

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

**BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.2034/M/2021
Assessment Year: 2011-12**

Dy. CIT 19(1), 2 nd Floor, Room No.203, Matru Mandir Bldg., Tardeo Road, Mumbai – 400 007	Vs.	Mr. Hemantkumar Sumermal J. Bhansali, 6/B, 52/54, 1 st Floor, C.P. Tank Road, Mumbai- 400 004 PAN: AABPB6379C
(Appellant)		(Respondent)

**CO No.31/M/2022
(Arising out of ITA No.2034/M/2021)
Assessment Year: 2011-12**

M/s. Hemantkumar Sumermal J. Bhansali, 6/B, 52/54, 1 st Floor, C.P. Tank Road, Mumbai- 400 004 PAN: AABPB6379C	Vs.	Dy. CIT 19(1), 2 nd Floor, Room No.203, Matru Mandir Bldg., Tardeo Road, Mumbai – 400 007
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Vimal Punmiya, A.R.
Revenue by : Smt. Sonia Kumar, D.R.

Date of Hearing : 24 . 05 . 2022
Date of Pronouncement : 31 . 05 . 2022

O R D E R

Per : Kuldip Singh, Judicial Member:

For the sake of brevity aforesaid appeal and cross objections bearing common question of law and facts are being disposed of by way of composite order.

2. Appellant Dy. CIT 19(1), Mumbai (hereinafter referred to as the Revenue) and the cross objector Mr. Hemantkumar Sumermal J. Bhansali (hereinafter referred to as the assessee) by filing present appeal and cross objections sought to set aside the impugned order dated 24.06.2021 passed by the National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter referred to as CIT(A)) on the grounds inter alia that:

ITA No.2034/M/2021 (Revenue's appeal)

“1. Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in restricting the addition to @12.5% of total bogus purchases and computing the profit for the purpose of section 28 of the I.T. Act, 1961 taking in to consideration the bogus bills against which no goods have been received?”

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in restricting the addition to @12.5% of total bogus purchases in presuming that the purchase have been made from unknown partie whereas bills have been received from hawala dealer?”

3. Ld. CIT(A) erred in restricting the addition to (a)12.5% of total bogus purchases that purchases have been made from unknown parties without clarification how the payment was made and whether section 69 of the IT Act, 1961 will be applicable or not?

4. Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in not considering the order of the Hon'ble supreme court in the case M/s N.K. Protein Ltd Vs DCIT(SLA-CC Nos. 769 of 2017 dt. 16.01.2017) , which is on the similar issue of bogus purchases and when the apex court order was already the law of the land when the Ld. CIT(A) has pronounced its order on 04.04.2019?

5. Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) erred by not following the Hon'ble Gujrat High Court decision in the case of CIT vs. N K Industries (In Tax Appeal No. 240 of 2009 vide order dated 26.02.2016) wherein 100% of the bogus purchase was held liable to be added in the hands of the assessee reversing the order passed by the Hon'ble ITAT restricting addition to 25%.

6. The appellant craves leave to amend or alter or add a new ground which may be necessary.”

CO No.31/M/2021 (Assessee's Cross Objections)

“On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in estimating profits @ 12.5% on alleged bogus purchases of Rs.95,36,617/- without pointing out any defects from sales records and stock records.”

3. Briefly stated facts necessary for adjudication of the controversy at hand are : the assessee is into the business as dealers in ferrous and non ferrous metals, filed its return at Rs.40,42,980/- which was completed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the ‘Act’) by making disallowance of Rs.95,36,617/- as peak balances from the alleged purchases and added the same under section 69C of the Act by treating the same as unexplained expenditure. The Assessing Officer (AO) brought on record the fact that the assessee is one of the beneficiaries of the bogus purchases by taking paper bills without actually taking the material physically and thereby made the addition of Rs.95,36,617/- qua the said bogus purchases under section 69C of the Act by taking the peak balances of alleged purchases of Rs.1,55,19,372/-.

4. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has partly allowed the appeal by restricting the addition to the extent of Rs.19,39,921/- being 12.5% of the bogus purchases of Rs.1,55,19,372/-. Feeling aggrieved both Revenue as well as assessee have come up before the Tribunal by way of filing present appeal and cross objections.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light

of the facts and circumstances of the case and law applicable thereto.

6. Undisputedly, the AO as well as the Ld. CIT(A) have proceeded to make the addition by taking into account the bogus purchases by the assessee on the basis of paper bills to the tune of Rs.1,55,19,372/-. It is also not in dispute that the AO made the addition by taking the peak balances of the alleged purchases whereas the Ld. CIT(A) restricted the addition to the 12.5% of the bogus purchases by following the decision rendered by Hon'ble Gujarat High Court in case of CIT vs. Simit P. Sheth, ITA No.553 of 2012, order dated 16.01.2013 and Vijay Proteins Ltd. vs. ACIT (1996) 58 ITAT 428 (Ahd).

7. In the backdrop of the aforesaid undisputed facts the Ld. CIT(A) decided the issue "as to how the bogus purchases made by the assessee ought to be brought to tax" by returning following findings:

"6.1.11 Further, the fact remains that the parties from whom the appellant was supposed to have made the purchases were not existing. Thus, from the above analysis of the facts, it is crystal clear that the purchases shown to have been made by the assessee from the above parties and claimed as expenses in his profit and loss account are not genuine. Since the purchases to that extent remain unverifiable the AO was not satisfied about the correctness and completeness of the accounts of the assessee. In this context it is more appropriate that invoking section 69C may not be logical and the instant case the ratio adopted by the judicial pronouncement in the case of CIT-1 vs. Simit P Sheth, ITA no.553 of 2012, order dated 16/01/2013 is much relevant. While deciding a similar issue, the Hon'ble High Court of Gujarat has held that in favour of the Department, the same has to be taken in the instant case also. The above decision of the Hon'ble High Court of Gujarat is squarely applicable to the facts of the instant case. What can be disallowed in the case of alleged non genuine purchases, as held by the Hon'ble High Court of Gujarat in the above cited case, is only the profit element embedded in such purchases shown to have been made from the non-existent parties. In

the instant case, Giving due consideration to the fact that the assessee has recorded purchases amounting to Rs.42,21,237/- in the books of account, hence, the GP is estimated at a reasonable rate on the non genuine purchases amounting to Rs.42,21,237/-. I am of the considered opinion that, it would be just and fair, if profit element embedded in such purchases is taken as the profit earned from purchases shown to have been made from the nonexistent parties. In this case, the assessee has obtained accommodation entries or non genuine purchases to the tune of Rs.42,21,237/-. Therefore, an addition on account of a higher margin of profit would be fair and equitable, if the gross profit (@ 12.5 is taken on non genuine purchases recorded in the books o account of the assessee of Rs.42,21,237/' during the year under consideration and the profit to that extent is added .back to the income of the assessee for the year under consideration. Having regard to the facts and circumstances of the case as well as Gujarat high Court decision in the case of Simit P Sheth (2013) (356 ITR 451 (Guj).) being the possible profit out of the purchases made through non-genuine parties known as tainted purchases and thereby, the addition to be restricted to an extent of Rs.2,11,062/(12.5% of Rs.42,21,237/-).

6.1.12 Further the courts have taken a view that in case of non-existent parties from Whom the purchases are shown to have been made, the most logical approach would be that only part of such purchases can be disallowed, in the cases where the corresponding sales are treated as genuine, or alternatively the profit embedded in such sales can only be brought to tax. Therefore what can be taxed in such transactions is profit element embedded on such alleged non genuine purchases and the entire or peak amount of such purchases cannot be treated as bogus.

6.2 In this back drop of enquiries conducted by the AO and also various submission placed by the appellant, I find that it is fair and just to restrict the addition to an extent of Rs.2,11,062/being 12.5% of the bogus purchases. Therefore, I direct the AO to restrict the addition as stated above, thus, all the above grounds raised by the appellant is treated as partly allowed.”

5.1 After carefully going through the above mentioned decision of the CIT(Appeal) in appellant's own case in AY 2012-13 and relying on the pronouncement referred by him, following the same decision, I consider it to be fair and reasonable to restrict the addition to an extent of Rs.19,39,921/- being 12.5% of the bogus purchases of Rs. 1,55,19,372/-. Therefore, I direct the AO to restrict the addition to Rs.19,39,921/-. Accordingly, the appeal is partly allowed.”

8. The Ld. D.R. for the Revenue challenging the impugned order passed by the Ld. CIT(A) contended that when the issue as to

the bogus purchases has not been specifically challenged by the assessee restricting the addition to the 12.5% of the bogus purchases, there was no basis with the Ld. CIT(A) to restrict the addition to the tune of 12.5% of the bogus purchases.

9. However, to repel the argument addressed by the Ld. D.R. for the Revenue, the Ld. A.R. for the assessee contended that in case of bogus purchases the issue is to be decided on the basis of settled principle of law that only gross profit of the bogus purchases is to be estimated keeping in view the past history qua bogus purchases of the assessee. Assessee placed on file and relied upon the decision of Shri Zaheerahmed Khatizama Khan vs. ITO in ITA 183/M/2021 and also brought on record working as to the gross profit earned during the year under consideration on the actual purchases as per his books of account, which is 6.41%.

10. Hon'ble Bombay High Court decided the identical issue in case of JK Surface Coatings Pvt. Ltd. in ITA No.1850 of 2017 order dated 28 October, 2021 by returning following findings:

“4. Having considered the memo of Appeal and the Orders passed by AO / CIT(A) and the Order of ITAT, the only issue that comes up for consideration is with respect to the extent of ad-hoc disallowance to be sustained with respect to bogus purchases. The AO has observed 100% of the purchase value to be added to the income of Assessee, the CIT(A) has said it should be 15% and ITAT has said it should be 10%. First of all, this would be an issue which requires evidence to be led to determine what would be the actual profit margin in the business that Assessee was carrying on and the matter of calculations by the concerned authority. According to the Tribunal, in all such similar cases, it is ranged between 5% to 12.5% as reasonable estimation of profit element embedded in the bogus

purchase when material consumption factor do not show abnormal deviation.

5. Whether the purchases were bogus or whether the parties from whom such purchases were allegedly made were bogus was essentially a question of fact. When the Tribunal has concluded that the assessee did make the purchase, as a natural corollary not the entire amount covered by such purchase but the profit element embedded therein would be subject to tax.”

11. So we are of the considered view that when no discreet enquiry has been made by the AO qua the alleged bogus purchases by perusing/rejecting the books of accounts of the assessee rather proceeded to make the addition by taking peak balances of the alleged purchases of Rs.1,55,19,372/- and at the same time the Ld. CIT(A) has also estimated the addition being the 12.5% of the bogus purchases as gross profit, the view taken by the Ld. CIT(A) is a plausible view which is in consonance with the decision rendered by the Hon'ble Gujarat High Court in the case of Simit P. Sheth (supra) and JK Surface Coatings Pvt. Ltd. (supra) cases.

12. No doubt, the reasoning given by the Ld. CIT(A) to estimate the gross profit at 12.5% is plausible but not in consonance with the past history of the assessee who has gross profit of 6.41% on its actual purchases made during the year under consideration i.e. Rs.11,34,14,455/-. So the gross profit needs to be estimated on the basis of gross profit otherwise being earned by the assessee on genuine purchases. In these circumstances by following the decision rendered by Hon'ble Jurisdictional High Court in case of JK Surface Coatings Pvt. Ltd. (supra) and Hon'ble Gujarat High Court in the case of Simit P. Sheth (supra), we deem 6.41% as the

reasonable gross profit on the gross purchases of Rs.1,55,19,372/- keeping in view the gross profit on genuine purchases. The AO is directed to compute the gross profit of 6.41% on bogus purchases of Rs.1,55,19,372/- in order to make addition thereof to the assessee.

13. Resultantly, appeal filed by the Revenue and cross objection filed by the assessee are partly allowed.

Order pronounced in the open court on 31.05.2022.

**Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER**

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

Mumbai, Dated: 31.05.2022.

* 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.