

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

**BEFORE SHRI KULDIP SINGH, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 672/MUM/2017 (A.Y:2011-12)

M/s. Kalpataru Ferroalloys Limited 32/34, 2nd Floor, Keshav Bhavan 1 st Carpenter Street, Mumbai - 400004 PAN: AADCK4077F	v.	Income Tax Officer – 5(2)(2) Mumbai
(Appellant)		(Respondent)

Assessee Represented by	:	Radha Habe
Department Represented by	:	Nimesh Yadav
Date of Hearing	:	28.11.2022
Date of Pronouncement	:	22.12.2022

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals)–10, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 28.10.2016 for the A.Y. 2011-12.

2. Brief facts of the case are, assessee company engaged in the business of trading in ferrous and non-ferrous metals and filed return of income on 30.09.2011 declaring total income of ₹.11,13,630/- for the

A.Y.2011-12 and the return was processed u/s. 143(1) of the Act. Subsequently, Assessing Officer received information from the DGIT (Investigation), Mumbai about the accommodation entries provided by various dealers and assessee was also one of the beneficiary from those dealers. The assessment was reopened u/s. 147 of the Act based on the information received from DGIT (Investigation), Mumbai, that the assessee has availed accommodation entries from various dealers who are appeared as hawala dealers who are said to be providing accommodation entries without there being transportation of any goods. In the re-assessment proceedings, the assessee was asked to prove the genuineness of the purchases made from the parties which are referred in the Assessment Order. In response assessee submitted that the purchases made are genuine. Assessing Officer also issued notice u/s.133(6) and the notices returned unserved in respect of the parties mentioned in the Page No.2 of the Assessment Order with an endorsement by the Postal Authorities that non known. The submissions of the assessee were rejected by the Assessing Officer observing that assessee failed to produce the parties and in the absence of confirmation from the parties the genuineness of the purchases could not be fully verified. Therefore, he rejected the submissions and estimated the profit

element in the purchases at 12.5% of the said purchases from those parties and was treated as suspicious purchases and added to the income of the assessee. Aggrieved assessee, preferred an appeal before the Ld.CIT(A) and Ld.CIT(A) sustained the action of the Assessing Officer. Against this order of the Ld.CIT(A) assessee is in appeal.

3. Aggrieved assessee filed an appeal before us raising following grounds in its appeal: -

"1. On the facts and in the circumstances of the case and in law, the learned CIT(A)-10, Mumbai has erred in confirming the action of the AO of issuing notice u/s. 148 without proper sanction u/s 151 and not providing the satisfaction note recorded by the Additional CIT-15(2) and thus violating the law laid down by Honorable Supreme Court.

2. In the facts and circumstances of case and in law, the learned CIT(A)-10, Mumbai erred in confirming the reopening of assessment by Assessing Officer merely on the basis of statement of third party without providing the opportunity of cross examination of the witnesses relied upon by the AO violating the principles of natural justice as laid down by Honorable Supreme Court in the case of Andaman Timber Industries v. Commissioner of Central Excise (Civil Appeal No. 4228 of 2006.)

3. In the facts and circumstances of the case and in law, the learned CIT(A)-10, Mumbai has erred in sustaining addition of Rs.85,37,189/- being 12.5% of Rs. 6,82,97,513/- i.e. alleged bogus purchases, merely on surmises and conjectures and relying upon non jurisdictional High Court decisions and ignoring jurisdictional High Court and Tribunal Decisions."

4. Assessee further raised additional ground as under: -

"1. In the facts and circumstances of the case and in law, the Learned CIT(A) has erred in upholding the reassessment order passed by the Assessing Officer immediately after disposing off the objection raised by the assessee against reopening of assessment,

thereby violating the law laid down by Honorable Bombay High Court in the case of Asian Paints Ltd. v. DCIT [2008] 296 ITR 90 (Bombay).

2. In the facts and circumstances of the case and in law, the Learned CIT(A) has erred in upholding the reassessment initiated by learned Assessing Officer without independent application of mind on the information alleged to have been received from sales tax authorities and DGIT(Invt) Mumbai."

5. At the time of hearing, Ld. AR submitted that assessee is not pressing the grounds on reopening. Ld. Counsel for the assessee reiterated the submissions made before the Ld.CIT(A). Ld. Counsel for the assessee further submitted that the assessee is in the business of ferrous and non-ferrous metals and the addition made by the Ld.CIT(A) is on higher side, thus requested to reduce the same. On merits, Ld. AR brought to our notice that the Gross Profit of the assessee for the A.Y.2011-12 is at 2.91% by bringing our attention to the comparative chart of Gross Profit rates for the Assessment Years 2009-10 to 2013-14. Ld. AR further submitted that department has accepted the sales and disputing only the purchases, in this regard, he submitted that maybe reasonable percentage of disallowance may be considered, Considering the Gross Profit chart submitted by him.

6. On the other hand, Ld.DR relied on the orders of the lower authorities.

7. Considered the rival submissions and material placed on record, we observe that Assessing Officer treated 12.5% of the bogus purchases made from various concerns which appeared as hawala transactions and the Ld.CIT(A) sustained the same. We observe from the comparative chart of G.P. Rates of the assessee that assessee has earned Gross Profit at 2.91% from genuine purchases. It is not in dispute that sales have been accepted as genuine from out of these purchases. When the sales have been accepted as genuine the entire purchases cannot be treated as non-genuine.

8. The Hon'ble Bombay High Court in the case of Pr.CIT v. M/s.Mohammad Haji Adam & Co. in Income Tax Appeal No. 1004 of 2016 dated 11.02.2019 held that the Tribunal correctly restricted the addition limited to the extent of bringing the Gross Profit rate on purchases at the same rate of other genuine purchases. While holding so, the Hon'ble High Court observed as under:

"All these appeals arise out of common Judgment of the Income Tax Appellate Tribunal. The facts in all these appeals being same, we make it from ITXA No. 1004 of 2016. The revenue - appellant has raised following questions for our consideration

"(a) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in not confirming the addition made by the Assessing Officer on account of bogus purchases shown to have been made through hawala transactions from certain parties who were only providing accommodation sale bills?"

(b) Whether on the facts and in the circumstances of the case and in law, where evidently no purchases were made from these parties who were issuing only bogus accommodation bills and this finding has been accepted by the CIT(A) and the ITAT, the ITAT, without any evidence, was justified in presuming that there must have been purchases and thereupon giving huge relief to the assessee?

(c) Whether on the facts and in the circumstances of the case and in law, the order of the Hon'ble ITAT is perverse as no reasonable person acting judicially and properly instructed in the relevant law could arrive at such a finding on the evidence on record?"

2 The issues relate to the Assessment Year ("A.Y." for short) concerning the respondent - assessee who is a trader of fabrics. During the survey operations in case of the entities from whom the assessee had claimed to have made purchases, the department collected information suggesting that such purchases were not genuine. The Assessing Officer ("A.O." for short) noticed that the assessee had shown purchases of fabrics worth Rs.29.41 Lacs (rounded off) from three group concerns, namely, M/s Manoj Mills, M/s Astha Silk Industries and M/s Shri Ram Sales & Synthetics. On the basis of the statement recorded during such survey operations, the A.O. concluded that the selling parties were engaged only in supplying the bogus bills, that the goods in question were never supplied to the assessee, and therefore, the purchases were bogus. He, therefore, added the entire sum in the hands of the assessee as its additional income.

3 The assessee carried the matter in the appeal before the Commissioner of Appeals who accepted the factum of purchases being bogus. However, he compared the purchases and sales statement of the assessee and observed that the department had accepted the sale, and therefore, there was no reason to reject the purchases, because without purchases there cannot be sales. He, therefore, held that under these circumstances A.O. was not correct in adding the entire amount of purchases as the assessee's income. He, therefore, deleted the addition refreshing it to 10 % of the purchase amount. He also directed the A.O. to make addition to the extent of difference between the gross profit rate as per the books of accounts on undisputed purchases and gross profit on sales relating to the purchases made from the said three parties.

4 The assessee carried the matter before the Tribunal. The Revenue also carried the issue before the Tribunal. The Tribunal in the impugned Judgment allowed the appeal of the assessee partly and dismissed that of the Revenue. The Tribunal noted that the CIT(A) had not given any reasons for retaining 10 % of the

purchases by way of ad hoc additions. The Tribunal, therefore, deleted such additions, but retained the portion of the order of the CIT(A) to that extent he permitted the A.O. to tax the assessee on the basis of difference in the GP rates.

5 *Learned counsel Mr Chhotaray for the Revenue strenuously contended that the CIT(A) and the Tribunal committed serious error. In the present case when it was established that the purchases are bogus, the entire amount should have been added to the income of the assessee. There is no question of granting any relief in the facts of the case. In this context he relied on a decision of the Division Bench of Gujrat High Court in the case of N.K. Industries Ltd. Vs Dy. C.I.T. in Tax Appeal No. 240 of 2003 and connected appeals decided on 20th June, 2016. In such judgment the Court had observed as under –*

"The Tribunal in the case of Vijay Proteins Ltd. Vs. CIT had 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 Woolen Carpet Factory (supra) or M/s Vijay Proteins Ltd. In the present case the Tribunal has categorically observed that the assessee had shown bogus purchases amounting to Rs.2,92,93,288/- 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.2,92,93,288/- represented alleged purchases from bogus suppliers it was not incumbent on it to restrict the disallowance to only Rs.73,23,322/"

6 *Counsel pointed out that the S.L.P. against such decision was dismissed by the Supreme Court.*

7 *On the other hand, Ms Khan learned counsel for the assessee opposed the appeals contending that the Tribunal has given proper reasons. The assessee was a trader. Even if the purchases are found to be bogus, entire purchase amount cannot be added by way of assessee's income. 8 In the present case, as noted above, the assessee was a trader of fabrics. The A.O. found three entities who were indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus.*

This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied. The finding of the CIT(A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by the assessee and the sales declared. That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases. The decision of the Gujarat High Court in the case of N.K. Industries Ltd. (supra) cannot be applied without reference to the facts. In fact in paragraph 8 of the same Judgment the Court held and observed as under-

"So far as the question regarding addition of Rs.3,70,78,125/- as gross profit on sales of Rs.37.08 Crores made by the Assessing Officer despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 is concerned, we are of the view that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6 % gross profit is taken into account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price. We have to reduce the selling price accordingly as a result of which profit comes to 5.66 %. Therefore, considering 5.66 % of Rs.3,70,78,125/- which comes to Rs.20,98,621.88 we think it fit to direct the revenue to add Rs.20,98,621.88 as gross profit and make necessary deductions accordingly. Accordingly, the said question is answered partially in favour of the assessee and partially in favour of the revenue."

9. *In these circumstances, no question of law, therefore, arises. All Income Tax Appeals are dismissed, accordingly. No order as to costs."*

9. Following the decision of the Hon'ble Bombay High Court (supra), we direct the Assessing Officer to restrict the addition/disallowance only to the extent of the Gross Profit rate on alleged bogus purchases at the same rate of the other genuine purchases declared by the assessee. Since the Assessing Officer has accepted the sales declared by the assessee and purchases are part of the same trading activities. To meet the ends of justice, we direct the Assessing Officer to sustain the addition @5% of the alleged bogus purchases. Accordingly, Ground No. 3 is partly allowed and all other grounds raised by the assessee are dismissed.

10. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 22nd December, 2022.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER
Mumbai / Dated 22/12/2022
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