



ITA Nos.6577-6578 & 6849- 6850/M/2014  
Toscano Infrastructure Private Limited  
Assessment Years : 2009-10 & 2010-11

**आयकर अपीलीय अधिकरण “ई” न्यायपीठ मुंबई में**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“E” BENCH, MUMBAI**

श्री शक्तिजीत दे, न्यायिक सदस्य एवं  
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।

**BEFORE SHRI SAKTIJIT DEY, JM AND  
SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./I.T.A. Nos. 6577 & 6578/Mum/2014  
(निर्धारण वर्ष / Assessment Years: 2009-10 & 2010-11)

<b>Toscano Infrastructure Private Limited</b> Ground floor, Ashar I.T. Park Road No. 16Z Wagle Industrial Estate Near Agricultural Bus stop Thane(W) – 400 604	<b>बनाम/ Vs.</b>	<b>Deputy Commissioner of Income Tax 10(3)</b> Room No. 451 Aaykar Bhawan M.K.Road Mumbai -400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. <b>AACCT-7263-P</b>		
(पीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

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आयकर अपील सं./I.T.A. Nos. 6849 & 6850/Mum/2014  
(निर्धारण वर्ष / Assessment Years: 2009-10 & 2010-11)

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(पीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)



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□ पीलार्थी की ओर से / <b>Appellant by</b>	:	Dr. K.Shivram & Shri Rahul Hakani, Ld. ARs
प्रत्यर्थी की ओर से/ <b>Respondent by</b>	:	Dr. A.K.Nayak, Ld. DR

सुनवाई की तारीख / <b>Date of Hearing</b>	:	24/04/2017
घोषणा की तारीख / <b>Date of Pronouncement</b>	:	02 /05/2017

### आदेश / ORDER

#### Per Manoj Kumar Aggarwal (Accountant Member)

1. The captioned appeals by assessee as well as by revenue for Assessment Years [AY] 2009-10 & 2010-11 assails common order of Ld. Commissioner of Income Tax (Appeals)-22 [CIT(A)], Mumbai dated 18/08/2014. Since the issues springs out of common sets of facts, we dispose-off all the appeals by way of this common order for the sake of convenience and brevity. First we take up assessee's appeal ITA No. 6577/Mum/2014 & Revenue's Appeal ITA No. 6850/M/14 for AY 2009-10 *qua* confirmation of addition to the extent of 20% on alleged *bogus purchases*.

2. Briefly stated, the assessee, being resident corporate assessee, was subjected to an assessment u/s 143(3) *read with section 147* of the Income Tax Act, 1961 vide Assessing Officer [AO] order dated 18/11/2013 wherein the total income of the assessee was determined at Rs.10,09,83,380/- under normal provisions after addition of certain *bogus purchases* for Rs.6,72,98,528/- as against income of Rs.3,36,84,850/- determined in the original assessment u/s 143(3)(iii) dated 25/12/2011. The assessee had filed its return of income on 30/09/2009 declaring total income of Rs.3,30,14,320/-. The assessee was engaged as *civil and labour contractors* during the impugned AY. The reassessment proceedings were initiated consequent to a



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survey action upon the assessee on 23/11/2012 where the assessee was found to have indulged in procuring certain *bogus purchase bills* without taking actual delivery of material. The assessee was found to have made purchases from following parties who were listed as *hawala dealers* as per information received from the Sales Tax Department:-

<b>No.</b>	<b>Name of the Dealer</b>	<b>TIN No.</b>	<b>Amount (Rs.)</b>
1.	Centurian Sales Corporation	27530623900V	43,69,207/-
2.	Atlas Enterprises	27710363744V	46,528/-
3.	Cosmos Enterprises	27490290339V	56,871/-
4.	U.V.Distributors Pvt. Ltd.	27450611043V	5,38,670/-
5.	Om Corporation	27310540795V	20,856/-
6.	Saican Mercantile Pvt. Ltd.	27290614817V	2,93,69,074/-
7.	Subhlabh Metal and Alloys Pvt Ltd.	27940590646V	3,28,97,322/-
		<b>Total</b>	<b>6,72,98,528/-</b>

During Survey operations, a statement u/s 133A was recorded from the MD of the assessee company which was retracted later on. The assessee denied having indulged in any such *bogus purchases* and contested the addition made with respect to bogus purchases. However, upon perusal of survey report and contentions raised by the assessee, AO noted that the assessee failed to establish the actual delivery of goods as no delivery challans, stock register, transportation bills etc. were available / produced either at the time of survey operations as well as during scrutiny assessment proceedings and hence the assessee failed to discharge the onus of proving the purchases made by him. Further, the assessee could not furnish any evidence to controvert the declaration and disclosure made during the course of survey proceedings which led the AO to make impugned additions.

3. Aggrieved, the assessee contested the same before Ld. CIT(A) with partial success vide order dated 18/08/2014 where it raised similar pleas and contended that the assessee being civil contractors, could not have carried out its business without actual delivery of goods and therefore, the purchases



were genuine particularly when the assessee was mainly working on government projects. The assessee produced *paper-book* containing details of projects undertaken by the assessee during the year along with details of purchase and consumption of steel in those projects. The assessee could also produce copies of delivery challans / details of delivery / lorry number etc. with respect to few parties only which led Ld. CIT (A) to conclude that the assessee failed to establish the actual delivery of goods conclusively. Thereafter, considering various judicial pronouncements on the subject, the Ld. CIT(A) restricted the disallowance to 20% of alleged *bogus purchases* which came to Rs.1,34,59,705/-. Still aggrieved, the assessee is in appeal before us. The revenue is in appeal against relief provided by the Ld. CIT(A).

4. The Ld. Counsel for assessee, *Dr. K.Shivram*, while drawing our attention to voluminous documents placed in the *paper- book*, contended that the assessee worked as contractor / sub-contractor mainly for government projects where the work of the assessee was scrutinized at various levels and further such a huge magnitude of work could not have been accomplished by the assessee without consumption of raw material. The assessee purchased mainly steel from the alleged bogus suppliers, which was a key raw material to undertake such projects. Moreover, the assessee was in possession of all purchase invoices etc. and the payments to alleged bogus suppliers were through banking channels and hence, the purchases could not be doubted. *Per contra*, the Ld. DR contended that adequate relief has already been provided by Ld. CIT(A) to the assessee and therefore, no further relief could be granted to the assessee on the facts of the case. The assessee produced additional evidences before Ld. CIT(A) which were never subjected to AO's scrutiny. Further, the onus to substantiate the purchase squarely lied on the assessee and the assessee has failed to discharge the primary onus of



proving the purchases conclusively as no evidences could be provided by him to substantiate actual delivery of goods despite making voluminous purchases from the *bogus* suppliers.

5. We have heard the rival contentions and perused the relevant material on record. A perusal of various documents placed in the *paper-book* reveals that although the assessee was in possession of purchase invoices but these invoices were incomplete with respect to details of transportation etc. The assessee had purchased bulky item like steel from these suppliers, the delivery of which required elaborate transportation and the assessee was expected to prove the actual delivery of material with transportation details, transport/GR receipts, Stock inward register etc. On the other hand, no concrete efforts has been made by revenue to establish the purchases as non-genuine beyond doubt by obtaining confirmatory letters etc. from the alleged bogus suppliers. *Prima facie*, it appears that the addition has been made solely on the basis of information received from the Sales Tax department and statement made u/s 133A by the MD of assessee company during survey operations. Therefore, we find lapses on both the sides. The Tribunal, invariably, in all such cases, have taken a stand that even if presuming that all purchases were bogus, entire addition thereof was not warranted for particularly when the sales were not in dispute and the accounts of the assessee were audited and the assessee provided quantitative details to a reasonable extent and the addition, if any, which has to be made in all such cases is to account for profit element embedded in such purchase transactions. Therefore, after due discussion with both the representative, we estimate the addition @12.5% of bogus purchases of Rs.6,72,98,528/- which comes to Rs.84,12,316/-. Hence, addition to that



extent is confirmed. Consequently, the assessee's appeal stands partly allowed whereas the revenue's appeal stands dismissed.

6. Now, we take up Assessee's Appeal ITA No.6578/M/2014 and Revenue's appeal ITA No.6849/M/14 for AY 2010-2011.

7. The revenue's appeal and Ground Nos. 1 to 4 of assessee's appeal related to addition with respect to bogus purchases. The assessee, in similar manner, suffered similar addition of bogus purchases for Rs.2,01,71,071/- in an assessment u/s 143(3) vide AO order dated 12/03/2013 which was contested before Ld. CIT(A) where the assessee got partial relief as the addition was restricted to 20%. The revenue has assailed the relief provided by the Ld. CIT(A) whereas the assessee has assailed the addition confirmed by the Ld. CIT(A).

8. As we have already decided the issue in AY 2009-10 and partly allowed the appeal of the assessee by restricting the addition to 12.5%, there being no major change in facts or circumstances except for figures etc., taking the same stand, we restrict the impugned additions to 12.5% of Rs.2,01,71,071/- which comes to Rs.25,21,384/-. Hence, the revenue's appeal stands dismissed whereas Ground Nos. 1 to 4 of assessee's appeal stands partly allowed.

9. The assessee, in ground No. 5 to 6 has further contested another addition on account of Service Tax Liability u/s 43B for Rs.51,74,066/-. Facts *qua* this addition are that during assessment proceedings, it was noted that the assessee reflected outstanding Service Tax Liability aggregating to Rs.51,74,066/- in his Balance Sheet under the head liabilities but since the same remained unpaid by the assessee, the same attracted disallowance u/s 43B. The assessee contended that since the amount was not collected from the customers, the liability to pay the same did not arise in terms of Rule 6 of



the Service Tax Rules. Further, the assessee never debited /routed the same through Profit & Loss account and therefore never claimed deduction thereof and hence, no such disallowance could be made. However, upon perusal of sub contract agreement entered into by the assessee with its customers, it was noticed that the payment of Service Tax was the liability of the assessee and as the same was not deposited before the due date of filing the return of income, the addition thereof was made in the assessment invoking the provisions of Section 43B. The same was contested before Ld. CIT(A) where the assessee relied upon certain judicial pronouncements and contended that the liability to pay service tax arose only upon receipt of payment from the clients. After appreciating the various contentions and case laws, the Ld. CIT(A) partly allowed the claim of the assessee by directing the AO to verify the amount of Service Tax collected by the assessee and disallow that portion which was collected but not paid. Aggrieved, the assessee is in appeal before us.

10. The Ld. AR has raised similar contentions before us and contended that the assessee maintained separate account of Service Tax wherein the service tax collected was credited thereby showing payable and the service tax paid on material etc. for set off is debited in the same ledger account and the net difference of two is shown as payable in the Balance Sheet. Further, the service tax payable was never debited / routed through Profit & Loss Account and the assessee never claimed deduction thereof and hence, Section 43B had no application. It was further contended that as per service tax rules, the liability to pay service tax arose only upon receipt of respective payments from the clients and hence the provisions of Section 43B were not applicable to the same. Reliance has been placed on the judgment of Hon'ble Delhi High Court in *CIT Vs. Noble & Hewitt (I) Pvt. Ltd. [2008 305 ITR 324]*



which was followed by Mumbai Tribunal in *Pharma Search Vs. ACIT [53 SOT 1]*.

11. Per *Contra*, Ld. DR contended that the assessee could follow either inclusive method or exclusive method of accounting and the assessee followed exclusive method under which the service tax liability was not routed through Profit & Loss Account and directly reflected in the Balance Sheet. Nevertheless, the assessee got the deduction thereof indirectly by not crediting the amount of Service Tax to the Profit & Loss Account. Our attention has been drawn to the provisions of Section 145A to contend that the receipts of assessee were to include the service tax portion and the deduction thereof could be provided only in terms of Section 43B upon actual payment of the same. Our attention was further drawn to explanation-2 to Section 43B to contend that as per this explanation, any sum payable means a sum for which the assessee incurred liability in the previous year even though such sum might not have been payable within that year under the relevant law. Therefore, the assessee incurred the liability during impugned AY which, in fact, may not be payable under the relevant service tax rules and therefore, Section 43B was rightly invoked. Reliance was placed on the judgment of Apex court in *Chowringhee Sales Bureau P. Ltd. [1977 110 ITR 385]*

12. We have heard the rival contentions and perused the relevant material on record. First of all, we find that Section 145A has no application to the issue under dispute as this section deals only with valuation of purchase and sale of goods and no application in service contracts. It is also not in dispute that the assessee followed exclusive method of accounting and credited the Profit & Loss account only with net amount of services rendered excluding service tax. Further, as per the service tax rules, as they stood at relevant





time, the assessee was liable to pay service tax only upon actual realization of services rendered against that liability and not on accrual basis. Therefore, we find although the service tax liability may have been shown as outstanding at year end, yet the same may not have become actually payable as per Service Tax Rules. At this juncture, the view taken by Mumbai Tribunal in *Pharma Search Vs. ACIT [supra]* becomes relevant where the Tribunal after considering the judgment of Hon'ble Delhi High Court in *CIT Vs. Noble & Hewitt (I)(P) Ltd. [2008 305 ITR 324]* & Chennai Tribunal in *ACIT Vs. Real Image Media Technologies P. Ltd. [2008 114 ITD 573]* coupled with apex court judgment in *Chowringhee Sales Bureau P. Ltd. [1977 110 ITR 385]* held that the rigor of Section 43B could not be applied in case no service tax was payable by the assessee as per relevant service tax rules. Further, Hon'ble Jurisdictional Bombay High court in *CIT Vs. Ovira Logistics Private Limited [ITA No. 1023 of 2013 17/04/2015]* dealing with the same issue has made similar observations:-

*"9] Having perused the aforesaid decisions, we are clearly of the view that Section 43B does not contemplate liability to pay service tax before actual receipt of the funds in the account of the assessee. In our view, liability to pay service tax into the treasury will arise only upon the assessee receiving the funds and not otherwise. Accordingly, when services are rendered, the liability to pay service tax in respect of the consideration payable will arise only upon the receipt of such consideration and not otherwise.*

*10]In the facts and circumstances of the case, we are of the view that no substantial question of law arises. Accordingly, the appeal has no merits and the same is dismissed. There will be no order as to costs."*

Respectfully following the jurisdictional High Court, we also held that rigor of Section 43B do not apply in case the liability to pay service tax did not arise as per the relevant Service Tax Rules notwithstanding the fact that the same was shown as outstanding in the books of accounts and remained unpaid. Therefore, in principle, we agree with the contentions of the Ld. AR and therefore, deem it fit to restore the matter back to the file of Ld. AO for limited



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purpose of verification of the fact that the service tax liability shown as outstanding at year end and remaining unpaid was actually not payable as per service tax rules. If so, the impugned additions shall stand deleted. The assessee is also directed to supply necessary documents / information to substantiate this fact failing which the Ld. AO shall be at liberty to dispose-off the matter on the basis of material available on record. The grounds of assessee's appeal stands allowed for statistical purposes.

13. In nutshell, both the appeals filed by revenue stands dismissed whereas both the appeals filed by assessee stands partly allowed.

*Order pronounced in the open court on 02<sup>nd</sup> May, 2017.*

Sd/-  
(Saktijit Dey)

न्यायिक सदस्य / **Judicial Member**

मुंबई Mumbai; दिनांक Dated : 02.05.2017

Sr.PS:- Thirumalesh

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

**आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order forwarded to :**

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

**आदेशानुसार/ BY ORDER,**

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