

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

**SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**आयकर अपील सं/ I.T.A. No. 100/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2011-12)**

Income Tax Officer 32(1)(1) R. No. 703, Kautilya Bhavan, BKC, Bandra (E), Mumbai - 400051	बनाम/ Vs.	Brijesh Raithatha A-108, Nand Dham, C Wing, L.T. Road, Borivali, Mumbai - 400092 PAN : ADOPR7271D
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी) / Respondent)

Appearances

For the Appellant/Department : Shri C.T. Mathews
For the Respondent/ Assessee : None

सुनवाई की तारीख / Date of Hearing : 31.01.2022
घोषणा की तारीख /Date of Pronouncement : 30.03.2022

आदेश / ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant/Department has challenged the order, dated 12.03.2020, passed by the Commissioner of Income Tax (Appeals) -44, Mumbai [hereinafter referred to as 'CIT(A)'] under section 250 of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] in appeal [CIT(A), Mumbai44/10282/2018-19] for the Assessment Year 2011-12, whereby the Ld. CIT(A) had partly allowed the appeal filed by the Assessee against the Assessment Order, dated 21.09.2018, passed under Section 143(3) read with section 263 of the Act.
2. The Revenue has raised the following grounds of appeal:-

1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the addition to 10% of the bogus purchases against 100% addition made by AO on account of bogus purchases.*
2. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering that the addition was made on the basis of information received from Sales Tax Department, Maharashtra through DIT(Inv.) with regard to bogus purchases made by the assessee from dealers without supply of actual goods.*
3. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering that the hawala dealers have admitted on oath before the Sales Tax Authorities that they have not sold any material to anybody.*
4. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering that the assessee could not prove the genuineness and creditworthiness of the purchase transactions during the course of assessment proceedings.*
5. *Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in not considering the facts which are similar to the facts in the decision of Hon'ble Supreme Court in the case of N.K. Proteins v DCIT (SLP(Civil) No.769/2017 dated 16.01.2017, wherein it was held that when the transactions have been found to be bogus there is no point in restricting it to a certain percentage and required to be disallowed in their entirety.*
6. *The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.*

3. Brief facts are that the Respondent/Assessee is an individual resident running a proprietary concern in the names of M/s Brijesh Kumar & Co. and is engaged in the business of trading in building materials, particularly, sand and metal. The Appellant filed its return of income for the Assessment Year 2011-12 on 29.08.2011 declaring total income of INR 16,18,220/-.
4. The Assessing Officer (hereinafter referred to 'the AO) received information from DGIT (Investigation), Mumbai/Sales Tax Department that some businessmen had accepted bogus purchase bills from some parties. Therefore, the assessment was re-opened and re-assessment was framed under Section 147 of the Act vide order dated 12.02.2016, (hereinafter referred to as '*the Re-assessment Order*') at a total income of INR 34,36,930/- after making an addition of INR 18,18,712/- being the difference between 12.5% of bogus purchases and the gross profit of 6.04% offered by the Assessee as his income.
5. However, the Re-assessment Order was set aside by the Principal Commissioner of Income Tax -32, Mumbai (hereinafter referred to as '*the PCIT*') under Section 263 of the Act as he was of the view that entire amount of '*bogus purchase*' should have been added to the returned income as per the decision of the Hon'ble Supreme Court in the case of N.K. Proteins Ltd: 250 taxman 22 (SC).
6. Thereafter, in the set aside proceedings, again assessment was framed under Section 143(3) read with section 263 of the Act vide order, dated 21.09.2018, (hereinafter referred to as '*the Post-Revision Assessment Order*') and entire amount of bogus purchases of INR 3,01,00,128/- was added to the returned income treating the same as '*unexplained expenditure*' under Section 69C of the Act. The relevant extract of the assessment order reads as under:

“17. In response to the above show cause notice the representative of the assessee vide his reply dated 24.08.2018 has stated that the judicial pronouncement in the case of M/s. N.K. Proteins Ltd. cannot be applied to the case of the assessee as the facts of both the cases are different. The A.R. of the assessee has given various examples to prove that the issues involved in the case of M/s. N. K. Proteins Ltd. and in the case of assessee are different. He has claimed that the purchases in this case are not ‘bogus’ but could be treated as ‘inflated’. The assessee has further relied on various case laws on the issue involved.

18. The submission made by the representative of the assessee has been perused. However, same is not found to be acceptable. As discussed above, the Hon’ble Supreme Court while upholding the judgment of Hon’ble Gujarat High Court in the case of M/s. N.K. Proteins Ltd. has clearly held that once it comes to a categorical finding that the amount represents alleged bogus purchases from bogus suppliers it is not incumbent to restrict the disallowance to certain percentage.

18.1 In this case, it has been clearly established that the entire purchases made by the assessee were bogus as he obtained purchase bills from bogus suppliers as established during the reassessment proceedings. Therefore, it is clear that the findings in the case of N.K. Proteins Ltd.(Supra.) are squarely applicable in this case. Further the cases laws relied upon by the assessee are also not relevant to the case of the assessee and hence not applicable.

19. In view of the above discussion, the entire bogus purchases of Rs.3,01,00,128/- are hereby treated as unexplained expenditure u/s.69C of the I.T.Act,1961, and added to the total income of the assessee. Penalty proceedings u/s.271(1)(c) of the I.T. Act, 1961 is initiated separately for furnishing inaccurate particulars of income leading to concealment of income.”(Emphasis supplied)

7. Being aggrieved, the Assessee preferred appeal before the CIT(A) against Post-Revision Assessment Order who granted relief to the Assessee by restricted the addition made by the AO to 10% of the purchases, i.e, INR 30,11,112/-, holding as under:

"3.11 In the present case from the facts available on record, it is observed that the AO has neither disproved the purchases for which all the bills, ledgers and bank payment proof are filed, nor the corresponding sales made by the appellant. Considering all the facts and circumstances of the case and the case laws discussed, the profit is restricted to 10% of the alleged bogus purchases. The AO is directed add 10% of Rs.3,01,11,428 working out to Rs.30,11,112 and modify the addition accordingly. Appellant gets part-relief, These grounds are partly allowed."

8. The Revenue is now in appeal before us challenging the order passed by CIT(A). All the grounds raised by the Revenue challenge the relief granted by the CIT(A) restricting the addition to 10% of bogus purchases and therefore, are being taken up together.
9. Ld. Departmental Representative appearing before us referred to the Post-Revision Assessment Order and placed reliance of the judgment in the case of NK Proteins Ltd vs DCIT, dated 16.01.2017 [SLP(C) No. 769/2017] to contend that the AO has correctly made addition of 100% of purchases while CIT(A) committed grave error in restricting the addition to 10% of purchases.
10. We have heard the Ld. Departmental Representative and perused the material on record. In paragraph 3.4 of the order impugned herein, the CIT(A) had correctly noted that there cannot be sales without corresponding purchases and therefore, the assessing officer in the Re-Assessment Order had correctly taxed profits element related to suspicious purchases. This fact was also noted by the assessing officer in paragraph 10 of the Post-Revision Assessment Order as under:

“10. However, during the re-opened assessment proceedings, the assessee submitted that for the purchases made, there is a corresponding sales angle as well. The income arising from such sales has been shown and offered by the assessee in the profit and loss a/c. Considering the fact of the case, the AO held that it was evident that the Assessee purchased goods from open/grey market for benefits like lower duties, better credit facility, greater bargaining power etc. causes best known to the assessee and to set right the record, assessee obtained accommodation purchase bills from the above parties”. (Emphasis Supplied)

It is in the above context that the purchases were held to be ‘bogus’ in the re-assessment proceedings since the same were made from open/grey market with accommodation bills arranged from parties. In our view, the judgment in the case of M/s. N.K. Proteins Ltd. (supra), heavily relied upon by the Revenue, would not apply to the facts of the present case. Even the PCIT had no grouse as regards the reason for which purchases were held to be bogus. The PCIT moved on the premise that judgment in the case M/s. N.K. Proteins Ltd., (supra) was applicable and accordingly, his only grievance was that 100% of such purchases should be taxed in the re-assessment proceedings instead of just the profit element. It is for only this reason that the Re-Assessment Order was set aside by PCIT.

11. We note that in the set aside proceedings which culminated in passing of the Post-Revision Assessment Order, 100% of such bogus purchases have been brought to tax. Adverse inference has been drawn against the Assessee as the Assessee had failed to produce the parties. Judgment in the case of N.K. Proteins (supra) has been applied without dealing with the aspect of corresponding sales. In similar facts and circumstances co-ordinate Bench of this Tribunal has granted relief to the assessee in the case of **ITO 16(2)(1), Mumbai vs Ashwin Purshottam**

Bajaj: ITA No. 4736/Mum/2014 & ITA No. 5207/Mum/2014, dated **14.12.2016**, and has held as under:

“9. *We have considered the rival contentions and also perused the material available on record. We have observed that the assessee is an individual running a proprietorship firm namely M/s The Shoe Box INC Retail Store of footwear, bags, belts, wallets and leather goods, boutique etc. having shops at different places , and office at Mumbai. Information was received by the AO from the Sales Tax Authorities, Government of Maharashtra that the assessee has made bogus purchases to the tune of Rs. 1.13 crores from following four parties who are in the list of hawala dealers giving accommodation entries without supplying any goods:-*

xx xx

The AO issued notices u/s 133(6) of the Act to the above stated parties to seek relevant information/documents but the notices were returned un- served. The assessee was asked by the AO to produce these four parties but the assessee could not produce the parties from whom the purchases were made. The AO made additions u/s 69C of the Act of the peak credit outstanding to be payable to these four parties during the year to the tune of Rs.1,31,88,227/- as against purchases of Rs.1,13,44,778/- . The credit for purchases from these four parties of Rs.1,13,44,778/- are appearing in the books of accounts of the assessee. The assessee has to discharge the primary onus as to the genuineness and bonafide of the transaction of purchase of goods. It is observed that the A.O. has made addition of the entire purchases amount to Rs. 1.13 crores by making additions of Rs. 1,31,88,227/- being peak credit payable during the year for purchases to these parties which included balance of Rs.18,43,451/- for purchases made in the earlier year, while the AO has , however , not doubted the sales made by the assessee against these purchases. The assessee has reconciled the quantitative details of the stock reflected in these purchases with quantitative details of stock as per sale invoices. The A.O. has doubted the purchases from these four alleged accommodation entry providers being

hawala dealers as concluded by Sales Tax Department of Government of Maharashtra to be bogus purchases, that these four parties only provided accommodation bills and the goods were never supplied by these parties and the assessee allegedly made purchases from some other parties for which payments were made through undisclosed income. Thus, the A.O. observed that the assessee has purchased the material from someone else while bogus bills were organized by these hawala dealers, hence, section 69C of the Act was invoked by the AO and additions were made by the AO. The conclusion of the Id. CIT(A) that the assessee has purchased material from some other dealers but quantitative reconciliation of the stock was duly done by the assessee of the sale and purchase and hence the profit element in this accommodation entries are to be added to the income cannot be faulted . The Id. CIT(A) restricted the addition by estimating GP ratio of 12.5% of Rs. 1,13,44,778/- being purchases from these alleged four accommodation entry providers. We do not find any infirmity in the well reasoned order of the Id. CIT(A) whereby net profit was estimated which was a reasonable estimation made by learned CIT(A) and we sustain/affirm the order of learned CIT(A). In the result , we dismiss both the appeal of the assessee as well of Revenue. We order accordingly.”
(Emphasis supplied)

12. The CIT(A) has granted relief to the Assessee following the decision of the Tribunal in the case of ITO16(2)(1), Mumbai vs Ashwin Purshottam Bajaj, (supra) as well as the decision of Ahmedabad Bench of the Tribunal, rendered in similar facts and circumstances, in the case of Shri Smit P Sheth Vs ITO: ITA No.3238 & 3293/Ahd./2009 which has since been confirmed by Hon'ble Gujarat High Court (ITR 256 ITR 451). In the present case, the purchases were held to be bogus as the same were made from open/grey market, sales have been accepted by the Assessing Officer and the CIT(A) has, in paragraph 3.4 of his order, returned a finding that the Assessee has been able to explain the source of expenditure from his bank account statement, purchase invoices and payments made through cheques. In view of the above, we

see no reasons to take any other view of the matter than the view so taken by the Co-ordinate Benches of the Tribunal.

13. We hold that in the facts of the present case entire amount purchases cannot be brought to tax. The CIT(A) has confirmed addition to the extent 10% of bogus purchases (i.e. INR 30,11,112/-) which is in addition to profits already offered by the Assessee to tax. We see no infirmity in the order passed by CIT(A) and decline to interfere in the matter.
14. Appeal filed by the Revenue is dismissed.

Order pronounced on 30.03.2022.

Sd/-
(Shamim Yahya)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 30.03.2022
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**