).

3. The revenue has challenged the impugned order by raising the following effective grounds:-

- “1. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in directing the AO to restrict the addition to Rs. 1,02,384/- as against addition of Rs. 4,17,391/- made by the Assessing Officer on account of bogus purchases, without appreciating the fact that the assessee had failed to discharge the onus to establish the genuineness of the transactions and also failed to furnish corroborative evidences in support of the claim.*
2. *On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in estimating the profit from Hawala purchases by disallowing only Rs. 1,02,384/- being 12.5% of the bogus purchases as even the basic onus of producing delivery challans, transportation details etc. were not fulfilled by the assessee.*

4. Before us, the Ld. Departmental Representative (DR) submitted that the Ld. CIT (A) has erred in directing the AO to restrict the addition to 12.5% i.e. Rs. 1,02,384/- as against the addition of Rs. 4,17,391/- made by the AO without considering the fact that the assessee has failed to establish the genuineness of the transaction during the assessment proceedings.

5. On the other hand, the Ld. counsel for the assessee submitted that the Ld. CIT (A) has rightly restricted the addition of 12.5% of the total amount of bogus purchases by following the ratio laid down by Hon'ble Gujarat High Court in the case of CIT vs. Simit P. Sheth 356 ITR 451. The Ld. counsel further pointed out that since the AO has not disputed the sales made by the assessee, the Ld. CIT(A) has rightly restricted the addition to 12.5% of the alleged bogus purchases.

6. We have heard the rival submissions of the parties and perused the material on record including the cases relied upon by the parties. The Ld. CIT(A) has restricted the addition of 12.5% of the total amount of bogus purchases holding as under:-

“6.1. Ground No 1 to 4 of the appeal are against addition of Rs. 4,17,391/-- being Peak amount of non-genuine purchases. 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. This party was found to be non-existent at the address given by the appellant. The appellant also failed to provide the latest address of the party. 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 the 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 TAT 'H' Bench, Mumbai the addition made by the AO is restricted to 12.5% of the total alleged bogus purchases of Rs. 8,19,074/- which should sufficiently cover the profit element embedded in the impugned purchases. The appellant's grounds of appeal are Partly Allowed'.

7. As pointed out by the Ld. counsel the AO has not dispute the sales made by the assessee during the year relevant to the assessment year under consideration. As per the settled principle of law, there cannot be any sale without actual purchases. In the present case, since the assessee failed to establish the genuineness of purchases the Ld. CIT(A) had no option but to make addition of a reasonable percentage of bogus purchases taking into consideration the profit earned by the assessee from such transactions. In our considered view the AO had made addition of peak transaction without any basis. On the other hand, the Ld. CIT (A) restricted the addition to 12.5% by following the ratio laid down by the Hon'ble Gujarat High Court in the case of *CIT vs. Simit P. Sheth* (supra). Since, the findings of the Ld. CIT (A) are based on the ratio laid down by the Hon'ble Gujarat High Court discussed above, we do find any reason to interfere with the findings of the Ld. CIT (A). We accordingly uphold the findings of the Ld. CIT (A) are dismissed the revenue's appeal.

In the result, appeal filed by the revenue for assessment year 2009-2010 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**