

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

SHRI M. BALAGANESH, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 1951/MUM/2021
(ASSESSMENT YEAR: 2009-10)

Southern Engineers,
18B/1B Raja Bahadur Mansion
47, Tamarind Lane Fort,
Mumbai - 400023
[PAN: ABLFS5389Q]

..... Appellant

Vs

ACIT-17(1), Mumbai
Aaykar Bhavan, M K Road,
Mumbai - 400020

..... Respondent

Appearances

For the Appellant/Assessee : Shri Himanshu Gandhi
For the Respondent/Department : Shri B.K. Bagchi

Date of conclusion of hearing : 09.06.2022
Date of pronouncement of order : 07.09.2022

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant has challenged the order, dated 15.09.2021, passed by the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2009-10, whereby the Ld. CIT(A) had dismissed the appeal filed by the Appellant against the Assessment Order, dated 31.10.2016, passed under section 143(3) read with Section 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The Appellant has raised the following grounds of appeal:

- “1 . *On the facts and circumstances of the case and law, the Ld. AO erred in issuing notice u/s 148 dated 30.03.2016 which is bad in law and require to be quashed.*
2. *On the facts and circumstances of the case and law, the Ld. AO erred in passing assessment order without providing copy of reason recorded for reopening even though asked by the appellant vide letter dated 16.06.2016.*
3. *On the facts and circumstances of the case and law, the Ld. CIT(A) erred in passing appeal order without providing opportunity of being heard though asked by the appellant vide letter dated 31.03.2021.*
4. *On the facts and circumstances of the case and law, the Ld. CIT(A) erred in confirming disallowance of Rs. 38,19,036/- being 100% of alleged purchases from M/s Hanuman Steel by treating the same as non-genuine.*
5. *On the facts and circumstances of the case and law, the Ld. CIT(A) failed to consider that:*
 - a) *Assessment order was passed without furnishing the material, evidenced which is against the appellant.*
 - b) *Opportunity of cross examination was denied to appellant. This is gross violation of principal of Audi Alteram Partem rendering the order to be bad in law liable to be quashed.*
 - c) *Addition was made purely on assumption and basis without bringing any material against the appellant.*
 - d) *Sales against the alleged purchase is not doubted then entire purchases cannot be disallowed.*
 - e) *100% Gross profit is not permissible.*
 - f) *Invoking provision of section 40A(3) on assumption is not permissible as per law.*
 - g) *No defect in books of account was found, even no defect in document submitted by the appellant*

was pointed out, and therefore, addition cannot be made.

h) Statement recorded during investigation of alien cannot be relied against appellant without giving opportunity to appellant and even statement of third party have no relevance incase of appellant.

6. Appellant craves leave to add further grounds or to amend or alter the existing grounds of appeal on or before the date of hearing."

3. The relevant facts in brief are that the Appellant filed return of income on 11.09.2009 declaring income of INR 40,23,494/-. The case of the Appellant was selected for scrutiny and assessment under Section 143(3) of the Act was completed vide order, dated 03.11.2011 determining total income of the Appellant at INR 43,22,260/-. Subsequently, on the basis of information received from the Investigation Wing, Mumbai that the Appellant has availed bogus entry of INR 38,19,036/- from M/s Hanuman Steel, a proprietorship concern Mr. Jagnesh K. Desai, re-assessment proceedings were initiated against the Appellant under Section 147 of the Act. During the re-assessment proceedings, notice under Section 133(6) of the Act was issued from M/s Hanuman Steel. However, no reply was received. Therefore, vide order-sheet dated 20.10.2016, the Appellant was asked to produce the party. However, the Appellant failed to produce the party. Since, the Appellant was not able to produce either the party or furnish the necessary documents to support actual transportation and delivery of goods. The Assessing Officer made an addition of INR 38,19,036/- in the hands of the Appellant holding the purchase from M/s. Hanuman Steel as bogus.

4. Being aggrieved, the Appellant preferred an appeal before the CIT(A) against the assessment order. Before the CIT(A), it was contended by the Appellant that the goods were actually purchased from M/s Hanuman Steel and thereafter, sold to Ruchi Soya Inds. Ltd. All the payments were made through banking channels. However, not being satisfied, the CIT(A) dismissed the appeal holding as under:

“9. The arguments of the appellant have to be rejected as the alleged supplier, Sh. Jagnesh K. Desai Prop. M/s Hanuman Steel himself has given statement that he never supplied any iron and steel to the appellant. No person is available to confirm that the iron and steel was actually delivered by M/s Hanuman Steel to the premises of the appellant. The bank transactions only confirm movement of funds and not the movement of the material. So, the inference drawn by the AO that the alleged purchases from Hanuman Steel were bogus purchases is confirmed.”

10. However, the appellant has claimed that the material was actually sold by the appellant to Ruchi Soya Inds. Ltd. This claim is not disputed. This shows that the appellant had actually purchased material from some other source without bill and in cash and sold the same to its customers. In these circumstances also, the purchase of material in cash would attract disallowance u/s 40A(3) of the Income Tax Act.”

*11. Considering these circumstances, the AO was justified in making addition of Rs. 38,19,036/-. The appeal is dismissed.”
(Emphasis Supplied)*

5. Being aggrieved, the Appellant is in appeal before us.
6. The Ld. Authorised Representative for the Appellant appearing before us restricted the arguments on the merits of the addition made during the course of re-assessment proceedings. Before

CIT(A) the Appellant has challenged the addition only on merits. Relying upon Ground No. 4 and 5 raised in the appeal, the Ld. Authorised Representative for the Appellant submitted that the additions were made merely on the basis of statements given by Mr. Jagnesh K. Desai, proprietor of M/s Hanuman Steel wherein the Appellant was not named. The Appellant had filed before the CIT(A) all the documents supporting the purchases and consequent sale. The Learned Authorised Representative for the Appellant relied upon following documents forming part of paper-book in support of his contentions - (a) Ledger Confirmation from Hanuman Steels alongwith VAT return extract & confirmation to VAT Department, (b) Chart of subsequent sales to Ruchi Soya Ind Ltd. and (c) purchase bills & delivery challan of Hanuman Steels alongwith corresponding sales to Ruchi Soya Industries Ltd.. He further submitted that the Sales Tax Department had accepted the factum of purchases being made from M/s Hanuman Steel and therefore, the same cannot be challenged. Learned Departmental Representative relied upon the orders passed by the lower authorities and submitted that the Assessee had failed to discharge the onus and substantiate that the purchases were genuine. No documents showing movement or delivery of goods were filed before Assessing Officer and CIT(A).

7. We have heard the rival submissions and perused the material on record including judicial pronouncements relied upon by both the sides during the course of hearing. We note that the authorities below had not accepted the purchases as being genuine since the Appellant had failed to produce the documents showing transportation and actual delivery of goods. The Appellant has placed before us confirmation, dated

03.11.2011 issued by M/s Hanuman Steel stating that sales of INR 38,19,036/- were made to the Appellant during the previous year relevant to the Assessment Year 2009-10. This was accompanied by four tax invoices raised by M/s Hanuman Steel on the Appellant and copy of delivery challans corresponding to the sale invoices. On perusal of the same, we find that three tax invoices are of the same date 06.09.2008 having invoice No. 208 with purchase quantity of 23.85 Metric Tons, Invoice No. 210 with purchase quantity of 35.59 Metric Tons and Invoice No. 211 with purchase quantity of 11.52 Metric Tons. The corresponding delivery challans generated by M/s Hanuman Steel do not inspire confidence as the same do not contain any details pertaining to the mode of transport and actual delivery. The challans do not contain acknowledgement, signature or stamp of the party receiving the goods. We concur with the Assessing Officer and CIT(A) that the Appellant has failed to establish transportation and delivery of goods. The Stock register, consignment note, details of vehicle used to transport heavy load etc. have not been furnished by the Appellant. However, we note that the Assessing Officer has not disputed the contention of the Appellant that sales were made to Ruchi Soya Inds. Ltd. and this fact has also been noted by the CIT(A). Therefore, in our view, the Assessing Officer was not justified in making addition of the entire amount of alleged bogus purchases, and should have restricted the addition to the amount of profit element embedded in the purchases. We note that in similar facts and circumstances, the Mumbai Bench of the Tribunal in the case of ACIT Vs. Rishab Steel House: ITA No. 2260/Mum/2019 (Assessment Year 2008-09, dated 25.11.2020) has, after taking into consideration other decisions of the

Tribunal and the judgments of the Hon'ble High Courts, arrived at a rate of 5% as a reasonable estimate of profits embedded in purchase made from grey market by the for an assessee engaged in the business of trading in steel. respectfully following the decisions of the Tribunal, we hereby set aside the order of CIT(A) and restrict the addition to 5% of the value of such bogus purchases.

8. As regards invocation of Section 40A(3) by the CIT(A), we would like to observe that the Appellant had filed letter, dated 31.03.2021, during the course of proceedings before the CIT(A) making, inter alia, the following submissions:

"The Learned Income Tax officer has completely ignored the fact if at all the purchase are being considered as bogus there will no corresponding sales and the same would obviously be made in cash and it would attract the provision of section 40A(3) of the Income Tax Act. Hence in this case there is corresponding sales and the payments have been routed through bank account as been clearly highlighted in support of the claim and hence it could not be considered as bogus." (Emphasis Supplied)

9. It seems that taking note of the same the CIT(A) has invoked provisions of Section 40A(3) of the Act returning a finding that the Appellant had actually purchased material from other sources without bill and in cash which were, thereafter, sold to customers by the Appellant. Since, the purchases were made in cash, provisions of Section 40A(3) of the Act were attracted. In our view, the CIT(A) was not justified in setting up an entirely new case against the Appellant without putting the Appellant to notice. The CIT(A) has confirmed the addition taking cash

purchases made from grey market which were not recorded in books of accounts as the basis and invoked the provisions of Section 40A(3) of the Act to make/confirm addition of INR 38,19,036/- in the hands of the Appellant. Clearly, this was not the basis of addition of INR 38,19,036/- made by the Assessing Officer. Therefore, in absence of any show-cause notice being issued by the CIT(A) to the Appellant relating to invocation of provisions of Section 40A(3) of the Act, the order of CIT(A) sustaining the addition of INR 38,19,036/- by invoking provisions of Section 40A(3) of the Act cannot be sustained.

10. In view of the above, Ground No. 4 and 5 raised by the Appellant are partly allowed while all the other grounds raised by the Appellant are dismissed.
11. In result, the present appeal is partly allowed.

Order pronounced on 07.09.2022.

Sd/-
(M. Balaganesh)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 07.09.2022
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