

IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER)

I.T.A. No.2683/Mum/2019 - Assessment Year 2009-10
I.T.A. No.2685/Mum/2019 - Assessment Year 2010-11

Kishorkumar M Vyas, HUF 1/13, Fly my sadan, Gamdevi Road Bhandup (W), Mumbai-400 078 PAN : AACHK3179C	vs	ITO-29(2)(1), Mumbai
APPELLANT		RESPONDENT

I.T.A. No.2684/Mum/2019 - Assessment Year 2009-10
I.T.A. No.2686/Mum/2019 - Assessment Year 2010-11

Kishorkumar M Vyas, 1/13, Fly my sadan, Gamdevi Road Bhandup (W), Mumbai-400 078 PAN : AAAPV8029L	vs	ITO-29(2)(1), Mumbai
APPELLANT		RESPONDENT

Appellant by	Shri C.V. Jain, AR
Respondent by	Smt. Smita Verma

Date of hearing	14-06-2021
Date of pronouncement	06-07-2021

ORDER

Captioned appeals by two different assesseees are against separate orders of learned Commissioner of Income Tax (Appeals)-40, Mumbai for the assessment years 2009-10 and 2010-11. Since, these appeals are connected matters being of

the individual and HUF and having common issues, they are clubbed together and taken up for disposal in this consolidated order, for the sake of convenience.

2. The grounds raised in these appeals are more or less identical. In grounds 1 and 2 assessee has challenged the validity of reopening of assessment under section 147 of the Income Tax Act, 1961. Whereas, in grounds 3 and 4, assesseees have challenged the merits of the disallowance made because of alleged non genuine purchases.

3. Briefly the facts are, both the assesseees are stated to be trading in iron & steel as well as allied products. It is stated, the assesseees purchase the goods from local wholesalers or on government auction and resale them to retailers or some wholesalers in the local market. For the impugned assessment years, the assesseees filed their returns of income in regular course. In assessment year 2009-10 assessments were originally completed under section 143(3) of the Act. Whereas, in assessment year 2010-11, the returns filed were processed under section 143(1) of the Act. Subsequently, the assessing officer received information from the Sales-tax department through the Investigation Wing indicating that the assesseees are beneficiaries of accommodation entries by way of non genuine purchase bills issued by certain entities identified as hawala operators. Based on such information, the assessing officer reopened the assessments for the impugned assessment years. In course of assessment proceedings, the assessing officer called upon the assesseees to prove the genuineness of purchases through supporting evidence. Though, the assesseees furnished some evidence to support the claim that purchases are genuine; however, the assessing officer was not convinced. He observed that the assesseees could not furnish any evidence to prove that goods were purchased from the concerned parties. Further, he

observed, notices issued under section 133(6) of the Act to the concerned parties seeking information regarding the transaction with the assessee did not yield any result. Thus, he concluded that the purchases are non genuine. Accordingly, he rejected the books of account of the assessee under section 145(3) of the Act. However, considering the fact that the assessee has furnished quantitative tally of purchases and sales, the assessing officer concluded that they must have purchased the goods from unverified sources and in the process have suppressed true profit. Thus, instead of disallowing the entire purchases, the assessing officer disallowed 12.5%, being the profit element embedded in the alleged non genuine purchases in respect of both the assessee for the assessment years under dispute. The assessee contested the aforesaid disallowances before learned Commissioner (Appeals). After considering the submissions of the assessee, learned Commissioner (Appeals) did not entertain the grounds raised by the assessee challenging the validity of reopening of assessment. As regards the merits of the disallowance made, learned Commissioner (Appeals) granted partial relief to the assessee by directing the assessing officer to work out the additions after reducing the gross profit/net profit already shown by the assessee against the proposed addition of 12.5% of the alleged non-genuine purchases.

4. The learned authorized representative of the assessee submitted, insofar as assessment year 2009-10 is concerned, the assessing officer had initially completed assessments under section 143(3) of the Act after conducting proper enquiry on all aspects including the purchases made by the assessee. He submitted, in course of original assessment proceedings, the assessee has also furnished all the details called for relating to the purchases including confirmations from some of the parties. Thus, he submitted, once the purchases

were verified and accepted in the original assessment proceedings, the reopening of assessment doubting the purchases is invalid as it is merely on a change of opinion without proper application of mind. In support of such contention, learned counsel relied upon various decisions as referred to in the written submissions and specifically relied upon a decision of the ITAT, Mumbai Bench in the case of Ritesh Kantilal Bafna vs ITO ITA 2327/Mum/2017 dated 19-08-2019. Thus, he submitted, the reopening of assessment being invalid, the assessment orders should be quashed.

5. As regards the merits of the issue, learned authorized representative submitted, the assessee is a dealer in iron and steel (ferrous items), wherein, profit margin is very less. Thus, he submitted, if at all any disallowance has to be made, let it be restricted to 2% on the alleged non genuine purchases.

6. The learned departmental representative submitted, after completion of original assessment in assessment year 2009-10, the assessing officer received specific information from the Investigation Wing indicating that certain purchases made by the assessee are non genuine. Thus, based on such fresh and tangible information and material available on record, the assessing officer has reopened the assessments under section 147 of the Act. He submitted, in assessment year 2010-11, the returns of income filed by the assessee were simply processed under section 143(1) and no scrutiny has taken place. Therefore, when no opinion was formed, there cannot be any change of opinion. Therefore, she submitted, there cannot be any issue regarding the validity of reopening of assessments under section 147 of the Act.

7. As regards the merits of the issue, she submitted, both the assessing officer and learned Commissioner of Income-tax (Appeals) are fairly reasonable in restricting the disallowance to the profit element only.

8. I have considered rival submissions and perused materials on record. No doubt, in assessment year 2009-10, assessments in case of both the assesseees were initially completed under section 143(3) of the Act. However, it is observed, after receiving the notices issued under section 148 of the Act, the assesseees had raised objection against reopening of assessment. It is evident, the assessing officer has dealt with the objections of the assessee in separate orders. Thus, the assessing officer has acted in conformity with the legal principles before proceeding to re-assess the income of the assesseees. It is further noticed from the material on record that the assessing officer has only made routine enquiry in course of original assessment proceedings. He has not made specific enquiry in respect of the purchases. It is also a fact on record, after completion of original assessments for assessment year 2009-10, the assessing officer received information from the Investigation Wing of the department indicating that certain purchases claimed to have been made by the assessee are non genuine as the concerned selling dealers have indulged in providing accommodation bills. Thus, it is evident, the assessing officer had tangible material available with him to form a belief that income chargeable to tax has escaped assessment. Thus, the contention of the assessee that the assessing officer has reopened the assessment on a mere change of opinion without proper application of mind is contrary to facts on record; hence, unacceptable.

9. Insofar as assessment year 2010-11 is concerned, it is an admitted factual position that the returns of income filed by both the assesseees were only

processed under section 143(1) of the Act. Thus, there was no occasion for examining the purchases made by the assessee. Considering the aforesaid factual position, I am unable to accept assessee's contention that the assessments were not reopened validly. The decisions relied upon by the learned counsel for the assessee being factually distinguishable; there is no need for deliberating on them at length. In view of the aforesaid, I hold that the grounds raised by the assessee challenging the validity of reopening of assessment under section 147 of the Act do not have merit. Accordingly, I dismiss them.

10. As regards the merits of the issue, it is borne out from record that the doubt, if any, is only with regard to the source of purchases and not the purchases. For this reason alone, the assessing officer restricted the disallowance only to the profit element embedded in the purchases, which was further reduced by learned Commissioner (Appeals). At the time of hearing, learned authorized representative has brought to my notice a decision of the co-ordinate bench in case of M/s Sterling Steel Industries Vs ITO in ITA 7096/Mum/2018 dated 20-04-2020, wherein, in case of a similarly placed assessee, the Tribunal has restricted the disallowance to 2% on the alleged non genuine purchases. Considering the nature of business of both the assessee's and keeping in view the decision of co-ordinate bench in case of M/s Sterling Steel Industries (supra), I am of the view that disallowance @2% on the alleged non genuine purchases would be fair and reasonable. Accordingly, I direct the assessing officer to compute the disallowance at 2% on the alleged non genuine purchases in all the assessment years under dispute. Grounds 3 and 4 are partly allowed.

11. In the result, appeals are partly allowed.

Order pronounced in the open court on 06/07/2021.

Sd/-

SAKTIJIT DEY
JUDICIAL MEMBER

Mumbai, Dt : 06/07/2021

Pavanan

Copy to :

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

By Order

Asstt. Registrar, ITAT, Mumbai