



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

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA no.357/Mum./2020
(Assessment Year : 2010-11)

Shri Dinesh B. Shah
5A, Jai Sidhivinayak Society
Ardeshar Dady Street, C.P. Tank Road
Mumbai 400 004 PAN – AYCP54651B

..... Appellant

v/s

Income Tax Officer
Ward-19(1)(4), Mumbai

..... Respondent

Assessee by : Ms. Morvi Chaturvedi
Revenue by : Shri Bharat Andhele

Date of Hearing – 27.07.2021

Date of Order – 13.9.21

ORDER

PER S. RIFAUR RAHMAN, A.M.

The captioned appeal has been filed by the assessee challenging the order dated 9th October 2019, passed by the learned Commissioner of Income Tax (Appeals)-30, Mumbai, pertaining to the assessment year 2010-11.

2. The assessee has filed the present appeal on the following grounds:-

"1. That on the facts and circumstances of the case and in law, the reopening proceedings initiated by the Assessing Officer u/s 147 is bad in law and liable to be quashed.

a) The Ld. A.O. erred in re-opening the assessment u/s 147 solely on the basis of information received from DGIT (Inv.), Mumbai, without any application of mind and as such, the re-opening is bad-in-law and liable to be quashed.

b) The Ld. A.O. erred in re-opening the assessment under section 147 based on suspicion and surmises without any tangible material showing escapement of income and as such, the re-opening is bad-in-law and liable to be quashed.

2. That on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming the action of A.O. in disallowing a sum of ₹ 58,86,189, on account of alleged bogus purchase, despite furnishing all documentary evidences in support of the same.

3. That on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in making enhancement u/s 251 to total income by disallowing 100% of alleged bogus purchase amounting to ₹ 4,70,89,512.

4. Without prejudice to above grounds, the learned CIT(A) erred in not allowing the decision of the Hon'ble Bombay High Court in the case of Mohd. Haji Adam & Co. wherein Bombay High Court has held that the addition needs to be restricted to gross profit rate of other genuine purchases."

3. The first issue raised by the assessee is with regard to re-opening of assessment under section 147 of the Act.

4. The second issue which arose out of the aforesaid grounds of appeal is, whether or not the learned CIT(A) was justified in enhancing

the total income by disallowing 100% of the alleged bogus purchase amounting to ₹ 4,70,89,512.

5. We first proceed to decide the issue on merit i.e., second issue and subsequently we will deal with the first issue i.e., re-opening of assessment under section 147 of the Act.

6. Brief facts are, the assessee is an individual and is engaged in the business of trading in bearings through his proprietorship concern Vipul Bearings. The assessee filed its return of income on 30th September 2011, declaring total income of ₹ 4,16,535. Subsequently, on the basis of information received from the Sales Tax authorities through the Investigation Wing of the Department indicating that the assessee is a beneficiary of accommodation entries provided by hawala operators through bogus purchase bills without supplying any goods, the Assessing Officer re-opened the assessment under section 147 of the Income Tax Act, 1961 (for short "*the Act*"). During the assessment proceedings, the Assessing Officer called upon the assessee to prove the genuineness of purchases worth ₹ 4,70,89,512, claimed to have been made during the year from 35 dealers. Further, to independently verify the genuineness of such purchases, the Assessing Officer issued notices under section 133(6) of the Act to the selling dealers calling for certain information. However, all such notices returned back un-

served. Further, the Assessing Officer was not satisfied with the evidences furnished by the assessee to establish the genuineness of purchases. Thus, ultimately, the Assessing Officer rejected the books of account of the assessee under section 145(3) of the Act and held that the purchases aggregating to ₹ 4,70,89,512, from the dealers were merely accommodation entries and such purchases were made to inflate the purchases / expenses and hence disallowed ₹ 58,86,189 (being 12.5% of ₹ 4,70,89,512).

7. The learned CIT(A) enhanced the entire amount of bogus purchase by observing as follows:–

"5. DECISION

5.1 This appeal is decided on merit, after carefully considering the material on record, the factual matrix and the legal position.

5.2 Grounds of appeal "a" to "d" is with respect to the addition made by the Ld. A.O. on account of non-genuine purchases amounting to ₹ 58,86,189, being 12.5% of the total non-genuine purchases of ₹ 4,70,89,512 by reopening of the assessment.

5.2.1 The relevant extract of the Assessing Officer is reproduced as under:–

".....

3. In respect of the above mentioned parties, information was received from Maharashtra Sales Tax Department that its name was appearing in the list of dealers, who had issued bogus bills without delivery of goods. Moreover, inquiries were conducted in the list of cases by the Sales Tax Authorities and it was reported that either these parties were not traceable or wherever these were found, it was stated by them that no business was done by them and they were engaged only in providing bills.

4. In view of the above, the undersigned had reason to believe that a part of the income of the assessee for AY 20110-11 has escaped assessment which resulted under-assessment. Accordingly, the case was reopened u/s. 147 of the I.T. Act 1961 and accordingly notice u/s. 148 was issued on 16.09.2014 and duty served. A notice u/s 142(1) was issued on 08.07.2015 along with Jurisdiction of the assessee was changed vide order of the JCIT Range 19(1) dated 15.11.2014 due to the restructuring in the department in the Month of November; 2014.

5. Thereafter, fresh notices u/s 143(3) & 142(l) were issued and the assessee was also supplied with recorded reasons for re-opening of the case. In response said notices Shri Praveen Bothra, CA, authorized representative of the assessee attended from time to time and filed details. The case was heard and discussed with him.

5. in respect of the above mentioned parties, information was received from Maharashtra Sales Tax Department that their names were appearing in the list of suspicious dealers, who had issued bogus bills without: delivery of goods. Moreover, inquiries were conducted in the list of cases by the Sales Tax Authorities and it was reported that either these parties were not traceable or wherever these are found, it was stated by them that no business was done by them and they were engaged only in providing bills.

6. Based on information, an independent inquiry was made by the undersigned and further details were called for from the assessee as per notice u/s 142(1) dated 31.07.2015. The assessee was asked to produce certain details Grid also the purchases from those above parties as per Annexure- A.

(a) Name of the Seller with current full address, (b) PAN
(f) Bill and Voucher No. with date,
(d) Description of goods purchased
(e) Quantity (f) Rate, (g) Amount
(h) Goods despatched from (name of tire place) with date
(i) Mode of transportation, if by Road Vehicle No. and also payments, detailed in the annexure-A.

7. Similarly, details of corresponding sales of goods were also called for as per annexure-II and link the purchase with sales supported by bills and vouchers and reflection in the stock register of its entry and exit item by item. The assessee was also asked to produce books of accounts, bills and vouchers for verification.

8. The submission / details furnished by the assessee have been carefully perused and considered. From the above discussions and the details so filed, the followings facts emerge -

(i) The Sale Tax Department has conducted independent enquires in each of the Mail parties and conclusively proved that these parties are engaged in the business of providing accommodation entries only. The parties are, issuing bills without delivering any goods and services.

(ii) The assessee could not produce any evidence during the course of hearing also that the assessee did not accept the findings of the Sales Tax Department and that the Sales Tax Authority has accepted the objection made by the Assessee.

(iii) Independent enquiries/investigations have been carried out by this office under section 133(6) of LT Act. But in all the cases the notice returned unserved with the remark, either "left", "not traceable", "not known", etc. The assessee was duly confronted with the same.

(iv) The assessee was asked to produce the said parties from whom such purchases have been made for examination. But the assessee failed to do so. Thus, in the books of accounts of the assessee, the purchases to the extent made from the above mentioned parties remained unverifiable. Thus, it transpires that the assessee had adopted a modus operandi to reduce his true profits by inflating his expenses by taking accommodation entries from such parties.

(v) The assessee could not file the vital documents such as delivery challans, transport receipts, goods inward register maintained at godown. Whatever documents filed by the assessee is not sufficient to prove that the goods were actually delivered to the assessee. The items shown to have been purchased from the said parties are of such nature that they require separate transportation.

(vi) The primary onus lies upon the assessee to establish the genuineness of purchases made by him.

(vii) Mere filing of evidences in support of purchases and payment through account payee cheque cannot be conclusive in a case where genuineness of delivery is in doubt. Payments by account payee cheques are not sacrosanct.

(viii) The Sales Tax Department certified that the aforesaid parties are 'non genuine operators' after conducting independent enquiries. It is evident that the assessee did not make any effort

to controvert the finding recorded by the DGIT (Inv.) and it made no efforts to produce the seller parties.

(ix) When all the evidences point to the fact that no actual goods were supplied by the above parties, then the argument of the assessee that it purchased goods in good faith is not tenable.

9. From the analysis of the facts above, it is crystal clear that the purchases made by the assessee from the above parties and claimed as debit in his *profit* and loss account are not genuine. Hence. I am not satisfied about the correctness and completeness of the accounts of the assessee. I, therefore, reject the books of accounts of the assessee by invoking provisions of Sec. 145(3) of the Act."

5.2.2 The assessment was re-opened based on the findings of the Sales Tax Department which was shared with the I)GIT Inv Mumhai. Thus, through this tangible information, the Ld AO had reason to believe that income had escaped assessment on account of claim of bogus purchases. However, the addition was made on account of the appellant not discharging the onus of proving the claim of purchase to the satisfaction of the Ijd. A() who held that mere filing of evidences in support of purchases and payments made through account payee cheques cannot be conclusive *in* case where genuineness of delivery and transaction is doubted. The addition is made on basis of purchase which are not substantiate.

6. During appellate proceedings, a notice for enhancement u/s 251(1)(a) was issued wherein the assessee appellant was asked to show cause why the income should not be enhanced to ^{100%} of the bogus purchases as against the addition made by the A() of 12.5 % of the bogus purchases. It was pointed out that there was failure to produce parties from whom purchases were made (Para 8 (iv) of the assessment order) vital documents like delivery challans, transport receipt, goods inward register maintained at the godown etc. were not furnished (Para 8 (v) of the assessment order). There was no compliance to this notice of enhancement u/s 271(1)(c).

6.1 The impugned purchases are to the extent of Rs. 4,70,89,512/- and these purchases are from 35 parties. These purchases of Rs.4,70,89,512/- have been claimed by the assessee appellant as expenditure, in the P & L account. This claim of expenditure has to be substantiated by the claimant i.e. the assessee appellant. As pointed out above, the burden of proof lies with the person making the claim. In the case of a trader, purchase of goods would normally have to be substantiated with

proof of purchase through purchase invoice, delivery challan, transportation receipt, proof of payment, proof of sale of the said goods purchased, stock register, confirmation from supplier etc.

6.2 The assessee appellant has not been able to produce the suppliers, who incidentally have been held to be accommodation entry providers by the Sales Tax Authorities of the Government of Maharashtra. The Id A() hi-is pointed out that the appellant could not file vital documents such as delivery challans, transport receipts, goods inward register maintained at godown and held that whatever was tiled by appellant was not sufficient, to prove that the goods were actually delivered to the appellant and that the primary onus to establish the genuineness of purchases which lay on the appellant was not discharged (cf para 8 (v) and (vi)).

6.3 When the assessee appellant has failed to substantiate the claim against impugned Purchases, the entire bogus purchases are to be disallowed. There is no basis for an addition of 12.5 % of such bogus purchases and consequent allowance of 87.5% of such unsubstantiated purchases.

6.4 The Hon'ble High Court of Bombay in (2018) 98 taxmann.com 234 (Mumbai) in the case of Shoreline Hotel (P) Ltd. held that the disallowance to the extent of 100% in the case of bogus purchases was to be upheld. The facts of the case were that the A() relied upon information received from the Sales Tax Department of the Government of Maharashtra in relation to certain parties who had been issuing bills and accommodation entries so as to facilitate evasion of taxes. The AO called for supporting documentary evidence, such as copies of purchase orders and mode of dispatch of goods, copy of the ledger of the party with invoices raised, details of payment made with copy of the bank account from where the payment was made and such other and further relevant details. The A() also issued notice u/s 133(6) of the I.T. Act, 1961 and these notices were returned back by the postal authorities. The AU recorded that assessee failed to furnish relevant information with respect to non genuine purchases and also failed to disclose true and fair affairs of its business and proceeded to estimate the gross profit at 15%. The CIT in action u/s 263 held that once the assessee could not produce any material nor could he ensure the presence of the supplier, before the AU, it would mean that the AU was expected to complete the exercise in accordance with the law. The action of the CIT u/s 263 to estimate the entire unsubstantiated purchases as bogus purchases was upheld.

6.5 The Hon'ble ITAT, Pune, in Kolte Path, in ITA Nos.1411 to 1415/PN/2013 for A. Vs 2003-04, 2005-06 & 2007-08 to 2009-10

and ITA Nos.1478 to 1483/PN/2013 for AY 200405 to 2009-10 held that, where suppliers have been unable to produce even the primary evidence to show movement of goods from supplier to assessee or any other form of evidence of delivery, even though payment was made through cheques and purchases are evidenced by suppliers bills, the purchases are liable to be disallowed in toto.

6.6 Reliance is also placed on Sumati Dayal (214 ITR 801 SC) and Durga Prasad More ((1971) 82 ITR 540 SC) to state that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real and that the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. It is not probable that a purchaser could be unable to furnish requisite information with respect to purchases made by it.

6.7 Initial burden to prove genuineness of purchases is on assessee. The Hon'ble High Court of Calcutta has held so in CIT v. Korlay Trading Co. Ltd. [1998] 232 ITR 820 (Cal.) (HC). Sec.37 deals with the question relating to the allowability of the expenditure incurred for the purposes of business. The onus of proof is upon the assessee to prove each of the following ingredients -(a) the item of expenditure must not be of the nature described under sections 30 to 36 of the Act; (b) the item of expenditure must not be in the nature of capital or personal expenses of the assessee; (c) the expenditure must be laid out wholly and exclusively for the purpose of business or profession. If the assessee fails to satisfy any of these tests the expenditure claimed is not allowable. The Hon'ble HC Bombay held so in the case of Ramanand Sagar (256 ITR 134). Thus, it is settled law that the onus of proof is on the assessee-appellant to establish that the purchases claimed as expense were genuine. This has not been discharged by assessee and hence the Id. AO has rightly disallowed the same.

6.8 Sec. 37 deals with the question relating to the allowability of the expenditure incurred for the purposes of business.

Sec 37(1) is as under:

"Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".

6.9 As per Sec. 101 and Sec. 103 of the Indian Evidence Act, 1872, whoever desires any Court to give judgement as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. Accordingly, when a claim for deduction towards expenditure, arising from purchase of goods, is made by the assessee appellant, the burden of proving that claim lies with the assessee appellant. This has not been discharged to the satisfaction of the Act.

6.10 The onus of proof is upon the assessee to prove each of the following ingredients - (a) the item of expenditure must not be of the nature described under sections 30 to 36 of the Act; (b) the item of expenditure must not be in the nature of capital or personal expenses of the assessee; (c) the expenditure must be laid out wholly and exclusively for the purpose of business or profession. If the assessee fails to satisfy any of these tests, the expenditure claimed is not allowable. The Hon'ble Bombay HC held so in the case of Ramanand Sagar (256 ITR 134).

6.11 The argument that the sales could not have been made without purchases is addressed below.

The onus is on the appellant to establish the purchases. When this onus is not discharged, the purchases are disallowed to the extent these are not substantiated. It is not for the Department to doubt sales.

The premise as per the IT Act in Sec 37(I) read with the Indian Evidence Act, Sec 101 and 103 is that the burden of proof with respect to claim of expenditure, in this case towards purchases, is on the assessee-appellant. When the burden is not discharged, the claim is liable to be disallowed. It is reiterated that it is not for the Department to reconcile the Sales claimed by the appellant.

Every argument in logic has a structure that is premises and conclusion. Premises are statements which give evidence for, or reasons for accepting the conclusion and conclusion is a statement which is purported to be established or affirmed on the basis of other statements, that is the premises. In this case, the conclusion is that bogus purchases are to be disallowed as per the provisions of Sec 37(1). This conclusion is based on the premises drawn by the Ld.A.O. that the expenditure is not proven as per Sec 37(1) of the IT Act.

The appellant can demolish his afore cited conclusion only by attacking the premises i.e. the basis for holding the purchases as bogus. If the argument is that the premises, that is finding of Ld.

AO of bogus purchases, is incorrect because the sales are not doubted, it is a case of logical fallacy. Again, it is reiterated that it is not for the Department/Revenue to establish the sales or otherwise.

If the appellant claims that it did indeed have the sales as claimed, then it is for the appellant to establish how the purchases were made; if these purchases were from the grey market it is for the appellant to establish from whom these purchases were made, how payments were made and how the corresponding sales took place.

The Hon'ble Delhi High Court in the case of La Medica (250 ITR 575) held that when the assessee's stand was that it had not effected purchases from anybody else, then it was not open to the Tribunal to make out a third case, which was not even the case of the assessee, to hold that the transactions were real and not fictitious, as claimed by revenue. Similarly, in the case of the assessee appellant for AY 2010-11, no claim has ever been made by the assessee, either during assessment proceedings or appellate proceedings that these purchases were genuine and made from a third party ⁱⁱⁱ grey market that is without bills. When such a claim has never been made by the assessee himself, it is not for the AU to surmise that this would have been the case. Even if such a claim of grey market purchases were to be made, the onus is on the assessee to establish how these grey market purchases were made, from whom these were made and how these are reflected in the books of account, stock register and also as to how the payments were made for these said grey market purchases. In the absence of the appellant establishing this, the bogus purchases have to upheld in toto to the extent not substantiated as per Sec 37(1).

