

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
" C " BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER

आयकर अपील सं./ITA Nos. 2463/AHD/2018
निर्धारण वर्ष/Asstt. Year: 2010-2011

I.T.O, Ward-2(1)(1), Ahmedabad.	Vs.	KFC Industries Pvt. Ltd., Vishal Corporation Building, Narol Char Rasta, Narol, Ahmedabad. PAN: AADCK5440L
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And

आयकर अपील सं./ITA No. 2464/AHD/2018
निर्धारण वर्ष/Asstt. Year: 2010-2011

I.T.O, Ward-2(1)(1), Ahmedabad.	Vs.	KFC Exports Pvt. Ltd., 66, Kirtikunj Society Shahalam, Danilimda, Ahmedabad-380009. PAN: AADCK5170H
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(Applicant)		(Respondent)
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Revenue by	:	Shri A.P.Singh, CIT, D.R
Assessee by	:	Shri Deepak R. Shah, A.R

सुनवाई की तारीख/**Date of Hearing** : 07/02/2023
घोषणा की तारीख /**Date of Pronouncement**: 22/03/2023

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned two appeals have been filed at the instance of the Revenue against the separate orders of the Learned Commissioner of Income Tax (Appeals)-2, Ahmedabad, of even dated 31/10/2018 arising in the matter of assessment order passed under s. 143(3) r.w.s. 147 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2010-2011.

2. First, we take up ITA 2463/AHD/2018, as appeal by Revenue in the case of KFC Industries Pvt. Ltd. for the AY 2010-11.

2.1 The Revenue has raised the following Modified grounds of appeal:

2. In this connection, as requested the modified grounds of appeal incorporating the amount of relief granted by the CIT(A) for the above mentioned assessee for A.Y. 2010-11 are as under:-

"1. "Whether the CIT(A) has erred in law and on facts of the case in deleting the additions of Rs.51,78,64,090/- made by the AO on account of bogus purchase made under section 68 of the Act ?"

"2. Whether the CIT(A) erred in law and on facts in not following the decision of the Hobbler Gujarat High Court in the case of N.K, Industries Ltd. vs. DCIT [2016] 72 taxmann.com 289 (Gujarat) (which was confirmed by the Hon'ble Supreme Court in its order Special Leave to Appeal(C).. CC No, 769 of 2017 dated 16.1.2017 wherein it was held that addition on basis of undisclosed income could not be restricted to certain percentage when the entire transaction was found as bogus").

"3. The appellant craves leave to amend alter any ground or add a new ground which may be

3. The only interconnected issue raised by the revenue is that the learned CIT-A erred in deleting the addition made by the AO for Rs. 51,78,64,090/- under the provisions of section 68 of the Act and furthermore failed to apply the principles laid down by the Hon'ble jurisdictional High Court in the case of NK Industries for determining the income on estimated basis.

4. The facts in brief are that the assessee in the present case is a private limited company and claimed to be engaged in the trading activities. The assessee in the year under consideration has claimed to have shown sales worth of Rs. 52,02,48,035/- to the party namely KGN Industries Ltd. However, it was discovered in the course of survey proceedings at the premises of KGN Industries Ltd dated 24th of January 2015 that the assessee is a paper company and engaged in providing the accommodation entries based on the statement recorded of EX CEO namely Shri Jethalal Jivabhai Hiranai and CEO/ Company Secretary namely Shri Deepak Vralal Rawal of the company.

4.1 Likewise, the assessee has also not produced the complete books of accounts to substantiate the sales and purchases shown by it in the financial statements. Thus, the AO proposed to make the amount of sale shown by the assessee to M/s KGN Industries Ltd amounting to Rs. 52,02,48,035/- as unexplained cash credit under section 68 of the Act.

4.2 However, the assessee during the assessment proceedings admitted that it is engaged in providing accommodation entries by carrying out circular transactions. As such the assessee against the sales as discussed above has claimed to have shown purchases from the company namely M/s Biotor Industries Ltd. for an amount of Rs. 51,93,23,847/-. The fact that the assessee is engaged in circular transaction, was admitted by the VAT department in the course of survey conducted in the case of M/s Biotor Industries Ltd. Accordingly, the assessee contended that whatever amount was received by it was transferred to M/s Biotor Industries Ltd. against the purchases. As such the assessee was not the beneficiary of the fund received by it against the sale of goods to KGN Industries Ltd. The assessee in support of its contention has also filed the order of the VAT department wherein it was held that the assessee is engaged in the circular transactions.

5. However, the AO disregarded the contention of the assessee by observing as under:

8. The reply of the assessee has been carefully considered and the following inferences have been drawn:-

(1) In its submission, the assessee itself has admitted that the transactions are bogus as found by the Sales Tax Authorities, the copy of the Sales tax Authority is annexed as Annexure "A". Therefore the assessee itself has admitted that the transactions in question are ingenuine

*(ii) The provisions of section 145 read with section 2(12A) supposes that the assessee's books of account must include the day-to-day registers for sale, purchase and stocks and stocks in books as the assessee is the trader. Undoubtedly, such registers are necessary to be maintained by the assessee for arriving at the correct profits figures. In the present case, admittedly, the assessee has not produced any of **such** records.*

On the contrary the assessee itself has admitted that its books of account are not reliable as the purchases and sales are bogus. Therefore the compliance of the assessee with accounting standard laid down by ICAI is out of question. Thus invoking the provisions of sec.. 145(3) of the Act to determined the correct income of the assessee company.

(iii) The contention of the assessee not to add the same as unexplained cash credit is not acceptable In the present case, as per the admission of the assessee the entire purchases of Rs 51,93,23,847/- is bogus and bogus invoices had been raised against these purchases The entire purchases have been debited in the P& L Account and there is no question of restricting the disallowance to a particular percentage.

*(iv) In this case, reliance is also placed on the decision of the Hon'ble High Court of Gujarat in the case of **N.K.Industries Ltd vs DCTI [2016J72 taxmann.com 289[Gujarat]** wherein it has held that it was not incumbent on the ITAT to restrict the purchases to a particular percentage when it was established that the entire purchases were bogus.*

In view of the above contentions, the entire amount of purchases of Rs 51,93,23,847/- is treated as bogus and added to the total income of the assessee u/s 68 of IT Act. Penalty proceedings u/s. 271(l)(c) of the Act are initiated for furnishing the inaccurate particulars income and concealment of income.

6. Aggrieved assessee preferred an appeal to the learned CIT-A.

7. The assessee before the learned CIT-A, while reiterating the submissions made before the AO further contended that all the ledger accounts, sales register, purchase registers etc. were filed which were not considered by the AO at the time of framing the assessment. As the assessee was engaged in the activity of circular transaction, the amount of bogus purchases of ₹ 51,93,23,847/- cannot be treated as unexplained cash credit under section 68 of the Act.

7.1 The assessee without prejudice to the above further submitted that the assessee has earned an income by engaging in the accommodation entries at the rate of 0.20% of the sales amount recorded in the books of accounts. Therefore, the addition should be restricted to ₹ 10,40,496/- being 0.2% of ₹52,02,48,035/- which can be added after adjusting the income already declared by the assessee being ₹ 1,16,308/- to the total income of the assessee.

8. The learned CIT-A after considering the submission of the assessee and the assessment order allowed the appeal of the assessee in part by observing as under:

3.4. The appellant during the year has shown purchase of Rs.51,93,23,847/- from M/s. Biotor Industries Limited and the sale of same to M/s. KGN Industries Limited for Rs.52,02,48,035/-. The AO has disallowed the entire purchase as the purchase was bogus. A survey was conducted in the case of M/s. KGN Industries Ltd. and it was found that the above company was a paper company only provided accommodation entry of purchase. A survey was conducted by the VAT Department, Gujarat in the case of M/s. Biotor Industries Ltd. and there too it was established that the company was engaged only in the billing activities. On perusal of bank account of appellant, it is evident that whatever fund has been received on the name of sale to M/s. KGN Enterprises has been transferred to M/s. Biotor Industries Ltd. on the name of purchase immediately. The appellant has submitted that the AO has made the addition of purchases shown from M/s. Biotor Industries Ltd. u/s. 68 which is not tenable on the facts and law. The appellant has shown purchase of Rs.51,93,23,847/- and shown a sale of Rs.52,01,48,035/-. The purchase and sale has been shown on the same day with slight margin with a profit of Rs.8,24,188/-. Appellant without prejudice has contended that at the best, if addition is to be made, it should be for the commission on accommodation entry @ 0.2% of the sale amount.

3.5. It is seen from the copy of purchase account, sales account and the copy of bank accounts that appellant has shown purchase from M/s. Biotor Industries Ltd. and shown sale to M/s. KGN Enterprises on the same day. In the bank account also the sale receipt from M/s. KGN Enterprises has been transferred to M/s. Biotar Industries Ltd. on the same day. On perusal of SBI Account of the appellant has shown, the receipt and payment as under"

Date	Party	Receipt(Rs.)	Payment(Rs.)
07/07/2009	KGN Industries Ltd.	6,70,44,672/-	---
08/07/2009	Biotar Industries Ltd.	---	6,50,00,050/-
11/07/2009	KGN Industries Ltd.	30,07,880/-	---
11/07/2009	Biotor Industries	---	50,00,050/-
23/07/2009	KGN Industries Ltd.	4,00,00,000/-	---
27/07/2009	Biotor Industries Ltd.	---	4,00,00,050/-
28/07/2009	KGN Industries Ltd.	4,00,00,000/-	---
28/07/2009	Biotor Industries Ltd.	--	4,00,00,050/-
29/07/2009	KGB Industries Ltd.	4,00,00,000/-	---
29/07/2009	Biotor Industries Ltd.	---	4,00,00,050/-
30/07/2009	KGN Industries Ltd.	4,00,00,000/-	---
30/07/2009	Biotor Industries Ltd.	---	4,00,00,050/-
31/07/2009	KGN Industries Ltd.	4,00,00,000/-	---
31/07/2009	Biotar Industries Ltd.	--	4,00,00,050/-

03/08/2009	KGN Industries Ltd.	3,00,00,000/-	---
04/08/2009	Biotar Industries Ltd.	---	3,00,00,050/-
10/08/2009	KGN Industries Ltd.	3,00,00,000/-	---
11/08/2009	Biotar Industries Ltd.	---	3,00,00,050/-

Similarly, in the HDFC Bank Account, receipt and payments were as under:

<i>Date</i>	<i>Party</i>	<i>Receipt(Rs.)</i>	<i>Payment(Rs.)</i>
22/09/2009	KGN Industries Ltd.	4,20,00,000/-	---
22/09/2009	Biotar Industries Ltd.		4,20,00,000/-
23/09/2009	KGN Industries Ltd.	7,20,00,000/-	---
23/09/2009	Biotar Industries Ltd.		7,20,00,000/-
24/09/2009	KGN Industries Ltd.	7,00,00,000/-	---
24/09/2009	Biotar Industries Ltd.		7,00,00,000/-
29/09/2009	KGN Industries Ltd.	22,07,885/-	--
29/09/2009	Biotar Industries Ltd.	---	12,37,435/-

3.6 Therefore, it is an established fact that appellant company has not carried out any real business but merely has been used as middle man to receive and make the payment. Appellant has been beneficiary of difference of sales and purchase shown in the books of account. The AO has made the disallowance of bogus purchases of Rs.51,92,23,847/-without considering the fact that corresponding sales was also bogus. The AO has made the addition of bogus purchase u/s. 68 without appreciating the intent and letter of section 68. The Honourable Supreme Court in the case of CIT Vs. Birla Gwalior Pvt. Ltd. [89 ITR 266] and CIT, Bombay City 1 Vs. Shoorji Vallabhdas & Co. in 46 ITR 144 has laid down that if is the real income which is taxable under the Income Tax Act. in view of the above, only real income as reflected in the books of account and. bank statement is to be taxed. Accordingly, The disallowance of bogus purchases of Rs.51,93,23,847/- made u/s. 68 of the Act is not sustainable.

3.7. The appellant in the process of being middle man has only earned income of Rs.9,24,188/- being difference of sale and purchase. The appellant in the return of income has shown loss of Rs.1 ,25,878/- by claiming operating and general expenses of Rs.10,59,757/-. As the appellant has not done any real business, the above expenses are not allowable. In view of the above, the addition made by AO to the extent of Rs.14,59,757/- is being **confirmed**. The ground of appeal is accordingly **partly allowed**.

9. Being aggrieved by the order of the learned CIT-A, the revenue is in appeal before us.

10. The learned DR before us repeated the findings of the AO contained in the assessment order and the grounds of appeal raised by the Revenue.

11. On the contrary, the learned AR before us submitted that only the real income can be brought to tax embedded in the bogus transactions. The Id. AR vehemently supported the order of the Id. CIT-A.

12. We have heard the rival contentions of both the parties and perused the materials available on record. The admitted position is that the assessee in the present case was engaged in providing the accommodation entries by way of carrying out the circular transaction of bogus purchases and sales. This fact has not been doubted by the revenue in the appeal filed before us. What has been challenged by the revenue as evident from the revised grounds of appeal is this that the bogus purchases should be treated as par with the unexplained cash credit under section 68 of the Act. The provisions of section 68 reads as under:

68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year

12.1 Admittedly, in the given case, the explanation offered by the assessee about the sum found credited in the books of accounts i.e. received on account of bogus sale and immediately transferred against the bogus purchases after retaining commission, was not found unsatisfactory by the AO. The only source of the income was the commission from the bogus transactions of sales and purchases. Thus, to our understanding the provisions of section 68 of the Act cannot be attracted. In holding so, we draw support and guidance from the judgment of Hon'ble Bombay High Court in case of PCIT vs. Alag Securities (P.) Ltd reported in 117 taxmann.com 292 where it was held as under:

20. We are in agreement with the view taken by the Tribunal. In a case of this nature Section 68 of the Act would not be attracted. Section 68 would come into play when any sum is found credited in the books of the assessee and the assessee offers no explanation about the nature and source thereof or the explanation offered by the assessee is not in the opinion of the Assessing Officer satisfactory. In such a situation the sum so credited may be charged to income tax as the income of the assessee of the relevant previous year. But that is not the position here. It has been the consistent stand of the assessee which has been accepted by the First Appellate Authority and affirmed by the Tribunal that the business of the assessee centered around customers/beneficiaries making deposits in cash amounts and in lieu thereof taking cheques from the assessee for amounts slightly lesser than the quantum of deposits, the difference representing the commission realized by the assessee. The cash amounts deposited by the customers i.e., the beneficiaries had been accounted for in the assessment orders of these beneficiaries. Therefore, question of adding such cash credits to the income of the assessee, more so when the assessee was only concerned with the commission earned on providing accommodation entries does not arise.

12.2 It is also important to note that the assessee being engaged in the circular transactions/ one of conduit in accommodation entries can be made subject to tax based on real income theory. It is for the reason that the assessee was not the beneficiary of the amount received by it on the sales made to the KGN Industries Ltd. As such the amount of sales received by the assessee was utilized against the purchases from M/s Biotor Industries Ltd. We have also perused the extract of the bank statement reproduced by the learned CIT-A in his order on page 10 of his order and find that whatever amount was received by the assessee against the sales was utilized immediately for the purchases. The learned DR at the time of hearing has also not controverted the observations of the learned CIT-A qua the utilization of sales amount against the purchases.

12.3 Thus, in view of the above, we hold that there cannot be any addition under section 68 of the Act in the given facts and circumstances for the bogus purchases shown by the assessee. What best can be added in the given facts and circumstances is the real income which has been earned by the assessee. To determine the real income, there is no standard formula prescribed under the provisions of law. However, we note that the different Hon'ble Courts in such facts the circumstances have adopted the basis of estimating the income based on some percentage. In holding so we draw support and guidance from the judgment of Hon'ble Bombay High Court in case of PCIT vs. Alag Securities (P.)Ltd reported in 117 taxmann.com 292 where it was held as under:

21. Coming to the percentage of commission, Tribunal had already held 0.1% commission in similar type of transactions to be a reasonable percentage of commission. Therefore Tribunal accepted the percentage of commission at 0.15% disclosed by the assessee itself. This finding is a plausible one and it cannot be said that the rate of commission was arrived at in an arbitrary manner. The same does not suffer from any error or infirmity to warrant interference, that too, under section 260A of the Act.

12.4 In the given facts and circumstances, the principles laid down in the above case directly applies to the case on hand. The assessee is just acting as a middleman and carrying out the circular transactions. Thus, at the most commission income can be brought to tax.

12.5 Before parting, it is important to note that the revenue has made the reference to the Judgment of Hon'ble Gujarat High Court in the case of NK Industries Ltd vs. DCIT reported in 72 taxmann.com 289 wherein the gross profit at the rate of 25% on the bogus purchases was adopted to determine the income of the assessee. However, the facts of the case on hand are different from the facts of the case of NK Industries (supra). The assessee being NK Industries Ltd was not engaged in circular transaction by way of providing accommodation entries for commission. In that case, the assessee was one of the beneficiary of the accommodations entries which were provided by the other parties whereas in the case on hand the assessee is middleman and engaged in the circular transaction. Thus, in our humble understanding we are of the view that the principles laid down by the Hon'ble Gujarat High Court in the case of NK Industries (supra) cannot be applied in the given facts and circumstances.

12.6 In view of the above and after considering the facts in totality, we do not find any reason to interfere in the finding of the learned CIT-A. At the time of hearing the Id. DR has not brought anything on record contrary to the finding of the Id. CIT-A. Accordingly, we uphold the same and direct the AO to delete the addition made by him. Hence, the ground of appeal of the revenue is hereby dismissed.

12.7 In the result, the appeal filed by the revenue is dismissed.

Coming to ITA No. 2464/Ahd/2018, an appeal by Revenue in the case of KFC Exports Pvt. Ltd.

13. The revenue has raised following grounds of appeal:

1. *Whether the CIT(A) has erred in law and on facts of the case in deleting the addition of Rs.52,21,66,403/- made by the AO on account of bogus purchase made under section 68 of the Act.*

2. *Whether the CIT(A) erred in law and on facts in not following the decision of the Hon'ble Gujarat High Court in the case of N.K. Industries Ltd. vs. DCIT (2016) 72 taxmann.com 289 (Gujarat) (which was confirmed by the Hon'ble Supreme Court in its order Special Leave to Appeal(C).. CC No.769 of 2017 dated 16.1.2017 wherein it was held that*

addition on basis of undisclosed income could not be restricted to certain percentage when the entire transaction was found as bogus.

3. the appellant craves leave to amend alter any ground or add a new ground which may be necessary.

14. The only interconnected issue raised by the revenue is that the learned CIT-A erred in deleting the addition made by the AO for Rs. 52,21,66,403/- under the provisions of section 68 of the Act and furthermore failed to apply the principles laid down by the Hon'ble jurisdictional High Court in the case of NK Industries for determining the income on estimated basis.

15. At the outset, we note that the issues raised by the Revenue in its grounds of appeal are identical to the issues raised by the Revenue in ITA No. 2463/AHD/2018 in case of KFC Industries Pvt. Ltd. for the assessment year 2010-11. Therefore, the findings given in 2463/AHD/2018 shall also be applicable on the issue raised in case of assessee on hand. The grounds appeal of the Revenue in case of KFC Industries Pvt. Ltd. has been decided by us vide paragraph No.12 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for ITA No. 2463/AHD/2018 shall also be applied for the in case of this appeal i.e. ITA No. 2464/AHD/2018. Hence, the grounds of appeal filed by the Revenue is hereby dismissed.

15.1 In the result, the appeal filed by the revenue is dismissed.

16. In the combined result, both the appeals of the revenue are dismissed.

Order pronounced in the Court on 22/03/2023 at Ahmedabad.

Sd/-
(T.R SENTHIL KUMAR)
JUDICIAL MEMBER

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated (True Copy)
22/03/2023

Manish