

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ “जी” मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI

BEFORE S/SHRI B.R.BASKARAN (AM) AND AMIT SHUKLA, (JM)
सर्वश्री बी.आर.बास्करन, लेखा सदस्य एवं अमित शुक्ला, न्यायिक सदस्यके समक्ष

आयकर अपील सं./I.T.A. No.2826/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2009-10)

Shri Ganpatraj A Sanghavi 135/141, 1 st floor, Room No.23, Gururajendra House, 5 th Kumbharwada, Mumbai-400004	बनाम/ Vs.	Assistant Commissioner of Income Tax, 15(3), Mumbai.
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AMXPS1466M

अपीलार्थी ओर से / Appellant by	Shri V K Tulsian
प्रत्यर्थी की ओर से/Respondent by	Shri Pavan Kumar Beerla

सुनवाई की तारीख / Date of Hearing : 16.10.2014

घोषणा की तारीख /Date of Pronouncement : 5.11.2014

आदेश / ORDER

Per B.R.BASKARAN, Accountant Member:

The appeal filed by the assessee is directed against the order dated 4.2.2013 passed by Ld CIT(A)-26, Mumbai and it relates to the assessment year 2009-10.

2. The Assessee is aggrieved by the decision of Id. CIT(A) in confirming the disallowances of following amounts made by the AO :

- a) disallowances of purchases – Rs.1,74,01,436/-;
- b) disallowance of donation;
- c) disallowance of telephone expenses; and
- d) disallowance of hamali and cartages expenses.

3. The facts relating to the case are stated in brief. The assessee is a proprietor of M/s Gururaj Metals and the said concern is in the business of supply of Ferrous and non-ferrous metals to small sale industries. He filed his

return of income for the year under consideration declaring total income of Rs.33,88,804/-. However, the AO completed the assessment by determining total income of the assessee at Rs.2,08,58,870/- by making various additions. The assessee challenged the additions by preferring an appeal before the Id. CIT(A), but the same was partly allowed. Still aggrieved, the assessee has filed this appeal before us.

4. The first issue relates to the disallowance of purchases made. The facts relating to the same are stated as under by the Id. CIT(A) :

“3. Ground No.1 is against the addition of Rs.1,74,01,436/- on account of bogus purchases. Brief facts in this regard are that during the assessment proceedings, inquiries were made u/s 133(6) from various parties from where the assessee has shown purchase of metals. The notice issued to the five parties ie. M/s Montex Industries, M/s Roshan Steel Impex, M/s Mokesh Metal and Tubes, M/s Viraj Steel and Alloys and M/s Shivam Metals Industries returned back by the postal authorities with a remark “not known”. Accordingly, the AO issued show cause notice to the assessee as to why the purchases from these parties should not be treated as non genuine and the same should not be added back. In response to the said notice, the assessee furnished ledger copy of purchases, signed by the respective parties and copies of sample purchase bills along with a few delivery challans and claimed that the purchases are genuine. However, the AO further inquired this matter through on the spot field inquiries by the Inspector, who submitted that none of the parties exists at the given address and the inquiries with the nearby shops revealed that nobody is aware about these parties. The report of the Inspector forms part of the assessment order. On the basis of detailed enquiries, the AO came to the conclusion that the assessee has managed to obtain the signatures of these parties, but actually these parties does not exists at the given address. The AO has further observed that (i) the receiver’s signature are not affixed on the delivery challans of the purchase from these parties. (ii) the mode of transport for delivery of these goods is not mentioned on the purchase bills of these parties whereas the

purchases invoice of other parties contains the lorry number etc.(iii) Major portion of purchases are still shown outstanding in the list of sundry creditors. On the basis of all these facts, the AO has held that the assessee has merely obtained accommodation entries for these purchases. If at all such purchases have been made from some other party, to make corresponding sales, the same would obviously be in cash, which would attract the provisions of section 40(A)(3) of the IT Act Accordingly, the AO has disallowed Rs.1,74,01,436/- on account of such bogus purchases.”

5. In the appellate proceedings, the assessee submitted additional evidences under Rule 46A of the Income Tax Rules, 1962 in the form of TIN allotment letter, Sales Tax Acknowledgement of E-return, challans, certificates under VAT etc in respect of purchases in question. Hence the Id. CIT(A) called for a remand report from the AO. In the remand report, the AO submitted that, out of five parties referred above, three parties, viz., (a) M/s Roshan Steel Impex (b) M/s Viraj Steel and Alloys and C) M/s Shivam Metals Industries appear in the list of hawala operators prepared by the Sales Tax Department. The AO further submitted that he has obtained bank statements of all the five parties and the perusal of the same shows that they have withdrawn the amounts in cash as soon as the cheques issued by the assessee were realised. The AO also placed reliance on the decision of the Delhi Bench of the Tribunal in the case of DCIT V/s Phoolwati Devi (2009) 314 ITR AT I (Delhi) and also the decision of Hon'ble Supreme Court in the case of Suman Dayal V/s CIT (1995) 214 ITR 801 (SC). Accordingly, the AO stood by the assessment order. The AO further observed that if at all the purchases were considered to have been made from any other party, the same would have been sourced out of undisclosed income of the assessee, in which case the provisions of sec. 69C of the Act would be attracted. Even though the assessee furnished a detailed reply in response to the remand report and also placed reliance on various case law, yet the Id. CIT(A) concurred with the view taken by the AO. The Id. CIT(A) also concurred with the view of AO that the assessee would have made purchases from the grey market and such purchases would have made in cash resulting in violation of the provisions of section 40(A)(3) of the Act. He also agreed with the view taken by AO that assessee has not explained the sources for making such purchases and hence

the aggregate amount of purchases is liable to be assessed as unexplained expenditure under the provisions of section 69C of the Act. Accordingly, the Id. CIT(A) confirmed the addition made by AO on this issue.

6. We have heard the rival contentions on this issue and perused the record. The AO placed reliance on the written submissions furnished before the Id. CIT(A) whereas the Id. DR placed strong reliance on the orders of authorities below. We notice that the assessee has furnished following reply in response to the remand report furnished by AO:

“3.2 In this respect, the appellant’s submissions made during the appeal proceedings are as under :

“We are in receipt of the remand report dated 21.12.2012 on 31.12.2012

1. The assessee had filed written submissions, paper book and application for additional evidence u/R 46A before your honour

The matter was remanded to the AO for a report vide letter dated 12.9.2012. The assessee had filed further details being ledger account of sundry creditors subsequently paid duly highlighted in the bank statement, in the remand proceedings.

2,. On perusal of the remand report it is seen that the AO in para 6 states that out of the 5 parties, three parties are hawala operators. The AO however accepts the existence of parties on enquiry with the banks (refer 9 on page 4 of the remand report)

3. The assessee respectfully submits that :

A. the assessee is proprietor of M/s Gururaj Metals, which is engaged in the business of supply of ferrous and non-ferrous metals to small scale industries. For the relevant previous year, the assessee has declared GP of 4.48% and NP of 1.01% on turnover of Rs.4,36,53,266/- (Pg.1-33 of the written submissions) As compared to the same, the assessee had, in the immediately preceding year, declared GP of 4.36% and NP of 1.02% on the turnover for that year. In the P/L account, the assessee has credited sales of Rs.4.36,53,266. The assessee has declared net profit of Rs.4.42,515/- from his proprietary concern, M/s Gururaj Metals. The assessee is registered under MVAT and filing the VAT returns regularly. Various judicial pronouncements have been submitted to your honour vide paper book 1

B.. During the courses of assessment proceedings, the AO had issued notice u/s 133(6) to 23 parties. Out of the same in case of 5 parties the notice came back as not known.

C. The AO held that the aggregate purchase of Rs.1,74,01,436/- are bogus purchase. The AO has relied on the copy of inspector report wherein it was submitted that parties were not in existence at the address.

D. The assessee submits that the parties confirmation bear their PAN Nos. and invoice copy bears their VAT No. and address. The payments were made by account payee cheque. Thus the assessee had discharged the primary onus of proof by proving the identity of party and genuineness of the transactions .

E. The assessee has filed additional evidences in paper book-II as under :

1	TIN allotment letter in case of Montex Inds.	265-266
2	Acknowledgment of filing E returns with sales tax department along with registration under CST in case of Rohan Steel Impex.	267-268
3	Acknowledgment of filing E returns with sales tax challans in case of Moksh Metal Tubes	269-270
4	Acknowledgment of filing E returns with sales tax and certificate of registration under CST and VAT in case of Viraj Steel Alloys	271-272
5	Acknowledgment of filing E returns with sales tax and certificate of registration under CST in case of Shivam Metals	273-275
6	Letters from RBS bank for clearing of cheques in names of 5 parties, dated 6.8.2012, 14.8.12, 25.6.12, 18.7.12, 17.7.12	276-303
7	Bank statement duly certifying the payments been made to parties	304
8	Certificate from depart of sales tax showing cancellation of registration by the parties	305-309
9	Ledger account of Hamali and cartage exp. Along with vouchers	310-318

F. The details of purchase and sales were submitted thus once the sales are accepted the purchases cannot be doubted. Without prejudice to above once payment are made by account payee cheques no disallowance could be made merely because parties are not found. The additional evidence produce in form of bank certificate and E return of sales tax prove the existence of the parties

G. Further payments were made by account payee cheques. This fact would over shadow all other short coming

a. **Mather & Platt (India) Ltd. vs CIT 168 ITR 493 Cal**

Assessee made payments to its two commission agents through agents through bank draft and account payee cheque respectively. During assessment proceedings, summons u/s 131 were issued after four years of aforementioned transaction to each of said commission agents calling upon them to confirm those payments- summons came back with remark 'not known' from postal authorities-whether tribunal was right in holding that assessee had failed to discharges onus of establishing identification of these two commissions agent- Held No..

b. **ITO V/s Kashmir Ind. Palace 99 Taxmann (Chd) (Mag)**

AO made addition of Rs.52,250 treating certain purchase as bogus as party was not produced for verification-whether since payments were made through account-payee cheques and amounts had gone into account of party concerned as duly certified by bank and assessee also had surrendered Rs.50,000/- during survey as excess stock. AO could not treat such purchase as bogus – Held, yes.

c. **Ramanand Sagar V/s DCIT 256 ITR 134 (Bom)**

Assessee filed his return and claimed deduction of expenses on account of equipment hire charges paid to five different parties-AO not being satisfied with proof presented in respect of two parties “ND” and “VF” made disallowance of payments made to said two parties—Whether xerox copies of bills and voucher produced to establish genuineness and reasonableness of total payments made in favour of “ND” being not satisfactory, disallowance of payment made to “ND” was justified- Held yes-whether since certificate produced by assessee from his banker established that payments were made to said party “VF” by account payee cheques, it overshadowed all other shortcomings sought to be pointed out by authorities while disallowing expenditure incurred by assessee and, hence, disallowance of payment by way of hire charges made to “VF” was not justified-Held, yes.

H. The assessee further submits that the details of total purchase and total sales quantity wise and date wise was furnished before the AO.

I. It may also not be out of place to mention that the parties are filing E-return of sales-tax and the acknowledgement are produce.

In view of the above facts the assessee has discharged the onus of proof, therefore no addition should be made . Without prejudice to above if at all the addition can be sustained then it should be at net profit ratio in respect of purchase.

J. Further once quantitative tally of sales is furnished, the same should be accepted (pg.78-107 of the written submissions). It is not open for AO to disregard the same.

a. **Babulal C Borana V/s ITO 282 ITR 251 (Bom)**

Where the identity of the persons from whom goods are purchases has been explained, payment are made by account payee cheques, transactions are recorded in books, no addition can be made.

b. ITO V/s Surana Trading 92 ITD 212 (Mum)(para 98)

Where a quantitative tally of sales is furnished, even if purchasers are not available, no addition could be made merely on assumptions or presumptions or surmises or conjectures.

c. CIT V/s Leaders Valves (P) Ltd 206 CTR 463 (P&H)

Commissioner (A) deleted additions made by AO on account of bogus purchase from seven parties as also addition in trading account besides allowing triple shift allowance on machinery etc- Tribunal concurred, with analysis and conclusion drawn by Commissioner (A) on appreciation of material on record, after taking notice of fact that trading results of assessee had all along been accepted and purchases of scrap from seven parties could also be not termed as bogus for reason that in subsequent assessment year purchase from those very parties stood accepted by department to a very substantial extent- Tribunal also took notice of Revenue's contradictory stand in as much as firstly specific additions were made in assessment on account of alleged bogus purchase and then assessee's books were rejected on ground that those were not verifiable, but adjustment of bogus purchases was made while working out gross profits and that too on basis of "sales version" in those very books though with a slight modification-Whether brief capitulation of findings of facts returned by Tribunal led to an irresistible conclusion that these were pure findings of fact giving rise to no question of law- held, yes.

d. Rajesh P Soni V/s ACIT 100 TTJ 892 (Ahd)

Where purchases are properly recorded in books of account and supported by authenticated purchases bills/ vouches payments were made through banking channel, the sales against these purchases not doubted. No addition can be made merely because he suppliers cannot be located.

e. CIT V/s M K Brothers (1987) 163 ITR 249 (Guj)

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 through purchases re 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 purchase as income of assessee-whether Tribunal was justified in deleting aforesaid addition to income of assessee on ground that there was not evidence to show that vouchers given by those parties to assessee were bogus or that any part of those payments came back to assessee-Held, yes.

K. In the remand report, the Id.AO has mentioned that notices u/s 133(6) were issued to Bank of Baroda, V P Road Branch and ABN AMRO, Fort Branch.

In response to the said notices, Bank of Baroda had provided, the details of four parties i.e. M/s Montex Industries, M/s Viraj Steel and Alloys, M/s Shivam Metal Industries and M/s Rohan Steel Impex since these parties were having account with the said bank.

The Id. AO has also mentioned that the Bank statements of the above parties provided by the Bank of Baroda, should that there was an immediate cash withdrawal against the cheque deposits. Your honour's attention is drawn to the fact that Bank of Baroda had provided the necessary details of the four parties with respect to the date of opening account numbers, bank statements etc. The existence of these parties is thus justified by an external indirect confirmation obtained by the Id. AO. Since the banks have mandated the KYC documents, the existence of these parties cannot be ruled out merely on the report of the Inspector

The assessee cannot be penalized if the other party enters in any dubious transactions. The assessee as a purchaser is concerned with the goods and the only obligation remains is to make the payment. Since the assessee does not have to recover money from these parties, hence he is not required to confirm on their creditworthiness. Moreover the assessee cannot sit over and investigate the genuineness of the party or their business transaction. The assessee as a business man taken due care in getting necessary details which were produced before your honour as well as the AO during assessment as well as remand proceedings.

L. As regard attraction of provision of section 40(3) is concerned it is applicable to cash payments. The said section states as under :

“where the assessee incurs any expenditure in respect of which payment or aggregate of payment made to a person in a day, otherwise than by an account payee cheque drawn on a bank or an account payee bank drafts exceeds twenty thousand rupees, no deduction shall be allowed in respect of such expenditure “

In the facts of the present case the payments were made by account payee cheque. The assessee has submitted the letters from RBS bank for clearing of cheques in names of 5 parties. Thus merely on presumptions and assumptions the provisions of section 40A(3) cannot be invoked. Merely because the parties are not traceable the assessee cannot be penalized for the same.

M. As regard invoking the provisions of section 69C is concerned, the said section reads as under :

“Where in any financial year an assessee has incurred any expenditure and offers no explanation, if any, offered by him is not in the opinion of the

AO, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, deemed to be the income of the assessee for such financial year]

[Provided that notwithstanding, anything contained in any other provisions of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income”]

The assessee has given explanation and also provided sufficient evidence in support of its claim. The assessee has not only proved the purchase but the corresponding sales also. The primary onus of proof has been discharged by the assessee. Merely, on prohibiting, the provision of section 69 cannot be invoked.

N. It is submitted that under IT Act there is no scope for assumption and presumptions nor anything can be implied. Addition cannot be sustained on the basis of preponderance of probabilities. Suspicion however strong it may be cannot form basis of addition. Addition cannot be made merely on suspicion surmises and conjectures in the hands of the assessee.”

7. A perusal of the orders passed by the tax authorities would show that they have suspected the genuineness of the purchases only for the reason that the above said five parties were not available in the given addresses. It is pertinent to note that the AO himself, during the course of remand proceedings, have obtained the bank statements of the above said five parties. It is in the common knowledge of everybody that the bank account, now a days, could be opened only on submission of proper documents. Further the assessee has furnished the Sales tax documents of the above said five parties and also their income tax details to prove their existence. Thus, it is seen that the assessee has furnished many documents to prove the existence of the parties and they have not been controverted by the assessing officer.

8. Be that as it may, another important factor the bank account copies collected by the assessing officer shows that the assessee had made the payments to the above said parties by way of account payee cheques. Thus, it is seen that the transactions have been routed through the bank accounts. Further, it is not the case of the assessing officer that the assessee has indulged in accounting of bogus purchases. When the assessee submitted that he could not have effected the sales without making corresponding purchases, the AO has taken the view that the assessee could have effected purchases in the grey

market, which conclusion is, in fact, not supported by any material. Under this impression only, the AO has further expressed the view that the assessee would have purchased the materials by paying cash thus violating the provisions of sec. 40A(3) of the Act, which is again based on only surmises. In the absence of any material to support the said view, we are unable to agree with the view taken by the tax authorities that the purchases amount is liable to be disallowed u/s 40A(3) of the Act. On the same impression only, the AO has expressed the view in the remand report that the purchases amount is also liable to be assessed u/s 69C of the Act as the source of purchases were not proved. Again the said conclusion is based upon only surmises, which could not be sustained. Thus, it is seen that the assessing officer has accepted the fact that the quantity details of purchases and sales have been reconciled by the assessee. Further, various case law relied upon by the assessee also supports his case. Under these set of facts, we are of the view that the Ld CIT(A) was not justified in confirming the disallowance of purchases. Accordingly, we set aside the order of Ld CIT(A) on this issue and direct the AO to delete the disallowance of purchases.

9. The next ground relates to the disallowance of donation expenses of Rs.3,351/-, which was claimed to have been paid for Ganapati Mandal Pooja. The Ld CIT(A) has confirmed the disallowance on the reasoning that the said payment is not related to the carrying on of the business. We agree with the said reasoning and accordingly uphold the order of Ld CIT(A) on this issue.

10. The next ground relates to the disallowance of Rs.16,472/- out of telephone expenses. On noticing that the telephone did not belong to the assessee and it belonged to a relative named Shri Mahendra Sanghvi, the AO disallowed the above said amount on the reasoning that the assessee could not prove the usage of telephone belonging to an outsider. The Ld CIT(A) confirmed the said disallowance, since the assessee could not furnish proper explanations. Before us also, the assessee did not furnish any convincing explanation or the letter obtained from Shri Mahendra Sanghvi regarding the usage of telephone. Hence, we have no other option, but to confirm the order passed by Ld CIT(A) on this issue.

11. The last issue relates to the disallowance of 20% of the amount claimed under the head "Hamali and Cartage Charges" on the reasoning that the said expenses incurred entirely on cash payment and further they were not supported by any evidence. Even though, the assessee furnished certain vouchers before Ld CIT(A) in the form of additional evidence, the first appellate authority noticed that they were deficient on many respects. Hence, he confirmed the disallowance made by the AO. Before us no fresh evidence or arguments were advanced in order to compel us to interfere with the decision taken by Ld CIT(A) on this issue. Accordingly, we confirm the order of Ld CIT(A) on this issue also.

12. In the result, the appeal filed by the assessee is partly allowed.

The above order was pronounced in the open court on 5th Nov, 2014.

घोषणा खुले न्यायालय में दिनांक: 5th Nov, 2014 को की गई ।

Sd

sd

(अमित शुक्ला / AMIT SHUKLA)
न्यायिक सदस्य / JUDICIAL MEMBER

(बी.आर.बास्करन / B.R. BASKARAN)
लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai: 5th Nov, 2014.

व.नि.स./ SRL , Sr. 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)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

True copy

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai