

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

BEFORE SHRI B. R. BASKARAN, AM AND SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T.A. No.1215/Mum/2022

(निर्धारण वर्ष / Assessment Years: 2011-12)

Magan Vadhaji Prajapati Room No.15, 2 nd Floor, 39/41, Kamal Niwas Bhandari Street, Mumbai- 400004.	बनाम/ Vs.	ITO Ward-19(2)(3) Matru Mandir Building, 1 st & 2 nd Floor, Nana Chowk, Bhatia Hospital Lane, Javji Dadaji Marg, Grant Road West, Mumbai-400007.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ANWPP7146B		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Bharat Kumar
Revenue by:	Shri V. K. Chaturvedi (Sr. AR)

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

घोषणा की तारीख /Date of Pronouncement: 18/11/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals) (NFAC), Delhi dated 22.03.2022 for AY. 2011-12.

2. The ground of appeal raised by the assessee is as under: -

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not considering the facts whereas some suppliers is not belonging to assessee and confirm the addition made by AO.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming addition Rs.17,38,432/- which was 12.5% of alleged bogus purchases.”



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3. Brief facts as noted by the AO is that he received information from DGIT (Inv.) which in turn came to it from sales tax department that the assessee is involved in taking entries of bogus purchases from the following parties named under: -

Sr. No	Name of the party	Amount
1	Mahavir Corporation	20,20,220/-
2	Rishabh Steel Industries	12,84,789/-
3	Ramdev Trading Company	3,08,817/-
4	Arpan Steels	5,14,711/-
5	Parmar Steel (India)	5,42,248/-
6	Red Rose Steels Pvt. Ltd.	2,38,752/-
7	Ridhi Sales Corporation	6,70,895/-
8	Naina Multitrade Pvt. Ltd.	30,81,078/-
9	Nimesh Steels Pvt. Ltd.	52,45,947/-
	Total	1,39,07,457/-

4. Consequently, the assessee's case was reopened and since the assessee has shown purchases of Rs.1,39,07,457/- from these parties; and since the sales tax department found that the said concerns were not doing genuine business of purchases & sales, and merely provides accommodation entries of purchases, the AO issued notice u/s 133(6) of the Income Tax Act, 1961 (hereinafter "the Act") to the above mentioned parties by speed-post but could not be served. The AO noted that the assessee has failed to substantiate the purchases made from the aforesaid hawala dealers. And therefore, he treated the same as bogus purchases and added the same ie. Rs.1,39,07,457/-. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to restrict the addition to gross profit @ 12.5% i.e. addition was restricted to Rs.17,38,432/- in place of Rs.1,39,07,457/-. Still not satisfied by the aforesaid action of the Ld. CIT(A), the assessee is before us.



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5. At the outset, the Ld. AR of the assessee brought to our notice that similar issue arose in the assessee's own case before the Tribunal for AY. 2009-10 & AY. 2010-11 wherein this Tribunal by order dated 19.09.2022 has adjudicated similar issue and restricted the addition as under: -

“9. We have heard the rival submissions and perused the material available on record. In the present case, on the basis of information received from investigation wing, Mumbai that assessee is one of the beneficiary of bogus purchases from parties who were found by the Sales Tax Department of Maharashtra to be indulged in practice of providing bogus sales/purchase bills without supplying any goods, reassessment proceedings in the case of assessee were initiated. Further, in order to verify the genuineness of the purchases made by the assessee, notice under section 133 (6) of the Act were issued. However, the same were returned as unserved. The AO also granted opportunity to the assessee to establish the genuineness of the parties and purchases made from them with adequate supporting evidences and also requested to produce the parties. However, the assessee neither produces these parties nor furnishes new addresses of these parties. The assessee merely produced invoices, delivery challans and Ledger accounts of these parties in its books. Since the assessee is a trader and the corresponding sales were accepted as genuine, therefore, the AO restricted the addition on account of non-genuine purchases to 12.5% following the decision of Hon^{ble} Gujarat High Court in Simit P. Sheth (supra). The learned CIT(A) also upheld the conclusion reached by the AO. 10. We find that in Simit P. Sheth (supra), the Hon^{ble} Gujarat High Court dismissed the appeal filed by the Department and upheld the decision of the coordinate bench of the



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Tribunal, wherein addition on account of bogus purchases was restricted to 12.5%, by observing as under:

“9. This being the position, the only question that survives is what should be the fair profit rate out of the bogus purchases which should be added back to the income of the assessee. The Commissioner adopted the ratio of 30 per cent of such total sales. The Tribunal, however, scaled down to 12.5 per cent. We may notice that in the immediately preceding year to the assessment year under consideration the assessee had declared the gross profit at 3.56 per cent of the total turnover. If the yardstick of 30 per cent, as adopted by the Commissioner (Appeals), is accepted the gross profit rate will be much higher. In essence, the Tribunal only estimated the possible profit out of purchases made through non-genuine parties. No question of law in such estimation would arise. The estimation of rate of profit return must necessarily vary with the nature of business and no uniform yardstick can be adopted.”

11. We further find that the coordinate bench of the Tribunal in *Shri Simit P. Sheth vs ITO*, in ITA No. 3238 and 3293/Ahd/2009, vide order dated 24/02/2012, observed as under:

“7. Having heard the submissions of both sides, we have been informed that the malpractice of bogus purchase is mainly to save 10% sales tax etc. It has also been informed that in this industry about 2.5% as the profit margin. Therefore, respectfully following the decisions of the co-ordinate bench pronounced on identical circumstances, we have a direct that the disallowance is required to be sustained at 12.5% of the purchases from those parties. With these directions, we hereby decide. The grounds of the rival parties which are partly allowed.”

12. Thus, from the above it is evident that the basis on which the coordinate bench of the Tribunal restricted the addition to 12.5% is by



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considering the percentage of sales tax tried to be saved by the parties engaged in these hawala transactions and the profit margin of the industry. Further, as noted above the said decision of the coordinate bench of the Tribunal was upheld by the Hon^{ble} Gujarat High Court in case cited supra. Thus, we are of the considered view that in the present case, the lower authorities though correctly agreed that only profit embedded in the sales could be brought to tax, however, placed reliance upon the aforesaid decision of Hon^{ble} Gujarat High Court to restrict the disallowance to 12.5% without appreciating the basis on which such percentage of addition was arrived at in the facts of that case. In the present case, reliable industry data was also not brought on record to prove the prevailing profit margin of the ferrous and non-ferrous industry during the relevant assessment year. Therefore, in view of the aforesaid findings, we deem it fit to modify the impugned order only to the extent that the disallowance on account of bogus purchases should be restricted to the total of rate of VAT applicable during the year under consideration in the State of Maharashtra on the goods traded by the assessee and gross profit earned by the assessee during the year under consideration. We, accordingly, direct the AO to recompute the disallowance. With the above directions, the sole ground raised in assessee's appeal is partly allowed."

6. Further the assessee also brought to our notice that though the chart shows that assessee had made purchases from nine (9) parties, however from parties named sixth (6th) onwards i.e. M/s. Red Rose Steels, M/s. Ridhi Sales Corporation, M/s. Naina Multitrade, M/s. Nimesh Steel, the assessee has not made any purchases because assessee's books does not reflect the same. Therefore, he wants us to reduce the same from the total of Rs.1,39,07,457/- i.e. an amount of



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Rs.92,36,672/- to be reduced from the total bogus purchases. To buttress this submission, the Ld. AR drew our attention to page no. 100 of PB wherein the affidavit of Shri Magan Vadhaji Prajapati stating the aforesaid facts is found placed therein. The Ld. DR opposes this prayer of assessee and submitted that if the assessee has not shown the purchases from these four (4) parties, and the investigation wing has received regarding the purchases, then it is a clear case of undisclosed transaction/undisclosed purchases, and consequently the entire undisclosed purchases ought to be added i.e, Rs.92,36,672/- and not the profit embedded in such sales as done by Ld CIT(A).

7. We have heard both the parties and perused the records. The assessee has filed an affidavit which is found placed at page 100 & 101 of PB wherein the assessee claims that out of nine (9) parties against whom the AO/Ld. CIT(A) has taken action, the four (4) parties transaction named in the chart below i.e. sixth to ninth, there is no transaction of purchases shown in the books of the assessee to the tune of Rs.92,36,672/-. Therefore, the action of AO & Ld. CIT(A) to have adopted the total purchases at Rs.1,30,07,457/- is erroneous and pointed out that the AO had passed an exparte order u/s 144 of the Act. In such circumstances, assessee pleaded that he did not get proper opportunity before the AO. We note that assessee had declared in his ROI Rs.3,62,210/-, which was re-opened u/s 147 of the Act based on DGIT investigation report which in-turn was the fall out of information received from sales tax department that assessee had indulged in bogus purchase from nine (9) parties named in the chart



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(supra) to the tune of Rs.1,39,07,457/-. According to AO, the notices issued u/s 133(6) of the Act to the nine (9) parties elicited no response because the same couldn't be served. And the assessee failed to substantiate the genuineness of the purchases. So he added the same i.e. Rs.1,39,07,0457/-. On appeal, the Ld. CIT(A) restricted the same to 12.5% of Rs.1,39,07,457/- i.e. Rs. 17,38,432/- still not satisfied the assessee is before us and contends that he has not shown in its books purchases to the tune of Rs.92,36,672/- from four (4) parties out of nine (9) parties. We note that AO has passed an order u/s 144 of the Act, which according to assessee was exparte order since no one appeared on behalf of assessee and apprise the correct facts to his notice. In the light of the aforesaid discussion, we are of the opinion that assessee did not get proper opportunity before the AO. Therefore, relying on the decision of the Hon'ble Supreme Court in **Tin Box Company Vs. CIT (249 ITR 216) (SC)**, wherein the Apex Court held that when assessee did not proper opportunity before the AO, then the assessment should be restored to the file of AO for denovo assessment. The Hon'ble Supreme Court order in Tin Box held as under: -

" It is unnecessary to go into great detail in these matters for there is a statement in the order of the Tribunal, the fact-finding authority, that reads thus :

"We will straightway agree with the assessee's submission that the ITO had not given to the assessee proper opportunity of being heard . " That the assessee could have placed evidence before the first appellate authority or before the Tribunal is really of no consequence for it is the assessment order that counts . That order must be made after the



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assessee has been given a reasonable opportunity of setting out his case . We, therefore, do not agree with the Tribunal and the High Court that it was not necessary to set aside the order of assessment and remand the matter to the assessing authority for fresh assessment after giving to the assessee a proper opportunity of being heard .

2 . Two questions were placed before the High Court, of which the second question is not pressed . The first question reads thus :

"1 . Whether, on the facts and in the circumstances of the case, the Tribunal was justified in not setting aside the assessment order in spite of a finding arrived at by it that the Income-tax Officer had not given a proper opportunity of hearing to the assessee ?"

In our opinion, there can only be one answer to this question which is inherent in the question itself : in the negative and in favour of the assessee .

3 . The appeals are allowed . The order under challenge is set aside . The assessment orders, that of the Commissioner (Appeals) and of the Tribunal are also set aside . The matter shall now be remanded to the assessing authority for fresh consideration, as aforesaid . No order as to costs ."

8. Respectfully following the aforesaid order of Hon'ble Supreme Court, we restore the assessment on this issue back to the file of AO for denovo assessment. Coming to the claim of assessee that assessee's books does not reflect any sale from four parties as shown in the chart (infra).

Sr. No.	Name of the party	Amount	Remarks
1	Mahavir Corporation	20,20,220/-	In our Books



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2.	Rishabh Steel Industries	12,84,789/-	In our Books
3.	Ramdev Trading Company	3,08,817/-	In our Books
4.	Arpan Steels	5,14,711/-	In our Books
5.	Parmar Steel (India)	5,42,248/-	In our Books
6.	Red Rose Steels Pvt. Ltd.	2,38,752/-	Not in our Book and not belong to me
7.	Ridhi Sales Corporation	6,70,895/-	Not in our Book and not belong to me
8.	Naina Multitrade Pvt. Ltd.	30,81,078/-	Not in our Book and not belong to me
9.	Nimesh Steels Pvt. Ltd.	52,45,947/-	Not in our Book and not belong to me

9. As regards the claim of assessee that its books doesn't reflect purchases from the aforesaid four (4) entities, we direct the AO to carry out enquiry and decide the issue taking into consideration the Ld. DR's contention regarding this issue (para.6,supra) and decide in accordance to law after hearing the assessee and assessee is at liberty to file documents/written submission before AO. And the AO to assess the income of assessee as per law taking into consideration, and taking into consideration, the decision of the Tribunal in assessee's own case (supra) regarding the gross profit addition (on bogus purchase).

10. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on this 18/11/2022.

Sd/-

(B. R. BASKARAN)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 18/11/2022.
Vijay Pal Singh, (Sr. PS)



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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
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