

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

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

ITA NO. 4689/MUM/2019 (A.Y. 2009-10)

Income Tax Officer – 19(2)(3) Room No. 218, 2 nd Floor Matru Mandir, Tardev Road Mumbai – 400 007	v.	Shri Madhukar Yashwant Kutrekar 196K, Gaiwadi, JSS Road Girgaon, Mumbai - 400004 PAN: AADPK8434B
(Appellant)		(Respondent)

Assessee by	:	Chaitee Londhe
Department by		Shri Sanjay J. Sethi
Date of Hearing	:	20.01.2021
Date of Pronouncement	:	03.02.2021

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the revenue against order of the Learned Commissioner of Income Tax (Appeals)-5, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 26.04.2019 for the A.Y. 2009-10 in restricting the addition to 13.71% as against the entire bogus purchases disallowed by the Assessing Officer.

2. Briefly stated the facts are that, assessee an individual, filed return of income on 30.09.2009 declaring income of ₹.2,98,580/- for the A.Y.2009-10 and the return was 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 assessment was 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 dealers as referred in Assessment Order. In response assessee furnished copies of purchase bills and bank statements 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. and no explanation was offered.

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 assessee failed to produce the parties and as such the purchases to the extent made from the parties are remained unverifiable. Assessing Officer observed that the notices issued u/s. 133(6) of the Act to the parties are returned unserved and the assessee has not produced the parties before the Assessing Officer. Therefore, Assessing Officer treated ₹.3,49,677/- of the alleged bogus purchases for the A.Y. 2009-10 as non-genuine. On appeal the Ld.CIT(A) considering the evidences and various submissions of the assessee restricted the addition to 13.71% of the alleged bogus purchases.

4. Ld. Counsel for the assessee reiterated the submissions made before the Ld.CIT(A) and supported the order of the Ld.CIT(A).

5. Ld. DR vehemently supported the orders of the Assessing Officer.

6. Heard both sides, perused the orders of the authorities below. On a perusal of the order of the Ld.CIT(A), I 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 including the decision Hon'ble Gujarat High Court in the case of CIT v. Simit P. Seth [38 taxman.com 385] and considering nature of business and Gross Profit shown by the assessee restricted the addition to 13.71% of the alleged bogus purchases. While holding so, the Ld.CIT(A) observed as under: -

"7.4.1 I have considered the submissions of the appellant and perused the materials available on record. The appellant has requested to delete the impugned disallowance of Rs. 3,49,677/-, being purchases made from bogus/hawala parties. The appellant has made detailed submissions, as above and the same have been considered carefully. It is admitted fact that the above referred dealers/parties from whom impugned purchases claimed to have been made and which have been treated as bogus, were appearing as "Hawala dealers/parties on the website of Sales Tax Department, Govt. of Maharashtra. The Sales Tax Department, Govt. of Maharashtra after extensive inquiries and investigation has declared said parties under consideration as "Hawala Dealer". During the course of investigation it was established that the above referred parties have not done any business as well as there was no actual delivery of goods to the purchase parties. The said parties were not traceable at given address. Based on the details like deposition, affidavit, enquiry report statement etc. received from the Sales Tax Department through DGIT(Inv.), the Ld. AG held that these details clearly establish that the parties/concerns under consideration were providing bogus bills without any actual delivery of goods.

7.4.2 It is also an admitted fact that neither at the time of assessment proceedings nor during the appellate proceedings, the appellant could submit the evidences of actual movement of goods under consideration from said party, i.e. neither Lorry receipt nor any proof of transportation was submitted. Further, copy of inward register was also not submitted. In absence of any third party evidences, it cannot be held that the appellant has proved that the goods/materials under considerations were purchased from the above referred party and hence the appellant's contentions in this respect are rejected.

7.4.3. Now the question arises that in the event of appellant not proving that it had purchased goods/materials from above referred dealer/party, whether entire such bogus purchases can be disallowed. The Ld. AC has accepted the sales/works made by the appellant and since there cannot be

sales without corresponding purchases, so entire purchases cannot be rejected without disturbing the sales or works carried out. The appellant has submitted that the purchases under consideration were 'spare parts' and in respect to the same he has raised bills to the customers charging cost of said spare parts and profit margin thereon. The facts of the case suggests that the appellant has not made purchases under consideration from above referred parties, but from somebody else, probably from grey market and may be without any bills. Any person indulging in the practice of purchasing the goods from the grey market and obtaining bogus bills of some of the parties would do so for getting some benefits and what would be the magnitude of the benefit would depend upon the facts of the case. Hence, the purchase price mentioned in the alleged sales bills cannot be accepted. The obvious reason is that the assessee did make purchases but at a lower price so as to increase its overall profits. In these circumstances, the entire amount of alleged bogus purchases cannot be disallowed/added, but only profit element embedded therein needs to be taxed.

7.4.4 In similar facts of the case the Hon'ble ITAT, Ahmedabad in the case of Shri Smit P Sheth vs ITO in ITA No. 3238 & 3293/Ahd/2009, for A.Y..2006-07 vide its order dated 24.02.2012 has held as under.

"Facts in brief as emerged from the corresponding assessment order passed u/s.143 r.w.s. 147 of the I.T. Act dated 31-12-2008 were that assessee individual is in the business of trading in steel on wholesale basis. It may not be out of place to mention that Gross Profit of Rs.7,42,524/- on sale of Rs.3,04,52,701/- was declared having GP rate at 2.43% as against the GP of the immediate past year at 3.56%. An intimation was received by the Assessing Officer from DDIT (Inv.)-I, Baroda. According to the said intimation, during the course of verification of banking transactions in the case of Shri Amratbhai Poonambhai Prajapati, Prop of Bhavna Trading Co. & Bhagyodaya Enterprises, Shri Kantilal Man gilal Shaarma, Prop of Miakshi Enterprises and Shri Jayantilal Man gilal S,harma, Prop of Arun Industrial Corporation and as per the admission in their statements recorded on oath, it was found that no sales were made by them to any party. It was intimated that those parties were simply issuing sale bills against those sales bills they were receiving "dalali". The modus operandi was that on issuance of sales bills the amount of cheque was received and on encashment of the said cheque after deducting "dalali" the balance amount was withdrawn in cash and returned to the respective parties. Therefore, the issuance of bogus sale bills was confirmed by those parties. On the basis of these facts, the Assessing Officer has held that barring invoices and delivery challans, there was no other document to prove that the purchases have actually been made by the assessee. There was no lorry receipt, transportation details, number of weightment, excise gate pass etc., no document was produced during the assessment proceedings.

After examining the bank accounts and other evidences AO has held that alleged purchases from Bhayna Trading Co., Minaxi Enterprise and Arun Ind. Corporation was not genuine purchase and therefore the said amount of bogus purchases of Rs41,04,903/- was taxed in the hands of the assessee. It may not be out of place to mention that books of account u/s.145(3) of the Act was rejected and profit of the assessee was estimated at Rs.5 lakh. Both the additions were contested before the Ld. CIT(A).

5. After examining the book results of the past year, Ld. CIT(A) has held that there was a regular arrangement of providing accumulation sales bills. However, he was of the view that taking into account the business results 30% of the purchases cost would be reasonable amount to be confirmed to cover the profits of the assessee. Resultantly, to the extent to Rs.12,31,471/- was deleted. This is the reason that both the sides are now in appeal. As far as addition of estimated income of Rs.5 lakh is concerned same was deleted, However, Revenue is not in appeal.

6. Ld. AR Mr. Soparkar has contested that the assessee has maintained the quantitative details of purchases and sale of steel. He has pleaded that the auditor has given the quantitative details as per the Special Auditor which confirms the maintenance of quantitative record. It was enquired from the Bench that whether the stock register and quantity-wise purchases and sales are available on record, however, the answer is negative. Further, it has also been enquired that whether the weighment details, excise gate pas, transportation details etc., are on record and again the answer was a negative. The Ld. AR has informed that almost in identical situation in the case of ACIT v. M/s Kulubi Steel in 1TA No1568/Ahd/2008 order dated 16-12-2010 vide para-8 has held as under:-

"8. From the above, it is evident that the assessee did not make any effort to controvert the finding recorded by the DDIT (Investigation) and it made no efforts to produce the seller parties on the other hand it claimed that it is not his responsibility to produce the seller. It is a settled law that onus is on the assessee to establish the genuineness of the purchase. The assessee has produced various evidence with regard to the receipt of the goods by it, it. Stock register, receipt of weigh-bridge for weighment of goods purchased by the assessee, octroi receipt of the payment of octroi duty etc. After considering the entire material, we are of the opinion that the assessee did not purchase the goods from the parties mentioned in the sales bill. At the same time, it did purchase the goods from some other suppliers, may be

without bill. Therefore, purchase rate as mentioned in the alleged sales bill cannot be accepted. Any person indulging in the practice of purchasing goods from the grey market and obtaining bogus bills of some other parties, would do so for getting some benefit. But what would be the magnitude of the benefit would depend upon facts of each case. In the case of Vijay Proteins, ITAT held that such benefit to be 25% and therefore sustained the disallowance for bogus purchase at 25%. In the case of Sunsteel (supra), the ITAT deemed it fit to sustain the disallowance for a lumpsum amount of Rs.50,000/-. However, we find that in the case of Shri Anubhai Shivalal (supra) the ITAT has considered both the decisions in the case of Vijay Proteins and Sunsteel (supra) and thereafter sustained the disallowance at 12.5%. Relevant findings of the ITAT in the case of Anubhai Shivalal reads are under:

3. At the time of hearing before us, it is submitted by the learned counsel that the addition sustained is excessive. In support of this contention he referred to the decision of the Tribunal in the case of ITO Vs. Sun Steel 92 TTJ (Ahd) 1126 wherein the Tribunal has sustained the addition of Rs.50,000/- on account of bogus purchases. However, we find that the facts in the above case were different. In the above case, the assessee has shown purchases of Rs.27,39,410/-, sale of Rs.28,17,207/- and GP at Rs.94,740/-. The Assessing Officer made the addition of Rs.27,39,407/- for bogus purchases. If the above sum is added to the GP, the GP works out Rs.28,34,1247/- which was more than the sale itself. The Tribunal held that it is impossible that the GP is more than the sale itself. The Tribunal also found that the assessee has maintained the quantitative details in respect of materials purchased and sold. Considering peculiar facts of that case, the Tribunal arrived at the conclusion that it would be fair and reasonable to estimate the addition at Rs.50,000/- as against the addition of Rs.27,39,407/- made by the Assessing Officer. However, the learned Commissioner of Income Tax (Appeals) considering the facts of the assessee's case, has sustained the addition at 12.5%. While doing so, he has also relied upon the decision of the Tribunal in the case of M/s. Vijay Proteins Ltd. 55 TTJ (Ahd) 76. In the case of M/s. Vijay Proteins Ltd., the Tribunal has sustained the addition of 25% of the bogus purchases. However, considering the facts of the assessee's case the CIT(A) restricted the disallowance to 12.5% as against 25% made in the case of M/s. Vijay Proteins Ltd. From these facts it is evident that the C/T(A)

has sustained the addition at 12.5% of the non genuine purchases considering the facts of the assessee's case. We, therefore, do not find any justification to interfere with the order of the CIT(A) in this regard. The same is sustained.

Likewise, in another appeal decided by /TAT Ahmedabad bench. "D" in the case of Smt. Sallandevi B Jain vs. ITO in ITA No.609/Ahd/2009 A.Y. 2005-06 order dated 13-01-2012. Again it was held that in respect of bogus purchases the addition is to be restricted to 12.5%, relevant para-7.1 reproduced below:-

"7.1 Considering the facts and circumstances of the case and the findings of the Id. AO and following the ratio of the decision in the case of Vijay Proteins (supra) and in the case of M/s. Bholanath Ply Fab P. Ltd. -vs- ITO in ITA No.137/Ahd/2009 and M/s. Raj Exports -vs- ITO in ITA No.2801/Ahd/2008, relied on by the Id. A.R., we restrict the addition to 12.5% of the bogus purchase made by the assessee. Thus, 12.5% of Rs. 12,86,373/- i.e. Rs. 1,60,797/- is added to the income of the as instead of the addition of Rs. 12,86,373/- added by the Ld. AO and confirmed by the Ld. CIT(A). The Id. AO is hereby directed to make addition, as indicated above. Thus, this ground of the assessee is partly allowed."

7. Having heard the submissions of both 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 purchases from those parties. With these directions, we hereby decide. The grounds of the rival parties which are partly allowed".

The above referred decision of the Hon'ble ITAT, Ahmedabad has been upheld by the Hon'ble Gujarat High Court in the same case reported in 38 taxmann.com 385, and has held as Linder.

"It is this judgment of the Tribunal which is in challenge before us at the hands of the Revenue. Learned counsel, Mr. Parikh, vehemently contended that the Commissioner (Appeals) and the Tribunal both committed a serious error in overturning the Assessing Officer's decision to make full addition of Rs. 41,04,903 when the purchases are found to be bogus. There was thereafter no question of retaining only a portion thereof for addition to the income of the assessee. Counsel heavily relied on the decision of a Division Bench of

this court in the case of Asstt. CIT v. Pawanra] B BOKadia [Tax Appeal No. 2345 of 2009, dated September 27, 2011], wherein this court was pleased to allow the Revenues appeal and reinstate the entire additions of the bogus purchases made by the Assessing Officer.

4. *In the present case, however, we notice that before the Commissioner (Appeals), the assessee pointed out that the assessee was trading in steel. Once his sale of 'x quantity of steel is accepted, the purchases of the some quantity had to be believed. It was canvassed that the assessee had made sales of I, 10,786 metric tons of steel. Therefore, there had to be a matching quantity of purchase of steel also. It was argued that since the Assessing Officer accepted the sales of the steel, equivalent of purchase also must be believed. It was in this background that the Commissioner (Appeals) made the following observations:*

4.3 I have considered the submissions of the authorized representative and the order of the Assessing Officer. It has been admitted that there was a regular arrangement for providing accommodation sales bills. The appellant has not been able to provide a confirmation from the supplier that the goods where indeed supplied to the appellant. It is an established fact that the onus lies on the appellant to prove that the purchases are genuine. The appellant has made the payments in cheque and the sales made by the appellant have been accepted in toto by the Assessing Officer. Hence, it is to be presumed that though the bills made have been given by MIs. Bhavna Trading Co., MIs. Minakshi Enterprises and MIs. Arun Industrial Corporation the actual purchases have not been made for them. It can, therefore, be concluded that the appellant has made purchases from persons in the open market. Taking into account all the relevant facts of the case I hold that 30 per cent of the purchases cost would be a reasonable amount to be confirmed, to cover the profits of the appellant. Hence, the addition to the extent of Rs. 12,31,471 is confirmed and the balance of Rs. 28,73,432 is directed to be deleted.

5. *We are broadly in agreement with the reasoning adopted by the Commissioner (Appeals) with respect to the nature of disputed purchases of steel. It may be that the three suppliers from whom the assessee claimed to have purchases the steel did not own up to such sales. However, the vital question while considering whether the entire amount of*

purchases should be added back to the income of the assessee or only the profit element embedded therein was to ascertain whether the purchases themselves were completely bogus and non-existent or that the purchases were actually made but not from the parties from whom it was claimed to have been made and instead may have been purchased from grey market without proper billing or documentation.

6. *In the present case, the Commissioner of Income-tax (Appeals) believed that when as a trader in steel the assessee sold certain quantity of steel, he would have purchased the same quantity from some source. When the total sale is accepted by the Assessing Officer, he could not have questioned the very basis of the purchases. In essence, therefore, the Commissioner (Appeals) believed the assessee's theory that the purchases were not bogus but were made from the parties other than those mentioned in the books of account.*

7. *That being the position, not the entire purchase price but only the profit element embedded in such purchases can be added to the income of the assessee. So much is clear by the decision of this court. In particular, the court has also taken a similar view in the case of CIT v. Vijay M. Mistry Construction Ltd. [2013] 355 ITR 498 (Guj) and in the case of CIT v. Bholanath Poly Fab (P.) Ltd. [2013] 355 ITR 290 (Guj). The view taken by the Tribunal in the case of Vijay Proteins Ltd. v. Asstt. CIT [1996] 58 ITD 428 (Ahd.) came to be approved.*

8. *If the entire purchases were wholly bogus and there was a finding of fact on record that no purchases were made at all, counsel for the Revenue would be justified in arguing that the entire amount of such bogus purchases should be added back to the income of the assessee. Such were the facts in the case of Pawanraj B. Bokadia (supra).*

9. *This being the position, the only question that survives is what should be the fair profit rate out of the bogus purchases which should be added back to the income of the assessee. The Commissioner adopted the ratio of 30 per cent of such total sales. The Tribunal, however, scaled down to 12.5 per cent. We may notice that in the immediately preceding year to the assessment year under consideration*

the assessee had declared the gross profit at 3.56 per cent of the total turnover. If the yardstick of 30 per cent, as adopted by the Commissioner (Appeals), is accepted the gross profit rate will be much higher. In essence, the Tribunal only estimated the possible profit out of purchases made through non-genuine parties. No question of law in such estimation would arise. The estimation of rate of profit return must necessarily vary with the nature of business and no uniform yardstick can be adopted:

