

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

I.T.A. No. 6227/Mum/2019 (Assessment Year 2011-12)

DCIT, Circle-3(3)(1) Room No. 609 6 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road Mumbai-400 020.	Vs.	M/s. Siroya Developers Private Limited 808, Raheja Chambers Nariman Point Mumbai-400 021.  PAN : AAACS7975D
(Appellant)		(Respondent)

Assessee by	None
Department by	Ms. Smita Verma
Date of Hearing	11.10.2021
Date of Pronouncement	29.10.2021

ORDER

This appeal by the Revenue is directed against the order of learned Commissioner of Income Tax (Appeals) [in short learned CIT(A)] 19.7.2019 pertains to A.Y. 2011-12.

2. The grounds of appeal read as under :-

1. "Whether on the facts and in the circumstances of the case and in law, the Ld. CT(A) was justified in deleting the addition made on account of bogus purchases made from M/s. R. G. Corporation who had been declared bogus entity by the Sales Tax Department and when the assessee could not establish the genuineness of the transaction with documentary evidences during the course of assessment proceedings and when the Hon'ble Supreme Court in 769 of 2017 in the case of N.K. Proteins Ltd. had dismissed the SLP of the assessee and the decision of Hon'ble High Court and upheld sustaining the addition of entire income on account of bogus purchases?
2. Whether on the facts and in the circumstances of the case and in law, the Hon'ble Ld. CIT(A) was right in deleting the addition of Rs.23,058/- on account of bogus purchases without appreciating the fact that the Shri Trilokchand Mehta [Prop. of M/s. R.G. Corporation] had confessed by affidavits before the Sales Tax Department that they had not supplied any material for which the assessee has claimed expenses?

3. Whether on the facts and in the circumstances of the case and in law, the Hon'ble Ld.CIT(A) was right in deleting the addition of Rs.41,52,476/- holding that the same has been incurred for business purpose without appreciating that the assessee claimed the said expenditure against interest income from Partnership Firm and not as incurred in relation to business of the assessee?
  4. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was right in deleting the disallowance u/s 14A which was computed as per Rule 8D of I.T. Rules 1962 to the tune of Rs. 6,80,642/- on the basis of CBDT Circular No. 5/2014 dated 11.02.2014 which clearly states that it is not necessary to earn exempt income in a particular year in which the disallowance is made?
  5. The appellant prays that the order of CIT(A) on the above grounds be set aside and that of Assessing Officer be restored.”
3. Apropos bogus purchase issue :
- Brief facts are that the assessee had purchased 3.66 brass of sand from M/s. R.G. Corporation for Rs. 23,058/- on 14<sup>th</sup> September, 2010 and debited the expenditure to the profit and loss account The AO received information from the Sales Tax Department that the proprietor of M/s. R.G. Corporation was engaged in issuing bogus bills. The AO called for various details of information from the appellant during the assessment proceedings. It is seen that the appellant provided crucial details such as ledger extract, purchase bill and delivery challan containing the details about the vehicle from which the sand was transported and also the receipt of the goods. The appellant also submitted books of accounts. The AO remarked in the assessment order that the "submission of the assessee is not acceptable" without giving reasoning for the same. The AO finally disallowed the entire amount of purchase stating that the assessee had not submitted any evidence to controvert the affidavit filed by the proprietor of M/s. R.G. Corporation before Sales Tax authorities.
4. Upon assessee's appeal learned CIT(A) deleted the same holding as under :-
- “4.2.2 I find that the AO has not considered crucial evidences submitted by the appellant for the purchase as well as transportation and receipt of the sand. The AO has not brought out in the order that he was in possession of specific evidences from Sales Tax authorities about the sales made by M/s.

R.G. Corporation to the appellant. The decision of the AO to treat the purchases as bogus without considering crucial evidences submitted by the appellant and simply on the basis of a general affidavit filed by proprietor of M/s. R.G. Corporation before Sales Tax authorities was not fair, reasonable and as per law. Therefore, in view of the above discussion the addition of Rs 23,058/- is deleted.”

5. Against the above order the Revenue is in appeal before the ITAT.

6. I have heard learned Departmental Representative and perused the records. Upon careful consideration I find that assessee has provided the documentary evidence for the purchase. Adverse inferences have been drawn due to the inability of the assessee to produce the suppliers. I find that in this case the sales have not been doubted. It is settled law that when sales 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 dt 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 in that case all the supplies were to government agency. In the present case the facts of the 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 my considered opinion on the facts and circumstances of the case the 12.5 % disallowance out of the bogus purchases meets the end of justice. Accordingly I modify the order of learned CIT(A) and direct accordingly.

7. Apropos addition of Rs. 41,52,476/-

Brief facts are that the appellant is a builder cum developer having various unfinished projects appearing as Work In Progress in the ice sheet Since there were no sales during the year the assessee had shown lie interest income received from the partnership firm on the credit side of profit and loss account.

The AO disallowed expenses totalling to Rs.48,03,947/-from following items by treating the same not to be incurred for earning the interest appearing on the credit side of the profit and loss account :-

Sr. No.	Particulars	Amount
1.	Depreciation	Rs. 5,46,309/-
2.	Finance Expenses	Rs. 1,05,162/-
3.	Administrative Expenses	Rs. 41,52,476/-
Total		Rs. 48,03,947/-

8. Upon assessee's appeal learned CIT(A) deleted the same holding as under :-

“The Assessing Officer has not disputed that the expenses were incurred by the appellant for the purpose of business during the relevant year. The only reason given by the AO for disallowance is that the expenses were not incurred for earning the interest income from the firm. It seems that the AO has completely ignored the fact that the appellant's main business was of a builder-developer which the appellant was carrying out during the year as evident from the increase in the WIP from about 6.63 crores to 33.31 crores and various other schedules and notes to the balance sheet Since the AO has not given any finding that the expenses were not incurred for the purpose of business there was no reason to make any such disallowance. Therefore, in view of the above discussion the addition of Rs. 41,52,476/- made by the AO by disallowing expenses debited to profit and loss account is deleted. The ground is allowed.”

9. Against the above order the Revenue is in appeal before the ITAT.

10. I have heard learned Departmental Representative and perused the record. Upon careful consideration I note that learned CIT(A) has passed a correct order. The Assessing Officer has erred in ignoring the apparent fact that the assessee is a builder and developer. So how these expenses are not related to the business is not dealt with by the Assessing Officer. He has erred in assuming that expenses are in relation to earning of interest which as rightly found by learned CIT(A) is an erroneous assumption. Hence, I uphold the order of learned CIT(A).

11. Apropos 14A disallowance :

Brief facts are that the assessee had not earned any exempt income during the year. The AO noted that the assessee was having investment of Rs 2,76,62,668/- in the partnership firm during the year. The AO reasoned that this investment might earn exempt income to the assessee and went on to invoke provisions of section 14A of the Act r.w. Rule 8D of Income Tax Rules after observing that the assessee has not disallowed any expenditure related to the exempt income.

12. Upon assessee's appeal learned CIT(A) deleted the same by relying on several case laws and concluding as under :-

“Besides, there are many other decisions wherein it was held that disallowance u/s.14A cannot be made when there is no exempt income. The decisions are listed below:

- (i) Cheminvest Ltd. v. ITO [2009] 378ITR 33 (Delhi HC).
- (ii) CIT vs Corrtch energy private limited (Tax Appeal No. 239 of 2014) (Gujarat High Court)
- (iii) CIT Vs Winsome Textile Industries Ltd (319 ITR 204) (P & H)
- (iv) CIT Vs Holcim India P Ltd (ITA No. 486/2014 & ITA No. 299/2014), Delhi High Court
- (v) CIT Vs Shvam Motors P Ltd (ITA No. 88 of 2014), Allahabad High Court.
- (vi) PCIT Vs Ballarpur Industries Ltd (ITA No. 51/2016) (Bombay HC, Nagpur bench).

4.4.4 The above mentioned view has also been endorsed by the Supreme Court in the case of CIT(Central)- 1 v/s. Chettinad Logistics Pvt Ltd, (2018) 95 taxmann.com 250, in which the SLP filed by the department was rejected on merits on the same issue and by the Supreme Court in the case of Maxopp Investment Ltd. Vs. CIT (91 Taxmann.com 154).

4.4.5 Respectfully, relying on the aforesaid judicial pronouncements, it is held that the disallowance u/s. 14A r.w. Rule 8D was not warranted in this case. In the light of the foregoing discussion, reduction of the WIP by Rs. 6,80,642 is hereby reversed. This ground stands allowed.”

13. Against the above order the Revenue is in appeal before the ITAT.

14. I have heard learned Departmental Representative and perused the record. Upon careful consideration I find that it is settled law as per the case laws mentioned by learned CIT(A) that no disallowance under section 14A is to

be done if there is no exempt income. The proposition is also supported by Hon'ble Bombay High Court decision referred above. Hence, I uphold the order of learned CIT(A).

15. In the result, the Revenue's appeal is partly allowed.

Pronounced in the open court on 29.10.2021.

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai; Dated : 29/10/2021

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