

IN THE INCOME TAX APPELLATE TRIBUNAL “G”BENCH, MUMBAI
BEFORE SHRI ABY T. VARKEY, JM AND SHRI OM PRAKASH KANT, AM

आयकर अपील सं/I.T.A. No.3191/Mum/2022
(निर्धारणवर्ष/Assessment Year: 2010-11)

Sawailal Surtaram Bhatti 161, 4 th Floor, Panchshil Niwas, 5 th Kamathipura, Mumbai-400 008	<u>बनाम</u> Vs.	Income Tax Officer, 20 (3) (2) Matru Mandir, Parel Mumbai-400 007
स्थायीलेखासं./जी. आइ. आर. सं./PAN/GIR No: .AEMPB3718G		
अपीलार्थी/ Appellant	..	प्रत्यर्थी / Respondent

Assessee by:	Shri Dhaval Shah
Revenue by:	Shri Anil K. Das

सुनवाईकीतारीख/Date of Hearing: 09/03/2023
घोषणाकीतारीख/Date of Pronouncement: 10/04/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of Ld. Commissioner of Income Tax Appeals, Mumbai (hereinafter referred to as the “Ld. CIT(A)])/NFAC, dated 18.10.2022 for assessment year 2010-11.

2. The assessee’s main grievance is against the impugned action of the Ld. CIT(A) dismissing the appeal *in limine*; and then also recording a finding that appeal filed by assessee as “*not maintainable*”; and thereafter, proceeded to observe in the impugned order about the merits of the addition made by AO [ad-hoc addition of 12.5% on bogus purchases to the tune of Rs.3,57,38,866/- based on the report of the Maharashtra Sales Tax Department] which was passed u/s 144 r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”).

3. The brief facts as noted by the AO is that the assessee had filed his return of income for assessment year 2010-11 on 09.09.2010 declaring total income of Rs.12,78,110/- which was processed u/s 143(1) of the Act. Subsequently, the AO received information from the DGIT (Investigation)-Mumbai, that the assessee was engaged in bogus purchase activity of taking accommodation entry from hawala operators which information was based on report of Maharashtra Sales Tax Department that twelve (12) persons named in the assessment order were indulging in providing bogus purchase bills in lieu of commission. And since, the assessee had dealt/transacted with the said 12 parties and has shown to have made purchases from them to the tune of Rs.3,57,38,866/- and since, the assessee has not responded to the notices, the AO held that assessee failed to prove genuineness of the purchases from these parties. The AO, was of the opinion that if any person indulged in the practice of purchasing the goods from the grey market and thereafter obtained bogus bills, would do so for getting some benefit. Therefore, according to AO, the purchase rate as per the purchase bills from the entry-operators cannot be accepted. And according to him, the rate of purchases made in cash from undisclosed parties [from grey market] must be much lower than the rate of credit purchases on account of evasion of sales tax, other taxes and cash discount etc. Thus according to him, there must be inflation of purchases. Therefore, according to the AO, profit element embedded in such inflated purchases would be taken care of in the case of assessee, if 12.5% of the same is estimated on the bogus purchases; and so he made an addition of Rs.44,67,358/-. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who was pleased to confirm the addition at the last paragraph of the impugned order (refer para 5 of the impugned order) and he also held that since the assessee could not give sufficient cause for delay in filing of appeal, the appeal is not maintainable.

4. The Ld. Authorised Representative (AR) assailing the action of the Ld. CIT(A) for not condoning the delay and simultaneously confirming the action



of the AO on merit, pointed out that similar actions were undertaken by the AO for assessment years 2009-10 and 2011-12 which was already heard by the SMC Bench of this Tribunal on 06/02/2023 and awaiting decision.

5. Even though we heard the appeal on 09.03.2023, we take judicial notice of the order of the Tribunal passed on 10.02.2023 in assessee's own case in ITA No.3189 & 3193/MUM/2022 for AY's 2009-10 and 2011-12, wherein on similar facts and circumstances, this Tribunal held as under:

These appeals are filed by the assessee against different orders of the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld.CIT(A)"] dated 18.10.2022 for the A.Ys. 2009-10 and 2011-12 in sustaining the action of the Assessing Officer.

2. Briefly stated the facts are that, assessee an individual engaged in the business of making of steel furniture filed return of income on 07.07.2009 and 10.08.2011 declaring income of ₹.7,75,359/- and ₹.2,99,360/- for the A.Y. 2009-10 and A.Y.2011-12 respectively, and the returns were processed u/s. 143(1) of Income-tax Act, 1961 (in short "Act"). Subsequently, Assessing Officer received information from the DGIT(Inv.), Mumbai about the accommodation entries provided by various dealers and assessee was also one of the beneficiary from those dealers. The assessments were reopened u/s. 147 of the Act based on the information received from DGIT (Inv.), Mumbai, that the assessee has availed accommodation entries from various dealers who are said to be providing accommodation entries without there being transportation of any goods. In the reassessment proceedings, the assessee was required to prove the genuineness of the purchases made from various dealers as referred in

Assessment Order. In response assessee submitted that the purchases made are genuine.

3. Not convinced with the submissions of the assessee the Assessing Officer treated the purchases as non-genuine and he was of the opinion that assessee had obtained only accommodation entries without there being any transportation of materials and the assessee might have made purchases in the gray market. It is the finding of the Assessing Officer that assessee failed to produce the parties and as such the parties remained unverifiable. Therefore, Assessing Officer treated ₹.24,56,579/- and ₹.2,13,304/- as non-genuine, being 12.5% of the total non-genuine purchases of ₹.1,96,52,633/- and ₹.17,06,432/- for the A.Y. 2009-10 and A.Y.2011-12 respectively. On appeal the Ld.CIT(A) sustained the action of the Assessing Officer in estimating the Gross Profit at 12.5%. Against these orders of the Ld.CIT(A) assessee is in appeal.

4. 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 Iron and steel and already declared the profit of 7.79% in A.Y. 2009-10 and 6.17% in A.Y. 2011-12. The applicable VAT during that period was only 4%. He prayed that the addition may be sustained at the applicable VAT rate. Further, he submitted that assessee is not pressing the Ground Nos. 1 to 4 of grounds of appeal.

5. On the other hand, Ld. DR vehemently supported the orders of the authorities below.

6. Considered the rival submissions and material placed on record and perused the orders of the authorities below. 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. The Hon'ble Gujarat High Court in the case of Bholanath Polyfab Pvt. Ltd [355 ITR 290] held that when the assessee made purchases and sold the finished goods as a natural corollary not the entire amount covered under such purchases would be subject to tax but only the profit element embedded therein. Similar view has been taken by the Hon'ble Gujarat High Court in the case of CIT v. Simit P. Seth [38 taxman.com 385]. Simply because the parties were not produced the entire purchases cannot be added as held by the Bombay High Court in the case of CIT v. Nikunj Eximp [216 Taxman.com 171]. We agree with the view of the lower authorities that there should be an estimation of profit element from these purchases and should be estimated reasonably as the assessee could not conclusively prove that the purchases made are from the parties as claimed, especially in the absence of any confirmations from them. Taking the totality of facts and circumstances, keeping in view the nature of business of the assessee i.e. trader in Iron and Steel Metals, it would be justified if the profit element embedded in those purchases are estimated at 5%. Accordingly, we direct the Assessing Officer to estimate the profit element from the non-genuine purchases at 5% for both the Assessment Years i.e., A.Y. 2009-10 and A.Y. 2011-12 and restrict the disallowance of purchases to 5% and compute the income accordingly.

7. In the result, appeals filed by the assessee are partly allowed.

6. Respectfully following the order of the Tribunal in assessee's own case which emanated also from the Ld. CIT(A)'s order dated 18.10.2022 for the



earlier as well as subsequent assessment years; and which actions were based on the same information from the Maharashtra Sales Tax Department pursuant to which DGIT(Inv.), Mumbai passed on the information to the AO to re-open the assessment and additions have been saddled on the assessee in the relevant assessment year 2010-11. And since, there is no change in facts and law, we respectfully follow the decision of the Tribunal in assessee's own case for assessment years 2009-10 and 2011-12 and find that AO in this year also has not disturbed the sales figures shown by the assessee, which implies that *genuineness of the sales* has been accepted by the AO. In such a scenario, the presumption is that the assessee had procured the goods from grey market for which accommodation entry/purchase bills have been taken as accommodation entry. In such a scenario, reasonable profit which have been suppressed by assessee from such sales should only be added. And in this case, it is noted that the Tribunal has taken a view that 5% of the non-genuine purchases would be reasonable. So we direct AO to restrict the addition @5% of the non-genuine purchase to the tune of Rs.3,57,38,866/-. The addition is thus restricted to 5% of Rs.3,57,38,866/-. The AO is directed to give relief accordingly to the assessee.

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

Order pronounced in the open court on this 10/04/2023

Sd/-

(OM PRAKSH KANT)

ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)

JUDICIAL MEMBER

मुंबई/Mumbai

दिनांक/Dated: 10/04/2023

Mahesh R. Sonavane



आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त/ CIT
4. विभागीयप्रतिनिधि ,आयकरअपीलीयअधिकरण ,मुंबई/ DR, ITAT, Mumbai
5. गार्डफाईल / Guard file.

सत्यापितप्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार / (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण ,मुंबई / ITAT, Mumbai