



॥ आयकर अपीलिय न्यायाधिकरण, पुणे “बी” न्यायपीठ, पुणे में ॥



**IN THE INCOME TAX APPELLATE TRIBUNAL, PUNE “B” BENCH, PUNE  
BEFORE SHRI S. S. GODARA, JUDICIAL MEMBER  
AND**

**SHRI G. D. PADMAHSHALI, ACCOUNTANT MEMBER**

**आयकर अपील सं. / ITA No.183/PUN/2020**

**निर्धारण वर्ष / Assessment Year : 2009-2010**

Asstt. Commissioner of Income Tax,  
Circle-3, Pune.

..... अपीलार्थी / *Appellant*

**बनाम / V/s.**

Shri Pritam S Mahale  
F.No-01, Nihar Apartment,  
Mayur Colony, Kothrud, Pune-29.

..... प्रत्यर्थी / *Respondent*

**द्वारा / Appearances**

Assessee by : None for the Assessee

Revenue by : Shri M. G. Jasnani

सुनवाई की तारीख / Date of conclusive Hearing : 03/10/2022

घोषणा की तारीख / Date of Pronouncement : 15/11/2022

**आदेश / ORDER**

**PER G. D. PADMAHSHALI, AM;**

The present appeal of the Revenue is assailed against the order of the Commissioner of Income Tax (Appeals)-3, Pune [for short “**CIT(A)**”] dt. 20/11/2019 passed u/s 250 of the Income-tax Act, 1961 [for short “**the Act**”] which emanated out of the assessment order dt. 09/03/2015 passed u/s 143(3) r.w.s. 147 of the Act, by the Dy. Commissioner of Income Tax-Circle-3, Pune [for short “**AO**”] for the assessment year 2009-10.

2. The grounds as raised in the memorandum are;

*“1. On the facts and circumstances of the case and in law, the Ld. CIT(Appeals) erred in restricting the disallowance to 17.96% of the alleged hawala purchases over & above the profit shown by the assessee even through the assessee could not produce primary evidences like octroi receipt, lorry receipt, delivery challans, stock register, weighing slips etc., to prove the genuineness of purchases.*

*2. On the facts and circumstances of the case and in law, the Ld. CIT(Appeals) erred in arriving at the disallowance by adopting a Gross Profit ration of 17.96% on alleged bogus purchase which is without any basis and justification.*

*3. On the facts and circumstances of the case and in law, the Ld. CIT(Appeals) erred in not considering the decision of Hon. Apex Court in the case of N.K. Proteins Ltd. In SLP 769 of 2017 dated 16.01.2017 wherein it has been held that once the purchase are bogus, additions should be made on the entire purchases and not only the profit embedded in such purchases.*

*4. The appellant prays to be allowed to add, amend, modify, rectify, delete or raise any grounds of appeal during the course of appellate proceedings.”*

3. Before we proceed for adjudication, its apt to paraphrase the facts of the case as;

3.1 The respondent assessee is an individual and **Govt Civil Contractor**, has for AY 2009-10 filed his return of income [for short **“ITR”**] on 26/09/2009 declaring total income of ₹1,38,98,500/-.

3.2 The sales tax department of Maharashtra conducted several raids on sales tax evader who are



found to have engaged in hawala transaction extending tax invoices without actual transaction, and the information of such Hawala Operators / Entry Providers were passed on to DGIT (Inv) Pune, which in turn shared the information in respect of the **responded assessee** who alleged to have involved in hawala transactions with ten hawala operators / entry providers for total amounting to ₹64,33,495/-, for the reason, the case of the assessee was reopened by a service of notice u/s 148 dt. 13/03/2014 and was put to notice to prove **genuineness** of alleged hawala purchases and the **existence** of ten hawala operators. In response thereto, the authorised representative [for short "**AR**"] tendered a written submission annexing copies of tax invoices, details of bank payment and ledger accounts etc.

3.3 In the absence of shred of evidence showcasing the **existence of hawala dealers and physical movement of goods** viz; purchase order, lorry receipt, weigh-ment slips, octroi receipts, goods received note, gate entry register and **stock register**

etc., the Ld. AO treating the total hawala purchases of ₹64,33,495/- as bogus, culminated the assessment u/s 143 r.w.s. 147 of the Act, by disallowing the entire amount debited to profit & loss account [for short **"P&L"**].

3.4 In an appeal before first appellate authority [for short **"FAA"**] the assessee reiterated his submission, wherein the Ld. CIT(A) in the light of decision of Hon'ble High Court of Bombay in the case of **"PCIT Vs Mohammad Haji Adam & Co."** ( ITA 1004 of 2016) restricted the disallowance to recomputed gross profit ratio / margin [for short **"GP"**] @16.96% on the reasoning that;

***"In the instant case also, the AO has not disputed the appellant's sales and no discrepancy was pointed out by the AO between the purchases shown by the assessee and the sales declared. Thus following the decision of the Hon'ble Bombay High Court, entire purchases are not to be added rather only the GP rate on the genuine purchases are to be added."***

3.5 Aggrieved by the action of Ld. FAA in restricting the disallowance to GP Ratio as without justification

and circumventing the decision of Hon'ble Apex Court in "**N. K. Protein Vs DCIT**", reported in 292 CTR 354 (SC), the revenue is in appeal on the grounds set in para 2 herein before.

4. When the matter called up at physical hearing, none represented the assessee, in the interest of justice we proceeded to adjudicate the matter following rule 25 of the **ITAT-Rules**, which empowers this Tribunal to decide the appeal ex-parte on merits where the respondent does not appear in person or through an authorised representative and same is done placing no-objection from the revenue. It is needless to mention that, the proviso to the said rule carves out an exception empowering the Tribunal to set-aside the **ex-parte** order if the respondent appears afterwards and **satisfies** placing evidential material to the effect that, there was **sufficient cause for his non-appearance** when the appeal was called for hearing and in the event of failure to substantiate the non-appearance, the setting aside exercise crashes.

5. During the course of physical hearing, the learned departmental representative [for short "**DR**"] adverting

Para 4.2 (Page 03/04) of the assessment order strenuously opposed the action of Ld. FAA in restricting the disallowance to GP Ratio being without justification, baseless and against the law laid by the Hon'ble Apex Court in **"N. K. Protein Vs DCIT"** (supra). It is further argued that, the action of Ld. CIT(A) merits reversal for the reasons that, the respondent assessee in the present case is not a dealer or trader but a Civil Contractor who has failed to prove the existence of hawala operators and showcase physical movement vis-à-vis consumption of goods by placing on record stock register, goods received note, gate entry register, octroi receipts, lorry receipts etc.

6. We have heard the rival contentions of both the parties; and subject to the provisions of rule 18 of **"ITAT Rules"**, perused the material placed on record, case laws relied upon by the appellant as well the respondent and duly considered the facts of the case in the light of settled legal position forewarned to parties present.

7. On perusal of records, we find that, upon the receipt of information from DGIT(INV), the Ld. AO after identifying



the list of entry operators with whom the assessee had alleged hawala transactions and quantification of amount of bogus purchases involved, has put the respondent assessee to notice calling evidential documents to prove the **existence of parties and genuineness of transactions**, and in the event of failure to showcase physical movement of goods & consumption thereof, disallowed the entire amount of bogus. Whereas, the Ld. FAA reverberating the findings of lower authority, restricted the disallowance to the GP ratio in the light of Hon'ble Jurisdictional High Court of Bombay in **"Mohammad Haji Adam & Co."** (Supra) for the reason of acceptance of sales/revenue without dispute. Insofar as the bogus purchases are concerned, the ratio laid in **"Mohammad Haji Adam & Co."** (Supra) cannot squarely be applied to the present case for three factual variations, firstly the assessee before us is neither a trader nor a dealer but a Govt Civil Contractor and secondly there was complete **absentia** with regards to quantitative details or consumption of material purchased, and finally the sales or revenue were not exclusively with reference to goods



purchases/consumed but inclusive of work contract services. However, the Hon'ble Lordship had occasioned to considered similar facts and circumstance in the case of **"PCIT Vs Pinaki D Pinani"** (Bombay ITA/1543 of 2017), wherein the assessee being civil contractor, with evidential stock records and sales, was able to demonstrate the quantity of material consumed in execution of work contract undertaken and thereby established the nexus.

8. In the light of aforesaid discussion, we are of the considered view that, the ratio laid down by the Hon'ble Supreme Court in the case of **"NK Proteins Ltd vs DCIT"** (Supra) is squarely applicable to the facts of assessee case, where the Hon'ble Supreme Court dismissed appeal of assessee and confirmed the findings of Hon'ble Gujarat High Court in respect of **bogus or sham purchases**, wherein the Hon'ble Lordships, after analysing necessary facts, by para 6 of the order have held that;

*"6. The Tribunal in the case of Vijay Proteins Ltd. (supra) has observed that it would be just and proper to direct the Assessing Officer to restrict the addition in respect of the undisclosed income relating to the purchases to 25% of the total purchases. The said*

*decision was confirmed by this Court as well. On consideration of the matter, we find that the facts of the present case are identical to those of M/s. Indian Woollen Carpet Factory (supra) or Vijay Proteins Ltd. (supra) In the present case the Tribunal has categorically observed that the assessee had shown bogus purchases amounting to Rs.2,92,93,2887- and taxing only 25% of these bogus claim goes against the principles of Sections 68 and 69C of the Income Tax Act. The entire purchases shown on the basis of fictitious invoices have been debited in the trading account since the transaction has been found to be bogus. The Tribunal having once come to a categorical finding that the amount of Rs.2,92,93,2887- represented alleged purchases from bogus suppliers it was not incumbent on it to restrict the disallowance to only Rs. 73,23,3227-.”*

9. In the present case too, when it has been categorically established that, the amount of bogus purchases ₹64,33,495/- is debited to P&L by fictitious tax invoices and the respondent assessee failed to establish the consumption of such goods in the execution of civil contract by adducing such stock movement records to the

satisfaction of Ld. AO., then taxing such bogus purchases GP rate of goes against the principles of taxation embedded in chapter VI of the Act and against the ratio laid down in “**N K Proteins Ltd**” and “**PCIT Vs Pinaki D Pinani**” (Supra), for the reason, we are of the considered view that, the Ld. AO was right in making 100% disallowance towards bogus / hawala purchases, and thus we are inclined to uphold the order of assessment and reverse the order the Ld. FAA.

**10. Resultantly, the appeal of the appellant revenue is allowed in above terms.**

In terms of rule 34 of ITAT Rules, the order pronounced in the open court on this TUESDAY 15<sup>th</sup> day of November, 2022.

-S/d-

**S. S. GODARA**

**JUDICIAL MEMBER**

-S/d-

**G. D. PADMAHSHALI**

**ACCOUNTANT MEMBER**

पुणे / PUNE ; दिनांक / Dated : 15<sup>TH</sup> day of November, 2022.

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

- |  |                                  |
|--|----------------------------------|
| 1. अपीलार्थी / The Appellant.            | 2. प्रत्यर्थी / The Respondent.  |
| 3. The Pr. CIT, Circle-3 Pune (MH-India) | 4. The CIT(A)-3, Pune (MH-India) |
| 5. DR, ITAT, Pune Bench 'B', Pune        | 6. गार्डफ़ाइल / Guard File.      |

आदेशानुसार / By Order,  
वरिष्ठ निजी सचिव / Sr. Private Secretary  
आयकर अपीलीय न्यायाधिकरण, पुणे / ITAT, Pune.