

**IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Sandeep Gosain, Judicial Member**

ITA No. 7723/Mum/2014
(Assessment Year: 2010-11)

Shri Vinod S. Deora G-507, Sonmarg S.V. Road, Malad (W) Mumbai 400064	Vs.	DCIT, 24(2) Now 30(3) C-13, Room No. 601, 6 th Floor Pratyakshakar Bhavan Bandra (E), Mumbai 400051 PAN - AAAPD4566E
Appellant		Respondent

ITA No. 7251/Mum/2014
(Assessment Year: 2010-11)

DCIT, 24(2) Now 30(3) C-13, Room No. 601, 6 th Floor Pratyakshakar Bhavan Bandra (E), Mumbai 400051 PAN - AAAPD4566E	Vs.	Shri Vinod S. Deora G-507, Sonmarg S.V. Road, Malad (W) Mumbai 400064
Appellant		Respondent

Appellant by: Shri Haresh P. Shah
Respondent by: Shri Rajneesh K. Arvind

Date of Hearing: 19.09.2016
Date of Pronouncement: 05.10.2016

ORDER

Per Jason P. Boaz, A.M.

These are cross appeals, one by Revenue and the other by the assessee, directed against the order of the CIT(A)-34, Mumbai dated 09.10.2014 for A.Y. 2010-11.

2. The facts of the case, briefly, are as under: -

2.1 The assessee, Prop. of M/s. S.R. International and engaged in the business of trading in licences and earning salary from M/s. Guruashish Exim Pvt. Ltd., filed his return of income for A.Y. 2010-11 on 30.09.2010 declaring total income of ₹22,87,440/-. The return was processed under

section 143(1) of the Income Tax Act, 1961 (in short 'the Act') and the case was subsequently taken up for scrutiny. In the course of assessment proceedings, the Assessing Officer (AO) records that information was received from Sales Tax authorities (Government of Maharashtra) that the assessee is a beneficiary of the transactions made by M/s. Crystal Enterprises and M/s. Induja Traders Pvt. Ltd., firms engaged in the business of issue of bills without delivery of materials; to the extent of ₹44,67,716/- and ₹25,93,040/- respectively. The AO required the assessee to produce these parties alongwith all relevant documents to establish the genuineness of the aforesaid transactions. The assessee expressed his inability to produce these two parties, but however, submitted Xerox copies of purchase bills, sale bills, bank statements indicating payments made and copies of ledger accounts of these two parties as appearing in its books. The assessee contended before the AO that there is no case of bogus purchases and that the aforesaid documentary evidence established that the said purchases amounting to ₹70,60,756/- from these two parties was genuine. The explanation put forth by the assessee did not find favour with the AO who was of the view that the inability of the assessee to produce these two parties before him, coupled with the information from Sales Tax authorities made it clear that the transactions with the aforesaid two parties viz., M/s. Crystal Enterprises and M/s. Induja Traders Pvt. Ltd. were not genuine and were only accommodation entries and therefore furnishing of purchase bills in this regard would not suffice. Relying on the statement of Shri Ramachandra Kore of M/s. Crystal Enterprises given before the Sales Tax authorities on 01.03.2012 by way of affidavit; which the AO felt was ample evidence to disprove the claim of genuine purchases made by the assessee, the AO disallowed the said purchases amounting to ₹70,60,756/- under section 40A(3) of the Act. Apart from this, the AO also made disallowance of personal expenses - ₹56,638/- and ₹6,908/- under section 14A of the Act. The assessment was accordingly completed under section 143(3) of the Act vide order dated 14.03.2013.

2.2 Aggrieved by the order of assessment dated 14.03.2013 for A.Y. 2010-11, the assessee preferred an appeal before the CIT(A)-34, Mumbai.

The learned CIT(A) disposed off the appeal vide the impugned order dated 09.10.2014 allowing the assessee partial relief of ₹52,95,567/- and confirmed the disallowance only to the extent of 25% of the value of purchases, i.e. ₹17,65,189/- out of ₹70,60,756/- and holding that the correct section under which the disallowance ought to be made was 69C of the Act.

3. Both Revenue and the assessee, being aggrieved by the order of the CIT(A)-34, Mumbai dated 27.09.2014 for A.Y. 2010-11 to the extent the same is against them, have preferred appeals raising the following grounds: -

3.1 Grounds raised by Revenue

- “1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.70,60,756/- made under section 40A(3) of the Act on account of non-genuine purchases from M/s. Crystal Enterprises and M/s. Induja Traders Pvt. Ltd. and directing the disallowance at 25% of alleged purchases of Rs.70,60,756/- ignoring the fact that these two parties are included in the list of suspicious and/or hawala dealers provided by the Sales Tax Department.*
2. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the additions of Rs.44,67,716/- and Rs.25,93,040/- made on account of purchases made from M/s. Crystal Enterprises and M/s. Induja Traders Pvt. Ltd. and directing the disallowance at 25% of alleged purchases of Rs.70,60,756/- ignoring the fact that the Sales Tax Commissioner has recorded the statement of Shri Sanjay Ramchandra Kore by way of affidavit that these dealers are engaged in the business of issue of bills without physical delivery of materials.*
3. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.70,60,756/- made under section 40A(3) of the Act on account of non-genuine purchases from M/s. Crystal Enterprises and M/s. Induja Traders Pvt. Ltd. and directing the disallowance at 25% of alleged purchases of Rs.70,60,756/- without giving any findings with regard to the genuineness of the claim of the assessee.*
4. *On the facts and in the circumstances of the case and in law, the Ld. C.I.T. (A) erred in deleting the additions of Rs.44,67,716/ and Rs.25,93,040/- made on account of purchases made from M/s. Crystal Enterprises and M/s. Induja Traders Pvt. Ltd. and directing the disallowance at 25% of alleged purchases of*

Rs.70,60,756/- ignoring the fact that the onus lies on assessee to produce the concerned parties which assessee failed to do.

5. On the facts and in the circumstances of the case, the Ld. C.I.T.(A) erred in deleting the additions relying on the Hon'ble Bombay High Court's decision in the case of CIT vs. Nikunj Eximp Enterprisers P. Ltd.(2013) 216 Taxman 171 without appreciating the fact that the assessee's case is entirely different from the facts of Nikunj Eximp case whereas in the assessee's case the Sales Tax Department has carried out investigation and established that the purchases are not genuine and that is not in the Nikunj Eximp case.

The appellant prays that the order of the CIT(A) be set aside and matter may be decided according to law. The appellant craves leave to amend or alter any ground or add new ground which may be necessary.”

3.2 Grounds raised by the assessee

- “1. The Ld. CIT(A) erred in **conforming disallowance of 25% of alleged purchases of Rs.70,60,756/- i.e. Rs.17,65,189/-** [Order Page No. 8 - para (iv)] instead of allowing/ deleting entire addition of ₹70,60,756 as explained in written submission & paper book.
2. Without Prejudice to the above, the AO inferred in his order that Purchases of Rs.70,60,756 is in cash (**inspite of cogent evidence of payment by A/C. Payee cheques**) & disallowed U/S. 40A(3) which was corrected by Ld. CIT(A) to Section 69C as “Unexplained Expenditure” ignoring the fact **it was explained & further there was corresponding Sales of goods (i.e. Licences)** is also wrong.
3. **WIHTOU PREJUDICE TO THE ABOVE**, the Ld. CIT(A) stated on page 8 para (iv) as under: -

‘Hence, the addition of entire purchases amount cannot be made in the present case. Rather, the cause of justice would be met by making addition of a reasonable percentage of such purchases in order to fulfil the gap of any leakage in aforesaid circumstances. I further find that in many such cases, the additions are made based on the G.P./N.P. ratio. In the present case, the appellant has shown G.P. of 0.68% & 1.19% on subsequent sale out of purchases from two suspicious dealers, i.e. M/s. Crystal License, & M/S. Induja License respectively. The appellant has not shown any comparison of G.P. ratio in respect of purchase/ sale from other parties, and also his overall G.P. ratio.’

Ignoring the fact that the above details was given in written submission dt. 20.05.2014 Para 25 - **WITHOUT PREJUDICE TO THE ABOVE**, the Assessing Officer failed to appreciate G.P. Ratio working of the transaction which is as under: -

	PURCHASE	SALES PROFIT		G.P. RATE
Crystal License	44,67,716	44,98,528	30,812	0.68
Induja License	<u>25,93,040</u>	<u>26,24,297</u>	<u>31,257</u>	<u>1.19</u>
	70,60,456	71,22,825	62,069	0.87
	=====	=====	=====	===

The overall G.P ratio for the whole year is also as under: -

A.Y.	G.P.
2010-2011	0.76%
2009-2010	0.75%
2008-2009	1.11%

4. *The Appellant craves leave to add, alter or amend the above Grounds of Appeal.*"

4. **Grounds 2 to 4 of assessee's appeal**

At the outset, the learned A.R. for the assessee submitted that assessee is not pressing grounds raised at S.Nos. 2 to 4 in its appeal. Since the grounds at S. Nos. 2 to 4 of the assessee appeal (supra) are not being pressed, the same are rendered infructuous and are accordingly dismissed.

5. **Grounds 1 to 5 of Revenue's appeal** **Ground No. 1 of assessee's appeal**

5.1 The only issue for consideration and adjudication before us is with respect to the genuineness or otherwise of purchases amounting to ₹70,60,756/- allegedly made by the assessee from M/s. Crystal Enterprises (i.e. ₹44,67,716/-) and M/s. Induja Traders Pvt. Ltd. (i.e. ₹25,93,040/-). Revenue challenges the impugned order of the learned CIT(A) in deleting the addition in respect of 75% of the aforesaid purchases from these two parties. On the other hand, the assessee's grievance is that the learned CIT(A) ought to have deleted the entire addition of ₹70,60,756/- on account of purchases and erred in confirming the same to the extent of ₹17,05,189/-, i.e. 25% of the value of the said purchases.

5.2 The learned D.R. for Revenue was heard and he placed strong reliance on the findings rendered by the AO in the order of assessment on his issue.

5.3.1 The learned A.R. for the assessee submitted that in the impugned order at para 3.3 thereof, the learned CIT(A) has observed that the addition

made by the AO was made on the basis of information received from Sales Tax authorities and that there was no mention of the name of the assessee in the case on hand therein or in the statement/affidavit of persons which is relied on by the AO and consequently contended that the addition made by the AO cannot be sustained as it is based only on presumptions and surmises. It is submitted that the assessee had admittedly placed before the authorities below copies of the purchase bills for purchases from the aforesaid two parties (placed at pages 26 to 47 of paper book), bank statements evidencing payments made through banking channels, ledger copies of these two parties in its books of accounts which evidenced the genuineness of the purchases. It was further contended that there is no evidence with the AO to prove that cash has flown back to the assessee in these transactions or that the bills given to the assessee by those two parties were bogus. It was submitted that once the purchases and sales are not disputed by the authorities below, there was no reason to make addition of entire alleged purchases or sustain a part of it. In this regard the assessee placed reliance on the decision of the Hon'ble Bombay High Court in the case of Nikunj Eximp Enterprises (P) Ltd. (2013) 216 Taxman 17 (Bom) wherein it was held that where sales supported the purchases and payments were through banks, merely because the suppliers had not appeared before the AO, the purchases could not be rejected as bogus.

5.3.2 The learned A.R. for the assessee further submitted that the additions made by the AO in the cases of some other assessee's on identical reasons; i.e. on the basis of statements given by third parties before the Sales Tax Department without carrying out any other separate inquiry to establish the allegation of bogus purchases, were held to be unjustified by various Coordinate Benches of this Tribunal and deleted. In this regard, the learned A.R. placed reliance on, inter alia, the following judicial pronouncements of the Coordinate Benches: -

- (i) Ramila Pravin Shah (ITA No. 5246/Mum/2013 dated 05.03.2015)
- (ii) Ramesh Kumar & Co. (ITA No. 2959/Mum/2014 dated 28.11.2014)
- (iii) Rajeev G. Kalathil (ITA No. 6727/Mum/2012 dated 02.08.2014)

It is submitted that in the instant case also the AO has made the impugned addition on the basis of statements given by third parties before the Sales Tax Department.

5.4.1 We have heard the rival contentions of both the parties and perused and carefully considered the material on record; including the judicial pronouncements cited. The assessee, Prop. S.R. International, is engaged in the business of trading in licences. The AO observed that the Sales Tax Department of the Government of Maharashtra has listed out names of certain dealers, who were allegedly providing accommodation entries to various parties without doing actual business. The AO noticed that the assessee had made purchases from two such parties, whose names found place in the list given by the Sales Tax Department, i.e. M/s. Crystal Enterprises (of ₹44,67,716/-) and M/s. Induja Traders Pvt. Ltd. (of ₹25,93,040/-) totalling to ₹70,60,756/-. The AO also placed reliance on the statement of a third party, Shri Sanjay Ramachandra Kore. Before the AO and later before the CIT(A), admittedly the assessee filed copies of purchase bills, bank statements evidencing payments made for purchase through banking channels and the copies of ledger accounts of these two parties appearing in the assessee's books of account to show that the said purchases were genuine. The AO was of the view that the inability of the assessee to produce these two parties before him, coupled with the reliance on the statement of a third party before the Sales Tax Department, even though the assessee was not named therein; rendered the purchases bogus and therefore relying on the said statement of the third party held the said purchases amounting to ₹70,60,756/- as bogus.

5.4.2 On appeal we find that the learned CIT(A) observed that in the statement made by the third party before Sales Tax Department relied upon by the AO to make the addition on account of bogus purchases, the assessee has not been named and that there being no corroborative evidence to prove that the said purchases made from the two parties were bogus, the addition of bogus purchases made by the AO in the case on hand was based on presumptions and is not sustainable in the eyes of law.

It is seen that the learned CIT(A) also acknowledged that the assessee in its attempt to prove the said purchases as genuine had filed copies of purchase bills, bank statements evidencing payment thereof, ledger accounts of these parties in the assessee's books of account. We also find that no fault had apparently been found by the learned CIT(A) with these purchases as there was no evidence on record to prove that cash in respect of the said transaction had flown back to the assessee or that the vouchers/purchase bills given by these two parties were bogus. Once the purchases and sales are not disputed, as in the case on hand, there is no reason to make addition of the entire alleged purchases.

5.4.3 In the case of Shri Ramila Pravin Shah (ITA No. 5246/Mum/2013 dated 05.03.2015), a Coordinate Bench of this Tribunal, following the decisions of other Coordinate Benches in the case of Ramesh Kumar & Co. (supra), held that the AO was not justified in making such additions based on statements given by third parties before the Sale Tax Department without conducting any further investigation to establish with corroborative evidence that the said purchases were bogus. The Coordinate Bench in the case of Ramila Pravin Shah (supra) in this regard at para 6 and 7 thereof has held as under: -

“6. On the other hand, the Id. AR submitted that the additions made in the case of some other assesses on identical reasons have been deleted by the Co-ordinate Benches of the Tribunal in the following cases

a) Ramesh Kumar and Co V/s ACIT in ITA No.2959/Mum/2014 (AY-2010-11) dated 28.11.2014;

b) DCIT V/s Shri Rajeev G Kalathil in ITA No.6727/Mum/2012 (AY-2009-10) dated 20.8.2014; and

c) Shri Ganpatraj A Sanghavi V/s ACIT in ITA No. 2826/Mum/2013 (AY-2009-10) dated 5.11.2014

In all the above said cases, the Co-ordinate Benches of the Tribunal has held that the AO was not justified in making the addition on the basis of statements given by the third parties before the Sales Tax Department, without conducting any other investigation. In the instant case also, the assessing officer has made the impugned addition on the basis of statements given by the parties before the Sales tax department. We notice that the ld.CIT(A) has properly analysed the facts prevailing in the instant case and for the sake of convenience, we extract the same below:-

"5.3.11. I have also gone through the judicial pronouncements relied upon by the Ld AR and find that the facts of the above referred judicial pronouncements are similar to the present facts of the case and, therefore the ratio of judgments of the above referred two cases are fully applicable in the present case. Further, I have also taken into consideration the decision of jurisdictional High Court and ITAT i.e. The Commissioner of Income Tax - 1 Mumbai Vs Nikunj Eximp Enterprises Pvt, Ltd. Appeal No hA No. 5604 of 2010 (Hon. Mumbai High Court) and Balaji Textile Industries (P) Ltd. Vs Income Tax Officer (1994) 49 ITD (Bom) 177. While in the case of Nikunj Eximp Enterprises, the Hon'ble Bombay High Court in its latest judgment has held that once the Sales are accepted, the Purchases cannot be treated as ingenuine in those cases where the appellant had submitted all details of purchases and payments were made by cheques, merely because the sellers/suppliers could not be produced before the A.O. by the assessee. Further, I have also gone through the judgment in case Balaji Textile Industries (P) Ltd. Vs Income Tax Officer by Hon. ITAT, Mumbai (1994) 49 ITD (BOM) 177 which was made as long back as 1994 and which still holds good in which was held that- "Issuing printed bills for selling the textile goods to the assessee-company at Bhiwandi was not a conclusive proof but it was a prima fade proof to arrive to a correct conclusion that the assessee purchased certain goods from certain parties at Bhiwandi. The assessee sold those goods to 'S' and adjusted the sale proceeds against the loan taken by it from that party. The assessee's books of account and the books of account of 'S' in which the entries of sale and adjustment were made, could not be discarded merely by saying that they were not genuine entries though neither the Assessing Officer nor the Commissioner (Appeals) opined anything in respect of those entries. Further, the purchase of the goods in the month of March 1985 did not make any difference. The assessee might not have carried on any business activities prior to March 1985, but that did not mean that the assessee was not entitled to carry on the business activity in March 1985. They could not be compelled to carry on the business activity throughout the year. There were no good reasons to disbelieve the sales made by the assessee to 'S'. No sales were likely to be effected if there were no purchases. A sale could be made if the goods were available with the seller. From all these facts on record, a reasonable and convincing inference which could be drawn, was that the assessee purchased the textile goods, sold them and adjusted the same towards the loan taken by it. Therefore, the assessee was entitled to get the entire deduction." I have also taken into consideration, the G.P Ratio/G.P. Margin of the appellant in the previous A.Y. as well as subsequent Assessment Year. If the addition made by the A.O. is accepted, then G.P. Ratio of the appellant during the present A.Y. will become abnormally high and therefore that is not acceptable because it onus of the A.O. by bringing adequate material on record to prove that such a high G.P. ratio exists in the nature of business carried out by the appellant.

Further, it has to be appreciated that (i) Payments were through banking channel and by Cheque, (ii) Notices coming back, does not mean, those Parties are bogus, they are just denying their business to avoid sales tax/VAT etc, (iii) Statement by third parties cannot be concluded adversely in isolation and without corroborating evidences against appellant, (iv) No cross examination has been offered by AO to the appellant to cross examine the relevant parties (who are deemed to be witness or approver being used by AO against the appellant) whose name appear in the website www.mahavat.gov.in and (v) Failure to produce parties cannot be treated adversely against appellant.

In view of the facts discussed above as well as binding judicial pronouncements of the jurisdictional ITAT Mumbai Bench as well as Hon'ble Mumbai High Court and other legal precedents, the addition made by the AO amounting to Rs.28,08,071/- cannot be sustained. Accordingly, the addition of Rs.28,08,071/- is deleted."

7. Hence, on a conspectus of the matter, we do not find any infirmity in the decision of the Id. CIT(A) on this issue."

Following the aforesaid decision of the Coordinate Bench in the case of Ramlia Parvin Shah (supra), we hold and direct that the addition of ₹70,60,756/- made by the AO (deleted to the extent of ₹52,95,567/- by the CIT(A)) is to be deleted in toto. We hold and direct accordingly. Consequently, Revenue's ground raised at S.Nos. 1 to 5 (supra) are dismissed.

5.4.4 After coming to the above finding, it is seen that the learned CIT(A) noticed that in respect of these transactions, i.e. purchases of ₹70,60,756/- the assessee had shown G.P. of 0.68% on sale of items purchased from M/s. Crystal Enterprises and G.P. of 1.19% on sale of items purchased from M/s. Induja Traders Pvt. Ltd. Stating that, inter alia, the assessee had not given his overall G.P. ratio, the learned CIT(A) proceeded to hold, on estimate, that 25% of the purchases amounting to ₹70,60,756/- i.e. R.17,65,189/- is to be brought to tax in assessee's hands. We find that this averment of the learned CIT(A) to be factually incorrect. From the details placed before the learned CIT(A) it is seen that the assessee vide letter dated 20.05.2014 had in fact at page 15 thereof given its own G.P. for the last few years as under: -

Sr.No.	A.Y.	Gross Profit
(i)	2010-11	0.76%
(ii)	2009-10	0.75%
(iii)	2008-09	1.11%

In our view, when the G.P. of the assessee from A.Y. 2008-09 to 2010-11 hovered between 1.11% to 0.76% and the G.P. on sale of the said purchases is 0.68% and 1.19%, nothing appears abnormally low in the G.P. rates. There is no basis whatsoever for the learned CIT(A) to have estimated the said purchases at ₹17,65,189/- (i.e. 25% of ₹70,60,756/-) and neither has the learned CIT(A) rendered any cogent reasons for coming to the said finding. In our view, the learned CIT(A)'s estimation that 25% of the alleged purchases of ₹70,60,756/- is profit therefrom, be taxed as income of the assessee, is unsustainable and therefore delete the same. Consequently, ground No. 1 of assessee's appeal is allowed.

6. In the result, the assessee's appeal for A.Y. 2010-11 is allowed and Revenue's cross appeal is dismissed.

Order pronounced in the open court on 5th October, 2016.

Sd/-
(Sandeep Gosain)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 5th October, 2016

Copy to:

1. The Appellant
2. The Respondent
3. The CIT(A) -34, Mumbai
4. The CIT - 24, Mumbai
5. The DR, "F" Bench, ITAT, Mumbai

By Order

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Assistant Registrar
ITAT, Mumbai Benches, Mumbai

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