10. *In the 'result, the tax appeal is dismissed."*

7.4.5 The Hon'ble ITAT, Mumbai vide its order dated 14.12.2016, in the case of Shri Ashwin Purushotam Bajaj in ITA Nos. 4736/Mum/2014 and 5207/Mum/20:14 has adjudicated similar facts/circumstances, as that of in the present case. Therein also the Ld. AO had held that the assessee had made purchases to the tune of Rs. 1,13,44,77/- from allegedly bogus parties as per information received from Sales Tax Department, Government of Maharashtra, who as per Government of Maharashtra web-site are suspicious parties providing accommodation entries and are thus bogus bill giving entities without doing any business. In view of the facts and circumstances of said case, the Assessing Officer therein observed that human probability is that goods mentioned in the paper transactions have been purchased by the assessee through an undisclosed entity the assessee does not wish to disclose and purchases were made from undisclosed source of income. Accordingly, the Assessing Officer added the said sum of Rs. 1,13,44,778/- to the total income of the assessee u/s 69C of the Act. The Ld. CIT(A) after considering the materials on records held that when the Assessing officer has not doubted the genuineness of Sales, could not have gone ahead and made the addition in respect of maximum credit balance of purchase especially when the AO himself recorded a finding that the assessee made purchases from some other party and the Ld. CIT(A) observed' that the element of profit embedded in bogus purchases which the assessee would have made from some unknown entities needs to be computed and estimated the same @ 12.5% of such bogus purchase. Accordingly, the Ld. CIT(A) partly allowed the appeal on this issue. Before the Hon'ble 'TAT both the Revenue and the assessee preferred an appeal against said order of the Ld. CIT(A). The Hon'ble ITAT dismissed both the appeals filed by the Revenue and assessee and held as under.

"The assessee has to discharge the primary onus as to the genuineness and bonafide of the transaction of purchase of goods.

It is observed that the A.O. has made addition of the entire purchases amount to Rs. 1.13 crores by making additions of Rs. 1,31,88,227/- being peak credit payable during the year for purchases to these parties which included balance of Rs. 18,43,451/- for purchases made in the earlier year, while the AO has, however, not doubted the sales made by the assessee against these purchases. The assessee has reconciled the quantitative details of the stock reflected in these purchases with quantitative details of stock as per sale invoices. The A.O. has doubted the purchases from these four alleged accommodation entry providers being hawala dealers as Concluded by Sales Tax Department of Government of Maharashtra to be bogus purchases, that these four parties only provided accommodation bills and the goods were never supplied by these parties and the assessee allegedly made purchases from some other parties for which payments were made through undisclosed income. Thus, the A.O. observed that the assessee has purchased the material from someone else while bogus bills were organized by these hawala dealers, hence, section 69C of the Act was invoked by the AO and additions were made by the AO. The conclusion of the Id. CIT(A) that the assessee has purchased material from some other dealers but quantitative reconciliation of the stock was duly done by the assessee of the sale and purchase and hence the profit element in this accommodation entries are to be added to the income cannot be faulted. The Id. CIT(A) restricted the addition by estimating GP ratio of 12.5% of Rs. 1,13,44,778/- being purchases from these alleged four accommodation entry providers. We do not find any infirmity in the well reasoned order of the Id. CIT(A) whereby net profit was estimated which was a reasonable estimation made by learned C/T(A) and we sustain/affirm the order of learned CIT(A). In the result, we dismiss both the appeal of the assessee as well of Revenue. We order accordingly."

The Hon'ble ITAT, Mumbai vide its order dated 18.01.2017 in the case of Smt. Kiran Navin Dos hi in ITA No. 2601/Mum/2016, under similar circumstances, where the Assessing Officer had disallowed/added the entire alleged bogus purchases u/s .69C of the Act, had confirmed the decision of Ld. CIT(A) in restricting the disallowance/addition to the extent of 12.5% of such bogus purchases.

7.4.6 From the above decisions, it is evident that therein 12.5% of such suspicious purchases have been considered the profit element embedded

in such purchases. However, the estimation of rate of profit return must necessarily vary with the nature of business and no uniform yardstick can be adopted. In the present case, the appellant himself has agreed for estimation of profit element, on above referred purchases @13.71% on such suspicious purchases. In view of the facts and circumstances of the case and above discussions, the Ld. AO is directed to restrict the addition @13.71% on above referred suspicious purchases and re-compute the addition accordingly. Hence, the Ground No. 1 raised in appeal is PARTLY ALLOWED."

7. 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 restricting the addition to 13.71% as against the entire bogus purchases disallowed by the Assessing Officer. Grounds raised by the revenue are dismissed.

8. In the result, appeal of the revenue is 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