

THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Shri Shamim Yahya (AM)

I.T.A. No. 914/Mum/2020 (Assessment Year 2010-11)

ITO-28(3)(1) Room No. 316 3 rd floor, Tower No. 6 Vashi Railway Station Complex, Vashi Navi Mumbai-400706.	Vs.	Shri Sabesan N. Nadar W-81, Rabale MIDC Thane Belapur Road Rabale, Navi Mumbai 400 701. PAN : AAXPN7880N
(Appellant)		(Respondent)

Assessee by	None
Department by	Ms. Smita Verma
Date of Hearing	14.10.2021
Date of Pronouncement	14.10.2021

ORDER

This is an appeal by the Revenue wherein the Revenue is aggrieved that the learned CIT-A has reduced the addition for bogus purchase of Rs. 13,54,425/- done @ 100% by the Assessing Officer by sustaining only 12.5% for the A.Y. 2010-11 vide order dated 14.11.2019.

2. The assessee in this case is engaged into the business of machinery manufacturing and fabrication work. The assessment was reopened upon information from sales tax department that assessee has made purchases from bogus dealers, the AO made 100% addition of the bogus purchase amounting to Rs. 13,54,425/-.

3. Upon assessee's appeal learned CIT-A has noted that the sale has not been doubted. Accordingly placing reliance upon several case laws and upon the facts of the case he sustained 12.5% disallowance out of the bogus purchases. Learned CIT(A) held as under :-

“All the grounds of the appeal are against addition of Rs. 3,54,425/- as unexplained expenditure u/s 69C of the Act. As per the investigations carried out by the Sales Tax Authorities, the aforementioned parties were found to be involved in giving accommodation entries only without actually supplying the goods. The logical inference is that the purchases made by the appellant would also be in the nature of accommodation entries only. To verify the same, the AO had made enquiries by issuing notices u/s 133(6) which were returned unserved by the postal authorities. This party was found to be non-existent at the address given by the appellant. The appellant also failed to provide the latest address of the party. During the scrutiny assessment the appellant furnished details of purchases and corresponding sales. However, the appellant could not produce the party before the AO inspite of opportunity being given. The appellant also failed to produce delivery challans or transportation details. The onus of proving the genuineness of such purchases is on the appellant which the appellant had not been able to discharge fully. When the hawala party had admitted on oath that it had given accommodation entries only without actually supplying the goods, the genuineness of purchases made from one party will have to be considered taking this into consideration while examining the documentation submitted by the appellant in support of its claim. The documentary evidences such as purchase bills, payments by cheques, etc. would all have been orchestrated to present a facade of genuineness and does not necessarily mean that the purchases from these parties are genuine. The Courts have held that payment by cheque by itself is not sacrosanct so as to prove genuineness of purchases when the surrounding circumstances are suspect. However, appellant has shown onward sales which has not been doubted by the Assessing Officer. Since there can be no sales without corresponding purchases, the only logical explanation is that the appellant would have made purchases from undisclosed parties in the grey market at lower rates and purchases were shown as being made from the impugned parties to suppress its profits.. In such a situation; the various Courts including the Hon'ble Gujarat High Court in the case of CIT vs Simit P. Sheth, 356 ITR 451 have held that not the entire purchases but only the profit element embedded in these purchases was to be disallowed. The Hon'ble Gujarat High Court in this case has held that profit margin of 12.5% of the bogus purchases will be reasonable. Respectfully following the Order in the case of Simit P. Sheth the addition is restricted to 12.5% of the bogus purchases of Rs. 13,54,425/-.”

4. Against above order Revenue is in appeal before the ITAT.
5. I have heard Id Learned Departmental Representative and perused the record. I find that in this case the sales or other aspects of the working have not been doubted. It is settled law that when these are not doubted, hundred percent disallowance for bogus purchase cannot be done. The rationale being no sales is possible without actual purchases. This proposition is supported from honourable jurisdictional High Court decision in the case of Nikunj

Eximp Enterprises (in writ petition no 2860, order dated 18.6.2014). In this case the honourable High Court has upheld hundred percent allowance for the purchases said to be bogus when sales are not doubted. However the facts of the present case indicate that assessee has made purchase from the grey market. Making purchases through the grey market gives the assessee savings on account of non-payment of tax and others at the expense of the exchequer. In such situation in our considered opinion on the facts and circumstances of the case the 12.5% disallowance out of the bogus purchases done by the learned CIT-A meets the end of justice. Accordingly I uphold the order of learned CIT-A. The decision of N.K. Proteins Ltd. (250 ITR 22) relied by the Revenue was a dismissal of SLP by Hon'ble Supreme Court and has already been explained and distinguished by Hon'ble Bombay High Court in the case of M. Hazi Adam & Co. (ITA No. 1004 of 2006 dated 11.2.2019).

6. In the result, appeal filed by the Revenue stands dismissed.

7. Before parting I may add that if the assessee has filed a cross appeal or cross objection and the same has remained unheard, either party may apply for recall of this order so that the appeals can be heard together.

Pronounced in the open court on 14.10.2021.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 14/10/2021

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS