IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI

SHRI PRAMOD KUMAR, VICE PRESIDENT
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 5568/MUM/2018
(ASSESSMENT YEAR: 2011-12)

Assistant Commissioner of Income Tax,
Range-9(1)(1),
Room No. 260A, 2nd Floor,
Aayakar Bhavan, M.K. Road,
Mumbai - 400020 ..... Appellant

M/s Abhishek Millennium Contracts Pvt. Ltd.,
A-206, Oberoi Chambers,
Opp. SAB TV Off., New Link Road,
Andheri (West), Mumbai - 400053
[PAN:AAECA70004P] ..... Respondent

Vs

Appearances
For the Appellant/Department : Shri Mehul Jain
For the Respondent/ Assessee : Shri Sashi Tulsiyan

Date of conclusion of hearing : 23.02.2022
Date of pronouncement of order : 23.05.2022

O R D E R

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant/Department has challenged the order, dated 26.07.2018, passed by the Commissioner of Income Tax (Appeals)–16, Mumbai [hereinafter referred to as 'the CIT(A)'] under Section 250 of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] in appeal [CIT(A)-16/IT-398/DCIT-9(1)(1)/2015-16] for the Assessment Year 2011-12, whereby the CIT(A) had partly allowed the appeal filed by the Assessee against the Assessment Order, dated 30.03.2015 passed under section 143(3) read with section 147 of the Act.

2. Revenue has raised the following grounds of appeal:

1. *"Whether in the facts and circumstances of the case and in law, the Ld. CIT(A) erred in restricting the addition at Rs. 25,88,404/- which is @ 12.5% of disputed purchases of Rs. 2,07,07,233/- and giving relief amounting to Rs. 1,81,18,829/- to the assessee?*

2. *Whether the ld. CIT(A) has failed to appreciate the judgment of the Hon'ble Apex Court in the case of N.K. Proteins Vs. DCIT SLP Nos. 769 of 2017 dated 16.01.2017 wherein the entire income on account of bogus purchase has been confirmed."*

3. *Whether in the facts and circumstances of the case and in law, the ld. CIT(A) erred in considering the receipt of Rs. 4,65,00,000/- as long term capital gain as against business receipt within the meaning of Section 28(va) of the Act?"*

3. Brief facts pertaining to the present appeal are that the Assessee is private limited company engaged, at the relevant time, in the business of contracting for plumbing and fire fighting systems. The Assessee filed its return of income for the Assessment Year 2011-12 on 29.09.2009 declaring total income of INR 6,78,44,123/- which was processed under Section 143(1) of the Act. Thereafter, reassessment proceedings were initiated based upon the information received from Sales Tax (VAT) Department, State of Maharashtra under Section 147 of the Act. The Assessing Officer (AO) framed assessment under Section 143(3) read with section 147 of the Act vide order, dated 30.03.2015 assessing total income at INR 9,29,24,980/- after making, inter alia, (a) an addition of INR 2,07,07,233/-, being total purchases made during the relevant previous year, holding the same to be bogus purchases, and (b) addition of INR 4,65,00,000/- on account of non compete fee.

Ground No. 1& 2

4. The Assessee carried this issue in appeal before the CIT(A) who partly allowed the appeal of the Assessee on this issue by restricting the

disallowance on account of bogus purchases to INR 25,88,404/- being 12.5% of the disputed purchases of INR 2,07,07,233./-.

5. Being aggrieved, the Revenue is in appeal before us.

6. The Ld. Departmental Representative appearing before us relied upon the Assessment Order to contend that the entire amount of bogus purchases should be treated as unexplained expenditure and the AO was correct in making addition of INR 2,07,07,233/-. In this regard, he relied upon the judgment of Hon'ble Supreme Court in the case of N.K. Proteins vs. DCIT: SLP No. 769 of 2017, dated 16.01.2017.

7. The Ld. Authorised Representative of the Assessee while responding to the submissions advanced by the Ld. Departmental Representative, relied upon written submissions dated 17.01.2022, and submitted that identical issue had come up before the Tribunal in the case of the Assessee for the Assessment Year 2010-11 in ITA No. 7197/Mum/2017 wherein appeal preferred by the Revenue on identical facts and grounds was dismissed.

8. We note that in Assessee's own case for the Assessment Year 2011-12 the Tribunal has in ITA No. 7197/Mum/2017, after noting identical facts and grounds, held as under:

> *"5. The solitary ground raised by the revenue relates to challenging the order of Ld. CIT(A) in restricting the addition at Rs. 9,85,338/- which is @12.5% of disputed purchase of Rs. 78,82,704/- and giving relief amounting to Rs. 68,97,366/- to the assessee.*
>
> *xx xx*

7. After having gone through the facts of the present case and hearing the parties at length, we find that although the Ld. CIT(A) had considered all the judgments referred by both the parties, but as per the facts of the present case, the AO had shown the parties from whom the assessee had purchased material as 'non-existence'. At the same time, the AO after examining the evidences produced by the assessee could not give any adverse finding that the assessee had not shown consumption/sales of the goods and that it had not offered the income on such sale of goods.

8. In our view, once the AO had not doubted the genuineness of sales, then in that eventuality, AO could not have gone ahead and made addition in respect of the entire purchases as it would lead to absurd profits. Ld. DR although had specifically argued that Ld. CIT(A) had failed to appreciate the judgment of Hon'ble Apex Court in the case of N. K. Proteins Vrs. DCIT, wherein addition on account of bogus purchase has been enhanced to 25%. But at the same time, after considering the facts of the present case, we find that Ld. CIT(A) had discussed and relied upon all the judgments which are on the identical grounds containing similar circumstances. Since in the present case, Ld. CIT(A) had held that since the purchases were made from the parties other than those mentioned in books of accounts, therefore in such circumstances, only the profit element embedded in such purchases could be added to the assessee's income. On this proposition, we draw strength from the judgment in the case of CIT vrs. Simit Shet (2013) 38 taxmann.com 385 (Guj). We have also considered the judgment of Hon'ble Apex Court in the case of N. K. Proteins Vrs. DCIT, but the facts of that case was altogether different. We have also considered the judgment in the case of Vijay M. Mistry Construction Ltd. 355 ITR 498 (Guj) and in that case also, the facts of the case are different from the facts of the present case. In that case, A.O had brought adequate material on record to prove that the cross cheques had not been given to parties from whom supplies were allegedly procured but these were encashed from a bank account in the name of another entity, possibly hawala dealer. Further, as per the facts of that

case, the money deposited in that account was withdrawn in cash almost on the same day. Therefore, in the said case, it was held that if the purchases were made from open market without insisting for genuine bills, the suppliers may be willing to sell the product at a much less rate as compared to a rate which they may charge in which the dealer has to give genuine sale invoice in respect of that sale. Hence keeping all these factors in mind, the court estimated an element of profit percentage of the overall purchase price accounted for in the books of accounts through fictitious invoices, therefore all the facts in that case are also distinguishable.

9. The AO in this case had held that the parties from whom the purchases were made by the assessee were found to be bogus, but at the same time the AO had not doubted the consumption/sales. Therefore under such circumstances, Ld. CIT(A) had rightly concluded that motive behind obtaining bogus bills thus, appears to be inflation of purchase price so as to suppress true profits. Hence Ld. CIT(A) had rightly estimated the suppressed profit to the extent of 12.5% of the purchases made from the bogus entities, as the suppressed profit element embedded in such purchases.

10. Moreover, no new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by Ld CIT (A). Therefore, there are no reasons for us to interfere into or deviate from the findings recorded by the Ld. CIT (A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, this ground raised by the revenue stands dismissed." (Emphasis Supplied)

9. In paragraph 6.1.28 of the order impugned herein, the CIT(A) took note of the fact that the AO had neither doubted the genuineness of sales nor given any adverse finding that the Assessee had not shown consumption/sales of the goods and/or that the Assessee had not offered the income on such sales of goods. Therefore, the CIT(A) concluded that the AO could not have gone ahead to make additions

in respect of entire purchases as the same would lead to absurd profits. Accordingly, the CIT(A) restricted the disallowance on account of bogus purchases to INR 25,88,404/- being 12.5% of the disputed purchases of INR 2,07,07,233/- holding as under:

> *"6.1.31 As narrated earlier, the Ld. A.O. in this case has held that the parties from whom the purchases were made by the appellant were found to be bogus and that is the reason from which it was not produced during the assessment proceedings. Not having doubted the consumption/sales, the motive behind obtaining bogus bills thus, appears to be inflation of purchase price so as to suppress true profits. Considering the facts of the case as well as the various case laws cited (supra), I estimate the suppressed profit to the extent of 12.5% of the purchases made from the bogus entities, as the suppressed profit element embedded in such purchases. This estimation is in addition to the GP shown by the appellant. Accordingly, this ground of appeal is partly allowed."*

10. There is nothing on record to controvert the findings recorded by the CIT(A). We are in agreement with the decisions of the Tribunal in the case of the Assessee for Assessment Year 2011-12 (ITA No. 7197/Mum/2017). We are not persuaded to interfere with the order passed by the CIT(A) on this issue. Accordingly, Ground No. 1 and 2 raised by the Revenue in the present appeal are dismissed.

Ground No.3

11. The facts relevant to the issue for consideration are that the Assessee-Company was engaged in the business of contracting since the year 2004. The business of Assessee included contracting in the field of plumbing and firefighting including supply and installation for plumbing and fire-fighting systems and equipments. Mr. Ashok Gupta, the promoter of Assessee, was also Director of D S Gupta Construction Private Limited. The Assessee had contract execution capabilities and specialized work force that was catering to market such as Chennai,

Goa, Udaipur, Ahmadabad etc. Whereas D S Gupta Construction Private Limited had been procuring and executing contract/assignments in metropolitan cities such as Delhi, Mumbai, Hyderabad and Bangalore on the basis of capabilities of the Assessee. D S Gupta Construction Private Limited had agreed to transfer its business to Blue Star Electro Mechanical Limited, a company belong to Blue Star Group. In the aforesaid background, during the relevant previous year, the Assessee entered into an Agreement for Assignment of Business, dated 25.09.2010 (hereinafter referred to as 'the Agreement') for assignment of business with D.S. Gupta Construction Private Limited. The relevant extract of the Agreement read as under:

"1) The Assignor as rightful owner of right to carry on the business of Plumbing and Fire Fighting agrees to sell and Assignee agrees to acquire the rights of the assignor to carry the said business and the goodwill as described in recital here in above.

2) The consideration for the assignment is agreed to be Rs. 4,65,00,000 (Rupees Four Crore Sixty Five Lakhs).

3) The said amount of Rs. 4,65,00,000 the Assignee agree to pay to the Assignor on or after signing of these agreement.

4) The Assignee agrees to facilitate the transfer of services of employees of the Assignor and the services shall not be terminated but shall continue to have effects as if originally they were appointed by the Assignee or BSMEL as the case may be in accordance with and save as may be provided by the contract of employment with the

employees the provisions of the labour laws governing them."

12. According to the Assessee as per the Agreement, the Assessee assigned in favour of D S Gupta Construction Private Limited the right to carry on business of contracting in the field of plumbing and fire fighting for a period of 42 months w.e.f. 31.08.2010 and received INR 4,65,00,000/- as consideration that was offered to tax by the Assessee as income under the head capital gains in the return of income for the Assessment Year 2011-12.

13. However, the Assessing Officer treated the consideration of INR 4,65,00,000/-received by the Appellant as business receipts taxable under the head Income from Business' in terms of Section 28(va) of the Act holding the same to be nothing but the sum received for '*'not carrying out the business activity'*.

14. Being aggrieved, the Assessee preferred appeal before the CIT(A) who accepted the claim of Assessee by treating the sum of INR 4,65,00,000/- received by the Assessee capital gain by invoking proviso (i) to Clause (a) to Section 28(va) of the Act.

15. Now the Revenue is in the appeal before us challenging the above relief granted by CIT(A).

16. The Ld. Authorised Representative for the Assessee submitted that the provisions of the Section 28(va) of the Act were invoked by the Assessing Officer ignoring the exception carved out by Proviso (i) to Clause (a) of Section 28(va) of the Act. He submitted that the Assessee had transferred the right to carry on the business and received consideration on account of such transfer which clearly falls under the aforesaid proviso. He submitted that the provisions contained in Section 28(va)(a) of the Act are not applicable in respect of any sum received on account of transfer of a right to carry on

business that is chargeable to tax as capital gains. In the present case, the sum received on account of sale of business (with goodwill) was on account of transfer of the right to carry on the business which is taxable as capital gains. In support of the aforesaid, the Ld. Authorised Representative for the Assessee relied upon the following decisions/judgments - CIT vs. M/s. Mediworld Publications Private Limited: 337 ITR 178 (Delhi), ACIT Circle 33(1), New Delhi vs. Smt. Sangeeta Vij (ITA No. 4274/Del/2011) and ACIT Circle 2(3), and Hyderabad vs. Late B. V. Raju, (ITA No. 1034/Hyd/2004).

17. It is vital that assessee has not transferred any tangible asset or any liability to the M/s. D. S. Gupta Construction Private Limited. What was transferred is the right to carry on the business of Plumbing and Firefighting. This is specifically mentioned in the agreement dated 25.09.2010 at page no. 13 of the agreement.

18. The Ld. Departmental Representative supported the Assessment Order and relied upon paragraph 7.4 of the Assessment Order which read as under:

> *"7.4 The submission of the assessee is considered. The assessee's emphasis is on its contention that there being sale of business as "on-going concern" basis, generating goodwill, which is capital in nature, it had treated and taxed the proceeds as Long Term Capital Gains. However, this contention of the assessee is found to be not acceptable in view of the following background;*
>
> *7.4.1 It is significant to narrate here the relevant and material facts emerging from the Agreement for Assignment of Business, which are briefly stated hereunder;*
>
> *The assessee company is an associate of D.S. Gupta Construction Private Limited. The assessee is the Assignor and D.S. Gupta Construction Private Limited is the Assignee.*

The Assignor and the Assignee both were carrying on the same line of business as that of contracting in the field of plumbing and fire fighting systems, equipment etc...

The Assignee had entered into an Arrangement for sale of its business with goodwill to Blue Star Electro Mechanical Limited (BSEML).

The Assignor (assessee company) assigned in favour of the Assignee the right to carry on the business of contracting in the field of plumbing and fire lighting for a period of 42 months w.e.f. 31.08.2010.

7.4.2 From the main features of the Agreement, as summarized heretofore, it is loudly clear that the consideration of Rs. 4,65,00,000/- is nothing but a sum received by virtue of the above referred Agreement for Assignment of Business dated 25.09.2010 for disengaging itself or not carrying out its business activity as that of contracting in the field of plumbing and fire fighting systems, equipment etc. in favour of the Assignee, which is an associate of the Assignor (assessee company). The terms of the Agreement referred to above itself categorically speak about the applicability of the provisions of clause (va) of Section 28 of the Act, which read as under;

> *"28. The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession.....*

7.4.3 On going through the aforesaid provisions vis-a-vis the terms of the arrangement dated 25.09.2010, it is clear that the consideration of Rs. 4,65,00,000/- is nothing but the sum received for not carrying out the business activity in favour of its associate company and hence the same is hereby treated as business receipt within the meaning of Section 28(va) of the Act. Accordingly, the sum of Rs. 4,65,00,000/- is hereby treated and taxed under the head "Income from Business" as against the assessee's claim of it being "Long Term Capital Gains". (Emphasis Supplied)

19. We have considered the rival contentions and perused the material on record. The CIT(A) has granted relief to the Assessee by relying upon proviso (i) to sub-clause (a) of Section 28(va) of the Act which reads as under:

> *"28. The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession:*
>
> *(i).....*
>
> *(va) any sum, whether received or receivable, in cash or kind, under an agreement for—*
>
> *(a) not carrying out any activity in relation to any business or profession; or*
>
> *(b) not sharing any know-how, patent, copyright, trade-mark, licence, franchise or any other business or commercial right of similar nature or information or technique likely to assist in the manufacture or processing of goods or provision for services.*
>
> *Provided that sub-clause (a) shall **not** apply to-*
>
> *(i) any sum, whether received or receivable, in cash or kind, on account of transfer of the right to manufacture, produce or process any article or thing or right to carry on any business or profession, which is chargeable under the head "Capital gains ",*
>
> *(ii) any sum received as compensation, from the multilateral fund of the Montreal Protocol on Substances that Deplete the Ozone layer under the United Nations Environment Programme, in accordance with the terms of agreement entered into with the Government of India." (Emphasis Supplied)*

20. The Ld. Authorised Representative for the Assessee has relied upon the decision of the Special Bench of the Tribunal in the case of ACIT Circle 2(3), Hyderabad vs. Late B. V. Raju, (ITA No. 1034/Hyd/2004) wherein, after examining the provisions of Section 28(va) of the Act, the special bench of the Tribunal observed as under:

"36. Thus with the amendment to the law, non-compete fee even if it is capital receipt is now chargeable to tax as Income from business. In Guffic Chem. (P.) Ltd. (supra) the Hon'ble Supreme Court held that payment received as non-competition fee under a negative covenant was always treated as a capital receipt till the assessment year 2003-04. It is only vide the Finance Act, 2002 with effect from April 1, 2003 that receipt by way of non-compete fee was made taxable u/s. 28(va)). The Hon'ble Court also held that it was well settled that a liability cannot be created retrospectively. The Hon'ble Court held that the amendment by insertion of clause (a) to section 28(va) was amendatory and not clarificatory.

37. CAPITAL GAIN OR NON-COMPETE FEE:

The conclusion that emerges from the aforesaid discussion is that when a business is sold and the purchaser enters into agreements to ensure that there is no competition, he may enter into agreements not only with the transferor of the business but also with persons connected with the transferor. He may also pay consideration to the transferor for transfer of business, for not engaging in competition. He may also pay consideration to persons associated with the transferor not to indulge in competition. The receipts by the transferor or other persons connected with the transferor can be divided into the following categories;

(a) The consideration paid by the transferee for transfer of the business to the transferor;

(b) Consideration paid to the transferor not to carry on same business directly or indirectly not to indulge in manufacturing same or similar products, not to use the trade names etc. ;

(c) Consideration paid to persons associated with the transferor to ensure that they also do not indulge in competing business;

It has to be clarified that the case laws in which the transferee claims the consideration paid as above as revenue expenditure have no bearing whatsoever when we deal with the case of the tax treatment in the hands of the transferee. There are different considerations for determining whether the cost paid by the transferor is to be regarded as capital expenditure or revenue expenditure.

38. As far as category (a) is concerned the receipt would fall for consideration under the head capital gains as there is a transfer of capital asset in respect of which the machinery provisions of computation of capital gain can be applied. As far as category (b) is concerned the consideration received would fall for consideration under the head capital gain but depending upon the law that prevailed at the time of transfer. Self generated assets like, goodwill of a business or a trade mark or brand name associated with a business, a right to manufacture, produce or process any article or thing or right to carry on any business, tenancy rights, stage carriage permits or loom hours by their very nature could not have cost of acquisition and therefore machinery provisions were amended to provide cost of acquisition being treated as nil. These amendments are set out in the later part of this order. As far as category (c) is concerned, the same would fall for consideration to see if it is capital receipt chargeable to tax as on the date of transfer because after 1-4-2003 such consideration even if regarded as capital receipt would be chargeable to tax u/s.28(va)(a) of the Act. Therefore the law as it prevails on the date on which a person agrees to desist from doing certain acts in relation to any business would be relevant.

39. If a payment is in the nature of non-compete fee received by the transferor when he sells his business and agrees not to carry on the business which he transfers then that would fall for consideration under (category (b) referred to earlier) section 55(2)(a) "right to carry on business". If the non-compete fee is paid to persons associated with the transferor then the same would fall for consideration only under Sec.28(va)(a) of the Act

introduced by the Finance Act, 2002, w.e.f 1-4-2003. It is significant to note that the words used in Sec.28(va)(a) of the Act are "not carrying out any activity in relation to any business". The proviso (i) to Section 28(va)(a) provides for exception to cases where such receipts are taxable as capital gain viz., where any sum is received for transfer of a right to carry on any business which is chargeable to tax as capital gain. When the transferor is already carrying on business and agrees not to carry on business transferred, then the same would fall for consideration only under Sec.55(2)(a) of the Act.

40. With the change in the law receipts on account of giving up right to carry on business even if it is capital receipt would now be chargeable to tax as income from business. The difference would be that if it is paid to the transferor for giving up right to carry on business, it would be regarded as capital gain, the cost of acquisition of right to carry on business being determined in accordance with the provisions of Sec.55(2)(a) of the Act. If it is compensation paid for "not carrying out any activity in relation to any business", which the transferor is not carrying on, the same would be chargeable u/s.28(va)(a) of the Act. If a receipt is considered as payment for not carrying on business which the transferor is already carrying on then it would be regarded as capital gain, being transfer of a capital asset viz., right to carry on business. Thus for the provisions of Sec.55(2)(a) of the Act to apply the transferor must be carrying on a business which he agrees not to carry on. If the transferor is not already carrying on business then he receives consideration only for "not carrying out any activity in relation to any business". In that case the provisions of Sec.28(va)(a) of the Act would apply and not the proviso thereto.

41. Now in the case before the special bench we are concerned with consideration paid to persons associated with the transferor. Late B.V. Raju was not carrying on business of manufacture of cement. He was associated with two cement manufacturing companies RCL and SVCL in various capacities. With this background, we will examine the meaning of the

expression 'a Right to Manufacture, produce or process any article or thing" and "Right to carry on any business" used in Sec.55(2)(a) of the Act." (Emphasis Supplied)

21. It is admitted position that the Assessee was carrying on business of contracting in the field of plumbing and firefighting. The Assessee agreed not to carry this business for a period of 42 months. In our view, as per the above decision of the special bench of the Tribunal, the payment of INR 4,65,00,000/- received by the Assessee is not taxable as business income as per provisions of Section 28(va) read with proviso (i) to Clause (a) of Section 28(va) of the Act. Further, we note that the CIT(A) has granted relief to the Assessee by relying upon the decisions in the case of CIT vs. M/s. Mediworld Publications Private Limited: (supra), ACIT vs. Champion Highland and Stud Farms P. Ltd. (ITA No. 2474/Mum/2010) and ACIT vs. Smt. Sangeeta Wij (supra) . We have gone through the aforesaid decisions, rendered in similar facts & circumstances, and note that the same support the contentions of the Assessee.

22. In view of the above, we are not persuaded to interfere with the order passed by the CIT(A) on this issue. Accordingly, Ground No. 3 raised by the Revenue in the present appeal is dismissed.

In the result, the present appeal is dismissed.

Order pronounced on 23.05.2022.

Sd/-	*Sd/-*
(Pramod Kumar)	(Rahul Chaudhary)
Vice President	Judicial Member

मुंबई Mumbai; दिनांक Dated : 23.05.022
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