

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

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT

ITA NOS. 1225 & 1226/MUM/2020 : A.Ys : 2010-11 & 2009-10

Arihant Metal Corporation
Office No. 15, 2nd floor,
Radhakrishna Building, 29,
4th Kumbharwada Lane,
Girgaon, Mumbai 400 004.

Vs. Income Tax Officer – 19(1)(1),
Mumbai. (Respondent)

PAN : AAOFA3596M (Appellant)

Appellant by : Shri Dixit Jain

Respondent by : Shri Vaibhav

Date of Hearing : 25/10/2021

Date of Pronouncement : 12/11/2021

ORDER

These two appeals by the assessee are arising out of the orders of Commissioner of Income Tax (Appeals)-30, Mumbai (in short 'CIT(A)') in Appeal Nos. CIT(A)-30/ITO 19(1)(1)/957/15-16 and CIT(A)-30/19(1)(1)/13113/2016-17 dated 09.10.2019 and 28.08.2019 respectively. The assessments were framed by the Income Tax Officer – 19(1)(1), Mumbai for Assessment Years 2009-10 and 2010-11 under Section 143(3) r.w.s 147 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") vide orders dated 17.03.2015 and 23.03.2016 respectively.

2. The facts and circumstances of the issue are exactly identical in both the years, hence, we will take the facts from Assessment Year 2009-10 in ITA No. 1226/Mum/2020 and will decide the issue.

3. The only issue argued before me is that the CIT(A) has erred in law and in fact in confirming the disallowance of bogus purchases to the extent of Rs.2,67,82,700/-. For this, assessee has raised the following Ground no. 4 :-

“4. The Ld. CIT(A) has erred in law and in facts in confirming disallowance of bogus purchase to Rs.2,67,82,700/-.”

The brief facts are that the assessee is engaged in the business of reselling of ferrous and non-ferrous metals. The Assessing Officer received information from Maharashtra Sales Tax Department that certain parties are issuing accommodation entries/bogus bills which were availed by various assessees. The assessee also availed bogus bills amounting to Rs.2,67,82,700/- from the following parties :-

1	<i>Rajkamal Steel</i>	<i>Rs. 5,03,988/-</i>
2	<i>Siddhi Vinayak Traders</i>	<i>Rs. 32,99,273/-</i>
3	<i>Aryen Sales Corporation</i>	<i>Rs. 14,21,247/-</i>
4	<i>Samco Steel & Alloys</i>	<i>Rs. 1,44,074/-</i>
5	<i>Manglik Metal (India)</i>	<i>Rs. 5,92,601/-</i>
6	<i>Reliable Metal (India)</i>	<i>Rs. 10,12,051/-</i>
7	<i>Nerolac Metal (India)</i>	<i>Rs. 9,99,687/-</i>
8	<i>Hindustan Steel Impex</i>	<i>Rs. 3,27,092/-</i>
9	<i>Raj Metal Industries</i>	<i>Rs. 3,53,585/-</i>
10	<i>Paras Enterprises</i>	<i>Rs. 6,24,260/-</i>
11	<i>Malwa Metal Corporation</i>	<i>Rs. 15,11,150/-</i>
12	<i>Shah Trading Co. & Dhulee Enterprises</i>	<i>Rs. 16,28,265/-</i>
13	<i>Drashti Overseas</i>	<i>Rs. 21,21,341/-</i>
14	<i>Navkar Impex</i>	<i>Rs. 1,22,44,086/-</i>
	<i>Total</i>	<i>Rs. 2,67,82,700/-</i>

The Assessing Officer required the assessee to give the following details :-

(a) Name of the Seller with current full address,

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

The assessee filed the purchase bills/sale bills, payments made by account payee cheques, produced the books of account and also the stock register, but could not produce the delivery challans, transportation receipts, octroi receipts, etc. The assessee also could not produce the parties and hence the Assessing Officer estimated the profit rate at 12.5% of the bogus purchases and thereafter made addition on account of non-genuine purchases at Rs.33,47,838/-. Aggrieved, assessee preferred appeal before the CIT(A).

4. The CIT(A) confirmed the action of the Assessing Officer and also enhanced the addition of bogus purchases to 100% as against the addition made by the Assessing Officer at 12.5% of the bogus purchases. For this, the CIT(A) recorded her findings in paragraphs 6.1 to 6.3 of her order which reads as under :-

“6.1 The impugned purchases are to the extent of Rs.2,67,82,700/- and these purchases are from 14 parties. These purchases of Rs.2,67,82,700/- 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 Ld AO has 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 filed 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.”

5. The CIT(A) also rejected the argument that sales could not have been made without purchases. For this, the CIT(A) recorded the following findings :-

“6.11.....

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 AO that the expenditure is not proven as per Sec 37(1) of the IT Act.

The appellant can demolish this 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.”

Even the CIT(A) has not followed the judgment of Hon'ble Bombay High Court in the case of M/s. Mohommad Haji Adam & Co. dated 11.02.2019 stating that “the decision of the Hon'ble High Court was not based on an argument with respect to Sec. 37(1) or the Indian Evidence Act, as discussed above”. The CIT(A) discussed this in paragraph 6.11 as under :-

“6.11

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 Ld. 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 AO to make an addition to the extent of difference between the GP rate as per the books of accounts on undisputed purchases and GP on sales 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 High 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.”

According to the CIT(A), assessee did not avail the opportunity provided to it for being heard in person. Hence, the CIT(A) enhanced the income to 100% of said bogus purchases claimed as expenses in the Profit & Loss account and disallowed by the Assessing Officer by applying profit rate of 12.5% of the bogus purchases. Aggrieved, now assessee is in appeal before the Tribunal against estimation of profit rate at 12.5% by the Assessing Officer and also against the enhancement made by the CIT(A).

6. Before me, the learned counsel for the assessee stated that assessee has filed the details asked by the Assessing Officer. Assessee filed the sale and purchase bills, proof of payment made by account payee cheques to the sellers, stock register, but could not file the delivery challans, transportation receipts, goods inward register maintained at the godown and octroi challans. For this reason, the Assessing Officer came to the conclusion that the assessee has indulged in non-genuine purchases and intention of indulging in such activity is to suppress the true profit. Hence, the Assessing Officer applied profit rate of 12.5% of the total non-genuine purchases by stating that it would be just and fair if the profit element embedded in such purchases is taken as the profit earned from such purchases shown to have been made from non-existent parties. The learned counsel stated that the CIT(A) has simply enhanced the addition by treating the entire bogus purchases as profit whereas it is a fact that sales made by assessee are not doubted. Once sales are not doubted, the bogus purchases in entirety cannot be added. Only the profit element can be added. That profit element can be determined by the nature of assessee's business. Here, the assessee is engaged in reselling of ferrous and non-ferrous items. On the other hand, the learned Sr. DR heavily relied on the orders of the authorities below and he supported the order of

CIT(A) enhancing the assessment for the reason that the CIT(A) has rightly pointed out that the assessee was unable to explain the genuineness of the purchases and once the purchases are unproved, or bogus, the addition to the extent of 100% is to be made, which has rightly been done by the CIT(A).

7. I have heard the rival contentions and gone through the facts and circumstances of the case. Admittedly, the assessee firm is engaged in reselling of ferrous and non-ferrous metals. Admittedly, the Income Tax Department received information from DGIT (Inv.), Mumbai, who have been informed by the Maharashtra Sales Tax Department regarding the practice of providing accommodation entries by issuing bogus sale/purchase invoices without supplying any goods. The Sales Tax Department has supplied list of such bogus entry providers/bill providers and such parties have admitted of not giving any delivery of goods, but only issued bills and vouchers. The assessee has taken accommodation entries from the above 14 parties amounting to Rs. 2,67,82,700/-. However, the assessee has filed details in respect of the purchases with date, invoice, delivery challans of goods as per invoice, quantity, details of payment made by account payee cheques only. The said quantity of goods item-wise sold by the assessee was also given with invoice numbers, names of vendees, quantity, payment received by account payee cheques, transportation receipts, identification of stock statement of sales against such purchases. The assessee also submitted delivery challans of vendors as well as vendees with transportation receipts and assessee has discharged its initial onus casted upon it by the Act. We noted that the assessee could not produce the parties or the addresses given by the assessee of the parties from whom assessee had made purchases remained unverified. The Income Tax Department issued notices under Section 133(6) of the Act to

the parties from whom purchases were made, but same returned unserved. I noted that neither the Assessing Officer nor the CIT(A) tried to carry out any exercise of verification of these parties from the Sales Tax Department or by issuing notices by other modes despite the fact that a plethora of information was available with the Assessing Officer/CIT(A) as noted above. In such situation, the only remedy left is, even though we hold that assessee has received bogus bills from the parties, application of profit rate. The assessee is engaged in reselling of ferrous and non-ferrous metals and in such circumstances we have to apply profit rate suitable to the trade. In this nature of business, i.e. reselling of ferrous and non-ferrous metals, VAT is at 5% and assessee might have made purchases from the grey market for which assessee might have saved some element of profit. Hence, we estimate the profit rate at 5% of the bogus purchases and reverse the orders of the authorities below to that extent. Thus, the appeal of the assessee is partly allowed.

8. Similar are the facts and circumstances, except for the quantum, in the assessee's case in ITA No. 1225/Mum/2020 for Assessment Year 2010-11 and hence, taking a consistent view in this year also, I apply the profit rate of 5% and direct the Assessing Officer accordingly.

9. In the result, both the appeals of the assessee are partly allowed.

Order pronounced in the open court on 12th November, 2021.

Sd/-
(MAHAVIR SINGH)
VICE PRESIDENT

Mumbai, Date : 12th November, 2021

SSL

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "SMC" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar/Sr. PS
I.T.A.T, Mumbai