

**IN THE INCOME TAX APPELLATE TRIBUNAL "F", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
&
SHRI SANDEEP GOSAIN, JM**

**ITA No.3699/Mum/2016
(Assessment Year :2009-10)**

M/s. Geolife Organics 301, Marathon Max, L.B.S.Marg, Opp. Nirmal Lifestyle, Mulund(W), Mumbai – 400 080	Vs.	ACIT – 23(2), Mumbai- 400051
PAN/GIR No.		AAHFG7722N
Appellant)	..	Respondent)

**ITA No.4276/Mum/2016
(Assessment Year :2009-10)**

Shri Vikram N. Chandan, Shop No.756/54, Nanubhai Desai Road, Mumbai – 400 004	Vs.	ITO – 19(3)(5), Mumbai- 400 007
PAN/GIR No.		ACYPC2583N
Appellant)	..	Respondent)

**ITA No.4917/Mum/2016
(Assessment Year :2009-10)**

Shri Jabarsingh B Daiya, R.No.16, 1 st Floor, Mulji Madhavji Building, 160, C.P.Tank Road, Mumbai – 400 064	Vs.	ITO – 19(2)(1), Mumbai – 400 007
PAN/GIR No.		AHYPD4454E
Appellant)	..	Respondent)

**ITA No.4760/Mum/2016
(Assessment Year :2009-10)**

Shri Rajendra Nemichandji Chandan, 38, Ground Floor, Alankar Building, 245/247, Khetwadi Lane, S.V.P. Road, Mumbai – 400 004	Vs.	ITO – 19(3)(1), Mumbai – 400 007
PAN/GIR No.		AEYPC6575L
Appellant)	..	Respondent)

Assessee by	Shri Neelkanth Khandelwal
Revenue by	Ms. Pooja Swaroop
Date of Hearing	09/02/2017
Date of Pronouncement	05/05/2017

आदेश / O R D E R

PER R.C.SHARMA (A.M):

These are the appeals filed by the assessee against the order of CIT(A)—40, Mumbai dated 03/03/2016 for the Assessment Year 2009-10 in the matter of order passed u/s.143(3) r.w.s.147 of the Act.

2. The following grounds have been taken by the assessee:-

ITA No.3699/Mum/2016

1. *The Hon'ble Commissioner of Income Tax (Appeals) – 40, Mumbai (Hon'ble CIT-A) erred on facts and in law in confirming the disallowance made by the Asst. Commissioner of Income tax – 29(1), Mumbai on account of alleged bogus purchases to the extent of Rs.19,51,175/- i.e., 12.50% of total alleged bogus purchases amounting to Rs.1,56,09,397/-.*

2. *The appellant prays that the disallowance on account of alleged bogus purchases confirmed by the Hon'ble CIT(A) to the extent of Rs.19,51,175/- may be deleted.*

ITA No.4276/Mum/2016

1. (a) *On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in upholding the action of the AO in re-opening of the assessment u/ s.147 of the Income Tax Act, 1961.*

2.a) *On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the addition of ~ 18,77,658/- made by the AO to the income of the Appellant on*

account of possible profit element @ 12.5% embedded in purchases made through alleged non-genuine parties on the basis of information of the Sales Tax Department about suspicious dealers having rejected the accounts u/s.145(3).

b) The Id. CIT(A) failed to appreciate that :-

i) all the purchases are genuine beyond doubt and supported by sufficient materials;

ii) all the goods purchased from these parties have been backed by corresponding sales which are accepted to be genuine;

iii) the gross profit ratio shown by the Appellant is quite reasonable;

iv) nothing has been brought on record by the AO that money has been exchanged in the hands in lieu of payment made for these purchases by account payee cheque; and

v) the AO had neither provided copy of materials and statements relied upon by him nor allowed any opportunity to the Appellant to cross examine those parties who have been alleged to have provided the accommodation entries of such purchases.

c) In reaching to the conclusion and confirming such addition made by the AO, the Id. CIT(A) omitted to consider relevant factors, considerations, principles and evidences while he was overwhelmed, influenced and prejudiced by irrelevant considerations and factors.

d) Without prejudice, the rate or percentage of profit element embedded in such purchases as fixed by the AO and confirmed by the CIT(A) is excessive and unreasonable on the facts of the case.

3. The Id. CIT(A) erred in holding that levy of interest u/s.234B of the Income Tax Act, 1961 is mandatory. The Appellant denies its liability for such interest.

4. The Id. CIT(A) erred in holding that the ground raised disputing initiation of penalty proceedings u/s.271(1)(c) is premature. The Appellant denies its liability for such penalty.

ITA No.4917/Mum/2016

1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the re-opening of the assessment U/s.14 7 of the Income Tax Act, 1961 made by the AO as the prescribed conditions therein are not satisfied.

2.a) On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the addition of Rs. 17,67,445/- made by the AO to the income of the Appellant on account of possible profit element @ 12.5% embedded in purchases made through alleged non-genuine parties on the basis of information of the Sales Tax Department about suspicious dealers having rejected the accounts u/s.145(3).

b) The Id. CIT(A) failed to appreciate that :-

i) all the purchases are genuine beyond doubt and supported by sufficient materials;

ii) all the goods purchased from these parties have been backed by corresponding sales which are accepted to be genuine;

iii) the gross profit ratio shown by the Appellant is quite reasonable;

iv] nothing has been brought on record by the AO that money has been exchanged in the hands in lieu of payment made for these purchases by account payee cheque; and

v) the AO had neither provided copy of materials and statements relied upon by him nor allowed any opportunity to the Appellant to cross examine those parties who have been alleged to have provided the accommodation entries of such purchases.

c) In reaching to the conclusion and confirming such addition made by the AO, the Id. CIT(A) omitted to consider relevant factors, considerations, principles and evidences while he was overwhelmed, influenced and prejudiced by irrelevant considerations and factors.

d) Without prejudice, the rate or percentage of profit element embedded in such purchases as fixed by the AO and confirmed by the CIT(A) is excessive and unreasonable on the facts of the case.

3. The Id. CIT(A) erred in holding that levy of interest u/s.234B of the Income Tax Act, 1961 is mandatory. The Appellant denies his liability for such interest.

4. The Id. CIT(A) erred in holding that the ground raised disputing initiation of penalty proceedings u/s.271(1)(c) is premature. The Appellant denies his liability for such penalty.

1. *On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the re-opening of the assessment U/s.14 7 of the Income Tax Act, 1961 made by the AO as the prescribed conditions therein are not satisfied.*

2.a) *On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the addition of Rs. 11,50,339/- made by the AO to the income of the Appellant on account of possible profit element @ 12.5% embedded in purchases made through alleged non-genuine parties on the basis of information of the Sales Tax Department about suspicious dealers having rejected the accounts u/s.145(3).*

b) *The Id. CIT(A) failed to appreciate that :-*

i) *all the purchases are genuine beyond doubt and supported by sufficient materials;*

ii) *all the goods purchased from these parties have been backed by corresponding sales which are accepted to be genuine;*

iii) *the gross profit ratio shown by the Appellant is quite reasonable;*

iv) *nothing has been brought on record by the AO that money has been exchanged in the hands in lieu of payment made for these purchases by account payee cheque; and*

v) *the AO had neither provided copy of materials and statements relied upon by him nor allowed any opportunity to the Appellant to cross examine those parties who have been alleged to have provided the accommodation entries of such purchases.*

c) *In reaching to the conclusion and confirming such addition made by the AO, the Id. CIT(A) omitted to consider relevant factors, considerations, principles and evidences while he was overwhelmed, influenced and prejudiced by irrelevant considerations and factors.*

d) *Without prejudice, the rate or percentage of profit element embedded in such purchases as fixed by the AO and confirmed by the CIT(A) is excessive and unreasonable on the facts of the case.*

3. *The Id. CIT(A) erred in holding that levy of interest u/s.234B of the Income Tax Act, 1961 is mandatory. The Appellant denies his liability for such interest.*

4. The Id. CIT(A) erred in holding that the ground raised disputing initiation of penalty proceedings u/s.271(1)(c) is premature. The Appellant denies his liability for such penalty.

3. Rival contentions have been heard and record perused.

4. Common grievance of all the assessee pertains to upholding addition of 12.5% on the alleged bogus purchase. Facts are similar in case of all the assessees. In the case of Shri Jabarsingh B Daiya, we found that the assessee is an individual, engaged in the business of trading in ferrous and non ferrous metals under the proprietary concern by name, M/s Ankur Steel & Engineering Company. The return of income for the year under appeal was filed on 10-08-2009 declaring total income of Rs. 3,17,810/-. The case was reopened u/s 147, by issuing notice u/s 148 of the Act on 26-02-2014, on the basis of the information received from the DGIT (Inv.), Mumbai, that the assessee is one of the beneficiaries of the accommodation entries provided by some of the MVAT dealers who were indulging in issuing bogus sale/purchase bills, which was investigated and kept on the public domain by the Sales Tax Department. Assessment u/s 143(3) r.w.s. 147 of the IT. Act, 1961 was completed by the Ld. AD on 09-03-2015 determining the total income at Rs. 20,85,250/-. The AO relying on the case of CIT Vs Simit P. Sheth [2013] reported in 356 ITR 451 (Guj.) and also considering the fact that purchases are recorded in the books of account, profit element embedded in such purchases was taken as the profit earned from purchases shown to have been made from the eighteen parties and estimated the profit @12.5% of the total non genuine

purchases of Rs.1,41,39,565/- which worked out to Rs.17,67,445/-, and added the same to the total income of the assessee.

5. By the impugned order, CIT(A) confirmed the action of the AO against which assessee is in further appeal before us.

6. It was contended by learned AR that the Assessee has furnished all the details of purchases, payment of which was made by account payee cheque, quantitative tally of purchases and sales so as to substantiate the fact that all the goods so purchased were sold by the assessee. He placed reliance on the decision of Bombay High Court in case of Nikunj Exim Enterprises Pvt. Ltd., 372 ITR 619 and Goolamally Hasanjee (ITA/3740-41/Mum/2012 – A.Y.06-07 and 08-09 dt. 10.06.2014). He also referred to the case of Ashok Talreja – HUF (ITA / 4629/Mum/2014 & Ors. A.Y.s07-08 to 09-10 dated 17/03/2016) and stated that facts of that case were similar to the case under consideration.

7. As per learned AR in the case of Jeetendra Harshadkumar Textiles (ITA/771 & 2211 / Mum/2011 dated 21-11-2012), similar issue was decided in favour of the assessee, that the decision of the Tribunal in the case of Jeetendra Harshadkumar Textiles was subsequently followed by the Tribunal to decide a similar issue in favour of the assessee in the case of M/s Primit Textiles (ITA/3948 to 3953/Mum/2012 and ITA/4012 to 4015 and 4020 to 4021/Mum/2012 dated 01.10.2013) and Neeta Textiles(ITA/6138-40/Mum/2013,dtd. 27.05.2015). In the case of Nikunj

Exim(supra)the Hon'ble Bombay High Court has dealt the issue of bogus purchases and corresponding sales as under :

"We have considered the submission on behalf of the Revenue. However, from the order of the Tribunal dated April 30, 2010, we find that the Tribunal has deleted the additions on account of bogus purchases not only on the basis of stock statement, i.e., reconciliation statement but also in view of the other facts. The Tribunal records that the books of account of the respondent- assessee have not been rejected. Similarly, the sales have not been doubted and it is an admitted position that substantial amount of sales have been made to the Government Department, i.e., Defence Research and Development Laboratory, Hyderabad. Further, there were confirmation letters filed by the suppliers, copies of invoices for purchases as well as copies of bank statement all of which would indicate that the purchases were in fact made. In our view, merely because the suppliers have not appeared before the Assessing Officer or the Commissioner of Income-tax (Appeals), one cannot conclude that the purchases were not made by the respondent-assessee. The Assessing Officer as well as the Commissioner of Income-tax (Appeals) have disallowed the deduction of Rs. 1.33 crores on account of purchases merely on the basis of suspicion because the sellers and the canvassing agents have not been produced before them. We find that the order of the Tribunal is well a reasoned order taking into account all the facts before concluding that the purchases of Rs. 1.33 crores was not bogus. No fault can be found with the order dated April 30, 2010, of the Tribunal."

8. As per learned AR, there is no doubt that the AO had accepted the genuineness of sales made by the assessee. He had not made any effort to make further investigation to substantiate his allegations with regard to non genuineness of the purchases. Considering the facts and circumstances of the case, the FAA was not justified in upholding the additions. It was also argued that the dealers are regularly assessed to tax and the purchases were also properly reflected in the books of

account and payments were made through account payee cheques and on payment of the amount to the seller, the purchaser has no control on their affairs and there is no evidence that the cash is received back from the suppliers and the purchases cannot be treated as bogus. As per learned AR, the Assessee maintained stock register and also maintained the quantitative details. The gross profit shown during the previous year was reasonable and satisfactory in comparison to the previous years and relied on several cases cited along with brief of the case laws of Hon'ble ITAT Benches giving relief in similar bogus purchase cases. Without appreciating the facts of the case AO relied on the case of CIT vs Simit P Sheth 356 ITR 451, and adopted 12.5% as profit element embedded but facts of the case are distinguishable as in that case the assessee is doing business in the state of Gujarat, whereas the present assessee is doing business in South Mumbai where competition is very high and profit margin range between 3 to 4%. In view of the assessee already declared gross profit of 4.55% in the books on the purchases, no further addition was warranted.

9. On the other hand, learned DR relied on the order of the lower authorities and contended that CIT(A) has very reasonably restricted the addition to the extent of 12.5% of alleged bogus purchases.

10. We have considered rival contentions and carefully gone through the orders of the authorities below. We have also deliberated on various

judicial pronouncements referred by lower authorities in their respective orders as well as cited by learned AR and DR during the course of hearing before us. From the record we found that the basis on which AO disallowed the alleged bogus purchases is the non-appearance of the suppliers before the AO to verify the purchases. In this regard we found that many Benches of ITAT and Hon'ble High Courts have held that when purchases are supported by sufficient documentary evidences then merely because of non-appearance before the AO, one cannot conclude that the purchases were not made by the assessee. Several decisions cited in support of the said argument are Nikunj Eximp Enterprises (P.) Ltd. v. CIT 216 Taxman 171 (Bom.), CIT v. Nangalia Fabrics (P.) Ltd. 220 Taxmann 17 (Guj.), CIT v. M.K. Bros. 163 ITR 249 (Guj.), Asstt. CIT v. Akruiti Dyeing & Printing Mills (P.) Ltd. [Tax Appeal No. 997 of 2008, dated 27/01/2009], CIT v. Veekay Prints (P.) Ltd. [Tax Appeal No. 2557 of 2010, dated. 1/2/2012], Diagnostics v. CIT 334 ITR 111 (Cal.), ITO v. Totaram B. Sharma [Tax Appeal Nos. 1344/2008 & 1355/2008, dated 9-2-2010], Dy. CIT v. Adinath Industries [2001] 252 ITR 476 (Guj.), CIT v. Precious Jewels Corpn. 17 taxmann.com 264 (Raj.), CIT v. Rajesh P. Soni [Tax Appeal No.1107 of 2006, dated 27-2-2012.

11. On identical facts and circumstances, the Hon'ble Jurisdictional High Court as well as the Tribunal, Mumbai Bench, has deleted the addition made under section 69C, in the following cases:-

- i) *CIT v/s Nikunj Eximp Enterprise Pvt. Ltd. 372 ITR 619 (Bom.);*
- ii) *A" CIT v/s Tarla R. Shah, ITA no.5295/Mum./2013,
dated 2nd February 2016; and*
- iii) *Shri Harilal Chunilal Jain v/s ITO, ITA
no.4547/Mum./2014, dated 1 January 2016.*

12. It is evident from the assessment order that on the basis of information obtained from the Sales Tax Department, Assessing Officer issued notices under section 133(6). As the assessee failed to produce the concerned parties, the Assessing Officer, primarily relying upon the information obtained from the Sales Tax Department held the purchases to be bogus and added 12.5% profit in addition to the normal profit declared by the assessee. Though, it may be a fact that assessee was not able to produce the concerned parties before the Assessing Officer, for whatever may be the reason, fact remains that during assessment proceedings itself the assessee had produced confirmed ledger copies of concerned parties, bank account statement, purchase bills, delivery challans, etc., to prove the genuineness of the purchases. It is also a fact on record that the Assessing Officer has not doubted the sales effected by the assessee. Thus, it is logical to conclude that without corresponding purchases being effected the assessee could not have made the sales. Moreover, the Assessing Officer has not brought any material on record to conclusively establish the fact that purchases are bogus. Merely relying upon the information from the Sales Tax Department or the fact that

parties were not produced the Assessing Officer could not have treated the purchases as bogus and made addition. If the Assessing Officer had any doubt with regard to purchases made, it was incumbent upon him to make further investigation to ascertain the genuineness of the transactions. Without making any further enquiry or investigation the Assessing Officer cannot sit back and make the addition by simply relying upon the information obtained from the Sales Tax Department and issuing notices under section 133(6) of the Act. As the Assessing Officer has failed to make any enquiry or investigation to prove the fact that the purchase transactions are not genuine whereas the assessee has brought documentary evidences on record to prove genuineness of such transactions which are not found to be fabricated or non-genuine, the action of the Assessing Officer in ignoring them cannot be accepted. When the payment to the concerned parties are through proper banking channel and there is no evidence before the Assessing Officer that the payments made were again routed back to the assessee, the addition made by estimating further profit of 12.5% earned by the assessee is not sustainable in law and facts. Keeping in view the totality of facts and circumstances of the case, we are inclined to restrict the addition to the extent of 2% of such purchases. We direct accordingly.

14. As the facts and circumstances in all the other cases are similar, respectfully following the reasoning given hereinabove, we direct the AO

to restrict the addition to the extent of 2% of such purchases. We direct accordingly.

15. In the result, the appeals of all the assesseees are allowed in part.

Order pronounced in the open court on this 05/05/2017

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 05/05/2017

Karuna Sr.PS

Copy of the Order forwarded to :

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

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai