

**INCOME TAX APPELLATE TRIBUNAL  
MUMBAI 'SMC' BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President)]**

ITA No. 2014/Mum/2020  
Assessment Year: 2009-10

**Income Tax Officer Ward - 1 (1)  
Kalyan.**

..... **Appellant**

**Vs.**

**Dipesh Jayantilal Gudhka**

.....**Respondent**

*Prop. M/s Rishi Corporation, H. No. 1399, D-4101  
Silver Leaf Residency, Behind Oswal Sagal Hall,  
Kamat Ghar Road, Anjurphata, Bhiwandi 421302 [PAN: AEGPG3760H]*

ITA No. 187/Mum/2021  
Assessment Year: 2009-10

**Dipesh Jayantilal Gudhka**

.....**Appellant**

*Prop. M/s Rishi Corporation, H. No. 1399, D-4101  
Silver Leaf Residency, Behind Oswal Sagal Hall,  
Kamat Ghar Road, Anjurphata, Bhiwandi 421302 [PAN: AEGPG3760H]*

**Vs.**

**Income Tax Officer Ward - 1 (1)  
Kalyan.**

..... **Respondent**

**Appearances:**

**Milind Chavan** *for the appellant*

**Nikunj Gada** *for the respondent*

Date of concluding the hearing : November 03, 2021

Date of pronouncement : November 03, 2021

**ORAL ORDER**  
**(Dictated in the open court)**

**Per Pramod Kumar, VP:**

1. These cross appeals are directed against the order dated 24<sup>th</sup> February 2020, passed by the learned CIT(A) in the matter of assessment u/s. 144 r.w.s.147 of the Income Tax Act 1961, for the assessment year 2009-10.

2. Grievances raised by the parties are as follows:-

**ITA No. 2014/Mum/2020**

*1. On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) has erred in not appreciating the fact that the assessee could not establish the genuineness of the purchases from the non-existent vendors as per information received from Law enforcement agency of State Govt. of Maharashtra i.e. Sales Tax Department, and established by the Assessing Officer.*

*2. On the facts and in the circumstances of the case, and in law, the Ld.CIT(A) has erred in not appreciating the fact that the onus to justify the claim of expenses is on the assessee and the same has failed to discharge it in relation to the purchases made from the non-existent vendors.*

*3. On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) has erred in ignoring, the fact that the assessee could not substantiate its claim of purchases from non-existent vendors by means of relevant supporting documents related to movement of goods, stock register, etc. to restrict the addition to 25 % of bogus purchases from the non-existent vendors.*

*4. On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) has erred in not appreciating the law correctly that once the purchases are unverifiable/not genuine/ bogus, the same should have been disallowed in entirety, particularly in view of the ratio of the decision of the Hon'ble Gujarat High Court in Tax Appeal No. 242 of 2003 dated 20/06/2016 in the case of N. K. Proteins Ltd. against which the SLP was dismissed by the Hon'ble Apex Court.*

*5. It is humbly requested that present appeal is being filed in accordance with the CBDT's Instruction No. 3/2018 dated 11.07.2018 amended vide letter dtd. 20.08.2018 as per para 10(e) of the said circular. Therefore, the order of the CIT(A) may kindly be vacated and that of the AO may be restored.*

**ITA No. 187/Mum/2021**

*1. On the facts and circumstances of the case, the learned Commissioner of Income Tax Appeals [CIT (Appeals)] grossly erred in upholding the re-assessment proceedings. In doing so, she failed to appreciate that the assessing office did not followed the procedure as laid down by the Hon'ble Supreme Court in case of GKN Drive Shaft (India) Ltd. Vs. ITO.*

**2. Without prejudice to above the learned CIT(Appeals) erred in upholding addition of 25% of the purchases of Rs. 3,22,063/- i.e. Rs. 80,516/-).**

3. So far as the grievances raised in the appeal of the assessee are concerned these are twofold-first, that reassessment proceedings are initiated in law on account of the fact that the requisite prior approval of the Joint Commissioner of Income Tax was not taken by the Assessing Officer before reopening the assessment, and on account of fact that reasons recorded for reopening the assessment were not provided to the assessee during the course of assessment proceedings and, second that the without prejudice, and in any way 25% of the gross value of bogus purchases which has been brought to tax is on the high side.

4. Mr. Nikunj Gada learned counsel for the assessee submits that the Assessing Officer was under the statutory obligation to obtain prior approval of the Joint Commissioner of Income Tax in respect of the reasons recorded for reopening the assessment. He invites our attention to the provisions of section 151 of the Act and took us through the same. It is submitted that in the remand report reproduced in the Commissioners order at page 7, the Assessing Officer has categorically contended that “no approval was needed as the Assessing Officer had the powers vested to reopen the case on the given date and therefore no approval from Jt. CIT has been sought.” It is his submission that the stand so taken is erroneous and learned Commissioner has not, in any event, even dealt with the same in the impugned order. Learned counsel for the assessee, further submits that it is admitted position that the reasons recorded for reopening of the assessment were not furnished during the assessment proceedings and also reassessment proceeding initiated in law. I am thus urged to quash the reassessment proceedings for this short reason alone. Without prejudice to this line of argument, learned counsel for the assessee invites our attention to several decisions of the co-ordinates benches wherein it is constantly held that the amount which can be brought to tax in respect of the bogus purchases is 12.5% of the same as profits estimated to be embedded.

5. Learned Departmental Representative on the other hand points out that the law, as it is stood at the relevant point of time, did not have any requirements for prior approval of Joint Commissioner of Income Tax to be taken for reopening assessment, in respect of the matters which are reopened within a period of four years. He thus justifies the stand of the Assessing Officer. As regards the question of not sharing the reasons recorded for reopening the assessment of the assessee, learned Departmental Representative invites our attention to the uncontroverted factual position that the reason recorded for reopening the assessment were sent to the assessee by registered post, but this registered post was returned back by the postal authority. In any event, according to the learned Departmental Representative, the reasons recorded for reopening of the assessment were confronted to the assessee at the first appellate stage. It is thus submitted that so far as the assessee’s challenge to reopening the assessment is concerned, it is devoid of any legally sustainable merits. As far as the question of quantum of addition is concerned,

learned Departmental Representative once again refers to Hon'ble Supreme Court judgment in the case of *N K Proteins Ltd 250 taxman 0022 (SC)* as also in the case *Shoreline Hotel Pvt. Ltd., [98 taxmann.com 234]* in support of the proposition that the entire amount of bogus purchase is required to be added to the income of the assessee. I am thus urged to hold, on merits, that the amount ought to be taxed in the hand of the assessee was 100% and not 25% of bogus purchases as has been held to be taxable by learned CIT(A) in the impugned order. Learned counsel for the assessee relies upon is binding precedent in the case of *CIT vs Videsh Sanchar Nigam Ltd. (340 ITR 66) & CIT vs. Trend Electronics (379 ITR 456)*, in support of the proposition that reasons for reopening not having been furnished to the assessee would vitiate the reassessment proceedings.

6. I have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position.

7. I find that the arguments of the learned counsel for the assessee proceed on incorrect appreciation of legal position. So far as the requirement of obtaining prior approval of the Jt. CIT is concerned, I find that the position as it prevailed at the point of time when the notice was issued i.e. on 15<sup>th</sup> April 2013, there was indeed no requirement of law to obtain prior approval of the Jt. CIT in the case of reopening the assessment within four years. The legal position as it prevailed at that point of time is, as evident from a plain perusal of the section 151 as it is stood at the relevant point of time is, as follows:-

*(1) In a case where an assessment under sub- section (3) of section 143 or section 147 has been made for the relevant assessment year, no notice shall be issued under section 148 3 by an Assessing Officer, who is below the rank of Assistant Commissioner, unless the Deputy Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice]: Provided that, after the expiry of four years from the end of the relevant assessment year, no such notice shall be issued unless the Chief Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer aforesaid, that it is a fit case for the issue of such notice.*

*(2) In a case other than a case failing under sub- section (1), no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Deputy Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the Deputy Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice.*

8. When attention of the learned counsel were invited to the above legal position, he did not have much to say, but he nevertheless justified argument on the ground that the information which he could access from the Income Tax Department website was little different nevertheless. Having been pointed out the correct legal position, learned counsel for the assessee graciously accepted that and left the matter to the bench. He has however no armory stone, such as his reliance on the decision of Hon'ble jurisdictional High Court in the case of *CIT vs Videsh Sanchar Nigam Ltd. (340 ITR 66) & CIT vs. Trend Electronics (379 ITR 456)*. This also does

not come to rescue of the assessee because as I have noted from the perusal of the learned CIT(A) impugned order there is a categorical submission by the Assessing Officer that every possible effort was made to serve the reasons recorded for reopening the assessment. It is noted that on 8<sup>th</sup> August 2013, assessee had made a request for the copy of the reasons recorded and in reply there to, on 4<sup>th</sup> October 2013 the Assessing Officer had sent by registered AD copies of the reasons recorded to the assessee which came back by the postal authorities with the remarks "Left". Under these circumstances the Assessing Officer certainly cannot be faulted for not furnishing the reasons for reopening of the assessment to the assessee.

9. In view of these discussions as also bearing in mind the entirety of the case, I reject the challenge to the validity of reassessment proceedings and uphold the stand of the authorities below on this point.

10. However, I agree with the learned counsel for the assessee that so far as the quantum of income which can be brought to tax in respect of the bogus purchases, the issue is now covered by a series of decisions of the divisional benches in favour of the assessee in as much as what can be brought to tax is only 12.5% of the bogus purchases and not the entire amount. As regards the arguments of the Departmental Representative, which primarily consists of reliance on Hon'ble Supreme Court judgment in the case of N. K Proteins and of Hon'ble jurisdictional High Court judgment in the case of Shoreline Hotel Pvt. Ltd., I can only add that these decisions have been duly taken in to account by several divisional benches and I am myself a party, and the divisional benches have held that given the peculiar facts of this type of cases that as of now what can be added to income of the assessee is only 12.5% of the profits. The judgment relied upon the learned Departmental Representative therefore, do not apply to the factual adjudication position that I am at present dealing with. In this view in the matter I uphold the contention of the assessee so far as taxability of profit at the rate 12.5% is concerned and to this extent I deem it fit and proper to allow the appeal of the assessee.

11. As I have upheld as above the taxability at the rate of 12.5% of the bogus purchases the grievance raised in the appeal of the Assessing Officer cannot be obviously we sustain which seeks restoration of 100% of the bogus purchases. The appeal filed by the Assessing Officer therefore must fail.

12. In the result, while the appeal of the assessee is partly allowed in the terms indicated above, the appeal of the Assessing Officer is dismissed. Pronounced and dictated in the open court today on the 03<sup>rd</sup> day of November 2021.

Sd/-  
**Pramod Kumar**  
(Vice President)

**Mumbai, dated the 03<sup>rd</sup> day of November 2021.**

*Copies to:*

<i>(1)</i>	<i>The Appellant</i>	<i>(2)</i>	<i>The respondent</i>
<i>(3)</i>	<i>CIT</i>	<i>(4)</i>	<i>CIT(A)</i>
<i>(5)</i>	<i>DR</i>	<i>(6)</i>	<i>Guard File</i>

*By order*

*Assistant Registrar/Sr.PS  
Income Tax Appellate Tribunal  
Mumbai benches, Mumbai*