

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'ई', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
&
SHRI AMARJIT SINGH, JM

आयकर अपील सं./ITA No.5149/Mum/2014 &
ITA No.4260/Mum/2015

(निर्धारण वर्ष / Assessment Year :2011-2012 & 2010-2011)

DCIT-24(2), Mumbai	Vs.	Shri Shivshankar R. Sharma, 103/2A, Shantivan, Raheja Township, Malad (East), Mumbai-400097
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ALVPS 0379 N		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से /Revenue by : Shri G. Nantha Kumar

निर्धारिती की ओर से /Assessee by : Shri J.P.Bairagra

सुनवाई की तारीख / Date of Hearing : 14/09/2016

घोषणा की तारीख/Date of Pronouncement 16/09/2016

आदेश / O R D E R

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

These are the appeals filed by the revenue against the order of CIT(A)-Mumbai, for the assessment year 2010-2011 & 2011-2012, in the matter of order passed u/s.143(3) r.w.s147 & 143(3), respectively.

2. In both the appeals, the revenue is aggrieved by the action of CIT(A) in giving part relief with respect to the bogus purchases.

3. Rival contentions have been heard and record perused. During the course of assessment for A.Y.2010-11, the AO observed that as per information received from Sales Tax Department, some of the parties were bogus supplier and the assessee was found to be having purchased

materials from the eight parties, who were reported to be bogus by the Sales Tax Department. Accordingly, the AO made addition of Rs.1,19,80,841/- in respect of these parties. The assessee was asked vide Show Cause Notice to provide the whereabouts of the parties, the assessee himself submitted the ledger, of the parties which were not relied upon by the AO as the assessee has not produced the parties. In view of the findings in the paragraph no.4, it was held by the Assessing Officer that the assessee did not purchase any goods from these eight parties. Accordingly, the aggregate of the purchases detailed in para no. 4 totalling to Rs.1,19,80,841/- was treated as unexplained expenditure under section 69C of the Act, added to the returned income of the assessee.

4. By the impugned order, the CIT(A) deleted the part of addition after observing as under :-

3.3. I have considered the submissions made by the Appellant, various case laws relied upon by him and his offer for surrender.

I observe that,

1. The appellant being a contractor of Government of Maharashtra operates in the interior parts of the state. Where materials are not available easily.

2. He has taken place order telephonically for material and purchases materials through broker and the payments for all the alleged bogus purchases have been made by the account payee cheques.

3. His bills are certified by the Government Authority and for executing his work he has to incur expenditure on consumable stores as well as for maintenance of machinery.

4. His accounts are audited u/s. 44AB of the Income Tax Act, 1961 and the same have not been rejected by the Assessing Officer while framing his impugned Assessment Order.

5. His gross profit and net profits have been consistently growing year after year and for the year under review he has declared a gross profit of 16.97% on his turnover which is higher by 4.21% as compared to the earlier year. This itself eliminates the possibility of bogus purchases being debited to Profit and Loss Account of the Appellant.

6. If the action of the assessing officer of treating the purchases of Rs.1,19,80,841/- is upheld on the ground that the alleged purchases were bogus, his gross profit would work out to 21.99% which is not tenable especially keeping in mind that he is a contractor for Government where such margins are not available in the tendered contracts.

7. However, the facts also remains that the above alleged bogus purchases are not fully verifiable and the parties were not produced for verification.

In view of the above, the Assessing Officer is directed to make a lump sum addition of Rs.3,00,000/- as the income escaped tax and delete the balance 'addition. This ground of appeal is partly allowed.

5. Against the above order of CIT(A) revenue is in further appeals before us.

6. It was argued by Id. DR that information was available on the official website of Sales Tax Department, Government of Maharashtra, www.mahavat.gov.in regarding suspicious parties who are only providing accommodation entries without doing any actual business. He further contended that these parties were not produced before the AO even after issue of notice to the respective parties. Accordingly, the AO was justified in making the addition.

7. On the other hand, Id.AR contended that assessee was engaged in business of contractor and was operating in interior part of the Maharashtra State, where materials are not available easily. Our

attention was also invited to the findings recorded by CIT(A) to the effect that all the purchase bills and supply bills were certified by Government authority for executing his work, accordingly assessee was required to incur expenditure for consumption of goods as well as for maintenance of machinery. He further contended that CIT(A) has already upheld addition of Rs.3 lacs out of such purchases which works out to be 3% of the such purchases as an extra profit having been taxed by the CIT(A) by upholding addition of Rs.3 lacs. In support of the order of CIT(A), reliance was placed by Id. AR on the following decisions :-

- i) Shri Ramila Pravin Shah Vs. ACIT, ITA No.5246/Mum/2013
- ii) Shri Ganpatraj A Sanghavi Vs. ACIT, ITA No.2826/Mum/2013
- iii) M/s G.V.Sons Vs. ACIT, ITA No.2239/Mum/2012
- iv) Shri Deepak Popatlal Gala Vs. ITO, ITA No.,5920/Mum/2013
- v) Babulal C. Borana Vs. Third ITO, 282 TR 251(Bom)
- vi) Rajeev G. Kalathil Vs. DCIT, 67 SOT 52(Mum Trib)
- vii) CIT Vs. Nangalia Fabrics Pvt. Ltd., 220 taxman 17 (guj)
- viii) CIT Vs. Nikunj Eximp Enterprises pvt. Ltd., 216 taxman 171
- ix) CIT Vs. M.K.Brothers, 163 ITR 249
- x) ITO Vs. Premanand, 107 TTJ 395
- xi) Arora Alloys Ltd., 370 ITR 372

8. We have considered rival contentions and carefully gone through the orders of authorities below. We had also deliberated on the judicial pronouncements referred by AO and CIT(A) in their respective orders as well as considered the ratio laid down by various decisions cited by Id. DR and AR during the course of hearing before us in the context of factual matrix of the case. From the record we found that by relying on the official website of the Sales Tax Department, Government of Maharashtra regarding suspicion parities providing accommodation entries, the AO has made an addition. In response to the show cause notice issued by the

AO, the assessee has supplied copy of bills, copy of the bank statement to prove that payment made for purchases, and copy of ledger accounts of all eight parties. The assessee is an individual carrying on a proprietary business in the name of M/s Noble Construction Company, undertaking construction work of dams and canals on behalf of Government of Maharashtra in the interior part of the State. In the interior parts the goods are not available easily. The Government contracts are time barring contract and the work is required to be completed on time. Accordingly, when the material is required in emergency the telephonic orders are placed upon the parties who supply the materials at site. The corresponding consumption of materials in respect of which the purchases were affected by the assessee firm have not been doubted by Id. AO. Neither any document information has been provided by the AO nor he has given any opportunity to the assessee to cross examine the said party and AO has concluded that the purchases by assessee company from the said party is bogus merely on the basis of information from Sales Tax Department. The AO has not conducted any independent enquires for making the addition especially since the assessee has discharged its primary onus of showing books of account, payment by way of account payee cheque and producing bills for purchase of goods. From the record we found that the gross profit of the assessee has been consistently growing year after year which is depicted in the table below and which has been accepted by the Department:

Assessment Year	Sales	Gross Profit	GP Ratio
2008-09	21,59,13,671	2,06,07,377	9.54%
2009-10	30,70,57,145	3,91,87,695	12.76%
2010-11	23,89,16,358	4,05,61,675	16.97%
2011-12	13,48,05,536	3,07,24,335	22.79%

The accounts of the appellant were duly audited u/s 44AB of the Act and the same have not been rejected by AO. However from the above table it is evident that assessee has been declaring higher gross profit during the year under consideration as compared to the GP rate shown in earlier years.

9. Hon'ble Bombay High Court in the case of Nikunj Eximp Enterprises (P) Ltd (216 Taxman 171), held as under :-

Section 37(1) of the Income-tax Act, 1961 - Business expenditure-Allowability of [Burden of proof] - Assessment year 2001-02 - Assessing Officer disallowed income of assessee alleging non-genuine purchases from different parties - Commissioner (Appeals) upheld order of Assessing Officer - Assessee filed letters of confirmation of suppliers, copies of bank statement showing entries of payment through account payee cheques to suppliers and stock reconciliation statements - Sales of purchased goods were not doubted and substantial amount of sales made by assessee was to Government department - Further, books of account of assessee had not been rejected - Tribunal deleted disallowance - Whether merely because suppliers had not appeared before Assessing Officer or Commissioner (Appeals), it could not be concluded that purchases were not made by assessee - Held, yes [Para 71 [In favour of assessee.

The above decision squarely applies to the case of the assessee as entire sales in case of assessee is made to the Government.

10. Hon'ble Chandigarh Tribunal in the case of ITO vs Arora Alloys Ltd (2012) (12 ITR (Trib) 263). This decision has been affirmed by the Punjab & Haryana High Court in 370 ITR 372, wherein it was held as under:-

Section 69C of the Income-tax Act, 1961 - Unexplained expenditure - Assessment year 2004-05 - Where addition on account of unexplained expenditure incurred for purchase of raw material was solely based on information received from Central Excise department, same could not be sustained In favour of assessee.

11. The decision of Hon'ble Bombay High Court in the case of Babulal C. Borana v. Third Income-tax Officer [2005] 144 TAXMAN 674 (Bom) also supports our contention.

12. Furthermore, the hon'ble Gujarat High Court in the case of Commissioner of Income-tax v. M.K. Brothers (Gujarat High Court) (163 ITR 249), held as under:-

[Section 69 of the Income-tax Act, 1961 - Unexplained investments - In relevant assessment year assessee made certain purchases from some parties and made payment through cheques - ITO found that parties were not available to cross-examine and that though purchases were claimed to have been made on credit ".- basis, payments were shown to have been made after substantial lapse of time after date of purchase - ITO held those transactions to be bogus and added back amount spent on purchases as income of assessee - Whether Tribunal was justified in deleting aforesaid addition to income of assessee on ground that there was no evidence to show that vouchers given by those parties to assessee were bogus or that any part of those payments came back to the assessee-Held, yes"

13. In view of the detailed finding recorded by CIT(A), which has not been controverted by Id. DR by brining any positive material on record, we do not find any reason to interfere in the order of CIT(A). Applying the proposition of law discussed in the above judicial pronouncements to the facts of the instant case, we do not find any infirmity in the order of CIT(A) sustaining addition of Rs.3 lakhs out of total purchases.

14. The facts and circumstances in the assessment year 2011-2012 are *pari materia*, therefore, following the reasoning given hereinabove, we do

not find any reason to interfere in the findings so recorded by CIT(A), which are as per material on record.

15. In the result both appeals of the revenue are dismissed.

Order pronounced in the open court on this 16/09/2016.

**Sd/-
(AMARJIT SINGH)**

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 16/09/2016

प्र.कु.मि/pkm, नि.स/ PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

**Sd/-
(R.C.SHARMA)**

लेखा सदस्य / ACCOUNTANT MEMBER

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai