

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “G”, MUMBAI
BEFORE SMT. PADMAVATHY S., ACCOUNTANT MEMBER
AND
SHRI. RAJ KUMAR CHAUHAN, JUDICIAL MEMBER
ITA NO. 791/MUM/2024 (A.Y: 2011-12)**

Assistant Commissioner of Income Tax – 4(2)(1)	Vs.	Gemsons Engineering Pvt. Ltd.	Precision
Room No. 640, Aayakar Bhavan, M. K. Road, New Marine Lines, Mumbai – 400020.		Plot No. AF-1, Cama Industrial Estate, Walbhat Road, Goregaon East, Mumbai 400063.	
PAN: AABCG0333J			
(Appellant)		(Respondent)	

Assessee Represented by	:	Shri. Bharat P. Shah
Department Represented by	:	Shri. Dinesh A. Chourasia – Sr. AR.
Date of conclusion of Hearing	:	06.06.2024
Date of Pronouncement	:	27.06.2024

ORDER

PER RAJ KUMAR CHAUHAN (J.M.):

1. This appeal is filed by the department/revenue against the order dated 27.12.2023 of Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as the “CIT(A)”], passed under section 250 of the Income Tax Act, 1961 [hereinafter referred to as “*the Act*”] for the A.Y. 2011-12, wherein the



disallowance of Rs. 1,34,21,728/- was deleted and addition was restricted to 12.5% on bogus purchase whereas the Learned Assessing Officer, DCIT, 9(1), Mumbai (hereinafter referred to as the "AO") has made addition @100%. Aggrieved by the order of the Ld. CIT(A), the department is in appeal before us and raised the following grounds of appeal:

- a. *"Whether on the facts and in circumstances of the case and in law, the Ld CIT(A)/NFAC has erred in deleting the disallowance of Rs. 1,34,21,728/-. Out of the total disallowance of Rs. 1,52,39,117/ made by AO due to bogus/unsubstantiated purchases?"*
- b. *Whether on the facts and in circumstances of the case and in law, the Ld CIT(A)/ NFAC is right in restricting the addition to 12.5% on bogus purchases where AO made addition @ 100%?*
- c. *Whether on the facts and in circumstances of the case and in law, the Ld CIT(A)/NFAC has erred in not relying on Hon'ble Supreme Court decision in the case of NK Proteins Ltd vs DCIT (2017) 292 CTR 354 (SC).*
- d. *Whether on the facts and in circumstances of the case and in law, the Ld. CIT(A)/NFAC has erred in restricting the disallowance on bogus purchase to 12.5% of the amount of bogus purchase and assuming in Para 5.4.2 of his order that the assessee had indeed made purchase, though not from named parties but other parties from grey marked without appreciating the fact that the assessee has not been able to establish that the purchase were actually made from any parties and without appreciating the fact that the entire bogus purchase was a debit in the P/L account to suppress taxable profit?*
- e. *The appellant craves leave to amend or alter any ground or add new ground which may be necessary."*

2. The brief facts giving rise to the present appeal are as under: -



3. The assessee filed its return of income declaring total income of Rs. 1,64,04,332/-, the said return was processed u/s.143(1) of "the Act" and was scrutinized accordingly a notice u/s. 143(2) dated 07.09.2012 was issued asking the assessee to file details. Thereafter, notice u/s. 142(1) dated 15.04.2013 & 03.10.2013 were issued and served on the assessee. The required details were filed and hearing was attended by Mr. Bharat P. Shah, C.A. of the assessee.
4. The department has received information from the Maharashtra Sales department that certain persons have given bogus bills for purchases to the beneficiaries. The modus operandi of the bogus bill providers is simple. If somebody / beneficiary wanted to obtain the bills of purchase (i.e., sale for bogus bill providers), he will give a cheque to them. The bogus bill provider will issue a bill of desired amount and will deposit the cheque in his bank account. After clearing of the cheque, the bogus bill provider will deduct his commission and will give the remaining amount in cash to the beneficiary. The beneficiary will use the cash either to make cash purchases from unregistered dealers or to keep in own pocket.
5. The assessee gave the details of the said parties as find mentioned in the para 4.4. of the Ld. AO's order. However, the assessee has failed to



produce the said parties before the Ld. AO. The Ld. AO therefore concluded that those parties were bogus data provider party and the transaction shown by the assessee is sham transactions. Purchased from the above parties are nothing but sham transactions. The assessee company has shown these bogus purchases to reduce the profitability and accordingly reduces the tax liability. As depicted in para 4.6 of the Ld. AO's order, these parties with whom the total sale of Rs. 1,53,39,117/- was done by the assessee company, the same has been treated as bogus purchases expenses and accordingly added back to the total income of the assessee u/s. 69C of "the Act" treating the same as unexplained expenditure. Penalty proceedings u/s. 271(1)(c) of "the Act" were initiated separately.

6. The assessee being dissatisfied with the Ld. AO's order filed appeal before the Ld. CIT(A) who has disposed off the same by the impugned order dated 25.03.2014.
7. We have heard the Ld. AR for the assessee and Ld. DR for the revenue/appellant. The department had relied upon the order of the Ld. AO stating that the Ld. AO has considered all the materials and documents and reached to the right conclusion that the assessee has failed



to substantiate the creditworthiness and identity of the parties and genuineness of the transactions and has found the alleged sales from those parties as bogus sales. It is further submitted that the Ld. CIT(A) has not followed the settled law and the finding is therefore perverse and needs to be set aside.

8. The Ld. AR on the other hand submitted that the Ld. CIT(A) in the case of the assessee for the A.Y. 2009-10 and 2010-11 has restricted the addition to 12.5% as has been done in the present case and the department has accepted those decisions of the Ld. CIT(A) and has not challenged the same, therefore, nothing has been stated as to why the department is not accepting the restriction of addition to 12.5% by the Ld. CIT(A) for the A.Y. 2011-12.
9. It is further argued that the Ld. CIT(A) in the appeal for A.Y. 2010-11, order dated 03.12.2019 (*submitted as attachment alongwith written submission*) has referred and relied upon the decision of the Hon'ble Gujrat High Court in the case of **Commissioner of Income Tax Vs. Simit P. Sheth** [2013] 38 taxmann.com 385 (Gujrat), order dated 16.01.2013. The department has not challenged the same and has accepted the said order. It is further submitted that in the present appeal



the department has challenged the Ld. CIT(A)'s order for the A.Y. 2011-12 on the basis of Hon'ble Supreme Court decision in case of ***N. K. Proteins Ltd vs. Deputy Commissioner of Income Tax*** [SLP No. 769 of 2017] but the Ld. CIT(A) has distinguished the said case by giving sound reasons in para no. 3 of impugned order. It is therefore vehemently argued that the appeal is devoid of any merit and liable to be dismissed.

10. We have considered the rival submissions of the parties. The Ld. CIT(A) has dealt with the issue of disallowance to the extent of 100% made by Ld. AO on account of bogus purchases in para no. 5.4 of this order and for the sake of appreciation of matter, the same is reproduced as under: -

“5.4. Decision on Grounds of Appeal No.2 & 3:

5.4.1 I have considered the rival contentions. I find from the assessment order that the Sales Tax Department declared those parties as non-genuine and their TIN have been cancelled. Further, notices issued u/s.133(6) by the AO to M/s. M/s. Gemsons Precision Engineering Pvt. Ltd. A.Y. 2010- 11/IT-10274/2016-17 Page 12 of 14 Padam Enterprises, M/s. Vardhaman Trading Co., M/s. Rummet Enterprises and M/s. Atlantic Enterprises were returned unserved by the Postal Authorities with the remark “unknown”. Also, the invoices and delivery challans produced by the appellant did not carry the seal/ stamp of any check post. The appellant did not produce the purchase orders. In view of the above, the AO was justified in holding that the purchases were not made from the parties mentioned in para 5.2.1 above.



5.4.2 *With regard to the appellant's submission made in the course of the appellate proceedings that the disallowance made by the AO is too high and unreasonable, I find that the AO has not disallowed the entire purchases of Rs.68,81,694/-. Instead, he has disallowed only 25% of such purchases. The AO has also relied on the decision of Gujarat High Court in the case of Simit P. Sheth. Thus, it is clear that the AO has accepted that though the appellant did not purchase goods from the parties mentioned in para 5.2.1 above, the appellant had purchased the goods from some other parties (grey market). Thus, the case of the appellant is squarely covered by the decision of the Hon'ble Gujarat High Court in the case of Simit Sheth (38 taxmann.com 385) (Gujarat). In that case, Assessing Officer having found that some of alleged suppliers of steel to assessee (Simit P. Sheth) had not supplied steel to assessee (Simit P. Sheth) but had only provided sale bills, held that purchases made from said parties were bogus. He, accordingly, added entire amount of purchases to gross profit of assessee (Simit P. Sheth). The Commissioner (Appeals) having found that assessee (Simit P. Sheth) had indeed made purchases, though not from named parties but other parties from grey market, sustained addition to extent of 30 per cent of purchase cost as M/s. Gemsons Precision Engineering Pvt. Ltd. A.Y. 2010-11/IT-10274/2016-17 Page 13 of 14 probable profit of assessee (Simit P. Sheth). Tribunal however, sustained addition to extent of 12.5%. The Hon'ble High Court has upheld the decision of the Hon'ble Tribunal. The relevant portion of the order of the Hon'ble Court is reproduced below:*

- “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.”

5.4.3 Taking into consideration the decision of the Hon’ble Gujarat High Court, I hold that 12.5% would be a reasonable estimate of inflation of purchase in this case. Accordingly, I direct the AO to restrict the disallowance to Rs.8,60,212/- being 12.5% of the total purchases. In the result, the grounds of appeal No.2 & 3 are partly allowed.”

11. In para 6 of the Ld. CIT(A)’s order, the Ld. CIT(A) has considered and accepted the submissions of assessee with regard to the distinguishable facts of the case of the assessee from the facts of N.K Proteins Ltd referred (“supra”). The relevant part of those submissions which were considered and accepted by the Ld. CIT(A) is reproduced as under: -

“3. The Supreme Court Judgement in the N.K Proteins Ltd vs Deputy Commissioner of Income Tax [SLP No. 769 of 2017] is not applicable in the assessee's case as there are material difference between two case. The information and concrete documents were available with Assessing Officer confiscated by department during search operations. The blank cheques of the



bogus parties, etc were available. However, in the assessee's case only information as to bills issued by dealers who are bogus in the eyes of Sales Tax department is available with the Assessing Officer. As quoted by Assessing Officer in Para 4.2 of the Assessment Order, Sales Tax Department has stated that, "the beneficiary will use cash either to make purchases from unregistered dealers". Thus, there is no conclusive evidence that assessee has not purchased the material of Rs. 1,53,39,117/-. So, on surmises or doubts the disallowance of purchases cannot be done in assessee's case."

12. We have carefully considered the findings returned by the Ld. CIT(A) as reproduced above, the Ld. CIT(A) has considered the detailed submissions of the parties in very meticulous manner and has returned a well-reasoned and legally sustainable finding. The reason given by the Ld. CIT(A) are cogent and also appeals to the conscience of this Tribunal. Moreover, the Ld. DR on behalf of revenue has failed to produce any contrary material which may lead us to consider the material on record differently from the considering of it by the Ld. CIT(A). Nothing is brought before us as to why the present A.Y. should be dealt with separately from the two previous A.Y. 2009-10 and 2010-11, wherein the concerned Ld. CIT(A) as discussed in earlier part of this order, has restricted the additions to the extent of 12.5% on account of alleged bogus purchases.
13. For the above reasons, we are of the considered opinion that there is no illegality and perversity in the impugned order of the Ld. CIT(A) and we



find no merit in the appeal and accordingly decides the grounds of appeal against the appellant by dismissing the same.

14. For the above reasons, the appeal is accordingly dismissed.

15. In the result, appeal filed by the revenue is dismissed in the above terms.

Order pronounced in the open court on 27.06.2024

Sd/-
(PADMAVATHY S.)
(ACCOUNTANT MEMBER)

Mumbai / Dated 27.06.2024
Karishma J. Pawar, (Stenographer)

Sd/-
(RAJ KUMAR CHAUHAN)
(JUDICIAL MEMBER)

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

(Asstt. Registrar)
ITAT, Mumbai