

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

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI NARENDER KUMAR CHOUDHRY (JUDICIAL MEMBER)**

**ITA No. 4521/MUM/2023
Assessment Year: 2009-10**

Income Tax Officer,
Rani Mansion Murbad Raod,
Kalyan West-421301.

Appellant

Vs. J D Electric Works,
Manik Colony Opp Raja Hotel
Ahilyabai Chowk,
Kalyan West-421301.
PAN NO. AAAFJ 9100 C
Respondent

Assessee by : Mr. Shashank Mehta
Revenue by : Ms. Rajeshwari Menon, Sr. DR

Date of Hearing : 02/05/2024
Date of pronouncement : 06/05/2024

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue is directed against order dated 26.09.2023 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)’] for assessment year 2009-10, raising following grounds:

- 1. Ground On the facts and in circumstances of the case, the CIT(A) erred in deleting the disallowance of purchases of Rs. 23,04,437/- from non-existent vendors by not following the decision of the Hon'ble Gujarat High Court in Tax Appeal No.242 of 2003 dated 20/06/2016 in the case of N.K. Proteins Ltd. Vs DCIT wherein it*



has been held that once the purchases are bogus, additions should be made on the entire purchases and not only the profit embedded in such purchases against which the SLP filed by the assessee was dismissed by the Hon'ble Apex Court vide (2017) 292 CTR 354 (SC)

2. *On the facts and in circumstances of the case, the CIT(A) erred in deleting the addition of Rs. 2,08,96,633/- on the basis of the submissions and supporting evidences, which were made for the first time during the appellate proceedings and were in the nature of additional evidences, without allowing the Assessing Officer to examine the additional evidences as per Rule 46A(3) of the I.T. Rules 1962. The appellant craves leave to add, amend or alter or alter any ground/grounds, which may be necessary.*

2. Briefly stated facts of the case are that the assessee firm is running a business of executing electrical contracts mainly for Government and semi-government authorities. For the year under consideration, the assessee filed return of income on 30.09.2009 declaring total income at Rs.28,16,550/-. Subsequently, in view of the information from the Sales Tax Department that assessee had obtained bogus bills from the certain 'hawala' operators, the Assessing Officer reopened the assessment by way of issue of notice u/s 148 of the Income-tax Act, 1961(In short ' the Act') . In the reasons recorded, the Assessing Officer noted that assessee had taken bogus bills amounting to Rs.23,04,437/- from 'hawala' dealers. In response to the notice u/s 148 of the Act, no return of income was filed. The Assessing Officer completed the reassessment after disallowing the entire purchases of Rs.23,04,437/- vide his order dated 16.01.2015 in terms of section 143(3) r.w.s. 147 of the Act. On further appeal, the ld CIT(A) deleted the addition. Aggrieved, the Revenue is in appeal raising grounds reproduced above.



3. In respect of Ground No. 1 of the appeal relating to disallowance of bogus purchase of Rs. 23,04,437/-, the Ld. CIT(A) noted that in respect of bogus purchases pertaining to assessment years 2009-10 to 2011-12, the assessee had already accepted the additional profit of Rs.20,00,000/- during the course of survey action carried out and same was declared in assessment year 2011-12. Before the Ld. CIT(A), the assessee submitted that assessee is a Government contractor and its sales have not been disputed by the Assessing Officer. In view of the facts, the Ld. CIT(A) observed that when sales have not been doubted then only possibility was that the assessee might have obtained goods in cash from the grey market and obtained a benefit of cash discount, for which, the additional profit @ 12% declared by the assessee was justified. Accordingly, he deleted the addition. The relevant finding of the Ld. CIT(A) is reproduced as under:

“Ground 1.1 & 1.2

The ground 1.1 and 1.2 are general grounds of appeal and being considered while adjudicating other grounds as under.

Ground No. 2.1:

1. The learned AO has carried out addition of Rs.23,04,437/- on account of purchases made by the appellant from hawala dealers. The learned AO has treated such entire purchases as unexplained expenditure and added to total income of the appellant. In this regard, the appellant, has raised multiple sub grounds of appeal which are adjudicated collectively as under.

2. The learned AO has re-opened the assessment proceedings based on information received from sales tax department wherein it was contested that the appellant has made bogus purchase from hawala dealers as under:



Sr. No.	Name of Hawal Dealer	Amount (Rs.)
1.	Renuka Sales	7,75,013/-
2.	Rekha Trading	8,36,868/-
3.	Deepali Enterprises	6,92,556/-
Total		23,04,4371/-

The learned AO had issued notice u/s 133(6) to above parties for cross confirmation but the same were not complied by the parties and thus, the learned AO treated them as bogus and added to total income.

1. In this regard, the appellant submitted that the income tax department's action pertaining to hawala purchases were carried out for 3 AYs in its case.

1. 1. The appellant claimed the aforesaid purchases as genuine since all the material were used for fulfilling its Govt. consignments.

1. 1. However, in order to buy peace of mind, the appellant had approached DDIT and had offered gross profit of 12% (rounded off to Rs.20/- lakhs) as additional income to tax as under:

Assessment year	Purchase Amount	12% of the purchase
2009-10	23,04,437	2,76,532
2010-11	1,16,37,017	13,96,442
2011-12	10,17,551	1,22,106
TOTAL	1,49,59,005	17,95,088

1. 1. The appellant also filed a copy of letter filed with DDIT along with copy of challan for payment of additional taxes on said Rs.20/- lakhs during AY 2011-12.

2. Copy of said letter was filed during the appellate proceedings also along with following documents:

- Invoices pertaining to alleged bogus purchases
- delivery challans
- transport receipts
- Copies of confirmation from alleged hawala dealers
- Copy of revised income tax return for AY 2011-12 depicting additional 20 lakhs income being offered to tax

1. 1. The appellant also contested that the Learned AO has not questioned the sales made by the appellant and has accepted the sales amount as appearing in the financial statements.

1.2. In the underlined case, it is imperative to establish the genuineness of creditors. In absence of visibility on correctness of the amount paid/ payable to creditors, the possibility of purchasing the goods from grey market or in cash at lower rates and recording the same at inflated price in books of accounts cannot be ruled out.



1. 3. However, if the entire purchases are disallowed, the corresponding sales also need to be ignored but the AO has not done so. Therefore, this leaves with unjustified adjustment in case of the appellant.

1. 4. Many high courts and tribunals have dealt with this issue of bogus purchases in greater details and have upheld that certain gross profit shall be added to total income instead of adding entire purchases (especially when corresponding sales are not challenged).

1. 5. There are plethora of judicial precedents on this very issue and reliance can be placed on following cases:

1. The Hon'ble Gujarat High Court in the case of Commissioner of Income-tax vs. Simit P. Sheth reported in [2013] 38 taxmann.com 385 (Gujarat) has held as under:-

In the present case, the Commissioner of Income-tax (Appeals) believed that when as a trader in steel the assessee sold certain quantity of steel, he would have purchased the same quantity from some source. When the total sale is accepted by the Assessing Officer, he could not have questioned the very basis of the purchases.

In essence, therefore, the Commissioner (Appeals) believed the assessee's theory that the purchases were not bogus but were made from the parties other than those mentioned in the books of account.

7. That being the position, not the entire purchase price but only the profit element embedded in such purchases can be added to the income of the assessee. So much is clear by the decision of this court. In particular, the court has also taken a similar view in the case of CIT v. Vijay M. Mistry Construction Ltd. [2013] 355 ITR 498 (Guj) and in the case of CIT v. Bholanath Poly Fab (P.)Ltd. [2013] 355 ITR 290 (Guj). The view taken by the Tribunal in the case of Vijay Proteins Ltd. v. Asstt. CIT [1996] 58 ITD 428 (Ahd.) came to be approved.

8. If the entire purchases were wholly bogus and there was a finding of fact on record that no purchases were made at all, counsel for the Revenue would be justified in arguing that the entire amount of such bogus purchases should be added back to the income of the assessee. Such were the facts in the case of Pawanraj B. Bokadia (supra).

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.

1. Nickunj Eximp Enterprises Pvt. Ltd Vs CIT [Bombay HC -WRIT PETITION NO.2860 OF 2012]

2. In the underlined writ petition, Bombay HC upheld addition based on GP ratio

3. The Hon'ble Bombay High Court in the case of PCIT vs. Pinaki D. Panani vide order dated January 18, 2020 has held that even if the purchases made by the assessee are to be treated as bogus, it does not mean that entire amount can be disallowed. As the AO did not dispute the consumption of the raw materials and completion of work, only a percentage of net profit on total turnover can be estimated.

4. The Hon'ble Bombay High Court in the case of Usha Exports vs. ACIT vide order dated December 21, 2019 has held that in case of bogus purchases where sales are accepted, the addition can be made only to the extent of difference between the GP declared by the assessee on normal purchases vis a vis bogus purchases. The AO is directed to restrict the addition to the extent of lower GP declared by the assessee in respect of bogus purchases as compared to G.P. on normal purchases.

5. PCIT vs. Jakharia Fabric (P) Ltd. (2020) 429 ITR 323 (Bom-HC) dated 10/02/2020

In the underlined case, honourable HC upheld the decision of ITAT for restricting adjustment to the tune of estimated profit element involved in bogus purchase.

1. 6. In view of the above, it would be justified to restrict addition to the tune of certain gross profit percentage.

Considering totality of the case and relying on various judicial pronouncements by Honorable High courts and ITATs, I am of the view that the addition shall be restricted to gross profit. The appellant has already offered additional 12% gross profit to tax and thus no further enhancement to total income is warranted in the impugned case. Restaurant, the addition made by learned AO for sum of Rs.23,04,437/- is deleted."

3.1 We find that Ld Assessing Officer has ignored the additional profit of Rs. 2,76,532/- declared at the rate of 12 percentile on the purchases of Rs. 23,04,437/- (i.e. the amount of purchases in dispute) treating the same to be bogus in nature and he held entire bogus purchase as disallowable. But, when he has not held



the sales corresponding to those purchases as bogus, then without purchases, there can't be any sales. Thus, the ld CIT(A) observed that only possibility in such case could be that where as bills of purchases would have been obtained from those bogus billers, the assessee must have purchased goods in cash from grey market and supplied to the sale parties. Thus, addition could be made only for part of additional profit on such sales corresponding to bogus purchase bills. The assessee has declared such additional profit at the rate of 12 percentile in AY 2011-12. Now, the only issue in dispute could be that in which assessment year, the assessee should have declared said additional profit on bogus purchase bills. Normally, such additional profit should have been declared in corresponding assessment year, but the Revenue has taken tax on such additional profit in AY 2011-12. The question which arises is whether the Revenue is justified in raising tax on same income in year under consideration, when tax on same has already been taken in another assessment year. In our opinion, the answer is negative unless the Revenue refund corresponding tax collected in another assessment year, otherwise. it amounts to taxing the same income twice, which is not permitted in law.

3.2 In view of the above discussion, we do not find any infirmity in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. The ground no. 1 of the appeal of Revenue is accordingly dismissed.



4. As far as ground No. 2 of the appeal is concerned, we find that the Assessing Officer has disallowed the entire purchases amounting to Rs.2,08,96,663/- from 20 suppliers out of purchases to Rs.3,19,02,036/-. The Assessing Officer issued notice u/s 133(6) of the Act for verification from the purchases parties, out of which partly were confirmed. Before the Ld. CIT(A), the assessee filed detailed confirmation in respect of all the parties however, the Ld. Assessing Officer did not respond those additional evidence for almost six years. The relevant finding of the Ld. CIT(A) in respect of additional evidence is reproduced as under:

“5. Observation and Decision:

Though there are 4 grounds of appeal raised by the assessee however the main issue involved in the present appeal is addition of Rs 23,04,4371-U/S 69C,40(3)&40A(3A) and addition of Rs 2,08,96,633/- U/s 37(1) of the I.T Act as unexplained expenses made by the AO based on the information received from sales tax department of Maharashtra which are actual grounds as 2.1 and 2.2 and ground number 1.3 and 4 are general and consequential in nature.

*There is a issue of additional evidences submitted by the assessee during appellate proceedings for which assessee has claimed that these evidences could not be claimed in front of AO as no sufficient opportunity was provided to him during the assessment proceedings .Even if contention of the assessee is not to be believed and additional evidences is not to be admitted it is pertinent to notice **that the remand report in this case is pending on part of AO as long as since more than six years and the appeal proceedings under these circumstances can't be kept permanently in abeyance hence additional evidences produced by the assessee are taken on record and case is decided on merit.**”*

(emphasis supplied externally)

5. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Before us, the Ld. DR submitted that additional evidence has been admitted by



the Ld. CIT(A) without allowing opportunity to the Assessing Officer for examining those additional evidences. In our opinion, the above argument of the Ld. DR is incorrect as the Ld. CIT(A) has allowed opportunity and for six years the Assessing Officer did not respond on those additional evidences and therefore, it cannot be said that no opportunity has been provided to the Assessing Officer. It is the Assessing Officer, who has not availed the opportunity for almost six years. In such circumstances, there was no option with the CIT(A) appeal and he himself analysed the additional evidences on merit under co-terminus power of the Assessing officer. In our opinion, the Ld. CIT(A) has passed a reasoned order after considering the additional evidences on record. We do not find any infirmity in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. The ground No. 2 of the appeal of the Revenue is accordingly dismissed.

6. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 06/05/2024.

Sd/-
(NARENDER KUMAR CHOUDHRY)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;
Dated: 06/05/2024
Rahul Sharma, Sr. P.S.



Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai