

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

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER**

**ITA NO. 670/MUM/2019** : **A.Y : 2009-10**

Income Tax Officer – 27(1)(5),  
Mumbai. (Appellant)

Vs. Late Smt. Jaswanti Dholakia  
1401, A Wing, Sheetalnath Tower,  
Sudha Park, Garodia Nagar,  
Ghatkopar (E), Mumbai 400 077.  
**PAN : AECPD3025L** (Respondent)

**CO NO. 18/MUM/2020** : **A.Y : 2009-10**  
**(in ITA NO. 670/MUM/2019)**

Late Smt. Jaswanti Dholakia  
(Legal heir – Jaysukh Dholakia)  
1401, A Wing, Sheetalnath Tower,  
Sudha Park, Garodia Nagar,  
Ghatkopar (E), Mumbai 400 077.  
**PAN : AECPD3025L**  
(Cross-objector/Org. Respondent)

Vs. Income Tax Officer – 27(1)(5),  
Mumbai.  
(Respondent/Org. Appellant)

**Assessee by** : **Shri Ajay Singh**  
**Revenue by** : **Shri Kailash Gaikwad**

**Date of Hearing** : **13/10/2020**  
**Date of Pronouncement** : **28/10/2020**

**ORDER**

This is an appeal by the Revenue and cross-objection by the assessee arising out of order of Id. CIT(A) dated 30.11.2018 pertaining to Assessment Year 2009-10. In Revenue's appeal, Revenue is aggrieved that the Id. CIT(A) has sustained addition for bogus purchase only @ 12.5% amounting to

Rs.2,19,139/- as against peak credit addition by Assessing Officer of Rs.9,90,200/- against bogus purchase of Rs.17,53,111/-.

2. The assessee in this case is engaged in business of civil construction and engineering. The assessment was reopened upon information from Sales Tax Department that assessee has made purchases of Rs.17,53,111/- from bogus dealers. The Assessing Officer made peak credit addition of the bogus purchases.

3. Upon assessee's appeal, Id. CIT(A) has noted that the sales has not been doubted. Accordingly, placing reliance upon several case laws and upon the facts of the case, he sustained 12.5% disallowance out of the bogus purchases. Against above order, Revenue is in appeal before the ITAT.

4. I have heard both the counsel and perused the records. I find that in this case the sales have not been doubted. It is settled law that when sales are not doubted, hundred percent disallowance for bogus purchases cannot be done. The rationale being no sales is possible without actual purchase. This proposition is supported from Hon'ble Jurisdictional High Court decision in the case of *Nickunj Eximp Enterprises (P.) Ltd.* (Writ Petition No. 2860, order dated 18.06.2014). In this case the Hon'ble High Court has upheld hundred percent allowance for the purchases said to be bogus when sales are not doubted. However, the facts of the present case indicate that assessee has made purchase from the grey market. Making purchase through the grey market gives the assessee savings on account of non-payment of tax and others at the expense of the exchequer. In such situation, in our considered opinion, on the facts and circumstances of the case, 12.5% disallowance out of the bogus

purchases done by the Id. CIT(A) meets the ends of justice. Accordingly, I uphold the order of Id. CIT(A).

5. In the result, this appeal filed by the Revenue stands dismissed.

6. In the cross-objection, assessee has raised the ground that :-

*“Reopening Assessment Order is Invalid :*

1. *The Id. Assessing Officer erred in passing the assessment order dtd. 26/03/2015 in the name of dead person inspite of being informed vide letter dated 09/10/2014 that the assessee had expired on 20/10/2012, therefore the assessment order is bad in law and liable to be quashed.*

2. *The learned Assessing Officer erred in issuing the reassessment notice u/s. 148 of the Act in the name of dead person.”*

7. The Id. Counsel for the assessee has given the following proposition :-

*“1. The assessee has raised a legal ground in his cross objection which goes to the root of matter i.e very jurisdiction of the AO to issue notice and complete assessment on a dead person. The facts of the same are already on record of AO. Therefore same may be admitted and decided.*

*2. A legal issue can be raised for first time before ITAT in cross objection.*

*ITO v/s Jasjit Singh (ITAT Delhi) (Cross Objection no. 138 to 142/Del/2014, dt. 23.09.2014)(DHL Operations 108 TTJ 152 (SB)(Mum) followed). Copy enclosed pg. 169*

*3. Notice u/s. 148 and 143(2) issued on dead person name is invalid and bad in law.*

*4. Assessment order passed in name of dead person is bad in law.*

- *Where Assessing Officer had issued notice under Section 148 in name of deceased assessee to reopen his assessment, for acquiring jurisdiction to reopen an assessment, notice should be issued in name of living person, i.e., legal heir of deceased assessee and section 292B could not be invoked to correct a fundamental/substantial error*  
*Sumit Balkrishna Gupta v. Assistant Commissioner of Income-tax, Circle 16(2), Mumbai [2019] 414 ITR 292 (Bombay) pg 164-168*
- *Notice issued in name of deceased assessee – Objection raised by legal heir of deceased assessee before completion of reassessment – Notice was held to be null and void. Jaydeepkumar Dhirajlal Thakkar v. ITO (2018) 401 ITR 302 (Guj)(HC)*
- *As per settled law, notice for reopening of assessment against a dead person is invalid. The fact that the AO was not informed of the death before issue of notice is irrelevant. Consequently, the s. 148 notice is set aside and order of assessment stands annulled (Alamelu Veerappan 257 Taxman 72 (Mad) followed)*

*Rupa Shyamsundar Dhumatkar vs. ACIT (2020) 420 ITR 256 (Bom)(HC) pg 161-163*

*Therefore, the notice and assessment may be quashed.”*

8. Upon hearing both the counsel and perusing the records, it is deemed appropriate to remit the issue to the file of Assessing Officer. If the averment as above is correct that despite being informed that assessee is dead, the Assessing Officer has framed the assessment on the dead person, the assessment would be void and liable to be quashed. Hence, the Assessing Officer shall examine the submission. If after due intimation, the Assessing Officer has chosen to frame the assessment on dead person, the assessment shall stand quashed on the touchstone of case laws referred above. Both the counsel fairly agreed to the above.

9. In the result, Revenue's appeal is dismissed and cross-objection of the assessee is allowed for statistical purposes.

Order pronounced under Rule 34(4) of ITAT Rules on 28<sup>th</sup> October, 2020.

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai, Date : 28<sup>th</sup> October, 2020

\*SSL\*

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "SMC-I" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar  
I.T.A.T, Mumbai