Again, if the appellant claims that in the event of disallowance of purchases as bogus, his sales too should be reduced, the onus is Oil assessee to establish which of the sales are bogus. A bald claim that the sales have not been doubted by Department cannot be advanced as ^{all} to hold unsubstantiated purchases per Sec. 37(1) as an expenditure. It is pertinent to note that the oft cited I Hon'ble Gujarat high Court decision in the case of Simit P. Sheth ((2013) 356 ITR 451) is based on the fact that where purchases were made from grey market, only profit element embedded in such purchase could be added to assessee's income and accordingly upheld ITAT's estimation of profit @' 15 % of bogus purchases.

6.12 The facts in the recent decision of the Hon'ble Bombay high Court in the case of M/s Mohommad Haji Adam & Co. dt.

11.02.2019, were that the I,d. AO added the entire sum on account of goods never being supplied to the assessee; the CIT(A) compared the purchases and sales statement of the assessee and observed that the department had accepted the sale and therefore there was no reason to reject the purchases, because Without purchases there could not be sales and restricted the addition to 10% of the purchase amount and directed the 110 to make all to the extent of difference between the GP rate as per the books of accounts on undisputed purchases and GP on sale relating to purchases made from disputed parties. The ITAT noted that the CIT(A) had not given any reasons for retaining 10% of the purchases by way of ad hoc additions. The ITAT permitted the AO to tax the assessee on the basis of difference in the GP rates. The Hon'ble Bombay High Court concluded that there being no discrepancy between the purchases and sales declared by assessee, the finding of the ITAT was correct in restricting the addition to the extent of bringing the GP rate on purchases at the same rate of other genuine purchases. This decision of the Hon'ble Bombay 111⁽³⁾11 Court was not based on an argument with respect to Sec. 37(1) or the Indian Evidence Act, as discussed above. hence, with utmost respect, this decision, though not cited by the appellant, cannot be relied upon.

6.12 The assessee-appellant did not avail the opportunity provided of being heard. The findings of the Ld AU with respect to purchases have not been rebutted; no further material was brought on record during appellate proceedings to substantiate the purchases held to be bogus by the Ld AU. in the light of the above facts, there is no merit in the appeal.

The grounds of appeal "a" to "d" with respect to the addition by the Ld AO estimating the income to be 12.5 percent of the bogus purchases are dismissed. The income is enhanced to Rs. 4,70,89,512/- being 100% of such purchases claimed as expenses in the Profit & Loss account, disallowed u/s 37(1) as it does not satisfy the conditions specified therein. Consequently, the income assessed by the AO, being 12.5% of the bogus purchases of Rs. 58,86,189/- is enhanced to Rs.4,70,89,512/-."

8. Having considered the submissions of the learned Departmental Representative, we find that, though, the assessee may not have been able to prove the genuineness of purchases from the declared source, however, it is a fact on record that the Assessing Officer has not

disputed the sales effected by the assessee. Therefore, it goes to prove that the assessee must have purchased goods from some other undisclosed source. In such circumstances, it is the settled legal position that the entire purchases cannot be disallowed, but only the profit element embedded in such purchases can be considered for addition. Therefore, keeping in view the decisions of the Tribunal in identical nature of cases, the decision of the Assessing Officer to restrict the disallowance to 12.5% of the non-genuine purchase is fair and reasonable requiring no interference from this forum. Accordingly, we set aside the impugned order passed by the learned CIT(A) and uphold the order of the Assessing Officer. Second issue is decided in favour of the assessee.

9. Now coming to the first issue i.e., re-opening of assessment under section 147 of the Act is concerned, since we have decided the second issue i.e., enhancement of assessment on merit in favour of the assessee, consequently the issue of re-opening of assessment under section 147 of the Act becomes academic in nature hence, remained unadjudicated.

10. In the result, assessee's appeal stands allowed partly.

Order pronounced in the open Court on 13.9.21

**Sd/-
MAHAVIR SINGH
VICE PRESIDENT**

**Sd/-
S. RIFAUR RAHMAN
ACCOUNTANT MEMBER**

MUMBAI, DATED: 13.9.21

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

*Pradeep J. Chowdhury
Sr. Private Secretary*

True Copy
By Order

Assistant Registrar
ITAT, Mumbai