

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL (IT) NO.1354 OF 2017

Pr. Commissioner of Income Tax-15,
Mumbai. ... Appellant
V/s.
Jakharia Fabric Pvt. Ltd. ... Respondent

Mr.Akhileshwar Sharma, Advocate for the Appellant.
Mr.M.Subramanian i/by Mr.V.S.Hadade, Advocate for the
Respondent.

**CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.
DATE : FEBRUARY 10, 2020**

P.C.:-

1. Heard Mr.Akhileshwar Sharma, learned standing counsel Revenue for the appellant; and Mr.M.Subramanian alongwith Mr.V.S.Hadade , learned counsel for the respondent/assessee.
2. This appeal has been preferred by the Revenue under Section 260A of the Income Tax Act, 1961 (briefly “the Act” hereinafter) against the order dated 21st September, 2016 passed by the Income Tax Appellate Tribunal, Mumbai Bench "J", Mumbai (“Tribunal” for short) in Income Tax Appeal No.6851/Mum/2014 for the assessment year 2010-11.
3. The appeal has been preferred on the following questions stated to be substantial questions of law:-

“(i) Whether on the facts and in the circumstances of the case, Tribunal was correct in law in confirming the order of the Commissioner of Income-tax (Appeals) restricting the disallowance to only 17.5% of the total alleged bogus purchase of Rs.1,14,92,970/- ignoring the fact that the said seller parties were found to be Hawala operators/bogus billers as per findings given by the Sales Tax Department, Government of Maharashtra and the Investigation Wing of the Income Tax Department ?

(ii) Whether on the facts and in the circumstances of the case, Tribunal was correct in law in confirming the order of the Commissioner of Income-tax (Appeals) restricting the disallowance to only 17.5% of the total alleged bogus purchase of Rs.1,14,92,970/-, ignoring the fact that the assessee had neither filed any documentary evidence nor confirmation for purchase nor produced any evidence in the form of stock register during the course of assessment proceedings to substantiate its claim that the goods claimed to have been purchased from alleged parties were actually consumed/sold?

(iii) Whether on the facts and in the circumstances of the case, Tribunal was correct in law in relying upon the decision of CIT Vs.Nikunj Eximp Enterprises Pvt. Ltd. 372 ITR 612 case ignoring that the facts of the said case are distinguishable from the facts of the present case, as in that case it was held that the material was actually purchased from defence organisation and so cannot be treated as bogus whereas the alleged purchases in the present case is from private parties who are found to be Hawala operators/bogus billers as per the findings given by the Sales Tax Department, Government of Maharashtra?

(iv) Whether on the facts and in the circumstances of the case, Tribunal was correct in law in confirming the order of the Commissioner of Income-tax (Appeals) restricting the disallowance to only 17.5% of the total alleged bogus purchases ignoring the decision of the

Delhi High Court in the case of La Medica 250 ITR 575 (2001) wherein it is held that purchases from unproven parties is bogus and the decision of the Gujarat High Court in Hynoup Foods & Oil Industries Pvt. Ltd. 290 ITR 702 (Guj) wherein it is held that provisions of Section 40A(3) of the Income Tax Act, 1961 were applicable to the cases of bogus purchase? "

4. Respondent (also referred to as "the assessee"), is an assessee under the Act. It is a company engaged in the business of trading in job work of dying of fabrics. In the assessment proceedings for the assessment year 2010-11 Assessing Officer received information from the Investigation Wing of the Income Tax Department in Mumbai that assessee had obtained bogus purchase bills amounting to Rs.1,14,92,970.00 from hawala operators, the details of which are as under :-

Hawala Name	Hawala PAN	FY	Amount Rs.
EVERREADY MARKETING PRIVATE LIMITED	AACCE2069E	2009-10	1,41,960
SAILEELA TRADING PVT LTD	AAKCS4578C	2009-10	22,21,232
ASHLEY TRADERS PRIVATE LIMITED	AAHCA8221H	2009-10	5,17,556
KALPATARU TRADING CO.	AICPD6505H	2009-10	38,26,122
K C ENTERPRISES	AJWPD9140R	2009-10	26,46,092
DEEPALI ENTERPRISES	AEAPT818P	2009-10	6,35,830
CIMCO CORPORATION		2009-10	2,11,744
SEVA ENTERPRISES	AEZPT9865R	2009-10	12,92,434
		Total	1,14,92,970

5. Following the same, notice under Section 142(1) of the Act was issued to the assessee in response to which assessee submitted show cause reply denying the allegation. On due consideration, Assessing Officer vide his assessment order dated 2nd March, 2013 passed under Section 143(3) of the Act treated the aforesaid amount as bogus purchases being made to reduce the profit of the assessee by inflating the purchases. Accordingly, the amount of Rs.1,14,92,970.00 was added to the total income of the assessee.

6. Assessee preferred appeal before the Commissioner of Income Tax (Appeals)-22, Mumbai (briefly referred to hereinafter as "CIT (A)")

7. In the appellate proceedings, CIT(A) while accepting the contention of the Assessing Officer about the bogus nature of the transactions however held that the entire purchases from the eight parties could not be added as bogus, but what needed to be taxed is the profit element embedded in such transaction. Following Gujarat High Court decision in the case of **CIT Vs. Simit P. Sheth, 356 ITR 451 (Guj)**, CIT(A) vide its appellate order dated 18th August, 2014 took the view that the estimation of 17.5% of profit would meet the ends of justice. Accordingly, direction was issued to the Assessing Officer.

8. In appeal before the Tribunal by the Revenue, Tribunal held that there was no reason to intervene in the finding of the CIT(A) which was a reasonable view. Accordingly, vide

the order dated 21st September, 2016, Tribunal affirmed the findings of the CIT(A).

9. Hence, Revenue is in further appeal before us under Section 260-A of the Act.

10. Submissions made have been considered.

11. In the assessment proceedings Assessing Officer had relied upon information obtained from the Investigation Wing of the Department at Mumbai which in turn had obtained the information from the Sales Tax Department, Government of Maharashtra. The information was to the effect that the eight parties from whom the purchases were allegedly made were alleged hawala dealers who had issued bogus bills totalling Rs.1,14,92,970.00.

12. In the appellate proceedings before the first appellate authority, it was held as under :-

“2.15 The facts in the present case shows that the appellant was not in a position to prove the existence of the suppliers. The suppliers were found to be engaged in providing bogus bills without actual delivery of goods. Moreover few of the suppliers are not regular parties and they were found to have supplied only during the year and there were no supply either in the earlier year or in the subsequent year from such parties. This circumstantial evidence also prove the bogus nature of the transaction. On careful analysis of the finding of Hon’ble High Court of Gujarat in the above mentioned cases, I am of the firm view that without purchase of materials it was not possible for the appellant to complete the job work of

dying. As mentioned above the AO had never disputed or examined the aspect of job work receipts. Hence I am of the firm belief that the appellant had made cash purchases from other parties which were not recorded in the books. The appellant took only bills from these 8 parties as accommodation to explain the purchases. Therefore the entire purchase from these 8 parties cannot be added as bogus and what needs to be taxed is the profit element embedded in such transaction. The appellant carryout only the job work of dying the cloths on a contract basis. Estimation ranging from 12.5% to 25% has been upheld by the Hon'ble Gujarat High Court depending upon the nature of the business. As held in the case of Simit P. Sheth (supra) no uniform yardstick could be applied to estimate the rate of profit and it vary with the nature of business. Taking all the facts into consideration and the findings of the Hon'ble Courts on this issue, I am of the view that estimation of 17.5% of profit would meet the ends of justice. Therefore, I direct the AO to estimate profit of 17.5% on the total alleged bogus purchase which works out to Rs.20,11,270(17.5% of Rs.1,14,92,970/-). The appellant get the relief of the balance Rs.94,81,700/-. The grounds raised are partly Allowed."

13. Thus as can be seen from the above, CIT (A) had relied upon the decision of the Gujarat High Court in **Simit P. Sheth (Supra)** and took the view that entire purchases from the eight parties could not be added as bogus but what needed to be added to the total income of the assessee was the profit element embedded in such transaction. CIT (A) noted that assessee carried out only the job work of designing the clothes on contract basis; profit estimation ranged from 12.5% to 25%. In the circumstances of the case, CIT(A) took the view that taking of 17.5% as the profit would meet the

ends of justice. Accordingly, Assessing Officer was directed to estimate profit of 17.5% on the total alleged bogus purchases and thereafter, to delete the balance amount of addition.

14. In further appeal Tribunal referred to the above finding of the CIT(A), whereafter it was held as under:-

“6. Thus, from the aforesaid analysis, conclusions and findings recorded by the Ld. CIT(A), it is evident that total purchases were wrongly disallowed by the Assessing Officer. The Ld.CIT (A) took a reasonable view whereby the disallowance was sustained to the extent of estimated inflation in the amount of purchases made by the assessee. The disallowance sustained by the Ld. CIT(A) @ 17.5% of the purchases have been accepted by the assessee with a view to bury the litigation. Nothing has been brought before us by the Ld.DR to contradict the findings recorded by the Ld.CIT(A). The assessee's counsel has also placed reliance upon the judgment of Hon'ble Bombay High Court in the case of CIT Vs. Nikunj Eximp Enterprises Pvt. Ltd. (supra) wherein similar issue has been decided on identical lines by the Hon'ble Bombay High Court. In our view, no intervention is required in the findings of Ld.CIT(A) and, therefore, the same is confirmed. The grounds raised by the revenue are dismissed.”

15. Thus, Tribunal concurred with the view taken by the CIT(A) that the Assessing Officer had erred in disallowing the entire total purchases and adding the same to the total income of the assessee. View taken by the CIT(A) that 17.5% of the purchases be added to the total income of the assessee as the profit element was a reasonable one. It was also noted that the said percentage was accepted by the

assessee with a view to close the litigation. Nothing was brought on record by the Revenue to contradict the findings recorded by the CIT(A). Tribunal had also referred to the decision of this court in **CIT Vs. Nikunj Eximp Enterprises Pvt. Ltd. 372 ITR 6129**. Infact, this court has also held following the decision of **Nikunj Eximp Enterprises Pvt. Ltd.** that the revenue is required to furnish the information received from the Sales Tax Department or from the Investigation Wing of the Department to the assessee allowing the assessee to test the veracity of such information otherwise such information could not be relied upon. This court in the case of **Principal Commissioner of Income Tax Vs. Vaman International Pvt. Ltd.**, Income Tax Appeal No.1940 of 2017, decided on January 29, 2020 held as under:-

“17.1. Thus, from the above, it is seen that Tribunal had returned a finding of fact that the assessee had filed copies of purchase bills, copies of purchase/ sale invoices, challan cum tax invoices in respect of the purchases, extracts of stock ledger showing entry/exit of the materials purchased, copies of bank statements to show that payment for such purchases were made through regular banking channels, etc., to establish the genuineness of the purchases. Thereafter, Tribunal held that Assessing Officer could not bring on record any material evidence to show that the purchases were bogus. Mere reliance by the Assessing Officer on information obtained from the Sales Tax Department or the statements of two persons made before the Sales Tax Department would not be sufficient to treat the purchases as bogus and thereafter to make addition under Section 69C of the Act. Tribunal has also held that if the Assessing Officer had doubted the genuineness of the purchases, it was incumbent

upon the Assessing Officer to have caused further enquiries in the matter to ascertain genuineness or otherwise of the transaction and to have given an opportunity to the assessee to examine/cross-examine those two parties *vis-a-vis* the statements made by them before the Sales Tax Department. Without causing such further enquiries in respect of the purchases, it was not open to the Assessing Officer to make the addition under Section 69C of the Act.

18. We are in agreement with the view expressed by the Tribunal. In fact, Tribunal has only affirmed the finding of the first appellate authority. Thus, there is concurrent finding of fact by the two lower appellate authorities.

19. This Court in the case of Commissioner of Income Tax -1, Mumbai v/s. Nikunj Eximp Enterprises(P.) Ltd., 372 ITR 619; wherein an identical fact situation arose did not interfere with the order passed by the Tribunal and held that no substantial question of law arose from such order. It was held that merely because the suppliers had not appeared before the Assessing Officer, no conclusion could be arrived at that the purchases were not made by the assessee.”

16. Today while dealing with Income Tax Appeal No.1330 of 2017 (**Principal Commissioner of Income Tax Vs. Rishabhdev Tachnocable Limited**), we have held as under:

“19. On thorough consideration of the matter, we do not find any error or infirmity in the view taken by the Tribunal. The lower appellate authorities had enhanced the quantum of purchases much beyond that of the Assessing Officer i.e., from Rs.24,18,06,385.00 to Rs.65,65,30,470.00 but having found that the purchases corresponded to sales which were reflected in the returns of the assessee in sales tax proceedings and in addition, were also recorded in the books of accounts with payments made through account payee cheques,

the purchases were accepted by the two appellate authorities and following judicial dictum decided to add the profit percentage on such purchases to the income of the assessee. While the CIT (A) had assessed profit at 2% which was added to the income of the assessee, Tribunal made further addition of 3% profit, thereby protecting the interest of the Revenue. We have also considered the two decisions relied upon by learned standing counsel and we find that facts of the present case are clearly distinguishable from the facts of those two cases to warrant application of the legal principles enunciated in the two cited decisions.

20. In **Bholanath Polyfab Limited (supra)**, Gujarat High Court was also confronted with a similar issue. In that case Tribunal was of the opinion that the purchases might have been made from bogus parties but the purchases themselves were not bogus. Considering the fact situation, Tribunal was of the opinion that not the entire amount of purchases but the profit margin embedded in such amount would be subjected to tax. Gujarat High Court upheld the finding of the Tribunal. It was held that whether the purchases were bogus or whether the parties from whom such purchases were allegedly made were bogus was essentially a question of fact. When the Tribunal had concluded that the assessee did make the purchase, as a natural corollary not the entire amount covered by such purchase but the profit element embedded therein would be subject to tax.

21. We are in respectful agreement with the view expressed by the Gujarat High Court.”

16. On thorough consideration of the matter, we do not find any error or infirmity in the finding returned by the Tribunal. No substantial question of law arises from such finding returned by the Tribunal.

17. Consequently, we find no merit in the appeal. Accordingly, the appeal is dismissed. However, there shall be no order as to cost.

(MILIND N. JADHAV, J.)

(UJJAL BHUYAN, J.)

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