

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)
"SMC" BENCH, MUMBAI**

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER

**ITA NOs. 4699 & 4700/MUM/2019
(A.Ys. 2010-11 & A.Y. 2011-12)**

Income Tax Officer – 19(3)(2) Room No. 224, 2 nd Floor Matru Mandir, Tardev Road Mumbai – 400 007	v.	Shri Sawalchand B. Sanghvi 4 th Floor, 72 Bhavnagar Bldg., Nanubhai Desai Road Khetwadi Main Road Mumbai - 400004 PAN: AAVPT4119Q
(Appellant)		(Respondent)

Assessee by : **None**
Department by : **Shri Sanjay Sethi**

Date of Hearing : **20.01.2021**
Date of Pronouncement : **03.02.2021**

ORDER

PER C.N. PRASAD (JM)

1. These appeals are filed by the revenue against different orders of the Learned Commissioner of Income Tax (Appeals)-52, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 30.04.2019 for the A.Ys. 2010-11 & 2011-12 in directing the Assessing Officer to allow set off the Gross Profit already shown by the assessee from the net addition @12.5% on account of bogus purchases.

2. Briefly stated the facts are that, assessee engaged in the business of trading in stocklist and suppliers in ferrous and Non-ferrous metals, pipe rods, sheets, plates and strips, filed return of income on 24.09.2010 and 24.09.2010 declaring income of ₹.4,18,309/- and ₹.3,81,244/- for the A.Ys: 2010-11 and A.Y. 2011-12 respectively, and the returns were processed u/s. 143(1) of the Act. Subsequently, Assessing Officer received information from the DGIT (Inv.), Mumbai about the accommodation entries provided by various dealers and assessee was also one of the beneficiary from those dealers. The assessments were reopened U/s. 147 of the Act based on the information received from DGIT(Inv.), Mumbai, that the assessee has availed accommodation entries from various dealers who are said to be providing accommodation entries without there being transportation of any goods. In the reassessment proceedings, the assessee was required to prove the genuineness of the purchases made from various parties referred in Assessment Order. In response assessee furnished copy of purchase bill, corresponding sale details, ledger account and submitted that the purchases made are genuine. Assessee further submitted that the payments are made through account payee cheques as such contended that all the purchases are genuine. However, parties were not produced before the Assessing Officer.

3. Not convinced with the submissions of the assessee the Assessing Officer treated the purchases as non-genuine and he was of the opinion that assessee had obtained only accommodation entries without there being any transportation of materials and the assessee might have made purchases in the gray market. It is the finding of the Assessing Officer that in the assessee failed to produce the parties as such the purchases made from the parties remained unverifiable. Assessing Officer observed that the notices issued u/s. 133(6) of the Act to the parties are returned unserved with a remark "Not known" and the assessee has not produced the parties before the Assessing Officer. Therefore, Assessing Officer treated 12.5% of the alleged bogus purchases of ₹.23,72,976/- and ₹.76,73,420/- for the A.Y. 2010-11 and A.Y. 2011-12 respectively as non-genuine. On appeal the Ld.CIT(A) considering the evidences and various submissions of the assessee directed the Assessing Officer to allow set off the Gross Profit already shown by the assessee from the net addition @12.5% on account of bogus purchases

4. In spite of issue of notice none appeared on behalf of the assessee nor any adjournment was sought. Therefore, I proceed to dispose off these appeals on merits on hearing the Ld.DR.

5. Ld. DR vehemently supported the orders of the Assessing Officer. On a perusal of the order of the Ld.CIT(A), we find that the Ld.CIT(A) considered this aspect of the matter elaborately with reference to the submissions of the assessee and the averments in the Assessment Order and following various judicial pronouncements directed the Assessing Officer to allow set off the Gross Profit already shown by the assessee from the net addition @12.5% on account of bogus purchases. While holding so, the Ld.CIT(A) for A.Y. 2010-11 observed as under: -

"5. All the grounds of the appeal are on the addition made by the AO of Rs 2,96,622/- by estimating the gross profit @ 12.5% on the alleged hawala purchases. I have duly considered the contentions of the assessee as well as the assessment order of the AO. It is observed that the AO received information from the Sales Tax Department of Maharashtra through the DGIT (Inv.), Mumbai, about a number of dealers indulging in providing accommodation entries in the form • bogus sales, purchases without actual supply of goods. The Sales Tax authorities had carried out a detailed investigation and had recorded statements and/or obtained affidavits/depositions from the said hawala dealers confirming that they had not carried out any real business transactions but had solely provided accommodation entries of purchases, sales, etc. Since, our assessee was also one of the beneficiaries of the accommodation entries provided by one of the hawala dealer, M/s Vatika Metals P Ltd of Rs 23,72,976/-, the assessment of the assessee was reopened by issue of notice u/s. 148.

5.1. To ascertain the genuineness of the said purchases, the AO issued notice u/s. 133(6) which could not be served and were returned back by the postal authorities with the remarks not known/'no such address/left' etc. The AO, therefore, asked the assessee to produce the party alongwith its books of accounts and also furnish evidences to establish the genuineness of the said purchase transaction. The assessee was unable to produce the said party. Further, the vital documents related to transportation of the material such as delivery challan, transport receipts, octroi receipts, weigh-bridge slip, etc. could not be submitted by the

assessee booked by it. However, the assessee could tally the bogus purchases with the corresponding sales. Therefore, the AO concluded that the assessee had made the said purchases from the grey market. Thereafter, the AO proceeded to make an addition of Rs 2,96,622/- being 12.5% of the alleged bogus purchases of Rs 23,72,976/-.

5.2 In course of the appellate proceedings, the assessee submitted that the Income Tax Department has relied upon the affidavits submitted by the alleged hawala/bogus suppliers. The assessee further submitted that the evidences relied upon have not been made available to it and an opportunity to cross-examine the said alleged hawala/bogus supplier was also not provided. Therefore it was contended by the assessee that the principles of natural justice have been violated and accordingly the assessment order is vitiated. It is observed that there is no dispute that the said alleged hawala/bogus supplier was not found at the stated address and it did not respond to notice u/s 133(6). It is also a fact that the assessee was not able to produce the alleged hawala/bogus supplier as its witness. An opportunity to cross-examine is not an absolute right. It is to be provided only once. the basic onus cast upon the assessee is discharged. In the instant case, the basic, onus to prove the genuineness of the transaction by producing the alleged hawala/bogus supplier or by submitting its confirmation or at least providing their latest address has clearly not been discharged by the assessee. In view of the factual scenario, the assessee cannot insist on being granted an opportunity to cross examine the alleged hawala/bogus supplier and on being provided the evidences relied upon by the AO.

5.3 In the appellate proceedings, the assessee submitted that all the details of sales and purchases of goods including names and addresses of the suppliers etc: were furnished to the AO and all the payments had been made by cheque. Moreover, a chart giving details of the purchases and a corresponding sales was also submitted. Further, it was submitted by the assessee that it had declared a GP rate of 6.47% for the year under consideration. Therefore, it was contended by the assessee that the 'action of the AO of making an addition of Rs 2,96,622/- by estimating the profit @ 12.5% of the alleged bogus purchases is not correct. The assessee has, accordingly, contended that the rate adopted by the AO of 12.5% for calculation of additional profits is on a higher side.

5.4 The aforesaid contentions of the assessee have been duly considered. It is a fact that the said alleged hawala supplier was found to

be non-existent at the stated ' address. The assessee could neither provide their 'latest address nor produce the party before the AO. However, the assessee was in a position to reconcile the purchases from the alleged hawala supplier with the corresponding sales. Therefore, the action of the AO of concluding that the said purchases have been made from the grey market cannot be faulted. Since the assessee was in a position to reconcile the alleged hawala purchase with the corresponding sales booked by it, the AO rather than making an addition of the entire amount of the alleged hawala purchases proceeded to estimate the additional profit @ 12.5%.

5.6. It is observed that subsequent to the decision of Vijay Proteins Ltd., the Hon'ble Gujarat High Court has adjudicated the case of Simit P..Sheth (ITA No 3238 & 3293/Ahd/2009), wherein the assessee was engaged in trading in steel which is similar to the business of our assessee. The Hon'ble Gujarat High Court in this case was seized with an issue where the A.O. had found that some of the alleged suppliers of iron & steel to the assessee had not supplied any goods but had only provided sale bills and hence, purchases from the said parties were held to be bogus. The AO in that case added the entire amount of purchases to gross profit of the assessee. Ld. CIT(A) having found that the assessee had indeed purchased though not from named parties but other parties from grey market, partially sustained the addition as probable profit of the assessee. The Tribunal however, sustained the addition to the extent of '12.5%. Taking into account the above facts, the Hon'ble Gujarat High Court held that since the purchases were not bogus, but were made from parties other than those mentioned in books of accounts, only the profit element embedded in such purchases could be added to the assessee's income and as such no question of law arose in such estimation. The Tribunal while estimating the profit embedded in the transactions @ 12.5% held as under:

"Having heard the submissions of both the sides, we have been informed that the malpractice of bogus purchase is mainly to save 10% sales tax etc,. It has also 'been informed that in this industry about 2.5% is the profit margin. Therefore, respectfully following the decisions of the co-ordinate bench pronounced on identical circumstances, we hereby direct that the disallowance is required to be sustained at 12.5% of the purchase from those parties. With these directions, we hereby decide the grounds of the rival parties which are partly allowed."

5.6 Moreover, the Hon'ble ITAT, Mumbai had an occasion to adjudicate this issue in the case of M/s Ratnagiri Steels (80 taxmann.com 265) which

was engaged in the business of trading in steel. During the year, information was received from the Sales Tax Authorities about purchases from alleged hawala/bogus suppliers. After due consideration of all the relevant facts, the Hon'ble ITAT confirmed the addition of profits arising from the alleged hawala/bogus purchases by adopting a rate of 12.5%. It was further held by the Hon'ble ITAT that the AO should give credit for the book GP shown by the assessee in respect of the alleged hawala/bogus purchases against the said GP rate, of 12.5%. The relevant portion of the order of the Hon'ble ITAT is 'reproduced as under:

"The authorities below in the 'instant case did not make any industry comparisons to arrive at fair, honest and rational estimation of GP ratio, rather applied GP ratio of 12.5% on alleged bogus purchases which estimation was in addition to the normal GP ratio declared by the assessee return of income filed with Revenue. The Revenue made aforesaid additions relying on the presumption that the material was in fact purchased from grey market at a lower rate and to cover deficiencies on record, the invoices were procured from these entry operators to reduce the profit. It was also considered that there will be savings on account of taxes while procuring material from grey market. The authorities below relied upon decision of Hon'ble Gujarat High Court in the case of C/T v. Simit P. Sheth (2013) 356 ITR 451/219 taxman 85 Mag./38 taxmann.com 385, which has estimated disallowance @12.5% of the disputed bogus purchases to meet the end of justice. The authorities below has not brought on record industry comparables nor any rational comparability vis a vis preceding years GP ratio are brought on record. There is. no allegation brought on record by Ld.DR that similar additions were also made in the immediately preceding year. The assessee earned GP ratio as detailed hereunder for last three years;-

<i>Financial Year</i>	<i>%GP</i>
<i>2007-08</i>	<i>4.3%</i>
<i>2008-09</i>	<i>5.45%</i>
<i>2009-10</i>	<i>4.9%</i>

The books of accounts were not rejected u/s. 145(3) of the 1961 Act by the Revenue. In the immediately preceding year. i.e. A. Y. 2008-09, the assessee earned GP ratio of 4.3% on total turnover, while for the year under consideration GP ratio earned. was 5.45%. In our considered view and based on facts and circumstances of the

case as discussed by us in details above, end of justice will be met in this case if GP ratio of 12.5% on alleged bogus purchases is added to income of the assessee against which credit for the declared GP ratio on the alleged bogus purchases will be granted by the AO after verification by the AO because of failure of the assessee to come forward to discharge primary onus cast upon him as detailed above for which assessee is to be blamed and in the midst of aforesaid un rebutted allegation against the assessee and non-discharge of primary onus, the declared lower GP ratio of 5.45% in the instant previous year under appeal .cannot be accepted. Thus, in nut-shell we are inclined to adopt GP ratio of 12.5%. on alleged bogus purchases in the instant case which in our considered view is fair, reasonable and rational keeping in view the factual matrix of the case, while the assessee shall be granted credit of GP ratio declared on this bogus purchases in the return of income filed with the Revenue. The assessee gets part relief. We order accordingly."

5.71 From the aforesaid cited decision of Gujarat High Court in the case of Simit P Sheth (supra), it can be observed that the appropriate GP percentage for computing the unaccounted profits from the purchases from the alleged hawala/bogus suppliers should factor the savings of taxes etc due to the unaccounted sales and the GP already shown in the regular books. It is observed that the ratio of the decision of the Gujarat High Court in the case of Simit P Sheth (supra) cannot be squarely applied to the facts of the case of our assessee since the sales tax rate prevalent in Gujarat was 10% as against only 4% applicable in Maharashtra for the relevant period. However, the facts of the case of the assessee are some what similar to that of Ratnagiri Steels (supra). In the case of Ratnagiri Steels(supra), the Hon'ble ITAT after considering the healthy GP shown of 5.45%, directed the AO to allow set off of the book GP against the said rate of 12.5% while computing the additional profits from the purchases from the alleged hawala/bogus suppliers. In the instant case, it is observed that the assessee has shown a healthy CF of 6.47%. Therefore, as was done by the Hon'ble ITAT, Mumbai in the case of Ratnagiri Steel (supra), it will be appropriate if rate of 12.5% is applied for computing the unaccounted profits related to purchases from the hawala/bogus suppliers and against this set off of the GP shown in the regular books in respect of the purchases from the hawala/bogus suppliers is allowed. Accordingly, the AO is directed to compute the additional profits in respect of the purchases from the alleged hawala/bogus suppliers by adopting rate of 12.5%. However, the AO will

allow a set off of the CF already shown by the assessee in the regular books in respect of the purchases from the said alleged hawala/bogus suppliers. Accordingly, all the grounds of the appeal are partly allowed.

6. *In the result, the appeal is partly allowed."*

6. On a careful perusal of the order of the Ld.CIT(A) and the reasons given therein, I do not find any infirmity in the order passed by the Ld.CIT(A) in directing the Assessing Officer to allow set off the Gross Profit already shown by the assessee from the net addition @12.5% on account of bogus purchases. Grounds raised by the revenue are dismissed for both the assessment years.

7. In the result, both appeals of the Revenue are dismissed.

Order pronounced on 03.02.2021 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER
Mumbai / Dated 03/02/2021
Giridhar, Sr.PS

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum