

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

Before Shri P K Bansal, Vice President &
Shri Pawan Singh, Judicial Member

ITA No. 5174/Mum/2015
Assessment Year : 2011-12

ACIT 27(3) Navi Mumbai	Vs.	Skylark Builders SSJC (Ghatkopar) Shop No.1A, Shiv Shakti Heights Pant Nagar, Behind Popular Hotel Ghatkopar (E) Mumbai 400 077 PAN AAYFS7231F
(Appellant)		(Respondent)

Appellant By : Shri Ram Tiwari
Respondent By : Shri M Subramanian

Date of Hearing : 02.08.2017	Date of Pronouncement : 08.08.2017
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ORDER

Per P K Bansal, Vice-President:

This appeal has been filed by the Revenue against the order of the CIT(A)-25, Mumbai, dated 10.08.2015, for A.Y.2011-12. The only issue involved in this appeal relates to the deletion of addition of ₹ 2,47,62,454/- by the CIT(A) on account of bogus purchases without appreciating the fact that the documents furnished in the shape of purchase bills, payment made by account payee cheques etc., only superficially supports the assessee's claim contrary to primary evidences as borne out by the Assessing Officer in his order.

2. We have heard the rival submissions and carefully considered the same along with the orders of the authorities below. We noted that the assessee is a partnership firm carrying on business of construction of building. During the impugned assessment year, the assessee incurred various expenses including purchases of building material in question. The return showing income of ₹55,49,670/- was filed on 30.09.2011. While framing assessment, the Assessing Officer noted that the assessee had made purchases for building material from unregistered dealers in addition to the purchases from registered dealers. There were ten unregistered dealers and the purchases made were amounting to ₹ 2,47,62,454/-. The assessee furnished copies of purchase bills, which bears details of description of material, quantity/measurement of material, rate/unit and net purchase amount along with the ledger accounts of the parties. The assessee further stated that these parties had delivered material, which was received by it at its site situated at Sai Janata Colony, Patel Chowk, Ghatkopar (E). The assessee further stated that payment to these parties invariably was made by account payee cheques. The Assessing Officer issued notices u/s. 133(6) to these unregistered parties but did not receive any response. Ultimately, few of the parties, as stated by the Assessing Officer, filed replies to the notices u/s. 133(6) on 21.03.2014. The Assessing Officer noted that none of the parties were filing income tax return, copy of PAN card was submitted, each of the

parties estimated net profit u/s 44AF @5% on sale for the year and income was below the maximum amount chargeable to tax and none of them submitted their bank statements. Since the compliance of notice was partial, the Assessing Officer treated each of the purchases made by the assessee to be bogus one and on the basis of probability relying on the decision of Sumati Dayal v CIT [214 ITR 801], made addition of ₹ 2,47,62,454/-. When the matter went before the CIT(A), the CIT(A) deleted the addition observing as under:

"2.5 I have carefully considered the submissions of the appellant. It is seen that that A.O has not gone beyond issuing notices u/s. 133(6). There has been no attempt to find out whether the appellant had made the purchases of materials which were required for the construction of the building. If the A.O. had analyzed and tried to ascertain whether the materials were in fact required for making the construction as was claimed, perhaps it would have been possible to know whether the materials were in fact procured. The A.O has also not doubted the veracity of the claim of purchases or has not pointed out any defect in the books and had not rejected the books of accounts. In a situation like this it may not be appropriate to disallow purchases only on the basis of the non response to the notice u/s. 133(6). The jurisdictional High Court in the case of Nikunj Eximp Enterprises P. Ltd. [372 ITR 619] has held that merely because the suppliers have not appeared before the A.O or the CIT(A), one cannot conclude that the purchases were not made by the respondent assessee. The Hon'ble High Court has also noted the observations of the Tribunal that the books of accounts of the appellant had not been rejected, the sales had not been doubted before the purchases were disallowed. In this appeal the facts are similar. Disallowance has been made only on the basis that the parties to whom the notice u/s. 133(6) were issued, had not responded. As has already noted herein before, the A.O had not done anything further to ascertain whether the materials in

question were procured and whether these were in fact utilized. Respectfully following the ratio of the decision of the jurisdictional High Court I hold that the disallowance, as has been made by the A.O is not in order and therefore the addition made by disallowing the purchases is deleted."

3. The learned DR even though vehemently relied on the order of the Assessing Officer as well as the decision of the Hon'ble Supreme Court in the case of Sumati Dayal vs. CIT (supra), he could not produce any evidence to support his contention that the purchases made by the assessee were bogus.

4. In our view, no addition can be made on the basis of probability. It is not a case where the assessee was not engaged in business. Facts in the case of Sumati Dayal vs. CIT (supra) were entirely different. The lady was not engaged in any business and had shown income from lottery, therefore, the Hon'ble Supreme Court had upheld the addition after taking into consideration the surrounding circumstances and applying the test of human probability. In view of the decision of Hon'ble Supreme Court in the case of CIT vs. Daulat Ram Rawatmull 87 ITR 349, when the onus is on the party, who alleges that the apparent is not real. In this case, we noted that the Assessing Officer treated the purchases made to be bogus, merely on the basis that some of the parties did not reply to the notice issued u/s. 133(6). The Hon'ble Jurisdictional High Court as relied upon by the learned AR, we noted in the case of Nikunj Exim Enterprises Pvt. Ltd. 372 ITR 619, has held that merely because the suppliers had not appeared before the Assessing

Officer or the Commissioner (Appeals), one could not conclude that the purchases were not made by the assessee. This is a case where books of account of the assessee have been rejected and the Assessing Officer has not brought on record anything, which may prove that the evidences submitted by the assessee were bogus.

5. In view of this fact, we do not find any infirmity or illegality in the order of the CIT(A). We, therefore, confirm the order of the CIT(A).

6. In the result, the appeal of the Revenue stands dismissed.

Order pronounced in the open court on 8th day of August, 2017.

Sd/-

(Pawan Singh)

JUDICIAL MEMBER

Mumbai; Dated: 8th August, 2017

SA

Sd/-

(P K Bansal)

VICE-PRESIDENT

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai
4. The CIT
5. DR, 'E' Bench, ITAT, Mumbai

BY ORDER,

#True Copy #

Assistant Registrar
Income Tax Appellate Tribunal, Mumbai