

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

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

**ITA No. 4604/MUM/2019
Assessment Year: 2010-11**

M/s Metallica Tubes & Pipes Pvt. Ltd., 106, Kanchanban, Dixit Road, Vile Parle (E), Mumbai - 400057 PAN: AAFCM6609K	Vs.	The Income Tax Officer- Ward 10(2)(4) Aayakar Bhavan, Mumbai - 400020
(Appellant)		(Respondent)

**ITA No. 3690/MUM/2019
Assessment Year: 2010-11**

The ITO – 10(2)(4), R. No. 216-A, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s Metallica Tubes & Pipes Pvt. Ltd., 106, Kanchanban, Dixit Road, Vile Parle (E), Mumbai - 400057 PAN: AAFCM6609K
(Appellant)		(Respondent)

Revenue by : Shri Jeetendra Kumar (DR)

Assessee by : Shri Haridas Bhat (AR)

Date of Hearing: 26/10/2020
Date of Pronouncement: 26/11/2020

ORDER

PER RAM LAL NEGI, JM

These are cross appeals filed by the assessee and the revenue against the orders dated 25.04.2019 passed by the Commissioner of Income Tax (Appeals)-17 (for short 'the CIT(A), Mumbai, for the assessment year 2010-11, whereby the Ld. CIT(A) has partly allowed the appeal filed by the assessee

against the assessment orders passed u/s 143 (3) r.w.s 147 of the Income Tax Act, 1961 (for short the 'Act').

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2. Brief facts of the case are that the assessee company engaged in the business of manufacturing and producing tubes, pipes, pipefitting components and accessories, filed its return of income for the assessment year under consideration declaring total income of Rs. 37,070/- under the normal provisions of Act and book profit u/s 115JB of the Act at Rs. 37,069/-. The return was processed u/s 143 (1) of the Act. Subsequently, on the basis of information received from Sales Tax Authorities that the assessee had obtained bogus bills amounting to Rs. 15,16,320/- from M/s N.B. Enterprises, a bogus bill provider, the case was reopened by issuing notice u/s 148 of the Act. The AO after conducting enquiries completed the assessment u/s 143 (3) r.w.s. 147 of the Act and determined the total income of the assessee at Rs. 15,53,390/- after making addition of Rs. 15,16,320/- on account of bogus purchases shown by the assessee. In the first appeal, the Ld. CIT (A) restricted the addition to 25% of the total amount of bogus purchases. Against the said findings of the Ld. CIT (A), the assessee and the revenue are in appeal before this Tribunal.

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

- “1. On the facts and circumstances of the case, and in Law, the Commissioner of Income Tax (A)-17, Mumbai erred in confirming the addition to the extent of Rs. 3,79,080/- made by the Assessing Officer on account of alleged bogus purchases.
2. The Ld. CIT (A) and AO failed to appreciate that:
 - a) The CIT (A) and AO has merely relied on the statements and affidavit from the alleged hawala operator, collected by the sales tax department and on survey statement and disregarded the substantial evidence and submissions filed by the assessee, without giving reasons or rebutting the evidences.

b) The CIT (A) has principally accepted that purchases have been made and the same is case of only unverifiable purchases.

3. *Thus the appellant therefore prays that the addition to the extent of Rs. 3,79,080/- made by the Assessing Officer on account of alleged bogus purchases may please be deleted.”*

4. The only grievance of the assessee is that the Ld. CIT (A) has wrongly sustained the addition of 25% of the total amount of bogus purchases determined by the AO. The Ld. counsel for the assessee submitted before us that the Ld. CIT (A) has merely relied on the statements of the alleged hawala operator and affidavit submitted before the Sales Tax Department. The Ld. counsel further submitted that since the assessee had furnished the details of the party concern and other documents including invoices raised by the party, ledger account for relevant period, delivery challan and copy of bank account statement to establish the genuineness of the transaction, the Ld. CIT(A) has wrongly sustained the addition of 12.5%. Since, the assessee had discharged the onus of establishing genuineness of transaction, the Ld. CIT (A) ought to have deleted the entire addition made by the AO.

5. On the other hand, the Ld. Departmental Representative (DR) submitted that since the Ld. CIT (A) has restricted the addition to 25% of the total amount of bogus purchases shown by the assessee, the department has filed cross appeal challenging the action of the Ld. CIT (A). The Ld. DR further submitted that the findings of the Ld. CIT (A) are contrary to the decision of the Hon'ble Supreme Court in the case of N.K. Proteins Ltd. vs. DCIT (2017) 84 taxman.com 195 (SC), therefore the same is liable to be set aside. The Ld. DR further pointed out that the assessee could neither produce the party during the assessment proceedings nor could submit any details and evidence to substantiate its contention. The Ld. DR further relied on the following judgment of the different High Courts and the Tribunal, in support of his contention.

1. *Alfa Rubber Industries vs. ACIT (2009) 2 taxmann.com 61 (Punjab & Haryana).*
 2. *Commissioner of Income Tax, Chennai vs. Jeeva Raja (2013) 37 taxmann.com 56 (Madras)*
 3. *Rameshchandra And Company vs. Commissioner of Income Tax 1987 168 ITR 375 (Bom)*
 4. *Sterling Machine Tools vs. Commissioner of Income Tax (1980) 123 ITR 181 (All)*
 5. *Income Tax Officer, Ward-4(3) , Surat vs. Shri Sidhivinayak Dyeing & Printing Mills (P) Ltd. (2009) 119 ITD 169 (Ahmedabad (TM)).*
6. We have heard the rival submissions of the party and perused the material on record including the cases relied upon by the parties. The AO has made addition of the total amount of the alleged bogus purchases for the reason that the assessee has failed to furnish stock register for the relevant period and the assessee has failed to produce the supplier before the AO. As mentioned by the AO, during the course of assessment proceedings summons u/s 131 of the Act was issued to M/s N.B. Enterprises on the address furnished by the assessee company. However, the same was returned unserved with the remarks 'not known'. Further, the Director of the assessee company was asked to produce the party, however, the assessee failed to do so. We further noticed that during the appellate proceedings, the assessee raised the issue that sufficient opportunity was not given to the assessee to present its case and passed the order on the basis of submissions and explanation dated 30.11.2015. However, the Ld. CIT (A) found that sufficient opportunity was given by the AO to the assessee to present its case. So far as the question regarding genuineness of transaction is concerned, we do not find any cogent and convincing evidence on record to rebut the findings of the AO that the assessee had obtained bogus entries from M/s N.B. Enterprises without purchasing the goods from it. Since the assessee failed to establish the genuineness of the transaction during assessment proceedings, the AO had no

option but to determine the profit from the said transaction on estimation basis. However, since the AO has not rejected the sales made by the assessee, 100% addition is not sustainable. Now the question arises whether addition of 25% of the bogus purchases sustained by the Ld. CIT(A) is reasonable in the light of the facts of the case? The Hon'ble Gujarat High Court in the case of *CIT vs. Simit P. Sheth* 356 ITR 451(Guj) 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. In the present case, the Ld. CIT (A) has sustained the addition of 25%, which is not in consonance with the judgment of the Hon'ble Gujarat High Court. Hence, we do not find any merit in the contention of the revenue that the Ld. CIT (A) ought to have sustained the addition made by the AO. The cases relied upon by the Ld. AR are distinguishable on facts and the ratio laid down in the said cases are not applicable to the present case. Hence, in our considered view, the addition of 12.5% is reasonable to meet the ends of justice. We therefore, modify the findings of the Ld. CIT (A) and restrict the addition to 12.5% of the total amount of bogus purchases determined by the AO.

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

- “1. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in restricting the addition to 25% of bogus purchase of Rs. 15,16,320/- despite upholding that the company is unable to substantiate its purchase from the claimed supplier i.e. N B Enterprises, who had been already established hawala dealers from Sales Tax Department and investigation wing of the Income Tax Department.*
2. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in restricting the addition to 25% of bogus purchase despite upholding that the assessee could not produce primary documents before the*

Assessing Officer or during the appellate proceedings which can establish beyond doubt the correlation between the items purchased and then corresponding sales.

3. *On the facts and in the circumstances of the case and in law, whether the Ld. CIT (A) is correct in not following the ratio of the decision of the Apex Court on the issue of bogus purchases in the case of N.K. Proteins Ltd. Vs. DCIT [2017] 84 taxmann.com 195 (SC), dated 16.01.2017 wherein it has been held that the addition on the basis of undisclosed income could not be restricted to certain percentage when entire transaction was found bogus.*

3. The only grievance of the revenue is that the Ld. CIT (A) has wrongly restricted the addition to 25% of the total amount of bogus purchases determined by the AO. Since, we have decided this issue in assessee's appeal after hearing both the parties at length taking into consideration the submissions and arguments made by the parties and restricted the addition to 12.5% of the total amount of bogus purchases, the revenue's appeal has become infructuous. Accordingly, we dismiss the revenue's appeal.

In the result, appeal filed by the assessee is partly allowed and the revenue's appeal is dismissed.

Order pronounced on 26th Nov., 2020 under rule 34 (4) of the Income Tax Appellate Tribunal Rules, 1963.

Sd-
(SHAMIM YAHYA)

ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)

JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 26/11/2020

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**