

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION.

INCOME TAX APPEAL (IT) NO.795 OF 2018

APPELLANT : Principal Commissioner of Income
Tax-32, Mumbai, Room No.206, C-11,
2nd Floor Pratyakshakar Bhawan, BKC
Mumbai-400 051

..VERSUS..

RESPONDENT : 1. Mr. Sanjay Dhokad,
Hi Rock Construction Co., 903-A,
Gurukul Towers, J S Road, Dahisar
(W) Mumbai 400 063

Mr. Suresh Kumar, Advocate for the Appellant.

CORAM : **DHIRAJ SINGH THAKUR AND**
VALMIKI SA MENEZES, JJ.

RESERVED ON : **11th NOVEMBER, 2022.**

PRONOUNCED ON : **9th JANUARY, 2023.**

JUDGMENT : (PER : VALMIKI SA MENEZES, J.)

. This is an appeal under Section 260A of the Income Tax Act 1961 (“the Act”), impugning order dated 31.03.2017, passed by the Income Tax Appellate Tribunal, Mumbai (“the Tribunal”), which while dismissing the appeal of the revenue, has upheld the order dated 10.05.2013 of the Commissioner of Income Tax (Appeals), Mumbai, which directs deletion of the

disallowance for the amount of Rs.4,99,27,664/- under Section 69C of the Act, as was directed by the Assessment Officer under his order dated 25.02.2013.

2. The appeal is sought to be admitted on the following substantial questions of law :

“5.1 Whether in law and on the facts and circumstances of the case, was the Hon’ble Tribunal justified in upholding the orders of the CIT(A) deleting the addition made on account of the non-genuine purchases; without a consideration that these parties themselves had given a declaration that they did not supply any material, but only accommodation bills ?

5.2 Whether in law, and on the facts of the instant case was the Tribunal was in error in not taking into consideration that an independent authority namely the Sales tax department had provided evidence of the fact that these parties did not undertake the sale of any material but only

provided bills at a commission ?”

3. The present matter pertains to Assessment Year 2010-11. The Respondent had filed his Return of income for the relevant assessment year, declaring a total income of Rs.37,60,430/-. That Return was processed in terms of the provisions of Section 143(1) of the Act, and his case was selected for scrutiny and accordingly a notice under Section 143(2) of the Act, was issued to Respondent on 25.08.2011. Thereafter, a fresh notice under Section 142(1) of the Act, alongwith a detailed questionnaire was issued to the Respondent on 09.07.2012. In response, the Respondent filed his reply with various clarifications and details called for by the said notice. In his reply, the assessee stated he was Civil Contractor engaged in civil construction contracts. He claimed that in the course of his business, he made purchases from various parties for which, payments were made through proper banking channels by cheque and such payments were realized.

4. During the assessment proceedings, the Respondent was called upon to furnish a list of persons from whom he had made purchases, and on supplying such a list, the Assessment

Officer identified 21 dealers from that list, who according to him, were termed as “suspicious dealers” indulging in issuing fictitious bills without actual supply of goods or material, for a commission, as was put up on the official websites of the Sales Tax Department, Government of Maharashtra.

5. Further, during the course of assessment, the assessee was asked to show cause by Notice dated 11.02.2013, as to why the alleged purchases from the said 21 parties, totally amounting to Rs.4,99,27,664/- should not be treated as his unexplained expenditure. The show cause notice claimed that notice under Section 133(6) of the Act, had been issued to the said 21 suppliers who, after having been served with the notice had not replied thereto. That spot enquiries were made by the Income Tax Department at the addresses of the said 21 suppliers and during the enquiries, it was revealed that no business was carried out from the premises, and in view of that fact, the assessee was called upon to show cause why purchases from the said 21 suppliers should not be treated as fictitious purchases.

6. Relying upon certain statements of the proprietors of the 21 Firms referred to in the notice, and since none attended or made any submissions on behalf of the assessee after receiving a show cause notice, the Assessing Officer presumed that the assessee had nothing to say and that the said purchases should be treated as his income. He passed the assessment order dated 25.02.2003, treating the entire amount of Rs.4,99,27,664/- as unexplained expenditure under the provisions of Section 69C of the Act, and added this amount to the total income of the assessee, and in consequence of this order, initiated penalty proceedings under Section 274, read with Section 271(c) of the Act, for furnishing inaccurate particulars of income and conceal income.

7. On the Respondent challenging the order of assessment dated 25.02.2013, the Commissioner of Income Tax (Appeals), allowed the same holding that the Respondent had proved the transactions by producing his books of accounts, banks statements and proved that the payments had been realized. On an appeal filed against the order dated 31.03.2017 has upheld the order of the Appellate Forum.

8. We have heard Mr. Suresh Kumar, learned Counsel for the Appellant and perused the records of appeal.

9. Mr. Suresh Kumar, learned Counsel submits that the Tribunal and the Commissioner (Appeals), have concurrently erred in holding that the transactions of the Respondent which were in question have been sufficiently proved. It is his submission that the burden of proving the transactions in terms of Section 69C of the Act, would not get discharge by merely producing such documents or by the production of the bank statements, invoices and books of accounts, and it was incumbent upon the Respondent to produce from the suppliers some evidence or proof of actual delivery of the material and of actual receipt of the amounts paid to them, notwithstanding that they were made through proper banking channels by account payee cheques.

He further submits that the statements recorded by the Sales Tax Department of the Government of Maharashtra from suppliers, whose names were shown on the website of the department as suspicious traders, had not been rebutted by the Respondent, who would be required to produce these traders

before the Assessing Officer or at least get their statements or affidavits recorded. Mr Kumar, relies upon a judgment of the Hon'ble Supreme Court in the case of Principal Commissioner of Income-Tax (Central)-1 ..V/s.. NRA Iron and Steel (P.) Ltd., reported in [2019] 103 taxmann.com 48 (SC), to buttress his submissions that the burden of proving the transactions was on the Respondent and the onus shifts on to the revenue only after the Respondent proves the transactions by producing evidence through the concerned suppliers.

10. The order of assessment dated 25.02.2013, passed by the Assessment Officer was challenged before the Commissioner of Income Tax (Appeals) at Mumbai, primarily on the ground that the Respondent had discharged the initial burden of proving the delivery of material from 21 suppliers referred to in a show cause notice and had proved payments to them through proper banking channels and such payments had been realized. The assessee has also specifically taken a ground in the appeal that his statement alleged to have been taken by the Sales Tax Department, but was never supplied or furnished

to him to enable him to deal with their content, and further, that such statements would have no legal sanctity to prove that the purchases made by the assessee were fictitious.

11. The Commissioner of Income Tax (Appeals) at Mumbai, considering this ground and the material on record, and has arrived at a specific finding, firstly that the Respondent herein had already shown gross profit and net profit in his accounts, which were duly accepted by the Assessing Officer, and therefore, in the absence of rejection of any book entries, such huge additions of Rs.4,99,27,664/- were not tenable at law. The Appellate Authority has further, on consideration of the material before the Assessing Officer, come to a conclusion that in the absence of Assessing Officer issuing any summons to the 21 suppliers alleged to have fictitious transactions with the assessee, and in the absence of the copies of the statements recorded by the Sales Tax Department being furnished to the Respondent to enable him to cross-examine the suppliers, the Assessing Officer could not have proceeded to treat the purchases as unexplained expenditure.

The Appellate Authority has then, after going through all the payments made by the assessee to those suppliers by perusing the bank statements of the assessee and ascertaining that the payments were made by account payee cheques, which had been credited to the bank accounts of the suppliers, concluded that the Respondent had in-fact proved the payments actually were made by him, and were not fictitious sales.

12. The Appellate Authority has specifically arrived at a finding that the Assessment Officer had accepted the correctness of the contracts executed by the Appellant with the suppliers, and having accepted the same, could not have proceeded to disallow the expenditure under the provision of Section 69C. of the Act. The Appellate Authority has then opined that the disallowance of the whole amount of Rs.4,99,27,664/- under Section 69C would result in abnormally high gross profit and net profit of the Appellant, which is unrealistic in any line of contract as has been executed by the Respondent. For all these reasons, the Commissioner of Income Tax (Appeals) at Mumbai, set aside the order of

assessment dated 25.02.2013 to the extent that it added the amount of Rs.4,99,27,664/- as unexplained expenditure under Section 69C of the Act, to the total income of the Respondent.

13. The revenue challenged the order of the Commissioner of Income Tax (Appeals) before the Tribunal, which on reconsideration of the material on record, has concluded that the Respondent had shown gross profit and net profit, which were accepted by the Assessing Officer and in the absence of rejection of the books and accounts, such additions were not tenable at law. The Tribunal has further noted that the assessee has disclosed the addresses of all the parties, who were suppliers and has furnished details of payments through bank accounts into the bank accounts of such suppliers. It has further found that after having received details of the payments made by the Respondent through cheques to such suppliers, it was incumbent upon the Assessing Officer to verify the transactions which had been done.

The Tribunal has held that the evidence given by the assessee, which is in the documentary form, has nowhere been discussed and discredited by the Assessment Officer and in that

light, merely because the names of such parties were found on the official website of the Sales Tax Department of the Government of Maharashtra would by itself not be sufficient to prove that the transactions were bogus. The Tribunal has held that the Respondent had sufficiently discharged the burden of proving the transactions.

14. The Tribunal has also referred to the judgment of this Court in the case of *The Commissioner of Income Tax-1, Mumbai ..V/s.. M/s. Nikunj Eximp Enterprises Pvt. Ltd., dated 17.12.2012, in Income Tax Appeal No.5604 of 2010* and applying the ratio therein, dismissed the appeal.

15. Section 69C of the Income Tax Act, reads as under :

“69C. *Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year.”*

The provisions would be attracted to a case where the assessee offers no explanation on the source of such

expenditure or part of thereof, or by the explanation that is offered is not, in the opinion of the Assessing Officer satisfactory. The Assessment Officer, is therefore, called upon by the provisions of Section 69C to record his satisfaction based upon the material produced by the assessee and cannot advert to material such as unproved statements recorded by some other Authority such as the Sales Tax Department, which in any event were not put to assessee during the course of the assessment proceedings.

16. Principal Commissioner of Income-Tax (Central)-
1 ..V/s.. NRA Iron and Steel (P.) Ltd., (supra), was the case in which, the Hon'ble Supreme Court considered a situation, where Share Capital/Premium was credited in the books of accounts of the assessee company, and such Share Capital/Premium was considered as transaction, which was not genuine, and therefore, treated as income of the assessee under Section 69C. It is in that context, that the Assessing Officer in that case, conducted an extensive investigation by holding an independent field enquiry to ascertain the genuineness of the investors in the assessee company. On the assessee being given

an opportunity for meeting of the evidence collected by the Assessing Officer to demonstrate the non-existence such investors, that the Assessing Officer concluded that the assessee had not discharged the initial onus of establishing by cogent evidence with the genuineness of the transactions and creditworthiness of the investors under Section 68 of the Act.

It is in this context that the Hon'ble Supreme Court concluded that the Lower Appellate Authorities had ignored the detailed findings of the Assessing Officer from the field enquiry and investigations carried out by him and the assessee had not discharged his legal obligation to prove the receipt of the Share Capital/Premium to the satisfaction of the Assessing Officer. The ratio laid down in Principal Commissioner of Income-Tax (Central)-1 .V/s.. NRA Iron and Steel (P.) Ltd., (supra), was in the facts of that case and would have no application to the present case.

17. The Bombay High Court in case of The Commissioner of Income Tax-1, Mumbai .V/s.. M/s. Nikunj Eximp Enterprises Pvt. Ltd., (supra), has in a similar case, where the assessee produced his books of accounts, copies of

invoices for purchases, and copies of bank statements indicating that purchases were made, has held as under :

“We have considered the submission on behalf of the revenue. However, from the order of the Tribunal dated 30.04.2010, 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 Accounts 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 CIT(A), one cannot conclude that the purchases were not made by the respondent-assessee. The Assessing Officer as well as CIT(A) 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 30.04.2010 of the Tribunal.”

18. The Appellate Tribunal was right in applying the ratio of the judgment in The Commissioner of Income Tax-1, Mumbai .V/s.. M/s. Nikunj Eximp Enterprises Pvt. Ltd.,

(supra), to the facts of the present case. There are concurrent findings arrived at by the Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal, on the fact that the Respondent had satisfactorily discharged the initial burden of proving the genuineness of the transactions.

19. In that view, we are of the considered opinion that this is not a fit case for consideration in appeal as the substantial questions of law proposed by the revenue would not arise. Therefore, the appeal is dismissed with no order as to costs.

(VALMIKI SA MENEZES, J.) (DHIRAJ SINGH THAKUR, J.)

TAMBE.