

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

**BEFORE SHRI PAVAN KUMAR GADALE, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 1869/MUM/2020 (A.Y. 2009-10)

Shri Ratansingh M. Rathore 502, Sushila Apartment Devidas lane, Borivali (W) Mumbai - 400092 PAN: AACPR4164L	v.	ACIT -32(3) Room No. 732, 7 th Floor Kautilya Bhavan Bandra Kurla Complex Bandra(E), Mumbai - 400051
(Appellant)		(Respondent)

Assessee by	:	Shri Subhash Chhajed
Department by	:	Shri T. Shankar
Date of Hearing	:	25.04.2022
Date of Pronouncement	:	15.06.2022

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income Tax (Appeals)-44, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 28.08.2020 for the A.Y. 2009-10.
2. Assessee has raised following grounds in its appeal: -

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the addition of Rs. 61,25,094/- being the 12.5% of total alleged bogus purchases of Rs. 4,90,00,753/- merely on the basis of information from DGIT (Inv.), Mumbai/Sales Tax Department Mumbai and without considering the fact that contract receipts/sales against such purchases made by the Appellant have not been disputed.

2. The Ld. CIT(A) failed to appreciate that:

i. All the purchases are genuine beyond doubt and supported by sufficient materials;

ii. All the goods purchases from these parties have been backed by corresponding sales which are accepted to be genuine;

iii. The gross profit ratio shown by the Appellant is quite reasonable as the average NP for the last 3 years of the appellant is 5.97% only.

iv. Nothing has been brought on record by the AO that money has been exchanged in the lieu of payment made for these purchases by account payee cheque; and

v. The AO has neither provided copy of materials and statements relied upon him nor allowed any opportunity to the appellant to cross examine those parties who have been alleged to have provided the accommodation entries of such purchases.

3. Without prejudice, the rate or percentage of profit element embedded in such purchases as estimated by the Learned AO and confirmed by the CIT(A) is excessive, unjustified and unreasonable on the facts of the case.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not considering the Hon. ITAT 4 Order dated 13/01/2015 in Appeal No. 5298/mum/2013 in appellants own case for A.Y. 2010-11 wherein the entire addition in respect of bogus purchases was fully deleted."

3. At the time of hearing, Ld. AR submitted that Assessing Officer has disallowed treating the disputed purchases as bogus purchases and made the addition @12.5% and the same was confirmed by the Ld.CIT(A). He submitted that in assessee's own case for the A.Ys. 2009-10 and 2010-11 the Hon'ble ITAT has deleted the addition. He brought to our notice Page No. 48 of the Paper Book which is the decision of the ITAT and he prayed that the similar to the case of the assessee in A.Y. 2009-10 the addition made in this assessment year under consideration also be deleted.

4. On the other hand, Ld. DR submitted that the issue involved is not covered and in that assessment year as relied by the assessee. Assessing Officer had made 100% disallowance, however, in the current assessment year Assessing Officer has made disallowance @12.5%. Further, he submitted that assessee has not filed any supporting documents, therefore, the facts in both the Assessment Years are completely different. He prayed that the addition may be sustained. Ld. DR has filed written submissions which are reproduced below: -

"Brief Synopsis of Revenue submissions:

- *AO order and CIT(A) are relied upon.*
- *Reopening is valid:*
 - *Avirat Star Homes Venture P Ltd vs ITO, 411 ITR 321 (Bom HC) (copy enclosed)*

- *Chhagan Chandrakant Bhujpal vs ITO, 440 ITR 359 (Bom HC) (copy enclosed)*
- *In the case of Home Finders Housing Ltd vs ITO. 356 Taxxman 59 (SC), the Hon'ble SC has held that if objections are not disposed off, the matter has to go back to the AO and order cannot be quashed. (copy enclosed).*
- *Assessee's submission that case is covered by decision of Hon'ble ITAT in AY 2010-11 is not acceptable as facts are different.*
 - *In AY 2010-11, AO had made 100% disallowance. The same was deleted by CITA. It was also confirmed by Hon'ble ITAT.*
 - *In AY 2009-10, AO has made only 12.5% disallowance.*
 - *In para 8.1. a detailed reasoning has been given by the AC. The AO has adopted a 12.5% disallowance as that would be fair and equitable.*
 - *Para 6.3 of AO order: Notices were not delivered and enquiries showed non-existence of parties.*
 - *Para 7.1. of AO order: Delivery challans were not produced.*
 - *CIT-A has upheld the disallowance.*
 - *The facts are totally different and distinguishable.*
- *The paperbook submitted by the assessee shows only ledgers. No evidence of the material having actually been delivered has been produced. It has not been produced before the lower authorities or even before Hon'ble Tribunal. Thus, complete primary onus has not been discharged by assessee*
- *Only when primary onus is discharged by assessee, the issue of cross-examination etc arise.*
- *In any case, in the case of 334 ITR 262, 245 CTR 233 (SC), ITO vs M Pirai Choodi, (19.11.2010), the issue of non-granting of cross-examination was considered by the Hon'ble Apex Court and the following was held:*
 - *"3. in this case, the High Court has set aside the order of assessment on the ground that no opportunity to cross-examine was granted, as sought by the*

assessee. We are of the view that the High Court should not have set aside the entire assessment order. At the highest, the High Court should have directed the Assessing Officer to grant an opportunity to the assessee to cross-examine the concerned witness."

- *In the case of T Devasahaya Nadar vs CIT (1963), 51 ITR 20 (Madras), it was held that "We are of opinion that it cannot be said as a general proposition of law that any evidence upon which the Department might rely should have been subjected to cross-examination. The procedure for assessment is indicated in s. 23 (3) of the Act. The ITO is not a Court. Having regard to the nature of the proceedings, he occupies the position of a quasijudicial Tribunal. He is not bound by the rules of evidence in the Indian Evidence Act. The limit of the enquiry and the kind of materials or evidence which he can act upon cannot be specified and the statute has not attempted it. Wide though his powers be, he must act in consonance with rules of natural justice. One such rule is that he shall not use any material against the assessee without giving him an opportunity to meet it — Dhakeswari Cotton Mills Ltd. vs. CIT (1954) 26 ITR 775. The source of information for the material against the assessee need not be divulged. In fairness to the assessee he should be told what is against him, so that he may, if he can, displace it. It is no denial of natural justice if the ITO refuses to produce an informant for being cross-examined by the assessee". The Hon'ble Court went on to hold that the statement could be used against the assessee.*
- *In the case of Champa Lal Choudhary vs DCIT, 54 SOT 398, [ITA nos.35 to 37/JP/2012] dated 25/05/2012, the Hon'ble ITAT, Jaipur Bench has held as under: "5.3.... In this regard, we may add that the onus to prove its purchase as genuine is on the assessee, and when year after year - similar issues having come up in its case for the preceding as well as the succeeding years - of such suppliers suddenly disappearing, without antecedents, when called upon for production in the course of assessment proceedings, is clinching enough to nail the purchases as not genuine:. Thus. when the suppliers of the assessee are not available at the given address year after year, the assessee's claim that it is covered by earlier year judgement is totally uncalled for.*
- *It has been held in several court judgements that payment through bank accounts does not mean they are genuine. In the case of CIT vs Mohanakala, 161 Taxman 169, 291 ITR 278, the Hon'ble Apex Court held as under: "May be the money came by way of bank cheques and paid through the process of banking*

transaction but that itself is of no consequence". Similarly, it was held in 208 ITR 465, CIT vs Precision Finance P Ltd (Calcutta HC): "6. The Tribunal did not apply its mind to the facts of this particular case and proceeded on the footing that since the transactions were through the bank account, accordingly, it is to be presumed that the transactions were genuine. It was not for the ITO to find out by making investigation from the bank accounts unless the assessee proved the identity of the creditors and their creditworthiness. Mere payment by account payee cheque is not sacrosanct nor can it make a non-genuine transaction genuine."

- *Page 90, 92 of assessee paper book: The principal items traded are sand, cement, grit powder, fly ash, metal, paver blocks, LPG gas cylinder, oil etc. From the details, nothing can be said about the accuracy of quantitative details of purchase.*
- *There is no whisper by the assessee about the delivery challan, evidences of movement of goods, lorry receipts, stock register, inward register, etc. [para 4.3 of CIT-A order].*
- *The assessee's reliance on decision of Hon'ble Gujarat HC in the case of Tejua Rohitkumar Kapadia 94 taxmann.com 324 is misplaced for in that case, the counterparty had confirmed the transactions.*
- *In the case of CIT vs Vesesh Infotechnics Ltd, 210 Taxman 522, (DoJ: 01.08.2012), the Hon'ble Karnataka HC has held that it is perfectly possible for a software enterprise to establish a new unit at an investment of Rs.2.06 lakhs, make a sale of Rs.72.32 lakhs in 18 days and have profitability of 94.8%. The Hon'ble HC has held that Revenue could not doubt the claim of the assessee. Clearly, the converse also holds true, and there is no reason to restrict the profits of the assessee to a lower sum, particularly when the records indicate that Revenue had estimated the profits on reasonable basis.*

In the light of the above, the order of the AO / CIT-A may kindly be upheld."

5. In the rejoinder, Ld. AR submitted that there was no cross examination opportunity granted to the assessee and further, he submitted that assessee has already declared 15.55% as Gross Profit and

further, addition of 12.5% will lead to abnormal profit which is not proper. He prayed that addition may be deleted.

6. Considered the rival submissions and material placed on record, we observe from the record that similar to the disallowance made in A.Y. 2009-10 and 2010-11 the Assessing Officer made the addition relating to disputed purchases @12.5%, it is pertinent to note that in the A.Y.2009-10 and 2010-11 the Assessing Officer has made 100% of the disallowance of the disputed purchases. However, Coordinate Bench has deleted the addition due to the fact that the Assessing Officer has not made any effort to initiate to find the genuineness of the purchases except issuing notice u/s. 133(6) of the Act. However, in the present assessment year the similar additions were made but it was restricted to 12.5% of the alleged purchases. Before us Ld. AR submitted that no cross examination opportunity was granted to the assessee and at the same time he submitted that assessee has already disclosed Gross Profit of 15.55%. After considering overall facts on record we observe that assessee has not submitted any data relating to genuine and non-genuine purchases and also the profit earned by the assessee in genuine and non-genuine purchases. Therefore, it is not possible to appreciate the submissions of

the assessee that assessee has already disclosed 15.55% as Gross Profit. Therefore, we are inclined to remit this issue back to the file of the Assessing Officer to evaluate the Gross Profit earned by the assessee in genuine and non-genuine purchases and the addition may be restricted to the difference of profit earned by the assessee in genuine and non-genuine purchases. Considering the issues related to A.Y. 2009-10, this issue need not be remitted to Assessing Officer, it will not lead to fruitful exercise. Assessee deals with these parties which are considered as doubtful dealers, however, they are not proved to be non-genuine dealers. For the sake of justice and to settle the issue at once, we deem it fit to restrict the disallowance @2.5% considering the fact that assessee has already disclosed the Gross Profit @15.55%. Accordingly, the grounds raised by the assessee are partly allowed.

7. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 15th June, 2022.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai / Dated 15.06.2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum