

IN THE INCOME TAX APPELLATE TRIBUNAL  
“E” BENCH, MUMBAI  
BEFORE SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER &  
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

No	ITA / CO No.	A.Y	Appellant	Respondent
1	8017/Mum/2019	2012-13	M/s Excel Reality N Infra Ltd, 31/A, Laxmi Industrial Estate New Link Road, Mumbai. AABCE1172H	Room No. 665A, 6 <sup>th</sup> Floor, Ayakar Bhavan, MK Road, Mumbai.
2	1180/Mum/2020	2012-13	DCIT – 9(2)(2) Room No. 665A, 6 <sup>th</sup> Floor, Ayakar Bhavan, MK Road, Mumbai.	M/s Excel Reality N Infra Ltd, 31/A, Laxmi Industrial Estate New Link Road, Mumbai. AABCE1172H

Appellant by :	Shri N.R. Agarwal. AR
Respondent by :	Shri Vijay Kumar Menon. DR

Date of Hearing	22.09.2021
Date of Pronouncement	28.09.2021

आदेश / O R D E R

**PER PAVAN KUMAR GADALE JM:**

The cross appeal is filed by the assessee and the revenue against the order of the Commissioner of Income Tax (Appeals)- 16, Mumbai passed u/s 143(3) r.w.s 147 and 250 of the Income Tax Act, 1961.

For the sake of convenience we shall take up assessee appeal ITA No. 8017/Mum/2019, A.Y 2012-13 as a lead case and the facts narrated therein. The assessee has raised the following grounds of appeal:

- “1. The Ld. CIT(A) erred in confirming the addition of 91,69,500/- being 12.5% of purchases Rs. 7,33,56,000/-.”*
- 2. The Ld. CIT(A) erred in confirming the addition of 14,67,120/- for commission being 2% of purchases Rs. 7,33,56,000/-.*
- 3. The Ld. CIT(A) erred in not adjudicating ground for reopening u/s 147 of the Act”.*

2. The Brief facts of the case are that the assessee company is engaged in the business of civil construction works. The assessee has filed the return of income for the A.Y 2012-13 on 27.09.2012 declaring a total income of Rs.3,65,62,010/- and the return of income was processed u/s 143(1) of the Act and the assessment was completed u/s 143(3) of the Act on 16.03.2015 determining a total income of Rs. 3,65,68,910/- Subsequently, the Assessing Officer (A.O.) has received information from DCIT, Central Circle Mumbai that the assessee has received accommodation entries from M/s.Paraneta Industries Ltd. Therefore the A.O. has reason to believe that the income has escaped assessment and after recording the reasons for reopening, the A.O.

has issued notice u/s 148 of the Act. The assessee has filed a letter to treat the return of income filed on 27-09-2012 as compliance. The assessee was provided the reasons for reopening of the assessment and has filed the objections. Subsequently, the A.O. has issued notice u/s 143(2) and 142(1) of the Act. In compliance to the notices, the Ld. AR of the assessee furnished the details and appeared from time to time and the case was discussed. The A.O. found that the assessee has made non genuine purchase transactions as per the information of DCIT, CC-2(2), Mumbai. Subsequently, the A.O. has issued notice u/s 133(6) of the Act on the party and the said notice was return un-served. The AO has called for the details in respect of the transaction of purchases, agreement etc and in compliance the assessee has filed the information in respect of the transactions referred in the assessment order. Finally, the A.O was not satisfied with the explanations and of the opinion that it is a clear case of bogus purchase transaction and made 100% addition of Rs. 7,33,56,000/-.Further, the A.O. has relied on the statement in respect of the accommodation entries provided on commission. The A.O. has observed that the amount of commission has to be treated as unexplained expenditure u/s 69C of the Act and assessed the total income of Rs. 11,13,92,030/- and

passed the order u/s 143(3) r.w.s 147 of the Act on 20.12.2018.

3. Aggrieved by the order, the assessee has filed an appeal before the CIT(A). The CIT(A) in the appellate proceedings considered the grounds of appeal, findings of the A.O in the scrutiny assessment, submissions of the assessee on the disputed issue. Finally the CIT(A) considered the judicial decisions of the Honble High Court and Hon'ble Tribunal and restricted the addition to the extent of 12.5% of bogus purchases and confirmed that action of the A.O. in respect of commission expenditure disallowance and partly allowed the appeal. Aggrieved by the CIT(A) order, the assessee has filed an appeal before the Honble Tribunal.

4. At the time of hearing, the Ld.AR submitted that the CIT(A) has erred in estimation of income @12.5% on the genuine transactions of purchases which are wrongly treated as accommodation entries by the A.O. Further the income/profit estimated on the purchases is on the higher side. The assessee has disclosed the profit in the financial statements on the projects and was accepted in the earlier years and the gross profit rate worked out @3.25%. Further on the similar facts

and joint ventures, the income is estimated @4% and prayed for reduction of estimation of profit and supported the submissions with the judicial decisions. Further, the Ld.AR emphasized that the CIT(A) has erred in confirming the addition of commission being @2% of bogus purchases as the A.O. has solely made addition based on the statement and without any material evidence. Lastly, the Ld.AR made submissions on validity of the reassessment and substantiated on the disputed issues with the paper book and judicial decisions and prayed for allowing the appeal.

5. Contra, the Ld.DR on the first ground of appeal with respect to genuineness of purchases submitted that the assessee could not establish the facts with proof with the A.O nor before the CIT(A). Whereas, in respect of addition of commission payments, the assessee must have incurred expenses for obtaining the bogus purchase transaction. On last disputed issue, with regard to validity of Assessement, the Ld.DR submitted that the notice was issued within the time and the recording of reasons is based on the Information received from DCIT(central circle)

Mumbai and the judicial decisions relied by the assessee are distinguishable on facts.

6. We heard the rival contentions and perused the material on record. Prima-facie the Ld.AR contentions are on three aspects, first we shall take-up issue were the Assessing Officer( A.O.) has made 100% addition of Bogus purchases and the CIT(A) has estimated income/profit @12.5%. The Ld.AR contentions are that the Assessee is engaged in civil construction works and the profit margin is very less due to operational delays and capitalization cost and the assessee's Gross Profit rate is around @3.25%. We consider it appropriate to refer to the observations of the CIT(A) at page 9 Para 4.1.26 of the order, which is read as under:

*“4.1.26. As narrated earlier, the Ld. AO in this case has held that the parties from which the purchases were made by the appellant were found to be bogus and that is the reason for which it was not produced during the assessment proceedings. Not having doubted the consumption/sales, the motive behind obtaining bogus bills thus, appears to be inflation of purchase price so as to suppress true profits. Considering the facts of the case as well as the various case laws cited (supra), I estimate the suppressed profit to the extent of 12.5% of the purchases made from the bogus entities, as the*

*suppressed profit element embedded in such purchases. This estimation is in addition to the GP shown by the appellant. Accordingly, this ground of appeal is partly allowed.*

7. The crux of the disputed issue as envisaged by the Ld.AR that the CIT(A) has restricted the addition to the extent of 12.5% of the bogus purchases considering profit element embedded. The Ld. AR emphasized that the addition of gross profit should be restricted to the G.P rate. We considering the facts and circumstances of the instant case are of the opinion that the gross profit rate disclosed in the financial statement is @3.25% and the assessee is in the Civil construction business and the margin of profit as mentioned by the Ld.AR is comparatively very much lower than 12.5% estimated by the CIT(A). Accordingly, to meet the ends of Justice, we restrict the profit percentage to 6% as against 12.5% and modify the order of the CIT(A). Further, we make it clear that this reduced percentage is applicable only to this Assessement year.

8. In respect of addition of estimation of commission. We are of the opinion that the A.O. has only estimated the commission payment without any evidence and the addition was solely made on the basis of statement recorded. Accordingly, the addition is without evidence and the revenue has not discharged the burden with any incriminating material and we direct the assessing officer to delete the addition and allow this ground of appeal. Lastly, on the ground of appeal of validity of reassessment proceedings, we find the reopening was made with proper information from DCIT(Central circle) and we are not convinced with submissions of the Ld.AR and we dismiss this ground of appeal of the assessee.

9. In the result, the appeal filed by the assessee is partly allowed.

**ITA No. 1180/Mum/2020, A.Y 2012-13.**

10. The revenue has raised the following grounds of appeal.

1. *Whether on the facts and circumstances of the case, and in law, the Ld. CIT(A) was justified in restricting the suppressed profit to the extent of 12.5% of bogus purchases, when the assessee could not produce any parties or evidence*

*that the said goods were purchased and the onus of providing genuineness of purchases was not discharged by the assessee?*

*2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in deleting the addition on account of bogus transaction without appreciating the fact that the assessee could not establish the one to one co-relation between item of purchase and sale?*

*3. Whether the Ld. CIT(A) has ignored the judgment of the Hon'ble Apex Court in the case of N.K. Proteins Vs. DCIT SLP Nos. 769 of 2017 dated 16.01.2017, wherein the Hon'ble SC had dismissed the SLP filed by the tax payer and confirmed the decision of the Hon'ble High Court for addition of entire income is to be made on account of bogus purchases as against the ITAT's decision restricting it to 25%*

11. At the time of hearing, the Ld.DR submitted that the CIT(A) has erred in restricting the addition to the extent of 12.5% irrespective of the fact that the assessee has entered into bogus purchase transactions and the CIT(A) has over looked the genuineness of purchases. Contra, the Ld.AR submitted that the assessee has filed the cross appeal. The Ld.DR could not controvert the findings of the CIT(A) with any cogent material or new information and relied on the order of the A.O.

12. We heard the rival submissions and perused the material on record. We find that the CIT(A) has

considered the facts of Gross profit/ profit embedded in the non genuine purchases and has restricted the addition to the extent of 12.5% of bogus purchases. The A.O. has not doubted the sales and we rely on the ratio of the Honorable Jurisdictional High Court in the case of M/s Nikunj Eximp Enterprises Vs Cit (W.P.No 2860 dated 18-06-2014). Accordingly, we are not inclined to interfere with the order of the CIT(A) and uphold the same and dismiss the grounds of appeal of the revenue.

13. In the result, the assessee appeal is partly allowed and the revenue appeal is dismissed

Order pronounced in the open court on 28.09.2021.

Sd/-  
( S RIFAUR RAHMAN)  
**ACCOUNTANT MEMBER**

Sd/-  
(PAVAN KUMAR GADALE)  
**JUDICIAL MEMBER**

Mumbai, Dated 28.09.2021

KRK, PS

**आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)

ITA No. 8017/Mum/2020 & 1180/Mum/2019  
M/s. Excel realty N Infra ltd,, Mumbai

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4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार / BY ORDER,

सत्यापित प्रति //True Copy//

1.

( Asst. Registrar)  
ITAT, Mumbai