

IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI AMARJIT SINGH, JM

ITA No.1321/Mum/2016
(Assessment Year: 2009-10)
ITA No. 1322/Mum/2016
(Assessment Year: 2010-11)
ITA No.1323/Mum/2016
(Assessment Year :2011-12)

Asst. CIT 19(3), Matru Mandir, 2 nd Floor R.No.206, Tardeo Road, Mumbai – 400 007	Vs.	M/s. Steel Line (India) 22, Bhandari Street, 1 st Floor 1 st Khumbharwada Lane, Mumbai – 400 004
PAN/GIR No.AAQFS2366B		
Appellant)	..	Respondent)

ITA No.880/Mum/2016
(Assessment Year: 2009-10)
ITA No. 881/Mum/2016
(Assessment Year: 2010-11)
ITA No.882/Mum/2016
(Assessment Year :2011-12)

M/s. Steel Line (India) 22, Bhandari Street, 1 st Floor 1 st Khumbharwada Lane, Mumbai – 400 004	Vs.	Asst. CIT – 15(2), Mumbai
PAN/GIR No.AAQFS2366B		
Appellant)	..	Respondent)

Assessee by	Shri Vimal Punmiya and Shri Bharat Kumar
Revenue by	Shri Ram Tiwari
Date of Hearing	05/07/2017
Date of Pronouncement	29/08/2017

आदेश / O R D E R

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

These are the appeals filed by the revenue and assessee against the order of CIT(A)-30, Mumbai 04/12/2015 for the A.Y.2009-10, 2010-11 and 2011-12 in the matter of order passed u/s.143(3) of the IT Act.

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

For A.Y. 2009-10 & 2011-12

1. *On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in estimating profit @ 17.50% on alleged bogus purchases of Rs. 27607616/- . Provisions of the Act ought to have been properly construed and regard being had to facts of the case profit should not have been estimated @ 17.50% instead of profit declared by the appellant. Reasons assigned by him are wrong and insufficient to justify estimating profit @ 17.50% on such purchases.*

2. *On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in rejecting claim of the appellant that proceeding initiated under section 147 of the Act by issuing notice under section 148 of the Act is bad in law and contrary to the provisions of the Act. Reasons recorded by him depict mere suspicion and no tangible material is available in possession of the Assessing Officer.*

3. *On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in rejecting claim of the appellant that order made under section 143(3) rws 147 of the Act is illegal, bad-in-law, ultra virus, without allowing reasonable opportunity of the hearing, and without appreciating facts, submission and evidences in their proper perspective and without providing copies of material /evidences relied upon is liable to be annulled.*

4. *The learned Assessing Officer erred in charging interest under section 234A. 234B. 234C and 234D of the Act.*

For A.Y.2010-11

1. *On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in estimating profit @ 17.50% on alleged bogus purchases of*

Rs. 8680527/- . Provisions of the Act ought to have been properly construed and regard being had to facts of the case profit should not have been estimated @ 17.50% instead of profit declared by the appellant. Reasons assigned by him are wrong and insufficient to justify estimating profit @ 17.50% on such purchases.

2. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in rejecting claim of the appellant that order made under section 143(3) rws 147 of the Act is illegal, bad-in-law, ultra virus, without allowing reasonable opportunity of the hearing, and without appreciating facts, submission and evidences in their proper perspective and without providing copies of material /evidences relied upon is liable to be annulled.

3. The learned Assessing Officer erred in charging interest under section 234A, 234B, 234C and 234D of the Act.

3. Revenue is aggrieved for upholding addition of 17.50% only instead of 100% addition made by AO, in all the years under consideration.

4. Common grounds have been taken by assessee and revenue in all the years under consideration and the CIT(A) by its consolidated order dated 04/12/2015 has disposed appeals of all the three years under consideration.

5. The grievance of both revenue and assessee relate to addition made on account of bogus purchases.

6. At the outset, Learned AR pointed out that tax effect in the appeals filed by the revenue for the A.Y.2010-11 and 2011-12 are below 10 lakhs, therefore, in view of CBDT Circular No.21/2015 dated 10th December, 2015, these appeals deserve to be dismissed.

7. We have gone through the orders of the authorities below and found that all the appeals for A.Y.2009-10, 2010-11 & 2011-12 were disposed by CIT(A) vide consolidated order dated 04/12/2015, wherein totality of tax effect was more than 10 lakhs, accordingly, CBDT Circular dated 10th December 2015 is not applicable in the instant case.

8. Rival contentions have been heard and record perused.

9. Facts in brief are that during the course of scrutiny assessment, AO found that assessee has made purchases from some of the parties who were found to be bogus in so far as these were not traceable at the addresses given by the assessee. In his order AO observed that Information was received in this case from the Office of DGIT (Inv.), that this assessee has taken accommodation entries from certain parties to inflate its purchases. An inquiry u/s. 133(6) of the IT Act, 1961 in a number of scrutiny cases, including in the case of the assessee in AY 2010-11, revealed that several of these parties are not available at the given address and the notices have been returned by the postal dept. with the remarks 'Not Known', 'left', 'unclaimed', etc. The assessee has been unable to produce these parties or prove genuineness of purchases made from them including the transport details, delivery challans etc. This indicates that the assessee had adopted a modus operandi; to decrease its true profits by inflating its expenses including purchase expenses by taking accommodation entries from such parties. The records of the assessee also reveal that the assessee has adopted this modus operandi in this year as well. This is apparent from the details of purchases from these parties (from whom the assessee had taken accommodation bills) relevant to the AY 2009-10 to 2011-12.

10. In view of the above, the AO worked out peak credit in respect of all the assessment years and made addition accordingly u/s.69C of the Act. By the impugned order, CIT(A) directed the AO to restrict the addition to the extent of 17.5% of such purchases after giving credit for GP rate already disclosed by the assessee.

11. Against the above order of CIT(A), both assessee and revenue are in appeal before us.

12. We have considered rival contentions and carefully gone through the orders of the authorities below. From the record, we found that while deciding the issue of bogus purchases and the profit element embedded therein which the assessee had earned over and above the normal profit, the CIT(A) had relied on the following judicial pronouncements:-

1. *Sri Ganesh Rice Mills vs. Commissioner of Income Tax (2007) 294 ITR 316 (All.)*
2. *Samurai Software (P) Ltd., vs. Commissioner of Income Tax (2008) 299 ITR 324 (Raj)*
3. *Indian Woollen Carpet Factory vs. Income Tax Appellate Tribunal (2002) 125 Taxman 763 (Raj.)*
4. *Sanjay Oilcake Industries vs. Commissioner of Income Tax (2009) 316 ITR 274 (Guj).*
5. *Asst. Commissioner of Income Tax vs. Tribhovandas Bhimji Zaveri (2000) 74 ITD 92 (Mum)*
6. *Bholanath Polyfab Pvt. Ltd., 355 ITR 290 (Guj).*

13. After considering the above judicial pronouncements, the CIT(A) concluded as under:-

2.7.19 The facts in the present case are similar to the facts in the above mentioned case. In the present case, the Ld. AO has shown that the eight parties in question were non-existent. The appellant has not been able to disprove the findings of the Ld. AO regarding the non-existence of the parties. Ld. AO has, after examining the evidences, found that the appellant did not purchased the goods from the said parties, at the same time he has not disturbed the

*sales of the goods and income offered on such sale of goods. In this case, Ld. AO has not disputed the quantitative details and also day to day stock register maintained. The appellant being a trader of goods, Ld. A.O. not having doubted the genuineness of sales, could not have gone ahead and made addition in respect of peak balance on such purchases. Thus, the issue would boil down to finding out the element of profit embedded in bogus purchases which the appellant would have made from some unknown entities. Hence, respectfully following the decision of the **Hon'ble Gujarat High Court** in the case of **Bholanath Polyfab Pvt. Ltd. (supra)**, it is concluded that the profit margin embedded in such amounts of purchases could only be disallowed and subjected to tax. .*

*2.7.20 Having decided that the profit margin only to be subjected to tax, now we have to see what is the percentage to be adopted for taxing, especially when it varies from trade to trade. Hon'ble Gujarat High Court in the case of **CIT vs. Simit Sheth (2013) 38 Taxmann.com 385 (Guj)**, 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 purchased 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 no 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, IT AT in the case of Vijay Proteins 58 ITD 428.***

*2.7.21 In the case of **Vijay Proteins**, 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 supplies were allegedly procured but these were encashed from a bank account in the jowame 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.

2.7.22 Further, in the case of **M/s. Sanket Steel Traders (ITA No. 2801/Ahd/ 2008 dated 20-05-2011)** it was, inter-alia, stated as under:

"3. At the time of hearing before us, it is submitted by the Learned Counsel that the addition sustained is excessive. In support of this contention he referred to the decision of the Tribunal in the case of *ITO vs. Sun Steel 92 TTJ (Ahd) 1126* wherein the Tribunal has sustained the addition of Rs.50,000- on account of bogus purchases. However, we find that the facts in the above case were different. In the above case, the assessee has shown purchases of Rs.27,39,410/-, sale of Rs.28,17,207/~ and Gross Profit at Rs. 94,740/-, The Assessing Officer made the addition of f 27,39,407/- for bogus purchases. If the above sum is added to the Gross Profit, the Gross Profit works out f 2,83,41,247/- which was more than the sale itself. The Tribunal held that it is impossible that the Gross Profit is more than the sale itself. The Tribunal also found that the assessee has maintained the quantitative details in respect of materials purchased and sold. Considering peculiar facts of that case, the Tribunal arrived at the conclusion that it would be fair and reasonable to estimate the addition at Rs.50,000/~ as against the addition of Rs.27,39,407/- made by the Assessing Officer. However, the Learned Commissioner of Income-tax (Appeals) considering the facts of the assessee's case, has sustained the addition at 12.5%. While doing so, he has also relied upon the decision of the Tribunal in the case of *M/s. Vijay Proteins Ltd. 55 TTJ (Ahd) 76*. In the case of *M/s. Vijay Proteins Ltd.* the Tribunal has sustained the addition of 25% of the bogus purchases. However, considering the facts of the assessee's case the CIT (A) restricted the disallowance to 12.5% as against 25% made in the case of *M/s. Vijay Proteins Ltd.* From these facts it is evident that the CIT(A) has sustained the addition at 12.5% of the non-genuine purchases considering the facts of the assessee's case. We, therefore, do not find any justification to interfere with the order of the CJT (A) In this regard. The same is sustained."

2.7.23 The motive behind obtaining bogus bills thus, appears to be inflation of purchase price so as to suppress true profits. Estimation ranging from 12.5% to 25% has been upheld by the Hon'ble Courts depending upon the nature of the business. **As held in the case of Simit P. Sheth (supra) no uniform yardsticks could be applied to estimate the rate of profit and it varies with the nature of business.** Taking all the facts into consideration and since the assessee is supplying the material to reputed companies and offering reasonably good percentage of GP (@6.49%) and also taking into

the findings of the Hon'ble Courts on this issue, I am of the view that estimation of 17.5% of profit would meet the ends of justice. Therefore, I direct the AO to estimate profit of 17.5% on the total alleged bogus purchases from the seven/eight parties as the profit element embedded in such purchases. While estimating the GP on the bogus purchases, the percentage of GP already offered in the books of account on the relevant sales out of the purchases and is to be reduced from such estimated profit. Since the GP percentage is varying from year to year, the AO is directed to verify the correctness of the average GP percentage stated by the appellant in the submissions (which is around 7% as per the calculation for the previous three years) and to reduce the same from the estimated net profit of 17.5% on the purchases made from the seven/eight parties. As directed earlier, on verification, if there are no purchases made from M/s Vardhaman Trading & co as claimed by the appellant and appears to be true, the same needs to be removed for arriving the GP on the bogus purchase parties. Accordingly, the ground of appeal is partly allowed.

14. Against the above order of CIT(A), both assessee and revenue are in further appeal before us. We have considered rival contentions and carefully gone through the orders of the authorities below and also deliberated on the 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 in the context of factual matrix of the case. From the record, we found that AO has made addition in respect of purchases found to be bogus as per the information from sales tax department. In the appellate proceedings, the CIT(A) recorded a finding to the fact that AO has not disputed the quantitative details and also day to day stock register maintained by the assessee. Assessee company being a trader of goods, AO not having doubted the genuineness of sales, could not have gone ahead and made addition in respect of peak balance on such purchases. Accordingly, CIT(A) concluded that issue boil down to

find out the element of profit embedded in bogus purchases which the assessee would have made. When the corresponding sales have not been doubted and the quantitative details of purchases and sales vis-a-vis stock was available, we deem it appropriate considering the entirety of facts and circumstances of the case to restrict the addition to the extent of 2% of such bogus purchase. Accordingly, the order of both the lower authorities are modified and AO is directed to restrict the addition to the extent of 2% on such purchases.

15. In the result, appeals of the assessee are allowed in part whereas appeals of the revenue are dismissed.

Order pronounced in the open court on this 29/ 08/2017

Sd/-
(AMARJIT SINGH)
 JUDICIAL MEMBER

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

Mumbai; Dated 29/08/2017

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.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
 ITAT, Mumbai