

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद /

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD - BENCH 'C'**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./ **ITA No.93/Ahd/2016**

*निर्धारण वर्ष/***Asstt. Year: 2010-2011**

AND

आयकर अपील सं./ **ITA No.814/Ahd/2016**

*निर्धारण वर्ष/***Asstt. Year: 2010-2011**

Ganesh Industries 157, Pindara Village Gandhinagar. PAN : AAIFK 1646 G	Vs.	ITO, Ward-2 Gandhiangar.
---	-----	-----------------------------

<i>अपीलार्थी/</i> (Appellant)	<i>प्रत्यर्थी/</i> (Respondent)
-------------------------------	---------------------------------

Assessee by :	Shri Tushar P. Hemani, AR
Revenue by :	Shri Lalit P. Jain, Sr.DR

*सुनवाई की तारीख/*Date of Hearing : 18/09/2018

*घोषणा की तारीख/*Date of Pronouncement: 10/10/2018

आदेश/ORDER

PER RAJPAL YADAV, JUDICIAL MEMBER:

ITA No.93/Ahd/2016 is directed against order of the Id.CIT(A), Gandhinagar, Ahmedabad vide which the Id.CIT(A) has dismissed appeal of the assessee and further enhanced the income. ITA No.814/Ahd/2016 is against order of the Id.CIT(A) vide which the Id.CIT(A) has imposed penalty of Rs.70,72,217/- under section 271(1)(c) of the Income Tax Act, 1961 on the addition made by enhancing the income at his end.

2. First we take quantum appeal: Though the assessee has taken six grounds of appeal, but its grievance relates to disallowance of expenses debited towards purchases amounting to Rs.2,08,06,760/- and Rs.3,15,000/-.

3. Brief facts of the case are that the assessee at the relevant time was engaged in the business of manufacture of ceramic glaze mixture. It has filed its return of income on 8.9.2010 declaring total income of Rs.7,89,630/-. The case of the assessee was selected for scrutiny assessment and notice under section 143(2) was issued and served upon the assessee. On scrutiny of the accounts, the Id.AO found outstanding liability as on 31.3.2010 against three entities from which purchases were made. He noticed such details as under:

<i>Sr. No.</i>	<i>Name of the Party</i>	<i>Purchases in Rs.</i>	<i>Outstanding liability in Rs.</i>
1.	Maharaja Mineral & Traders	Rs.81,14,080/-	Rs.61,39,449/-
2.	Balaji Grinding Mills	Rs.44,89,680/-	Rs.40,71,680/-
3.	Natural Traders	Rs.82,03,000/-	Rs.77,85,000/-

4. The Id.AO, thereafter issued notice to all these concerns as well as to the assessee and called for various details. After detailed inquiry, he disallowed certain payments made to these parties with the help of section 40A(3). This section contemplates that payments made to a party at a time exceed Rs.20,000/- in cash would not be allowable as deduction. In this way, the Id.AO has made addition of Rs.28,01,631/-. The Id.AO has determined the taxable income of the assessee at Rs.39,87,513/- as against returned income at Rs.7,89,630/-. The Id.AO has also disallowed a sum of Rs.3,15,000/- also.

5. Dissatisfied with these additions, the assessee carried the matter in appeal before the Id.CIT(A). The Id.CIT(A) had issued a notice for enhancement of income. According to the Id.CIT(A) the alleged purchases from three concerns viz. Maharaja Minerals & Traders, Balaji Grinding Mills and Natural Traders are to be treated as bogus. The

Id.CIT(A) made addition of the alleged outstanding liability as well as payment made by the assessee to these concerns. In other words, the purchases made from these concerns were treated as bogus and corresponding purchases cost was disallowed to the assessee. He made addition of Rs.2,08,06,760/-. Similarly, with regard to the addition of Rs.3,15,000/- it was outstanding balance of Ricasil Ceramic Industries P.Ltd. The Id.CIT(A) did not allow of this amount on the ground that no payment has been made by the assessee to this concern, and this concern did not respond to the notice of the AO.

6. Before us, the Id.counsel for the assessee contended that it has made genuine purchases from the above referred three parties and in support of its claim, it has filed following documentary evidence:

<i>Particulars</i>	<i>Pgs of P/B</i>
<i>Purchase ledgers</i>	<i>106-112</i>
<i>Ledgers of concerned three parties</i>	<i>113-117</i>
<i>Purchase bills w.r.t. purchases from concerned parties</i>	<i>118-133</i>
<i>Details w.r.t. purchases viz. name and address of parties, date of purchase, amount and quantity of purchases, etc. and like details for sales as we well</i>	<i>134-154</i>
<i>Quantitative details of stock</i>	<i>154</i>
<i>Tax Audit Report and Annual accounts</i>	<i>82-87, 93-104</i>

7. He Placed on record copy of Hon'ble Gujarat High Court's judgment. On the other hand, the Id.DR relied upon order of the Id.CIT(A). He submitted that the assessee failed to prove genuineness of the purchases, hence, the Id.CIT(A) has rightly disallowed the claim of the assessee.

8. We have duly considered rival submissions and gone through the record carefully. The case of the assessee is that it has made total purchases of Rs.5,31,42,644/-. The details of such purchases have been placed in the profit & loss account at page no.86 of the paper book. The sales disclosed by the assessee have not been disturbed either by the AO or by the Id.CIT(A). In other words, sale target achieved by the assessee have been accepted. The case of the AO while examining purchases was that certain bills made to three concerns were exceeding Rs.20,000/- and those payments were made in cash. Therefore, disallowance under section 40A(3) deserves to be made. He accordingly disallowed a sum of Rs.28,10,631/-. But the Id.CIT(A) harboured a belief that total purchases made from these three concerns deserves to be treated as bogus and a disallowance is to be made. The Id.counsel for the assessee pointed out to us that if these purchases are being treated as bogus, then almost 40% of the purchases would be wiped out from the total purchases, and if that be so, then how the assessee would achieve the sale target accepted by the AO. The GP rate would be increased to a figure which could not be achieved in this line of business. Alternatively, it was submitted that such issues can be baffling the Revenue authorities at different stages and travelled upto the Hon'ble High Court. He placed on record judgment of the Hon'ble Gujarat High Court in the case of CIT Vs. Gujarat Ambuja Export Ltd., Tax Appeal No.840 of 2013 wherein the Tribunal has upheld the addition to the extent of 5% of total purchases which were treated as bogus. In that case purchases were shown to be made from Vishal Traders, but actually someone else made supplies to the assessee. In that circumstance, considering the extra element of profit earned by the assessee an addition to the extent of 5% is made. Revenue was not satisfied on this addition and took the dispute before the Hon'ble High Court. It was contended that atleast 25% of purchases ought to be disallowed because in the past certain cases viz. Sanjay Oilcake Industries Vs. CIT, (2009) 316 ITR 274 (Guj) 25% of

purchases were disallowed to the assessee and addition was made. However, considering the nature of business carried out by the assessee in the case of Gujarat Ambuja, the Hon'ble Gujarat High Court upheld the addition made by the Tribunal at 5% of the total purchases. No doubt, there is discrepancy in the purchases made by the assessee from three parties. The payments were outstanding at close of the accounts substantially, and before us, the Id.counsel for the assessee agreed that if an *adhoc* disallowance of the purchases is being made then the assessee would have no objection. He prayed that such *adhoc* addition should be restricted at 5% of the total purchases made from these concerns. The Id.DR contended that it should not be less than 25%.

9. On due consideration of the above facts and circumstances, we are of the view that the assessee failed to substantiate its purchases with plausible evidence, though it has submitted details, but these are purchase ledgers maintained by the assessee. They demonstrated quantitative details of purchases, details of parties, but confirmation from those parties have not been filed. Hence, purchases from these three parties are to be treated as non-genuine. Element of extra profit earned by the assessee in this exercise deserves to be added in the total income. The dispute can be appreciated with an example viz. an assessee makes purchases from party "A", but obtains bill from party "B". In this exercise it avoids to pay certain local taxes, excise etc. otherwise quantity of sales cannot be achieved if purchases at all are not being made. Thus question is, how much is the extra profit earned by an assessee. At the end of the assessee it was contended that 5% should be estimated, whereas Revenue pleaded that it should not be less than 25%. We have taken into consideration this aspect. We find that on the total turnover including the alleged bogus purchases, the assessee has already shown GP at the rate of 14.27%. If we further estimate 5% to 6% more than the GP on the total turnover including the alleged bogus purchase would be more than 20%. This will meet

ends of justice. Therefore, we direct the AO to calculate net profit at 5% (five percent) on the alleged bogus purchases amounting to Rs.2,08,06,760/- and make addition to the total income of the assessee. As far as disallowance of Rs.3.15 lakhs is concerned, the assessee has submitted complete details. The only reason assigned by the AO is that this concern failed to respond to show cause notice. Considering our above discussion on the purchases made from three parties, we direct the AO to estimate the net profit on the purchases made from these parties also. In other words, he will take 5% of net profit of Rs.3,15,000/- and make addition to the income of the assessee.

10. Now we take penalty appeal. The Id.AO did not impose any penalty upon the assessee, though he made disallowance under section 40A(3) of the Act. However, on appeal, the Id.CIT(A) made enhancement to the income of the assessee by treating the total purchases made from three parties as non-genuine. The Id.CIT(A) initiated penalty proceedings and imposed penalty of Rs.70,72,217/- under section 271(1)(c) of the Act.

11. Before us, the Id.counsel for the assessee contended that identical issue travelled upto the Hon'ble Gujarat High Court in the case of Rameshchandra A Shah Vs. ACIT (Tax appeal no.800 of 2008 copy filed) wherein Hon'ble High Court deleted the penalty by observing that income of the assessee is estimated and no penalty under section 271(1)(c) is imposable. The question framed by the Hon'ble High Court in that case reads as under:

"A) Whether on the facts and circumstances of the case, the Income-tax Appellate Tribunal, was right in law in confirming the penalty under Section 271(1)(c) of the Income-tax Act, 1961 in respect of the addition of Rs.2,09,150/- being 25% of purchases of Rs.8,36,601/-?"

B) Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal, was right in law in upholding the order of CIT(A) to confirm the penalty under Section 271(1)(c) of the Income-tax Act, 1961 in respect of addition of Rs.2,09,150/- sustained in appeal?"

12. Hon'ble High Court thereafter replied to the question as under:

"4. Learned Counsel for the appellant has drawn the attention of this Court to the decision of this Court in the case of Vijay Proteins Ltd. v. Commissioner of taxmann.com 44 (Gujarat) and relevant paragraphs are reproduced as under :-

"Insofar as T.A.No.243/2002 is concerned, the question of law raised therein is already concluded by a decision of this Court rendered in T.A. No.461/2000 & allied matters, as stated herein above. Paras 6 & 6.1 of the said decision are relevant for our purpose, which read thus;

"6. Heard both the parties and gone through the material available on record. In the instant case, we are of the opinion that assessment made is just and proper. The statements made in the affidavits are not based on any record or corroborated with cogent evidence. The presumption raised by the papers which were seized from the custody of the appellant had not been rebutted. Therefore, the issues raised in appeals no. 461 to 464 of 2000 are required to be answered in the affirmative and against the assessee.

6.1 So far as the issue involved in appeals no. 833 to 836 of 2005 is concerned, in view of the decisions cited hereinabove by learned advocate for the appellant we are of the opinion that the penalty has been wrongly imposed under Section 271(1)(c) of the Act. In the case of Krishi Tyre Retreading and Rubber Industries (supra), it has been held that as the addition had been sustained purely on estimate basis and no positive fact or finding had been had been found so as to even make the addition which was a pure guess work, no penalty under section 271(1)(c) of the Act could be said to be leviable on such guess work or estimation. We therefore answer the issue involved in appeals no. 833 to 836 of 2005 in the negative and in favour of the assessee."

18.1 At this juncture, it would be relevant to refer to a decision of the Apex Court in the case of Asst. Commissioner of Income-tax v. Gebilal Kanhaialal, HUF, [2012] 348 ITR 561 (SC) wherein, it has been held that the only condition which was required to be fulfilled for getting the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income up to the date of payment. Clause (2) did not prescribe the time limit within which the assessee should pay tax on income disclosed in the statement u/s.132(4) and thus, the assessee was entitled to immunity under clause (2) of Explanation 5 to section 271(1)(c)."

Learned Counsel for the appellant has also placed reliance on the decision of this Court in the case of Vijay Proteins Ltd. v. Commissioner of Income-tax in Income Tax Reference No.139/1996 with Tax Appeal No.243/2002 wherein the question of law was answered in favour of the assessee and against the Revenue and consequently, the penalty imposed was quashed and set aside.

It is submitted in the facts of present case, the order of penalty also imposed upon the assessee may be dismissed.

5. On the other hand, learned Counsel for the respondent - Department has submitted that in view of the bogus purchases, the order of penalty may be confirmed.

6. We have heard learned Counsel for the respective parties and perused the records of the case. Taking into consideration the order the Tribunal, the evidence which has surfaced on record as well as the decision of this Court in the case of Vijay Proteins Ltd. v. Commissioner of Income-tax (supra), we are of the view that the issues raised in this Appeal are to be answered in favour of the assessee and against the Department."

13. A perusal of the above judgment would indicate that addition in that case was made on the similar line. Penalty was also imposed on similar reasoning. Tribunal has confirmed the penalty and Hon'ble High Court reversed order of the Tribunal and deleted penalty. Hon'ble Court put reliance upon its earlier judgment in the case of Vijay Proteins Ltd. CIT, Tax Reference No.139 of 1996 as well as Krishi Tyre Retreading

and Rubber Industries. Basically, Hon'ble High Court was of the view that conclusively it was not brought on record whether the purchases are to be treated as bogus or not. The income has been estimated on the basis of circumstances brought on record. There is no disparity on facts. In the present appeal also, on the basis of circumstantial evidence, it has been concluded that the purchases made by the assessee to some extent are non-genuine, and therefore profit element involved in such purchases deserves to be assessed as income of the assessee. Respectfully following the judgment of Hon'ble jurisdictional High Court we allow this appeal of the assessee and delete the penalty.

14. In the result, ITA No.93/Ahd/2016 is partly allowed and ITA No.814/Ahd/2016 is allowed.

Order pronounced in the Court on 10th October, 2018 at Ahmedabad.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER