

THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Shri Shamim Yahya (AM)

I.T.A. No. 1279/Mum/2019 (Assessment Year 2009-10)
I.T.A. No. 1278/Mum/2019 (Assessment Year 2010-11)
I.T.A. No. 1277/Mum/2019 (Assessment Year 2011-12)

Vaishali P. Kadhi Vijay Transport Kavita, R.B. Mehta Road, Ghatkopar East Mumbai-400 077. (Appellant)	Vs.	ITO 27(3)(5) Tower No. 6, 4 th Floor Vashi Railway Station Complex Vashi, Navi Mumbai. (Respondent)
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I.T.A. No. 1069/Mum/2019 (Assessment Year 2009-10)
I.T.A. No. 1070/Mum/2019 (Assessment Year 2010-11)

ITO 27(3)(5) Tower No. 6, 4 th Floor Vashi Railway Station Complex Vashi, Navi Mumbai. (Appellant)	Vs.	Vaishali P. Kadhi Vijay Transport Kavita, R.B. Mehta Road, Ghatkopar East Mumbai-400 077. (Respondent)
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PAN : AIIPK3479R

Assessee by	Shri Vijay Chandak
Department by	Shri Pramod Nikalje
Date of Hearing	23.09.2020
Date of Pronouncement	25.09.2020

ORDER

These are appeals by the assessee for A.Y. 2009-10 to 2011-12 and by Revenue for A.Y. 2009-10 & 2010-11, wherein the grievance is that the learned CIT-A has erred in sustaining 12.5 percent disallowance on account of bogus purchases, vide respective orders for the concerned assessment years as under :-

A.Y. 2009-10	Rs. 4,78,406/-
A.Y. 2010-11	Rs. 4,23,007/-
A.Y. 2011-12	Rs. 3,51,666/-

As against this following disallowance done by Assessing Officer.

A.Y. 2009-10	Rs. 5,74,087/- @ 15%
A.Y. 2010-11	Rs. 5,07,008/- @ 15%
A.Y. 2011-12	Rs. 3,51,658/- @ 12.5%

2. The assessee in its ground has also urged that learned CIT(A) has erred in not considering the following gross profit also declared in audited profit and loss account while sustaining 12.5% disallowance :

A.Y. 2009-10	12.84%
A.Y. 2010-11	13.97%
A.Y. 2011-12	10.36%

The assessee has also challenged the validity of reopening.

3. Brief facts of the case are that assessee in this case is engaged in the business of supply of building material. The Assessment in this case was reopened upon receipt of information from the sales tax Department that assessee has made bogus purchases. The assessee submitted the purchase vouchers and the payments were made through banking channel. However the suppliers were not produced before the assessing officer. Sales in this case were not doubted.

4. The income tax officer in this case, has made disallowance @ 15% for A.Y. 2009-10 & 2010-11 and @ 12.5% for A.Y. 2011-12 on account of bogus purchase as under :

A.Y. 2009-10	Rs. 5,74,087/-
A.Y. 2010-11	Rs. 5,07,008/-
A.Y. 2011-12	Rs. 3,51,658/-

5. Upon assessee's appeal Id CIT-A noted the assessee's submission that it had already shown sufficient gross profit. However Id CITA opined that the GP should be around 25 % hence he sustained 12.5% disallowance

6. Against above order assessee is in appeal before the ITAT. I have heard learned Departmental Representative and perused the records.

7. Before proceeding further it will be gainful to reproduce the assessee's statement before learned CIT(A) noted by him in his order from A.Y. 2011-12 since facts being identical in all years as under :-

"The Appellant begs to submit as under :-

1. That the Assessee is carrying on business of Building material supplier under the Name of Eastern Sand Supply Co. That the Assessee maintains regular books of accounts and books are audited. The Appellant is assessed also to Sales Tax, the Appellant books are both Tax Audited and VAT Tax Audited.

2. That the Assessee filed the return for relevant year on 25.09.2011 declaring total income of Rs. 4,84,770/-. This return was processed u/s 143(1) of the IT Act 1961 on the income returned.

3. That the Appellant was later served with notice u/s 148 Dt 24.03.2014. The Appellant submitted that the return filed originally may please be treated as return filed in response to 148. Assessee also objected to re-assessment notice and asked for reasons for re-opening of Assessment, which were provided to the Appellant.

4. The Appellant submitted that issue of notice is based on suspicion. There is no assertion as regards on the basis of which material on record he has come to such conclusion. Assessee objected to it. It was claimed that re opening is based on external source which itself is not confirmed and Department is only suspicious of transactions with Assessee. Thus it was submitted that Assessing Officer seeks to assume jurisdiction u/s 147 on the borrowed satisfaction of Sales Tax Department or DGIT. Therefore it was claimed that requirement of Section 147 are not satisfied. There is nothing in reasons recorded except the assertion that there were bogus purchases. The assertion made by Assessing Officer is bare one, without any reference pointing out escapement of income. Hence it is submitted that proceedings u/s 148 abinitio is bad in law and assessment made with reference to notice u/s 148 is liable to be cancelled.

5. We also proceed on facts. In para 4.2 of the Assessment Order the Assessing Officer has provided the details of alleged bogus concerns from whom the Appellant allegedly had only accommodation entry and such alleged total transactions and name of parties with their TIN Numbers were provided. In the course of re-assessment proceedings as asked for the Appellant had filed details of the purchases, Name and Address of the parties from whom the purchases were made. How payments were effected (All payments are through bank only). The Appellant also filed copies of Purchase Bills, VAT Audit Report and Sales Statement. The Bank Statement was also filed showing payments by A/c Payee cheques. The Appellant also produced Octroi Receipt, Toll Naka receipt. Royalty receipt and expenses incurred for transport for verification, as can be seen from the reply filed in f 148 proceedings. The Appellant on these

facts claimed that all these alleged bogus purchases are the bonafide genuine transaction. Alleged bogus concerns whose names are mentioned in Para 4.2, their copy of A/c in Appellants book and the copy of Purchase bills are enclosed. Their VAT Number is tallied.

The Assessing Officer matched the Assessee's purchase bills and transactions with alleged bogus concerns. He also examined Bank Statement and verified transaction with these alleged bogus concerns. He also examined these transactions with Octroi receipts, lorry details etc. Nothing incriminating or irregular was found in his examination. The Appellant has no Closing Stock. The Appellant when receives order for material supply, the Appellant purchases it and the same lorry is sent to the purchaser with all taxes, octroi and naka receipts charged on account. Thus supplies were also verified with purchase entries and he was satisfied. Hence there is no adverse comment on the books and records maintained. Sample copies of sale bills which were verified by Assessing Officer and copies kept on record, copies thereof are filed. (Page No. 8 to 44)

It would be appreciated that learned Assessing Officer in his Order on the basis of assumptions held that the Appellant may have inflated the purchase price of goods while selling price is shown much at lower price.

There is no basis for such presumption. There is no reference to the Assessee's books of account and his examination thereof and comparison results from turnover shown by alleged bogus suppliers.

It is further submitted that purchases as shown by Assessee were supported by proper invoices -for which payment was shown by A/c Payee cheques and there was no evidence to show that Assessee had received cash from suppliers. In such circumstances merely on the report of Sales Tax Department purchases could not be said to be bogus without independent enquiry by Assessing Officer violating principles of natural justice.

Moreover the Appellant was able to link the entire purchases with documentary evidence and more particularly in view of the fact that the Appellant supplied the very same consignment to her purchases booked. In such circumstances the provisions of Section 69C could not be made (Maruti Impex VS JCIT 2016 Tax Pub(DT) 2264 (Mum Trib)).

Assessee was mainly supplier without involving any stock being maintained at her behest and all relevant bills/vouchers, octroi receipts, Naka Receipt, Lorry receipt, gate pass etc and a/c payee cheques payment in support of purchase and supply of goods being on record and no difference is brought out in purchases as shown and alleged purchases from bogus suppliers, the addition made to the income on assumption of higher purchase price and lower sale price made the addition, which is unwarranted and bad in law.

6. There is no difference rioted by the Assessing Officer either with respect to Sundry Creditors, Debtors, Bank Transactions etc. Sales figure or sales is not in doubt. No purchase to sale ratio analysis is made. No other infirmity is pointed out. Therefore the Appellant supported his books under the I T law

provisions. Thus it is not in anyway established that the Appellant made payment for purchases through cheques but did not make purchases in reality or had inflated purchases, fudge books of accounts. Thus the Appellant had discharged its onus to prove purchases and books of account. A.O. did not bring any cogent/corroborating evidence to prove that Appellant is beneficiary from such alleged bogus concerns. No enquiry was carried out by Assessing Officer independently to prove his claim but merely relied on information received and therefore addition is based on conjecture suspicion. Merely non appearance of the supplier in absence of any other corroborative evidence, it would not be a basis to justify the addition.

Assessee relies on Asst CIT VS Mahesh K. Shah (2017) 155 TR(A) 716-(Mum. Trib.)

7. Therefore in view of the submissions above it is submitted that:
- i. Assessing Officer did not find any difference in the purchases as per books of Assessee and purchases as shown by allegedly bogus concern.
 - ii. Appellant provided details like all purchase bills, VAT & Tax Audit Report, Payments made through Bank details thereof, Octroi Receipts, Toll naka Receipts, Royalty Receipts and expenses vouchers for transportation for verification. Nothing wrong is found on examination thereof.
 - iii. Appellant has no Closing Stock. When Appellant receives order, against said the Appellant purchases said goods from market and supplies the same to her trader. Therefore transaction is one to one.
 - iv. Assessing Officer assumed that the Assessee may have inflated purchase price and selling price must have been shown much less. There is no basis to such assumption. Only on this assumption addition is made.
 - v. No evidence is brought on record to show that Appellant has received cash from suppliers against the A/c Payee cheques issued by Appellant.
 - vi. No difference is noted by Assessing Officer with respect to Sundry Creditors, Debtors and Bank transactions. Sales figures are undisputed. No infirmity is pointed out in the books.

Hence it is requested that addition made to the income returned at Rs. 3,51,656/- u/s 143(3) read with 148 may please be deleted.

8. Sir, if the submissions above do not satisfy Your honour, then Appellant requests for a date after 15th October to explain to Your honour facts and stand of Assessee on 148 notice. Counsel Shri Vijay Chandak, Advocate is to come from Nagpur, in this case. Presently because of I.T. Return work, Counsel could not come personally.

Kindly do the needful and oblige. Assessee requests Yourhonour to delete the additions to income returned. "

8. Upon careful consideration I find that assessee has provided the documentary evidence for the purchase. Adverse inference has been drawn due to the inability of the assessee to produce the suppliers. 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 purchase cannot be done. The rationale being no sales is possible without actual purchases. This proposition is supported from honourable jurisdictional High Court decision in the case of Nikunj Eximp Enterprises (in writ petition no 2860, order dt. 18.6.2014). In this case the honourable High Court has upheld hundred percent allowance for the purchases said to be bogus when sales are not doubted. Ld CIT-A despite taking note of the decision of Nikunj Eximp Enterprises (supra), has chosen to distinguish the same. He has not cogently rebutted the detailed submission of the assessee. Further he has not dealt with the assessee's detailed submission.

9. In the present case the facts of the case indicate that assessee has made purchase from the grey market. Making purchases through the grey market gives the assessee savings on account of nonpayment of tax and others at the expense of the exchequer. As regards the quantification of the profit element embedded in making of such bogus/unsubstantiated purchases by the assessee, I find that it will be doubled prejudice if the gross profit already declared is not reduced from the standard 12.5% being disallowed on account of bogus purchases. Accordingly I direct that since assessee has shown a gross profit rate of 12.84% for A.Y. 2009-10, 13.4% for A.Y. 2010-11 and 10.36% for A.Y. 2011-12, the same should be deducted from standard 12.5% disallowance. As a result there will be no disallowance for A.Y. 2009-10 & 2010-11 as the gross profit declared is more than 12.5% and disallowance for A.Y. 2011-12 should be restricted to (12.5% - 10.3%). Since the issue on

merits in favour of the assessee, adjudication on reopening is of academic nature. Hence, I am not engaging into that.

10. In the result the appeals by revenue stand dismissed and appeals by assessee are partly allowed.

Order pronounced under Rule 34(4) of the ITAT Rules on 25.9.2020.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 25/09/2020

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

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