

IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No.1187/Mum/2021 (Assessment Year 2010-11)

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| ITO, Ward -3(1) Kalyan(W)-421 301 | Vs. | Jeeju Nair W-10, MIDC, Phase-II Village-Sagaon Dombivli(E)-421 204 PAN : AAABA0092J |
| (Appellant) | | (Respondent) |

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| Assessee by | None |
| Department by | Shri S.N.Kabra, Sr.AR |
| Date of Hearing | 07.02.2022 |
| Date of Pronouncement | 08 .02.2022 |

ORDER

Per Shamim Yahya (AM) :-

This is an appeal by the revenue, wherein the revenue is aggrieved that the Ld.CIT(A) has reduced the addition for bogus purchase of 100% done @12.5% by AO by sustaining only 12.5% for the AY 2010-11 vide order dated 21.02.2020.

2. The assessee in this case is engaged into chemicals trade. The assessment was reopened upon information from Sales tax department that assessee has made Rs. 13,25,000/- purchases from bogus dealers. The AO made 100 addition of the bogus purchase.

3. Upon assessee's appeal Ld.CIT(A) has noted that the sales have 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. The Ld.CIT(A) has held as under:-

"I have considered the facts of the case, findings of the A.O. in the Assessment Order and statement of facts filed by the Appellant at the time of filing appeal. During the course of Assessment Proceedings, information was called for by the AO u/s 133(6) of the I.T. Act, 1961 from M/s. Ramvev Trading and MM Smart Link Tradex Pvt Ltd, but nobody complied with the notices issued u/s 133(6). It is noted that the AO was in possession of information received from the Sales Tax Department, indicating strongly that the parties concerned were only providing accommodation entries and were not carrying out any real business. Thus, the onus that was cast on the Appellant was of a greater degree to prove the genuineness of the parties as well as these purchases. Under those circumstances, the claim of the Appellant that the said purchases are genuine cannot be accepted in totality. Although the Appellant, during the course of Assessment Proceedings, submitted ledger account of both the parties, bank statement reflecting the payments made through either by payee cheque or by demand draft.

There cannot be any dispute about the well settled legal proposition that tax can be levied only on real income. It is elementary rule of accountancy as well as of taxation laws that the profit from business cannot be ascertained without deducting cost of purchase from sales, otherwise it would amount to levy of income tax on gross receipts or sales. Such recourse is not permissible unless it is specifically authorized under any provisions contained in the Act. The Hon'ble Jurisdictional High Court in the case of Harima Bharubhai - ITA No. 313 of 2013) has held that only the profit attributable to the unaccounted sales can be brought to tax. Similar view has been taken by the Gujarat High Court in the cases of Vijay M Mistry Construction Pvt Ltd (355 ITR 498), Bholanath Polyfab (P) Ltd (355 ITR 290) and Vijay Proteins Ltd (58 taxmann 44).

The Hon'ble Ahmedabad ITAT, in the case of Simit P Sheh v/s ITO, in ITA No. 3238 and 3293/Ahd/2009 has held that "the malpractice of bogus purchase is mainly to save 10% sales tax etc. It has a/so been informed that in this industry about 2 5% is the profit margin. Therefore, respectfully the decisions of the co-ordinate bench pronounced on identical circumstances, we hereby direct that the No- 3238 & 3293/Ahd/2009 A.Y. 2006-07 Sh. Simit P Sheth Vs. ITO wd 2(2),BRD page 6 disallowance is required to be sustained at 12.5% of the purchases from those parties". The order of the IT AT was also sustained by the Hon'ble Gujarat High Court vide order dated 16.01.2013, (38 taxmann 385) wherein it was held that "This being the question, the only question that survives is what should be the fair profit rate out of the bogus purchases which should be added back to the income of the assessee. The Commissioner adopted ration of 30% of such total sales. The Tribunal, however, scaled down to 12.5%. We may notice that in the immediately preceding year to the assessment year under consideration the assessee had declared gross profit @ 3.56% of the total turnover. If the yardstick of 30%. as adopted by the commissioner, is accepted GP rate will be much higher. In essence, the Tribunal only estimated the possible profit out of purchases made through non-genuine patties. No question of law in such

estimation would wise. The estimation of rate of profit return must necessarily vary with the nature of business and on uniform yardstick can be adopted."

Considering the facts of case and in view of various decisions as discussed above, it is held that only 12.5% of the bogus purchases of Rs. 13,25,000/-,that is .Rs. 1,65,625/- is to be added to the income of the Appellant. Accordingly the disallowance of Rs. 1.65.625/- is confirmed and balance amount of Rs. 11,59,375/- is deleted and the above grounds of appeal are partly allowed."

4. Against the above order, revenue is in appeal before us. We have heard the Ld. DR and perused the record.

5. We find that in this case, the sales have not been doubted it is settled law that when sales are not doubted, 100% disallowance for bogus purchase cannot be done. The rationale being no sales is possible without actual purchases. This proposition is supported from Hon'ble jurisdictional High Court decision in the case of Nikunj Eximp Enterprises(in Writ Petition No.2860, order dated 18.06.2014). In this case, the Hon'ble High Court has upheld 100% disallowance 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 Ld.CIT(A) meets the end of justice. Accordingly, we uphold the order of Ld.CIT(A).

6. The decision of N.K.Protiens relied by the revenue was a dismissal of SLP by the Hon'ble Supreme Court and has already been explained and distinguished by Hon'ble Bombay High Court in the case of Mohammad Hazi Adam & Co in ITA No.1004 of 2006, dated 11.02.2019.

7. In the result, this appeal filed by the revenue stands dismissed.

8. Before parting, we 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 08 .02.2022.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 08 .02.2022
Thirumalesh, Sr.PS

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