

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

**BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

ITA NO. 1723/MUM/2015 : (A.Y : 2011-12)

DCIT, Circle – 3(3)(1) Vs. M/s. Remi Process Plant &
Mumbai (Appellant) Machinery Ltd.
11 Cama Industrial Estate
Walbhat Road, Goregaon (E)
Mumbai 400 009

PAN : AAACR0409H (Respondent)

ITA NO. 1817/MUM/2015 : (A.Y : 2011-12)

M/s. Remi Process Plant & Vs. DCIT, Circle – 3(3)(1)
Machinery Ltd. Mumbai
11 Cama Industrial Estate
Walbhat Road, Goregaon (E)
Mumbai 400 009

PAN : AAACR0409H
(Respondent)

Appellant by : Shri Purushottam Kumar
Respondent by : Shri Bhagirath Singh

Date of Hearing : 28/02/2017
Date of Pronouncement : 21/03/2017

ORDER

PER D.T. GARASIA, JM:

The above are two cross-appeals filed against the order of CIT(A)-8, Mumbai dated 29.12.2014 which have arisen out of order passed by Assessing

Officer dated 21.01.2014 under section 143(3) of the Income Tax Act, 1961 (in short 'the Act').

ITA NO. 1723/MUM/2015 (Revenue's appeal)

2. At the outset, the Id. AR pointed out that the CBDT vide Circular No.21/2015 dated 10/12/2015 has revised the monetary limits for filing of appeals by the Department before the Tribunal retrospectively and the tax effect in dispute in the captioned appeal is below the monetary limit of Rs.10.00 lacs specified in the said CBDT Circular.

3. In this background, Ld. Departmental Representative appearing for the Revenue was required to state his position. He has not brought out any material to suggest that the captioned appeal is protected by any of the circumstances prescribed in Para-8 of the Circular dated 10/12/2015 (supra) and as a consequence such appeal is liable to be treated as withdrawn/not pressed. The relevant portion of the circular dated 10/12/2015 (supra) is reproduced below:-

“3. Henceforth appeals/SLPs shall not be filed in cases where the tax effect does not exceed the monetary limits given hereunder:-

<i>Sl. No.</i>	<i>Appeals in Income-tax matters</i>	<i>Monetary Limits (In Rs.)</i>
1.	<i>Before Appellate Tribunal</i>	<i>10,00,000</i>
2.	<i>Before High Court</i>	<i>20,00,000</i>
3.	<i>Before Supreme Court</i>	<i>25,00,000</i>

.....

4. For this purpose, "tax effect" means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed (hereinafter referred to as "disputed issues"). However the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

.....

8. Adverse judgments relating to the following issues should be contested on merits notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 above or there is no tax effect:

- (a) Where the Constitutional validity of the provisions of an Act or Rule are under challenge, or
- (b) Where Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires, or
- (c) Where Revenue Audit objection in the case has been accepted by the Department, or
- (d) Where the addition relates to undisclosed foreign assets/ bank accounts.

9. The monetary limits specified in para 3 above shall not apply to writ matters and direct tax matters other than Income tax. Filing of appeals in other Direct tax matters shall continue to be governed by relevant provisions of statute & rules. Further, filing of appeal in cases of Income Tax, where the tax effect is not quantifiable or not involved, such as the case of registration of trusts or institutions under section 12A of the IT Act, 1961, shall not be governed by the limits specified in para 3 above and decision to file appeal in such cases may be taken on merits of a particular case.

10. This instruction will apply retrospectively to pending appeals and appeals to be filed henceforth in High Courts/ Tribunals. Pending appeals below the specified tax limits in para 3 above may be withdrawn/ not pressed. Appeals before the Supreme Court will be governed by the instructions on this subject, operative at the time when such appeal was filed."

(underlined for emphasis by us)

4. Without going into the merit of the issues raised in the captioned appeal, this appeal is deemed to be withdrawn/not pressed as its filing is in contravention of the CBDT Circular dated 10/12/2015(supra).

5. In the result, by applying the CBDT Circular dated 10/12/2015(supra), the captioned appeal of the Revenue is dismissed as withdrawn/not pressed.

ITA NO. 1817/MUM/2015 (Assessee's appeal) :-

2. The first ground is disallowance of Rs. 10,000/- u/s 14A and second ground is addition on account of bogus purchase of Rs. 7,92,220/-.

3. The assessee has claimed long term capital gains on sale of investments of Rs. 1,06,000/- as exempt on tax. In response to a query raised the A.O. as to why the expenses incurred and claimed in respect of exempt income should not be disallowed as per section 14A r.w.r. 8D. The assessee contended that these investments have been made from its own capital and reserves and it has not incurred any expenditure to earn such tax free income. The A.O. did not convince with the above explanation and he worked out the expenses attributable to exempt income comes to Rs. 23,685/-. Whereas the A.O. himself disallowed Rs. 5,265/-, therefore, the A.O. restricted the disallowance of Rs. 18,420/-. The matter carried to CIT(A) and CIT(A) has dismissed the appeal of the assessee.

4. The learned AR submitted that the assessee has made investment out of share capital and reserves. The assessee did not borrow any funds for making

investments. The assessee contended that interest income of Rs. 18,50,216/- and interest expense is Rs. 7,59,817/-, therefore, net interest income of Rs. 10,90,399/-. The A.O. relied upon the decision of CIT vs Reliance Utilities and Power Ltd. 313 ITR 340 (Bom). The learned DR relied upon the order of the revenue authorities.

5. We have heard the rival contention of both the parties. The assessee company had share capital and reserves of Rs. 10.31 crores as against investment of Rs. 20,00,000/- at the year end. The CIT(A) has held that if the assessee's capital, reserves, surplus and current account deposits are higher than cost of tax free investments, it has be presumed that the said investment is made by the assessee out of interest free funds. The CIT further held that if the funds are available both interest free and interest bearing then a presumption would arise that the investments made out of interest free funds generated or available with the company and if the interest free funds are sufficient to meet the investment then there is no need of disallowing any interest.

6. We find that before A.O. and CIT(A), the Assessing Officer has not given any working of expenditure in relation to earning of such exempt income with any supporting evidences. Therefore, the A.O. has applied of Rule 8D of the Income Tax Act and worked out the expenditure for earning the exempt income i.e. Rs. 23,685/-. We find that CIT(A) has restricted disallowance upto Rs. 10,669/-. In the result, the appeal of the assessee is dismissed.

7. The assessee has claimed to have made purchase from M/s. Shree Sundha Steels Pvt. Ltd., amounting to Rs. 33,65,085/-. The assessee in support of his claim has produce the copies of quotations, purchase order, tax invoices,

bills, delivery challans, copy of confirmation etc. During the course of hearing, the statement of Iswar Singh Dewal, Director of M/s. Shree Sundha Steels Pvt. Ltd were recorded by Sales Tax Department and he has admitted that no goods and materials have been delivered and have been withdrawn from bank and cash has been remitted back to the purchaser after deducting a nominal commission.

8. The matter carried to CIT(A) and CIT(A) has restricted the disallowance of 25% in view of the judgement of Sanjay Oil Cake Industries vs 316 ITR 274. The learned AR submitted that the assessee company has furnished copies of invoice, delivery challan, purchase order, copy of bank statement and account confirmation from the said party. Therefore, no addition should be made. He relied upon the decision of M.K. Brothers 163 ITR 249, CIT vs 250 ITR 476, CIT vs Nangalia Fabrics Pvt. Ltd. 220 Taxman 17 (Guj).

9. We have heard the rival contention of both the parties. We find that in this case the assessee is a manufacturer of process of plant & machinery and generation of wind power and trading in steel goods. We find that in the case of purchaser, the assessee might have purchase this goods from some third party but some have been utilized in his factory payment have been made by way of payment terms. Therefore looking to this background, we find that the similar addition has been dealt by the Tribunal and various High Courts and Supreme Court had held that where the purchase were bogus or where the parties from whom purchase is bogus. Therefore relying upon the decision of Hon'ble Gujarat High Court in the case of **CIT vs Simit Sheth (2013) 38 Taxmann.com 385 (Guj)**, Hon'ble Court was seized with a similar issue where the A.O. had found that some of the alleged suppliers of steel to the assessee

had not supplied any goods but had only provided sale bills and hence, purchases from the said parties were held to be bogus. The A.O. in that case added the entire amount of purchases to gross profit of the assessee Ld. CIT(A) having found that the assessee had indeed purchases though not from named parties but other parties from grey market, partially sustained the addition as probable profit of the assessee. The Tribunal however, sustained the addition to the extent of 12.5%. Taking into account the above facts, the Hon'ble Gujarat High Court held that since the purchases were not bogus, but were made from parties other than those mentioned in books of accounts, only the profit element embedded in such purchases could be added to the assessee's income and as such the question of law arose in such estimation. While arriving at the above conclusion, the Hon'ble Court also relied on the decision in the case of **Vijay M. Mistry Construction Ltd. 355 ITR 498 (Guj)** and further approved the decision of **Ahmedabad Bench, ITAT in the case of Vijay Proteins 58 ITD 428.**

In the case of Vijay Proteins (supra), the Hon'ble ITAT was seized with a case of bogus suppliers of oil cakes where 33 parties were found to be bogus by the departmental authorities even though payments were made to the said parties by cross cheques and in fact the A.O. in that case had brought adequate material on record to prove that the cross cheques had not been given to parties from whom suppliers were allegedly procured but these were encashed from a bank account in the name of another entity, possibly hawala dealer. Subsequently, the money deposited in that account was withdrawn in cash almost on the same day. The Tribunal however, held that if the purchases were made from open market without insisting for genuine bills, the suppliers may be willing to sell the product at a much less rate as compared to a rate which

they may charge in which the dealer has to give genuine sale invoice in respect of that sale. Keeping all such factors in mind, the Tribunal estimated an element of profit percentage of the overall purchase price accounted for in the books of accounts through fictitious invoices.

Apart from a number of cases referred to by the Ld. AR, specific reliance has been placed on the decision of Hon'ble Mumbai Bench of ITAT in the case of **Madhukant B. Gandhi in ITA No. 1950/Mum/2009 dated 23-02-2010**, in support of the without prejudice grounds raised by the appellant and the relevant part of the above cited decision is reproduced herein below:

“After considering the rival submissions and perusing the relevant material on record we find from the trading and Profit and Loss Account of the assessee for the year ended 31-03-2005 relevant to the assessment year under consideration, copy place at page 18 of the paper book, that the opening stock and closing stock was shown at Rs. 3.55 lakh and Rs. 12.37 lakh respectively. Purchases worth Rs. 67.53 lakh were made against which the sales of Rs. 66.45 lakh were reflected. Page 52 onwards is a quantitative tally of the opening stock, purchase, sale and closing stock. When we consider the quantum of the purchases held by the AO to be bogus vis-à-vis the total quantity of sales and closing stock, it becomes clear that some goods were in fact purchases by the assessee which were subsequently sold, as but for the inclusion of such quantity purchased the sale of the quantity declared is not possible. **At the same the Assessing Officer also brought the inquiry to the logical conclusion that the purchases from these three parties were bogus.** It is simple and plain that unless some purchases are made there cannot be corresponding sale. **The only possibility which exists in such a situation is that assessee made the entire for bogus purchases at inflated rates while keeping the actual purchases at lower rates outside the books of account.** In such a scenario if we approve the view taken by the lower authorities that the purchases from these three parties totaling to Rs. 42.99 lakh were bogus, then the corresponding sale would also have to be declared as bogus, which is not the case of the Revenue in as much as the figure of sales has been accepted by the AO. At the same time the figures of purchases from these parties cannot be equally accepted.

It is seen that the assessee had shown net profit rate at 2.13%. From the impugned order, it is seen that the rate of net profit from A.Y. 2001-02 to A.Y. 2005-06 ranged between 2.13 to 3.40%. In view of the fact that it has amply established that the purchases recorded in the books of account from these three parties were bogus with a view to suppress the profit, now need to zero in on the correct rate of net profit which could be applied under these circumstances. Section 44AF though not strictly applicable in this case, provides for 5% net profit rate on the total turnover. In our considered opinion, it will be just and fair if the net profit rate of 5% is applied on the goods sold which were allegedly purchased through these parties. On the conclusion of the hearing in this case, a proposal to this effect was made from the Bench. Both the sides finally agreed to it. We hold that the net profit rate of 5% be applied. On the application of such net profit rate, the effective addition will be Rs. 1,18,826/- as follows:

Purchase from this three parties	Rs. 42,99,845/-
Conversion of purchase price into sale price With profit rate of 5% (42,99,845 / 100X 105)	Rs. 45,14,837/-
Net profit (45,14,837 – 42,99,845)	Rs. 2,14,992/-
Less: Net profit declared by the assessee (45,14,837 X 2.13 / 100) [Since the net profit rate declared by the Assessee is 2.13%]	Rs. 96,166/-
Further addition (2,14,992 – 96,166)	Rs. 1,18,826/-

We therefore uphold the addition at Rs. 1,18,826/- allowing relief of Rs. 41,81,019/-. This ground is party allowed. (Emphasis supplied)”

In view of the above, it has been prayed that even if a view is taken that there was n element of profit which was embedded in the transactions of purchases in question, adequate relief should be given for GP already offered by the appellant, the details of which are as under:

A.Y.	G.P. Rate
2008-09	5.56
2009-10	5.07

2010-11	5.19
2011-12	5.25
2012-13	5.66

Considering the decision of the Hon'ble Mumbai Bench of ITAT in the case of Madukant B. Gandhi (supra) and the approx. average GP of 5% declared by the appellant, it is held that the net addition sustained in this case would be 12.5% [as per Simit Sheth (supra) – 5% - 7.5%].

10. In the result, the appeal filed by the assessee is partly allowed. A.O. is directed to take the GP @ 12.5% as stated in the above judgment and the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 21 /03/2017

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(D.T. GARASIA)
JUDICIAL MEMBER

Mumbai, Date : 21/03/2017
Sr. P.S. (B.S.)
Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "T" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai