

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.1732/M/2021
Assessment Year: 2009-10**

&

**ITA No.1733/M/2021
Assessment Year: 2009-10**

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| Shri Shailesh D. Thakare (Prop. of Shivam Trading Company), K-14, New Vaity Wadi, Vishnu Nagar, Naupada, Thane (West), Mumbai – 400 602 PAN: ABZPT 0626P | Vs. | Income Tax Officer, Ward 3(3), 6 th Floor, B – Wing, R.No.8, Ashar IT Park, Road No.16Z, Wagle Estate MIDC, Thane (W) - 400604 |
| (Appellant) | | (Respondent) |

**ITA No.290/M/2021
Assessment Year: 2009-10**

&

**ITA No.291/M/2021
Assessment Year: 2009-10**

| | | |
|---|-----|---|
| Income Tax Officer, Ward 3(3), Room No.8, 6 th Floor, B – Wing, Wagle Industrial Estate, Thane (W) - 400604 | Vs. | Shri Shailesh D. Thakare (Prop. of Shivam Trading Company), K-14, New Vaity Wadi, Vishnu Nagar, Naupada, Thane (West), Mumbai – 400 602 PAN: ABZPT 0626P |
| (Appellant) | | (Respondent) |

Present for:

Assessee by : Ms. Radha Halbe, A.R.
Revenue by : Shri B.K. Bagchi, D.R.

Date of Hearing : 09.02.2022
Date of Pronouncement : 17.03.2022

O R D E R**Per Kuldip Singh, Judicial Member:**

For the sake of brevity aforesaid cross appeals bearing identical question of law and facts are being disposed of by way of a composite order.

2. Appellant Shri Shailesh D. Thakare (hereinafter referred to as the assessee) and Income Tax Officer, Ward 3(3), Thane (hereinafter referred to as the Revenue) by filing the aforesaid cross appeals sought to set aside the impugned order dated 20.02.2020 qua the quantum proceedings under section 143(3) read with section 147 of the Income Tax Act (for short 'the Act) and impugned order dated 20.02.2020 qua penalty levied under section 271(1)(c) of the Act on the grounds inter alia that;

ITA No.1732/M/2021 (Assessee's appeal)

“1. In the facts and Circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the Assessing Officer of completing the assessment without providing a copy of the documents relied upon by the Assessing Officer thereby violating the law laid down by Honorable Supreme Court in the case of Kishanchand

Chellaram vs. CIT (1980) 125 ITR 713 and Andaman Timber Industries vs. Commissioner of Central Excise (Civil Appeal No. 4228 of 2006.)

2. In the facts and circumstances of the case and in law, the learned CIT(A) has erred in sustaining the addition of Rs.9,65,425/- being 25% of alleged bogus purchases of Rs.38,61,698/-.

3. The appellant craves leave to add, alter, delete or modify all or any of the above grounds of appeal. All the above grounds are without prejudice to each other.”

ITA No.1733/M/2021 (Assessee's appeal)

“1. In the facts and Circumstances of the case and in law, the learned CIT(A) erred in upholding the action of learned Assessing Officer in issuing the penalty show cause notice in standard proforma without striking off the inapplicable charge in the said notice and giving vague directions in the Assessment Order dated 26.03.2014, thereby violating the principle of natural justice as held by Hon'ble Bombay High Court in the case of CIT vs. Shri Samson Perinchery [2017] 392 ITR 4 (Bombay) and PCIT vs. Goa Coastal Resorts and Recreation Pvt. Ltd. [Tax Appeal No. : 24 of 2019; order dated 11.11.2019 (Bombay High Court)].

2. In the facts and Circumstances of the case and in law, the learned CIT(A) erred in upholding the action of learned Assessing Officer in levying penalty u/s. 271(l)(c) of Rs.2,58,886/- by passing a draft order dated 30.03.2017 with divergent and unclear findings as to the charge under which the penalty of Rs.2,58,886/- is levied.

3. In the facts and Circumstances of the case and in law, the learned CIT(A) erred in sustaining the penalty of Rs.2,58,886/- levied u/s. 271(l)(c) on the estimated profit addition of 25% on alleged bogus purchase.

4. The appellant craves leave to add, alter, delete or modify all or any of the above grounds of appeal. All the above grounds are without prejudice to each other.”

ITA No.290/M/2021 (Revenue’s appeal)

“1. On the facts & in the circumstances of the case, and in law, the Ld.CIT(A) has erred in deleting the penalty by not appreciating the fact that the assessee failed to prove the genuineness of the alleged bogus purchases from the Hawala parties during the course of assessment as well as penalty proceedings.

2. On the facts & in the circumstances of the case , it is submitted that the penalty was levied for the additions made on the basis of information received from Law enforcement agency of the State Government of Maharashtra i.e. Sale Tax Department.

3. The Ld.CIT(A) while deleting the penalty has not appreciated the ratio laid down by the Hon'ble Supreme Court in the case of MAK DATA(P) LTD Vs CU [358 ITR 593 (SC)].

4. It is humbly submitted that present appeal is being filed in accordance with the CBDT's Instruction No. 3/2018 dated 11/07/2018 amended vide letter dated 20.08.2018 as per para 10(e) of the said circular. Therefore, the order of the CIT(A) may be vacated & that of the Assessing Officer may be restored.

5. The appellant craves leave to add, amend, alter or delete any ground of appeal.”

ITA No.291/M/2021 (Revenue’s appeal)

“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 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.

6. The appellant craves leave to add, amend, alter or delete any ground of appeal.”

ITA No.1732/M/2021 (Assessee's appeal)

ITA No.291/M/2021 (Revenue's appeal)

3. Briefly stated facts necessary for adjudication of the controversy at hand are : the assessee is into the business of trading in electrical items under the name and style of M/s. Shivram Trading Co. On the basis of information received from Sales Tax Department alleging that certain entities have provided bogus

purchases bill to the assessee for accommodation entries to the tune of Rs.38,61,698/- as under:

| S. No. | Name of the Party | Amount of bill |
|---------------|--------------------------------|-----------------------|
| 1 | Swastik Sales Agency Pvt. Ltd. | 7,74,982/- |
| 2 | Navoday Trade Impex Pvt. Ltd. | 9,40,358/- |
| 3 | Rajeshwari Trading Pvt. Ltd. | 12,31,199/- |
| 4 | Elecon Impex Pvt. Ltd. | 9,15,159/- |
| | Total | 38,61,698/- |

4. Consequently the Assessing Officer (AO) after recording reasons initiated the reopening under section 147 read with section 148 of the Act. Declining the contentions raised by the assessee that he has made genuine purchases, AO proceeded to add an amount of Rs.38,61,698/- to the total income of the assessee and thereby framed the assessment at total income of Rs.41,09,458/- under section 143(3) read with section 147 of the Act.

5. Assessee carried the matter before the Ld. CIT(A) who has restricted the additions to Rs.9,65,425/- and deleted the balance amount of Rs.28,96,273/-. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) both assessee as well as Revenue have come up before the Tribunal by way of filing cross appeals.

6. Undisputedly, reopening was initiated by the AO on the basis of information received from Sales Tax Department that 4 entities have provided bogus bills worth Rs.38,61,698/- to the assessee. It is also not in dispute that the AO without making any enquiry/ investigation has added the entire amount of alleged bogus bills i.e. Rs.38,61,698/- to the total income of the assessee. It is also not in dispute that the Ld. CIT(A) deleted 75% of the addition made by the AO on the ground that the entire amount of bogus purchases cannot be added to the income of the assessee rather 25% of the bogus purchases i.e. Rs.9,65,425/- out of the total purchases of Rs.38,61,698/- has added to the income of the assessee. It is also not in dispute that gross profit earned by the assessee during preceding as well as subsequent years was on average 11.2% during 2007-08 to 2010-11 which is as under:

| A.Y. | Turnover | Gross Profit | G.P. % | Net Profit | NP% |
|---------|---|--------------|--------|-------------|--------|
| 2007-08 | 82,73,567/- | 11,43,965/- | 13.83% | 3,05,669/- | 3.69% |
| 2008-09 | 95,38,933/- | 11,96,573/- | 12.54% | 3,00,710/- | 3.15% |
| 2009-10 | 98,50,047/- | 9,42,778/- | 9.57% | 3,34,312/- | 3.39% |
| 2009-10 | 98,50,047/- (Including alleged bogus purchases of Rs. 38,61, 698/-) | 48,04,476/- | 48.77% | 41,96,010/- | 42.60% |
| 2010-11 | 1,10,59,213/- | 11,21,573/- | 10.14% | 3,98,407/- | 3.60% |

7. In the backdrop of the aforesaid undisputed facts the Ld. A.R. for the assessee contended that when consequent sales made by the assessee during the year under assessment have not been disputed by the AO as well as the Ld. CIT(A) addition to the tune of 25% of the bogus purchases is not sustainable and relied upon the decision rendered by Hon'ble Bombay High Court in the case of Principal Commissioner of Income Tax vs. M/s Mohommad Haji Adam & Co. in Income Tax Appeal No.1004 of 2016 & ors. order dated 11.02.2019 and further contended that co-ordinate Benches of the Tribunal have taken uniform view that in such cases addition may be made up to 12.5% of the bogus purchases. In support of his arguments the Ld. A.R. for the assessee also relied upon the decision of Hon'ble Bombay High Court in case of CIT vs. Nikunj Eximp Enterprises (P) Ltd. (2013) 216 Taxman 171 (Bom.)

8. Hon'ble Bombay High Court in identical facts and circumstances of the case decided the issue in case of M/s. Mohommad Haji Adam & Co. (supra) even after distinguishing the decision rendered by the Hon'ble Gujarat High Court in case of N.K. Industries Ltd. vs. Dy. CIT in Tax Appeal No.240 of 2003 and connected appeals decided on 20.06.2016, also relied upon by the Revenue, held that when there is no discrepancy

between the purchases shown by the assessee and the sale declared, the assessee cannot be punished since the sale price is accepted by the Revenue and moreover it goes against the principle of section 68 & 69C of the Act. In these circumstances following the consistent view taken by the co-ordinate Benches of the Tribunal and decision rendered by the Hon'ble Bombay High Court, we are of the considered view that keeping in view the gross profit earned by the assessee in preceding as well as succeeding years as discussed in the preceding paras addition in this case @ 12.5% of the gross bogus purchases of Rs.38,61,698/- would meet the ends of justice.

9. Since no independent enquiry has been carried out by the AO rather relied upon the information supplied by the Sales Tax Department as to the alleged bogus purchases and at the same time AO has not disputed the sales recorded by the assessee the gross profit rate on the normally accepted purchases can be fixed to deal with such bogus purchases. So the total addition on the basis of 12.5% minus already declared by the assessee in the year under assessment shall meet the ends of the justice.

10. The contentions raised by the Ld. D.R. for the Revenue that 100% bogus purchases made by the assessee be added to his total

income is not sustainable in the eyes of law. So appeal filed by the assessee is partly allowed and appeal filed by the Revenue is dismissed.

ITA No.1733 /M/2021 (Assessee's appeal)
ITA No.290/M/2021 (Revenue's appeal)

11. On the basis of assessment framed under section 143(3) read with section 147 of the Act at the total income of Rs.41,09,458/- by way of making addition of Rs.38,61,698/- on account of bogus purchases made by the assessee having been taken from hawala entry providers, proceeding under section 271(1)(c) of the Act have been initiated. Declining the contentions raised by the assessee the AO proceeded to levy the penalty to the tune of Rs.1,27,91,012/- @ 100% of the tax sought to be evaded.

12. The assessee carried the matter before the Ld. CIT(A) by way of filing the appeal who has partly allowed the same by restricting the penalty to the tune of Rs.9,65,425/- i.e. being the addition made by the Ld. CIT(A) in appeal @ 25% of the total bogus purchases by partly allowing the appeal.

13. Feeling aggrieved from the impugned order both assessee as well as Revenue have come up before the Tribunal by way of filing the present cross appeals.

14. Undisputedly, initially the AO has made addition of Rs.38,61,698/- on the total amount of alleged bogus purchases made by the assessee during the year under assessment. It is also not in dispute that addition made by the AO has been restricted by the Ld. CIT(A) to the tune of Rs.9,65,425/- i.e. @ 25% of the total bogus purchases. It is also not in dispute that now Tribunal vide order of even date has restricted the addition to the extent of 12.5% of the entire bogus purchases.

15. In the backdrop of the aforesaid undisputed facts the Ld. A.R. for the assessee contended that when the entire addition has been made on the basis of estimation penalty levied by the AO and sustained by the Ld. CIT(A) is not sustainable. Moreover, penalty in this case has been levied on the basis of information received from the Sales Tax Department and no independent enquiry has been made by the AO, hence, the penalty is not sustainable. Co-ordinate Bench of the Tribunal has also deleted the penalty in the identical facts and circumstances of the case by citing as DCIT vs. M/s. Toshvin Analytical Pvt. Ltd. in ITA No.7505/M/2019 order dated 10.06.2021.

16. Furthermore, when the basis for initiation of penalty proceedings have been altered or modified by the appellate authority the AO cannot proceed with the penalty proceedings as has been held by Hon'ble Delhi High Court in case of Pr. CIT vs. Fortune Technocomps (P) Ltd. (ITA No.313/2016) (Delhi HC) by following the decision rendered by the Hon'ble Kolkata High Court in case of CIT vs. Ananda Bazar Patrika Pvt. Ltd. (1979) 116 ITR 416 (Cal HC) by returning the following findings:

“Wherein the Hon'ble Calcutta HC affirmed the view of the ITAT that "once the basis for initiation of penalty proceedings was altered or modified by the first appellate authority, the then Learned Assessing Officer has no jurisdiction thereafter to proceed on the basis of the findings of the first appellate authority.”

17. So we are of the considered view that when entire addition in this case is on estimation basis and at no point of time Revenue Authorities have reached the specific conclusion that the assessee has concealed the particulars of income or has furnished inaccurate particulars of income rather made the addition on the basis of information received from Sales Tax Department without conducting any independent enquiry as to the alleged bogus purchases, the penalty levied by the AO and confirmed by the Ld. CIT(A) is not sustainable in the eyes of law.

18. In view of what has been discussed above ITA No.1732/M/2021 for A.Y. 2009-10 of assessee's appeal is partly allowed and ITA No.291/M/2021 for A.Y. 2009-10 of Revenue's appeal is dismissed and ITA No.1733/M/2021 for A.Y. 2009-10 of assessee's appeal is allowed and ITA No.290/M/2021 for A.Y. 2009-10 of Revenue's appeal is dismissed.

Order pronounced in the open court on 17th March 2022.

**Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 17.03.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.