

आयकर अपीलीय अधिकरण “E” न्यायपीठ मुंबई में।

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

**BEFORE SHRI JOGINDER SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 5013/Mum/2016

(निर्धारण वर्ष / Assessment Year : 2011-12)

Income Tax Officer- wd 7(2)(4), Room No. 807, 8 TH floor, Pratishtha Bhavan, M.K. Road, Mumbai - 400 020.	<u>बनाम/</u> v.	M/s Naik Environmental Engineering P. Ltd., Shirinabad, 58, JameJamshed Road, Matunga, Mumbai - 400 019.
स्थायी लेखा सं./PAN : AAACN1338D		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by :	Shri V Justin
Assessee by :	None

सुनवाई की तारीख /**Date of Hearing** : 08.08.2017

घोषणा की तारीख /**Date of Pronouncement** : 16-08-2017

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the Revenue, being ITA No. 5013/Mum/2016, is directed against the appellate order dated 31st May, 2016 passed by learned Commissioner of Income Tax (Appeals)- 13, Mumbai (hereinafter called “the CIT(A)”), for assessment year 2011-12, appellate proceedings before learned CIT(A) arising from the assessment order dated 27-03-2014 passed by learned Assessing Officer (hereinafter called “the AO”) u/s 143(3) of the Income-tax Act, 1961 (hereinafter called “the Act”).

2. The grounds of appeal raised by the Revenue in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

"1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred by not verifying and examining whether quantity of alleged bogus purchases made and their corresponding sales is accounted in the books of accounts. During the assessment proceedings the assessee failed to establish the facts and discharge his onus. In this case the purchases were entirely bogus where the parties were not traceable and not substantiated by the assessee during the assessment proceedings. Further the assessee also failed to establish the genuineness of the alleged parties.

2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in granting relief by merely relying on the submission made by the assessee regarding average G.P. of five years A. Y. 2006-07 to 2010-11 at the rate of 17.6% and directed to take as profit at the rate of 17.6% of total alleged bogus purchase without establishing the quantitative direct relation with alleged bogus purchases and corresponding sale.

3. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in applying the judgement of the Hon'ble Gujarat High Court in the case of CIT Vs Simit P Sheth reported in 356 ITR 451 to this case when the business of the assessee, the evidence produced by the assessee and the quantitative details produced in both cases are different.

4. On the facts and in the circumstances of the case and in law, the Id. CIT(A) completely ignored the decision of Hon'ble Gujarat High Court in the case relied upon that if the entire purchase were wholly bogus the entire amount of such bogus purchase should be added back to the income of the assessee."

3. The brief facts of the case are that assessee company is manufacturer of engineering goods. During the course of assessment proceedings u/s 143(3) r.w.s. 143(2) of the 1961 Act, information was received by the AO from DGIT (Inv.) Mumbai regarding bogus purchases as informed by the Sales Tax

Department , in which the assessee company appeared as one of the beneficiaries for the transaction of Rs.82,54,793/- with the alleged entry operators, the details of which are as under:-

Sr No	Name of the party	PAN	TIN	F.Y.	Amount involved(Rs)
1	Somnath International	AISPG1601K	27470616755V	2019-11	1,60,538
2	M R Corporation	BFLPS4883N	27710551730V	2010-11	4,36,255
3	Viva Trading Pvt. Ltd.	AADCV3609A	27040801631V	2010-11	22,50,000
4	Pluto Multitrade P. Ltd.	AAFCP5947B	2792079455IV	2010-11	54,08,000
				Total	82,54,793

The assessee had submitted list of purchase vouchers, gross total of purchase material, VAT, forwarding charges, freight charges, transport charges and excise inputs etc., list of sales vouchers , bank reconciliation statement etc. The assessee was asked by the A.O. to furnish the quantitative details like opening stock, purchases, consumption and closing stock of raw material and the production of each of finished goods in case of manufacturing concern, documents related to transportation, receipt of goods in connection with the purchase and sale etc.. However, the A.O. observed that the assessee had not given proper details in response to the questionnaire issued by the AO seeking above details.

The A.O. issued notices u/s 133(6) of the Act to all the above four parties asking confirmation about the transaction with assessee along with copy of their ledger account, copy of income-tax return, copies of bank statements , but the notices returned back unserved with the remark by the postal authorities “not known/left”.

Under these circumstance, the A.O. issued notice u/s 142(1) of the Act to the assessee informing that notices issued to the aforesaid four parties from whom the assessee has allegedly purchased material has returned unserved and asking assessee to prove genuineness of the purchases , identification of the suppliers and justification of the transaction and credit worthiness of the parties.

However, the A.O. observed that the assessee could not prove the genuineness of the purchases from the said above four parties and these parties have provided accommodation entries to the assessee by issuing bogus bills without supplying any material. The notices issued to the said parties u/s 133(6) of the 1961 Act has returned unserved. The AO observed that onus of proving genuineness of the purchase transaction is on the assessee as the said purchases to the tune of Rs.82,54,793/- stood debited in Profit and Loss Account of the assessee, which onus the assessee failed to discharge that said purchases were genuine . The AO held that transaction of purchase of material to the tune of Rs. 82,54,793/- from these four parties are nothing but a colorable devices using forged and fabricated bills for the purposes of evasion of income-tax. The A.O. made addition of entire alleged bogus purchases from the aforestated four parties to the tune of Rs. 82,54,793/- to the income of the assessee u/s 69C of the Act, vide assessment order dated 27-03-2014 passed by the AO u/s 143(3) of the 1961 Act.

4. Aggrieved by the assessment order dated 27-03-2014 passed by the A.O. u/s 143(3) of the 1961 Act, the assessee carried the matter in appeal before the ld. CIT(A), who after considering the submission of the assessee held as under:-

“ I have carefully considered the AO's order as well as the AR's submissions. According to the AO, the entire bogus purchases amounting to Rs. 82.54 lakhs ought to be added back as the four parties concerned had confessed to the Sales Tax Department that they had indulged in bogus sales. Further, all the four notices issued under section 133(6) of the Act also have been returned back unserved as these parties were not available at the respective addresses. On the other hand, the AR has pointed out that the AO has not disturbed the sales emanating from these allegedly bogus purchases. Accordingly, the AR has proposed that only the GP should be added back and not the entire quantum of the alleged bogus purchases. Coming to the issue of GP, the AR has furnished copies of the audited accounts for the preceding five assessment years viz. AYs 2006-07 to 2010-11. The GP ratios of these years have been worked out as follows - 27.98% (AY 2006-07), 18.36% (AY 2007-08), 16.14% (AY 2008-09), 12.98% (AY 2009-10) and 12.56% (AY 2010-11). The average GP of these five years works out to 17.6% which according to the AR should be the basis for making the addition.

5.1 While dealing with a similar issue, the Hon'ble Gujarat High Court in the case of CIT v. Simit P. Sheth (356 ITR 451) had endorsed the stand of the CIT(A) who held that when all the sales have been accepted by the AO, he could not possibly question the very basis of their purchases. The Hon'ble High Court had accordingly held that the only element worthy of addition in such a case would be the element of profit and not the purchases. In the instant case, it is seen that the appellant has come forward with a request that it may be charged to tax only to the extent of the addition arising on account of the profit made out of such alleged bogus purchases. It is seen that the average GP of the last five assessment years comes to 17.6% . After careful consideration of all the aspects of this case, I feel that the appellant's plea is a fair one. Accordingly the AO is directed to add only the GP arising out of these allegedly bogus purchases of Rs. 82,54,793/- , the GP rate in this case having been determined at 17.6%.

5.2 Coming to the sole ground of appeal which is seen to deal with this very same addition made on account of the allegedly bogus purchases as above , relief has already been given to the appellant as decided in the preceding sub-paragraphs.

Ground no. 1 is accordingly taken to have been partly allowed.”

The ld. CIT(A) observed that the average GP of the last five assessment years comes to 17.6% and the learned CIT(A) directed the A.O. to adopt GP ratio of 17.6% for this year too, vide appellate order 31-05-2016 passed by learned CIT(A).

5. Aggrieved by the appellate order dated 31-05-2016 passed by the ld. CIT(A), the Revenue is in appeal before the Tribunal.

6. None appeared on behalf of the assessee, hence, we proceed to dispose of this appeal after hearing the ld. D.R. and material available on record.

7. The ld. DR submitted that the assessee company is a manufacturer of engineering goods. It is submitted that the assessee has not proved the consumption/utilization of material allegedly purchased from these four hawala entry providers who have merely issued bogus bills without supplying material, for production of finished goods. The learned DR submitted that learned CITA(A) erred in applying GP ratio to these alleged bogus purchases in the absence of the assessee proving consumption/ utilization of the material for producing finished goods. It is submitted by learned DR that the assessee failed to prove genuineness of these alleged purchase transactions from hawala entry providers. Under these circumstances the learned DR submitted that the matter needs to be set aside and restored to the file of the A.O. for re-determination of the issue after verifying the consumption/utilization of the material for manufacturing of finished goods.

8. We have considered rival contentions and also perused the material available on record. We have observed that the assessee company is manufacturer of engineering goods. Information was received by the AO from DGIT (Inv.) Mumbai regarding bogus purchases as informed by the Sales Tax Department in which the assessee company appeared as one of the

beneficiaries for the transaction of Rs.82,54,793/- through bogus purchases from hawala entry operators who are engaged in providing accommodation entries by issuing bogus bills without supplying any material, the details of which are as under:-

Sr No	Name of the party	PAN	TIN	F.Y.	Amount involved(Rs)
1	Somnath International	AISPG1601K	27470616755V	2019-11	1,60,538
2	M R Corporation	BFLPS4883N	27710551730V	2010-11	4,36,255
3	Viva Trading Pvt. Ltd.	AADCV3609A	27040801631V	2010-11	22,50,000
4	Pluto Multitrade P. Ltd.	AAFCP5947B	2792079455IV	2010-11	54,08,000
				Total	82,54,793

Notice u/s 133(6) of the Act were issued by the A.O. to all the above four parties but the notices returned back unserved with the remark by the postal authorities "not known/left". The assessee also could not produce the parties before the A.O. nor proper replies were submitted before the AO. It is observed that assessee company is a manufacturer of engineering goods and the assessee could not prove that the material so purchased from these alleged hawala entry operators has been utilized/consumed for manufacturing of the engineering goods as well the assessee could not prove genuineness of the purchase transactions. In the absence of utilization/consumption of the material so purchased from these alleged entry providers being proved for manufacturing of finished goods, there is always possibility of manipulations to suppress profits and evade taxes and hence it is critical for the assessee to prove utilization/consumption of these material so purchased for manufacturing of finished goods dealt with by the assessee. In our considered view keeping in view factual matrix of the case and in the

interest of justice to both the parties, the matter needs to be set aside and restored to file of A.O. for denovo determination of this issue by the AO on merits in accordance with law and the assessee is hereby directed to prove the consumption/utilization of the material so purchased from these alleged entry providers for manufacture of the engineering goods so dealt with by the assessee with cogent evidences before the A.O. including production of excise records concerning stocks and also to prove that these purchases to the tune of Rs.82,54,793/- from these alleged entry operators were genuine . The AO shall admit all relevant evidences /material filed by the assessee in de-novo proceedings before adjudicating this issue on merits in accordance with law. The A.O. shall provide sufficient opportunity of being heard to the assessee in accordance with principles of natural justice in accordance with law in set aside proceedings. At this stage we are reminded of the recent decision of Hon'ble Supreme Court in the case of N. K. Proteins Ltd. v. DCIT (2017-TIOL-23-SC-IT). We order accordingly.

9. In the result, appeal of the Revenue in ITA No. 5013/Mum/2016 for A.Y. 2011-12 is allowed for statistical purpose.

Order pronounced in the open court on 16th August 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक: 16-08-2017 को की गई ।

Sd/-
(JOGINDER SINGH)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 16.08.2017

व.नि.स./ R.K., Ex. 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, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "E" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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

	Draft dictated on	08.08.2017	Sr PS
2	Draft placed before Author on	09-08-2017	Sr PS
3	Draft proposed & Place before the 2 nd member		JM/AM
4	Draft discussed/approved by 2 nd Member		JM/AM
5	Approved draft comes to the Sr PS		Sr.PS
6	Kept for pronouncement on		Sr PS
7	File sent to the Bench Clerk		Sr PS
8	Date on which file goes to the Head Clerk		
9	Date on which file goes to the AR		
10	Date of dispatch		Sr PS