

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

BEFORE SHRI SHAMIM YAHYA, AM

I.T.A. Nos. 1613, 1614 & 1615/Mum/2018
(Assessment Years: 2008-09, 2010-11 & 2011-12)

Shri Tagaram G. Prajapati 51/11, Dr. Mahimtura Marg, 3 rd Kumbharwada, Girgaon, Mumbai-400 004	Vs.	ITO-19(3)(5), Matru Mandir, Mumbai-400 007
PAN/GIR No. AAKPP 5101 D		
(Appellant)	:	(Respondent)
Appellant by	:	Shri Bhupendra Shah
Respondent by	:	Shri S. K. Bepari
Date of Hearing	:	17.10.2018
Date of Pronouncement	:	02.11.2018

ORDER

Per Shamim Yahya, A. M.:

These are appeals by the wherein the assessee is aggrieved that the learned Commissioner of Income Tax (Appeals)-51, Mumbai (‘ld.CIT(A) for short) dated 12.12.2017 has erred in sustaining 9% disallowance on account of bogus purchases.

2. Brief facts of the case are that the assessee is engaged in the business of trading in ferrous and non-ferrous metal. The assessee filed his return of income on 28.09.2008 declaring total income of Rs.1,43,110/-. The Sales Tax authorities had carried out a detailed investigation and had recorded statements and/or obtained affidavits/depositions from the various hawala dealers who had admitted that they are only engaged in providing accommodation entries of purchases/sales without any actual delivery of goods. This information was received by the Assessing Officer (A.O. for short) through the DGIT(Inv.), Mumbai. Since, the assessee was also one of the beneficiaries of the

accommodation entries provided by the said hawala dealer, M/s Navratan Impex of Rs.3,04,980/-, the assessment of the assessee was reopened by issue of notice u/s. 148. To ascertain the genuineness of the said purchases, the AO issued notices u/s. 133(6) which could not be served and were returned back by the postal authorities with the remarks 'not known'/'no such address'/'left' etc. The AO, therefore, asked the assessee to produce the parties along with their books of accounts and also furnish evidences to establish the genuineness of the said transaction. The assessee was unable to produce the said parties. Since the assessee could tally the purchases with the corresponding sales, the AO concluded that the assessee has purchased the said goods from the grey market. Thereafter, the AO proceeded to add an amount of Rs.38,123/- being 12.5% of the total hawala purchases of Rs.3,04,980/- for A.Y. 2008-09.

3. On similar reasoning, the Assessing Officer (A.O.) in this case has made 12.5% addition on account of bogus purchase as under for other years:

A.Y. 2010-11	Rs.14,73,814/-
A.Y. 2011-12	Rs.20,78,049/-

4. Before the Id. CIT(A), the assessee challenged the reopening as well as merits of the addition. The Id. CIT(A) affirmed the reopening. However, on merits he restricted the disallowance to 9%. The Id. CIT(A)'s observation on reopening are as under:

In this case, the AO received information from the Sales Tax Department through DGIT (Inv), Mumbai about a number of dealers indulging in providing accommodation entries in the form of bogus sales, purchases, etc. without actual supply of goods. The Sales Tax Authorities had carried out a detailed investigation and had recorded statements and / or obtained affidavits / depositions from the said hawala suppliers to the effect that they are not involved in any actual business but solely provide accommodation entries for bogus sales, purchases, etc. Since our assessee was one of the beneficiaries of the accommodation entries provided

by one of the hawala suppliers, M/s Navratan Impex of Rs.3,04,980/-, the assessment of the assessee was reopened by the AO by issue of notice u/s 148.

5.1 It is observed that a notice u/s 148 of the Act was issued in this case on the basis of specific information received by the AO from Sales Tax Department through the DGIT (Inv), Mumbai that the assessee was one of the beneficiary of accommodation entries in the nature of bogus sales/ purchases from M/s Navratan Impex of Rs. 3,04,980/-. On the basis of this information and after due consideration of other relevant facts, the assessment for the relevant year was reopened by the AO.

5.2 In my considered view, the information received by the AO through Departmental channels was credible and actionable, and was sufficient to invoke the provisions of Sec 147 of the Act. I would like to mention that at the time of issue of notice u/s 148, the AO is only required to form a broad opinion about income escaping tax in the hands of the assessee and he is not required to exactly quantify the amount of concealment. The sufficiency of reason cannot be challenged at the time of reopening of assessment as held by the Hon'ble Supreme Court in the cases of Raymond Woollen Mills (236 ITR 34) and Rajesh Jhaveri Stock Brokers (161 Taxman 316). The AO has recorded the reasons before issue of notice u/s 148 and has also shared the same with the assessee at his request. Further, the AO has made available to the assessee the reasons recorded for reopening and the objections raised by the assessee against the reopening of assessment have also been duly disposed off by the AO. Thus, the AO has also duly complied with the procedure requirement laid out by the Hon'ble Supreme Court in the case of GKN Driveshafts (1) (125 taxmann. 963) for reopening of assessments.

5. However, on merits he restricted the disallowance to 9%, the ld. CIT(A)'s observation on merits are as under:

6.1 To ascertain the genuineness of the said purchases, the AO issued notices u/s. 133(6) which could not be served and were returned back by the postal authorities with the remarks 'not known'/'no such address'/'left' etc. The AO, therefore, asked the assessee to produce the parties alongwith their books of accounts and also furnish evidences to establish the genuineness of the said purchase transactions. The assessee was unable to produce the said parties. Further, the vital documents related to transportation of the material such as delivery challan, transport receipts, octroi receipts, weigh-bridge slip, etc. could not be submitted by the assessee booked by it. However, the assessee could tally the bogus purchases with the corresponding sales. Therefore, the AO concluded that the assessee had made the said purchases from the grey market. Thereafter, the AO proceeded to make an addition of Rs.38,123/- being 12,5% of the alleged bogus purchases of Rs.3,04,980/-.

6.2 In the appellate proceedings, the assessee submitted that all the details of sales and purchases of goods including names and addresses of the suppliers etc. were furnished to the AO and all the payments had been made by cheque. Moreover, a chart giving details of the purchases and a corresponding sales was also submitted. Therefore, it was contended by the assessee that the action of the AO of making an addition of Rs.38,123/- by estimating the profit @ 12.5% of the alleged bogus purchases is not correct. The assessee also submitted that the AO has adopted the rate of 12.5% by relying upon the decision IT AT, Ahmedabad in the case of Simit P Sheth (ITA No 3238 & 3293/Ahd/2009) and which has also been approved by the on'ble Gujarat High Court. It was pointed out by the assessee that in Para 7 of the aid order of the Hon'ble ITAT, it has been noted that the malpractice of bogus urchases is mainly to save 10% sales tax. After considering this, the Hon'ble ITAT estimated the additional profit on the alleged bogus purchases @ 12.5%. It was therefore submitted by the assessee that since as against 10% sales tax then applicable in Gujarat, the rate of sales tax in Maharashtra is of only 4%, therefore the rate applied by the AO of 12.5% is on the higher side.

6.3 The contentions of the assessee have been duly considered. It is a fact that the said alleged hawala suppliers were found to be non-existent at the stated addresses. The assessee could neither provide their latest addresses nor produce the parties before the AO. However, the assessee was in a position to reconcile the purchases from the alleged hawala suppliers with the corresponding sales. Therefore, the action of the AO of concluding that the said purchases have been made from the grey market cannot be faulted. Since the assesses was in a position to reconcile the alleged hawala purchase with the corresponding sales booked by it, the AO rather than making an addition of the entire amount of the alleged hawala purchases proceeded to estimate the additional profit @ 12.5%. However, there is some force in the contention of the assessee that the rate adopted by the AO of 12.5% after considering the decision of the Hon'ble ITAT Ahmedabad in the case of Simit P Sheth (supra) is on the higher side, considering that the sales tax then prevalent at Gujarat was of 10% as against sales tax of 4% in Maharashtra. Therefore, after considering the factual position in the case of the assessee, it will be appropriate if the rate of 12.5% adopted by the AO is scaled down to 9%

6. Against the above order, the assessee is in appeal before the ITAT.

7. I have heard both the counsel and perused the records. In support of his case, the learned counsel of the assessee has placed reliance upon the decision of Hon'ble Gujarat High Court in the case of *Pr CIT vs. Teju Rohitkumar Kapadia* (in Tax Appeal no

691/2017 vide order dated 04.05.2018). In this case, the Hon'ble High Court has confirmed the deletion of disallowance on account of alleged bogus purchase as necessary documentary evidence for the purchase was on record. The special leave petition against this order has been dismissed by the Hon'ble Supreme Court in its decision dated 04.05.2018 in Special Leave Petition (Civil) Diary No. 12670/2018.

8. As regards the reopening of the case, on a careful consideration, I note that in this case information was received by the Assessing Officer from DGIT Investigation (Mumbai) there are some parties who are engaged in the hawala transactions and are also involved in issuing bogus purchase bills for sale of material without delivery of goods, which information was based on information received by Revenue from Maharashtra Sales Tax Authority. Information was received that the assessee was beneficiary of hawala accommodation entries from entry providers by way of bogus purchase. The accommodation entry provider has deposed and admitted before the Maharashtra Sales Tax Authority vide statement/ affidavit that they were engaged in providing bogus accommodation entries wherein bogus sale bills were issued without delivery of goods, in consideration for commission. These, accommodation entry providers, on receipt of cheques from parties against bogus bills for sale of material, later on withdrew cash from their bank accounts, which was returned to beneficiaries of bogus bills after deduction of their agreed commission. The Assessee was stated to be one of the beneficiaries of these bogus entries of sale of material from hawala entry operators in favour of the assessee wherein the assessee made alleged bogus purchases through these bogus bills issued by

hawala entry providers in favour of the assessee. These dealers were surveyed by the Sales Tax Investigation Department whereby the directors of these dealers have admitted in a deposition vide statements/affidavit made before the Sales Tax Department that they were involved in issuing bogus purchase bills without delivery of any material. There is a list of such parties wherein the assessee is stated to be beneficiary of bogus purchase bills.

9. From the above, I find that tangible and cogent incriminating material were received by the AO which clearly showed that the assessee was beneficiary of bogus purchase entries from bogus entry providers which formed the reason to believe by the AO that income has escaped assessment. The information so received by the AO has live link with reason to believe that income has escaped assessment. On these incriminating tangible material information, assessment was reopened. At this stage there has to be prima facie belief based on some tangible and material information about escapement of income and the same is not required to be proved to the guilt. In this regard, I refer to the decision of the Hon'ble Apex Court in the case of *CIT(A) Vs. Rajesh Jhaveri Stock Brokers P. Ltd*, 291 ITR 500:-

"Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the AO has cause or justification to know or suppose (hat income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the AO should have finally ascertained the fact by legal statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in *Central Provinces Managnese Ore Co, ltd. v. ITO*(1991) 191 ITR 662, for initiation of action under section 147(a) (as

the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the AO is within the realm of subjective satisfaction ITO v. Selected Dalurband Coal Co, (P.) Ltd. (1996) 217 ITR 597 (Supreme Court); Raymond Woollen Mills Ltd. v. ITO (1999) 236 ITR 34 (Supreme Court).”

10. The above discussion and precedent from Apex Court fully justify the validity of reopening in this case. Further I find that the Ld. CIT(A) has carefully examined the issue and has properly appreciated the issue. Hence, I do not find any infirmity in the same. Accordingly, I uphold the order of the Ld. CIT(A) on the issue of reopening. Since, the issue has been decided on the basis of the Hon’ble Apex Court decision, the other case laws referred by assessee are not supporting the assessee’s case.

11. As regards the merits, upon careful consideration I find that the assessee has provided the documentary evidence for the purchase. Adverse inference has been drawn due to the inability of the assessee to produce the suppliers. I find that in this case the sales have not been doubted. It is settled law that when sales are not doubted, hundred percent disallowance for bogus purchase cannot be done. The rationale being no sales is possible without actual purchases. This proposition is supported from Hon'ble jurisdictional High Court decision in the case of Nikunj Eximp Enterprises (in writ petition no 2860, order dt. 18.6.2014). In this case the Hon’ble High Court has upheld 100% allowance for the purchases said to be bogus when sales are not doubted. However

in that case all the supplies were to government agency. In the present case, the facts of the case indicate that assessee has made purchase from the grey market. Making purchases through the grey market gives the assessee savings on account of non-payment of tax and others at the expense of the exchequer. In such situation, in my considered opinion, on the facts and circumstances of the case, 12.5 % disallowance out of the bogus purchases meets the end of justice. However in this regard learned counsel of the assessee has prayed that when only the profits earned by the assessee on these bogus purchase transaction is to be taxed the gross profit already shown by the assessee and offered to tax should be reduced from the standard 12.5% being directed to be disallowed on account of bogus purchase.

12. Upon careful consideration I find considerable cogency in the submission of the learned counsel of assessee as otherwise it will be double jeopardy to the assessee. Accordingly, I modify the order of the ld. CIT(A) and direct that the disallowance in this case be restricted to 12.5 % of the bogus purchases as reduced by the gross profit rate already declared by the assessee on these transaction. The ld.counsel of the assessee fairly accepted this proposition.

13. In the result, these appeals filed by the assessee stand partly allowed.

Order pronounced in the open court on 02.11.2018

Sd/-
(Shamim Yahya)
Accountant Member

Mumbai; Dated : 02.11.2018
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai