

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

BEFORE SHRI ABY T. VARKEY, JM AND SHRI S RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No.2772/Mum/2023

(निर्धारण वर्ष / Assessment Year: 2009-10)

Hiren Chinubhai Shah A-301, Savoy Residency Santacruz (West) S.O. Mumbai, Mumbai-400054.	बनाम/ Vs.	ITO, Ward-22(1)(5) Kautilya Bhavan, BKC, Bandra (East), Mumbai- 400051.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AGUPS8207K		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Bhupendra Shah	
Revenue by:	Shri Satya Prakash Singh (Sr. AR)	

सुनवाई की तारीख / Date of Hearing: 21/11/2023

घोषणा की तारीख /Date of Pronouncement: 29/11/2023

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 23.06.2023 for the assessment year 2009-10.

2. The main grievance of the assessee is against the action of the Ld. CIT(A) sustaining the disallowance of Rs.20,84,190/- u/s 69C of the Income Tax Act, 1961 (hereinafter "the Act") being 100% of the total purchases made from two (2) parties.

3. At the outset, we note that even though the assessee in his grounds of appeal has raised legal issue against the reopening of the assessment u/s 147 of the Act, but before us the same has not been argued. Therefore, the legal issue is not adjudicated.



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4. Ground no. 3 regarding penalty is pre-mature and Interest charged u/s 234A, 234B and 234C are consequential. So dismissed.
5. Before us, only ground no. 2 was argued, which is against the action of the Ld. CIT(A) sustaining disallowance of Rs.20,84,190/- u/s 69C of the Act being 100% disallowance of total purchases from two (2) parties namely (i) M/s. Kriya Impex Pvt. Ltd. and (ii) M/s. Sun Diam.
6. Brief facts are that the assessee had filed his return of income for AY. 2009-10 declaring total income of Rs.9,01,650/- which was processed u/s 143(1) of the Act. Thereafter, the AO issued notice u/s 148 of the Act dated 28.03.2016 conveying his desire to reopen the assessment u/s 147 of the Act. The reasons recorded for reopening the assessment has been reproduced at page no. 1 & 2 in his assessment order wherein AO notes that he received information from Director of Investigation Tax (Inv.) (DIT) that during the course of search proceedings on Shri Rajendra Jain Group and others, it came to light that Shri Rajendra Jain had admitted of providing accommodation entries to the beneficiaries through his concerns/companies and named eleven (11) concerns through which such fraudulent activities were being carried out. The AO noted that during the relevant assessment year, the assessee has transacted with Shri Rajendra Jain concerns (i) M/s. Kriya Impex Pvt. Ltd. to the tune of Rs.8,97,050/- and (ii) M/s. Sun Diam to the tune of Rs.11,87,140/- total of Rs.20,84,190/-. Therefore, according to the AO since the assessee has transacted with these concerns which is not doing genuine business but is providing



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accommodation entries, the AO was of the opinion that purchases made from these two concerns are bogus and thereafter there is escapement of income. Therefore, he reopened the assessment of the assessee and during the assessment proceedings the assessee was directed to prove the genuineness of the purchases from these two concerns and directed the assessee to produce the proprietor/director of the two concerns. Pursuant thereto, the assessee replied to the AO (*which has been reproduced at para no. 8 of the assessment order*) wherein *inter-alia* the assessee filed documents to prove the genuineness of the purchases from two concerns and also requested the AO to add only profit element @ 6% (as per instruction no. 02/2008 of assessee in diamonds manufacturing/trading). The AO did not accept the contention of the assessee and noted that assessee failed to produce the proprietor/director of the two concerns. And therefore, according to him, the genuineness of the purchase transaction has not been proved. And thereafter he held that the transaction with these two concerns as non-genuine and bogus purchases from paper concerns of Shri Rajendra Jain Group. And thus he disallowed 100% purchases made from the two concerns to the tune of Rs.20,84,190/- us/ 69C of the Act. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A)/NFAC who was pleased to confirm the action of the AO. Aggrieved, the assessee is before us.

7. We have heard both the parties and perused the records. The sheet anchor of the assessee's contention is that undisputedly, the AO/Ld. CIT(A) has not disturbed the sales which has been shown by



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the assessee which includes the sale of diamonds purchased from both M/s. Kriya Impex Pvt. Ltd. and M/s. Sun Diam. According to the Ld. AR, the purchases were made on 08.11.2008 from both concerns and sold on 11.11.2008 and 15.01.2009 to M/s. Bothra Gems & Jewels and the assessee has shown gross profit (GP) of 9.3% from such transactions which details given at page no. 34 of PB as under: -

Stock Details
F.Y. 2008-09
AY. 2009-10

S. No	Item	Date	Inward Party Name	Qty	Amount	Date	Outward Party Name	Qty	Amount
1	Cut & Polished diamonds	08.11.2008	Kriya Impex Pvt. Ltd.	550.00	897,050.00				
2	Cut & Polished diamonds					11.11.2008	Bothra Gems & Jewels	550.00	990,550.00
3	Cut & Polished diamonds	09.01.2009	Sun Diam	780.50	1,187,140.00				
4	Cut & Polished diamonds					15.01.2009	Bothra Gems & Jewels	780.50	1,307,337.50
				1330.50	2,084,190.00			1330.50	2,297,887.50

8. Moreover, the Ld. AR drew our attention to the details of the purchases of diamonds which are given page no. 20 of the PB as well as the details of the sales of diamonds which are placed at page no. 22 of the PB. To show the genuineness of the transaction, the assessee has placed copy of the purchase details and proof of hand delivery of diamonds purchased from two concern; and sales of the said diamonds details which placed at page no. 23 to 26 of PB. In order to show that the purchases have been effected through banking channel he drew our attention to banks taken placed at page no. 27 to 28 of PB. The confirmation of both parties are found placed at page no. 29 to 33 of PB. And we find that the AO/Ld. CIT(A) has not disturbed the sales of diamonds shown by assessee including the diamonds purchased from the two concerns. In such a scenario, the presumption which can be



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drawn in the aforesaid facts and circumstances of the case is that the assessee has procured the diamonds from the grey market and used the services of the two concerns (*M/s. Kriya Impex Pvt. Ltd./M/s. Sun Diam to provide sales bills*). In such a scenario, only the profit embedded in such sales should only be brought to tax. And for that we rely on the decision of the Hon'ble Bombay High Court in the case of *PCIT Vs. Nitin Ramdeoji Lohia (2022) 145 taxmann.com 546 (Bom)* wherein the Hon'ble Bombay High Court held as under: -

“Both these appeals under section 260A of the Income-tax Act, 1961 ("the Act") challenge the order dated 05th July, 2017, passed by the Income-tax Appellate Tribunal, Bench "B", Pune ("ITAT") in Income-tax Appeal No. 1408/PUN/2015 relevant to the assessment year 2010-11 and Income-tax Appeal No. 1409/PUN/2015 relevant to the assessment year 2011-12, respectively, whereby the appeals filed by the Revenue have been dismissed.

2. The facts and issues arising in both these appeals are identical, however, for the sake of deciding the issue, reference is being made to the facts in ITA No. 673 of 2018.

3. The following questions of law have been proposed for our consideration:

- a.* Whether in the facts and circumstances of the case and in law, the ITAT was justified in directing the A.O. to delete the addition made on account of bogus purchase ignoring the fact that the addition was made by the A.O. on the basis of credible information from the Sales Tax Department and on the fact that the assessee did not substantiate/confirm the veracity of the impugned purchases in the assessment proceedings?



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- b.* Whether in the facts and circumstances of the case, the ITAT was justified in directing the A.O. to delete the addition made on account of bogus purchase ignoring the fact that the absolute burden of proof to substantiate/confirm the veracity of the impugned purchases was cast on the assessee, which was not discharged by cogent, relevant and reliable evidence, during the course of the assessment proceedings?
- c.* Whether in the facts and circumstances of the case and in law, the ITAT was justified in directing the A.O. to delete the addition made on account of bogus purchase ignoring the fact that the parties from whom the impugned purchases were claimed to be made were not available on their given addresses and further the assessee did not produce such parties before the A.O. to confirm the veracity of the impugned purchases?
- d.* Whether in the facts and circumstances of the case, and in view of the Hon'ble Supreme Court's judgment dated 16-1-2017 in the case of N.K. Proteins Ltd. Vs DCIT [2017] 84 taxmann.com 195 (SC), it was incumbent on the ITAT to restrict the addition made on account of 'Bogus Purchases', it having once come to a categorical finding that such total amount of addition made represented alleged purchases from bogus suppliers?

4. Briefly stated the material facts are as under:

The Respondent assessee is engaged in the business of trading in industrial oil and transport services. A return of income was filed by the assessee declaring a total income at Rs. 4,47,970/-. The Sales Tax Department of the Government of Maharashtra provided information to the Assessing Officer



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(A.O.) giving names, addresses and details of persons, who had provided entries of bogus purchases. The said information also contained details of beneficiaries of such bogus bills. Based upon the information so received, the A.O. issued notice under section 148 of the Act, followed by the statutory notices under section 143(2) and 142(1) of the Act and the order of assessment under section 143(3) r/w section 147 of the Act was passed on 30th March, 2015 and total income assessed at Rs. 1,46,82,548/-. The A.O. thus made an addition of Rs. 1,42,34,578/- on account of alleged bogus purchases from Hawala dealers/parties.

5. An appeal was preferred by the assessee before the CIT (Appeals). The appeal was allowed *inter alia* on the ground that the A.O. having not disputed the sales, it was not a case of bogus purchases and that it was at best a case of inflated purchases. The CIT (Appeals), however, was of the opinion that the gross profit shown by the assessee at 0.69% was very low in that particular kind of trade and, therefore, estimated the gross profit at 5% and further directed the A.O. to make an addition in the gross profit ratio and delete the balance addition made.

6. Both the Revenue as also the assessee preferred appeals against the order passed by the CIT (Appeals), whereas the Revenue in its appeal challenged the deletion of Rs. 2.45 crores on account of alleged bogus purchases, the assessee questioned the order to the extent the gross profit rate was calculated at 5% as against 0.69% declared by the assessee, which had resulted in an addition of Rs. 10,59,974/-. The Tribunal dismissed the appeal filed by the Revenue and allowed the appeal preferred by the assessee. It was



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held that the case of the Revenue was based on the investigation carried out by the Sales Tax Department only and that no cross-examination of the persons, whose names had figured in the list so prepared by the Sales Tax Department, was allowed. It was held that the A.O. had failed to complete the investigation in the case and that the affidavits and the confirmation letters filed by the assessee from three dealers from whom it had made purchases, were not inquired into at all and that the assessee had discharged the onus of proving the factum of making purchases from the respective parties and that there was no contrary evidence brought on record by the A.O. in that regard. It, therefore, while allowing the appeal of the assessee, directed the A.O. to delete the addition on account of bogus purchases.

7. From the above facts it is thus clear that the CIT (Appeals) partially allowed the appeal of the assessee on the ground that the A.O. had not disputed the sales and, therefore, this was not a case of bogus purchases, inasmuch as if the purchase was bogus, it would not be possible for assessee to complete the transaction by way of sale, unless it could be shown from the record that the corresponding sale was also a sham transaction.

We are in agreement with the view expressed by the CIT (Appeals) that, if the purchases are bogus, it would be impossible for the assessee to complete the business transaction and that if the purchase is bogus, the corresponding sale also must be bogus or else the transaction would be impossible to complete and as a necessary corollary, unless the corresponding sale is held to be bogus, the purchase also cannot be held to be bogus, rather it would be a case of purchase from bogus entities/parties. That view has been upheld by the Tribunal in principal while dismissing the



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appeal of the Revenue. In view of the above, we are of the opinion that the questions of law proposed as (a), (b), and (c) in the appeal cannot be said to be substantial questions of law.

Insofar as the question of law framed as (d) is concerned, we find that the Tribunal has not addressed the issue of adopting the gross profit rate of 5% on the alleged Hawala purchase of Rs. 2.45 crores as against the rate of 0.69% declared by the assessee, despite the fact that the CIT (Appeals) had specifically gone into that question in its order dated 18th August, 2015 and had directed the A.O. to make 5% addition in the gross profit ratio, while deleting the balance addition.

We, therefore, deem it appropriate to remand the matter back to the Tribunal only to the limited extent of going into that issue. Parties to appear before the Tribunal on 05th December, 2022 and orders to be passed thereupon, preferably within a period of three months thereafter.

The decision taken above in ITA No. 673 of 2018 shall apply mutatis and mutandis to ITA No. 750 of 2018. In the result, both the appeals are, accordingly, disposed of.”

9. In the light of the aforesaid discussion, we find force in the contention of the assessee that the Ld. CIT(A) erred in sustaining the 100% disallowance of purchases from two concerns and thus, erred in confirming the addition of Rs.20,84,190/- u/s 69C of the Act. Therefore, as per the ratio laid down by the Hon'ble Courts, profit embedded in the transaction need to be brought to tax particularly when the tax authorities have not disturbed the sales declared by the



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assessee. We note that the assessee had himself offered profit element @ 6% from purchases from the aforesaid parties (*para no. 8 of assessment order*). In the light of the aforesaid, the AO is directed to restrict the addition @ 6% of the disputed purchases.

10. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on this 29/11/2023.

Sd/-

(S RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 29/11/2023.
Vijay Pal Singh, (Sr. PS)

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai