

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

INCOME TAX APPEAL NO. 781 OF 2018

Principal Commissioner of Income Tax,
29, Mumbai, Bandra Kurla Complex,
Mumbai-400 051 ...Appellant

V/s.
Jagdish Thakkar
Vikas Paradise, 1002 B, LBS Road,
Mulund West, Mumbai- 400 102 ...Respondent

Mr. Arvind Pinto, Advocate for Appellant.
Mr. Mandar M. Vaidya, Advocate for Respondent.

**CORAM : DHIRAJ SINGH THAKUR &
ABHAY AHUJA, JJ.
DATE : 5th AUGUST, 2022.**

PER COURT:

1. This is an Appeal filed under Section 260A of the Income Tax Act, 1961 (the “Act”), for the Assessment Year 2011-2012, whereby the Appellant-Revenue against order dated 6th January, 2017 of the Income Tax Appellate Tribunal, Mumbai (“ITAT”).

2. The Respondent-Assessee is proprietor of M/s A. J. Traders and is engaged in the business of resale of industrial goods. During the previous

year relevant to the assessment year under consideration, the Assessee earned profits and gains from business or profession and income from other sources. He filed his return of income on 26th September, 2011 declaring a total income of Rs. 31,18,188/- after claiming deduction under chapter VI-A of Rs. 1,65,000/-. The said return was initially processed under Section 143(1). Later on, being selected for scrutiny, the Assessing Officer proceeded on the basis of information received from the Director General of Income Tax, Investigation, Mumbai to the effect that the purchases made by the Assessee were appearing in the list of hawala dealers of the Sales Tax Department and issued notices under Section 133(6) of the Act in order to verify the purchases made from three parties viz. (i) Harshil Ferromet : Rs. 1,22,40,800/- (ii) Hans Enterprises : Rs. 1,08,18,184/- (iii) Khushal Mercantile Pvt. Ltd.: Rs. 85,13,856/-. According to the Assessing Officer none of the parties complied with those notices either on account of non availability at the given address or failure to attend before the Assessing Officer. The Assessing Officer vide order dated 13th January, 2014 called for the production of parties and also copies of purchase bills, corresponding sales, etc. The Assessee submitted parties' ledger accounts, bank statements, etc., but failed to produce the parties. It was submitted that since all the payments were made through

the banking channel and details as required were produced the onus on the Assessee was discharged. According to the Assessing Officer, mere production of purchase invoices and payments having been made through banking channels would not be sufficient to conclusively establish the genuineness of purchases since the Assessee had not produced the parties. The explanation by the Assessee was that the entire purchases from the said parties were exported and that all the purchases made were settled by payment through account payee cheques which were cleared by such seller's bank account.

3. The Assessing Officer after considering the submissions held that though there were sales against purchases and payments for purchases were made by account payee cheques, yet it does not make purchases genuine and held that the goods were certainly purchased but not from the persons who had supplied the bills. According to the Assessing Officer, the goods were purchased in cash from the market and sale bills were obtained from hawala dealers for that purpose. The Assessing Officer has relied upon the Affidavits of such persons filed in the Sales Tax Department. He therefore added the sum of Rs. 3,15,72,840/- on the ground that the Assessee has violated Section 69C of the Act.

Alternatively, the Assessing Officer also presumed that the sales were effected from unaccounted stock and alternatively held that the said amount was unexplained investment under Section 69 of the Act.

4. Aggrieved by the same, the Assessee filed an Appeal before the CIT(A). The CIT(A) after considering the submissions made on behalf of the Assessee as well as the Revenue, observed that the issue that was to be decided was whether the addition on account of the purchase of goods made at the relevant point of time can be held to be bogus, when the Assessing Officer himself admits that the purchases were in fact made. The CIT(A) observed that the Assessee has made payment by account payee cheques in favour of the parties from whom he has shown to have purchased goods. He observed that the Assessee had discharged his onus by furnishing the bills, delivery challans relating to the said purchases, details and evidence to show that the payments of such purchases were made by account payee cheques and the same were duly accounted in the books of the Assessee. The CIT(A) observed that so far as purchases are concerned, the Assessing Officer has also not disputed the fact that the Assessee purchased goods at relevant points of time for which he produced and accounted the bills of these parties. He also observed that

all the purchases were reflected in the stock reconciliation furnished to him in respect of the subject purchases made by the Assessee. According to the CIT(A), the Assessee appeared to have discharged his onus in respect of the purchases in question. He further observed that the Assessing Officer had not doubted the sales arising out of the said export activity and its gross profit ratio ("GPR") and therefore all the purchases in the case could not be treated as bogus. It is also recorded in the order of the CIT(A) that the Assessing Officer had not made available the copies of the documents relied upon by him for the purpose of making the addition which also proves that there was no evidence to show that the money which was given by cheques to such persons has come back to the Assessee in the form of cash.

5. The CIT(A) has observed that it is not the case of the Assessing Officer that the payments against these purchases were in cash as all the payments had been made through account payee cheques/RTGS and had been debited to the bank account of the Assessee in the names of the concerned parties. It is also not the case of the Assessing Officer that he made further investigation to prove that these payments made to the parties in question were withdrawn from that account in cash and flown

back to the Assessee. It is also recorded in the order of the CIT(A) that the Assessing Officer had access to the bank account of the parties, that he could not bring on record any evidence of the money flowing back to the Appellant. It was a mere assumption that the Assessee had received the money back from the said parties. The CIT(A) accordingly held that in the absence of any such evidence thereof, no the purchases made from the said parties cannot be treated as bogus in entirety.

6. According to the CIT(A), the Assessing Officer has made an addition on the basis of presumption of third party purchases and cash payment thereof. He observed that no matter, howsoever, wild suspicion may be, that cannot partake the character of proof and observed that no addition or dis-allowance can be made on mere presumption, conjecture or surmises. He further observed that the parties from whom purchases have been shown to be made were registered dealers under the MVAT Act.

7. According to the CIT(A), the crucial facts of corresponding sales of goods purchased from the said parties and payments to them by proper banking channels were ignored by the Assessing Officer. That the Assessing Officer could not have invoked the provisions under Section 69C

and added the said purchases as unexplained expenditure, as Section 69C applies only in the case where the source of the expenditure is in doubt and not the expenditure itself. That in the case at hand, on one hand, the Assessing Officer has doubted the expenditure in the form of purchase from the said parties and on the other hand, he has added the income on the ground that the source of the expenditure has remained unexplained; if the expenditure itself has been rejected as non-genuine, then there is no question of adding any income on the ground that the source of the said expenditure has remained unexplained, as both these are mutually exclusive.

8. The CIT(A) observing that the purchases effected by the Assessee not being in dispute and that there being no material on record brought by the Assessing Officer to show that the Assessee purchased material from unexplained cash available with him, held that no addition could be made under Section 69C of the Act. It is also recorded in the said order that the purchase parties have not responded to the notices under Section 133(6) which could not be ignored.

9. The CIT(A) relying upon the various decisions including the decision in the case of *CIT Vs. Bholenath Poly Fab (P) Ltd.* in I.T.A. No. 63 of 2012 dated 23rd October, 2012 observed that the conclusion drawn by the Assessing Officer that simply because the parties are not available for confirmation of sales made by them to the Assessee or because the parties were declared as suspicious dealers by the Sales Tax Department, will not make the same as bogus purchases, liable to be disallowed in their entirety. The CIT(A) held that it would be fair and reasonable if the disallowance out of the bogus purchases in the case of the Assessee for the year under consideration was restricted to 10% of such purchases and directed the Assessing Officer to dis-allow 10% of the alleged bogus purchases viz. 3,15,72,840/- being the profit from the purchases made from the parties during the year under consideration, thereby confirming the addition of Rs. 31,57,284/- on account of bogus purchases and deleting the balance. Aggrieved by the order of the CIT(A), Revenue filed an Appeal before the ITAT.

10. The ITAT after considering the submissions, found that the Assessing Officer had not doubted sales (exports) made by the Assessee; that he had accepted the book results shown by the Assessee; that the

payments made by the Assessee through banking channels were not in doubt and that there was no evidence of making unexplained investments. The Tribunal records that except issuing notice under Section 133(6) to the suppliers of the goods, the Assessing Officer has not made any further investigation. It is also recorded by the Tribunal that the Assessee had produced before the Assessing Officer the delivery challans, purchase bills and evidence of payment made through banking channels. Holding thus, the Tribunal came to a conclusion that Assessee had discharged the initial burden and it was the duty of Assessing Officer to rebut the evidences produced by the Assessee, but he did not bring anything on record. The Tribunal confirmed the order of the CIT(A) and held that the CIT(A) had rightly held that the provisions of Section 69C could not be invoked and dismissed the Appeal of the Revenue.

11. Being aggrieved by the aforesaid decision of the Tribunal, Revenue has preferred this Appeal proposing the following questions as substantial questions of law:-

“ (1) Whether in law and on the facts of the instant case, was the Tribunal right upholding the orders of the CIT(A) restricting the addition u/s 69C to 10% of the accommodation entries?

(2) Whether in law and on the facts of the instant case, was the Tribunal justified in ignoring the fact that the Respondent

Assessee had failed to provide evidence of having made purchases against the bills that were accounted for; it being incumbent on the Assessee to prove that these purchases are genuine.

(3) Alternatively, in law and on the facts of the instant case, does the AO in the absence of evidence regarding the genuine nature of the purchases, be compelled to accept the entries in the books or bank entries.

(4) Alternatively, in law and on the facts of the instant case, can the fact of there being corresponding sales, indicate that the accommodation bills for which there was evidence that these were not genuine, be allowed as deduction?”

12. Mr. Pinto, learned counsel for the Revenue relies upon the order of the Assessing Officer and submits that the Respondents are involved in providing accommodation entries without doing any actual business or delivery of the goods. He submits that this inference has been drawn by the Sales Tax Department after having done field work and independent inquiries with respect to each of the hawala parties. Learned Standing Counsel would submit that even the Director General of Income Tax, Investigation, Mumbai took up the task of going to the bottom of the truth and pursuant to the action by way of searches and surveys on the basis of such information conducted inquiries, which fortified the findings of the Sales Tax Department that these parties are :-

(a) issuing only bills and doing non-genuine business (Hawala Business);

(b) not maintaining stock and not keeping Stock Register;

- (c) not effected any purchase;*
- (d) there were no transaction of goods;*
- (e) entries were being provided by the parties for commission.*

13. He submits that the inquiries and investigation revealed that the hawala operators never sold any goods but only issued bogus bills to the beneficiaries for a commission. He submits that the *modus operandi* was that the hawala operators would raise bogus bills and upon receipt of the cheque for the bills, the amounts were withdrawn by the such operators in cash and then returned to the beneficiaries in cash after deduction of commission.

14. Learned Standing Counsel further submits that in the facts of the present case also, the Assessee made purchase from the three parties in question and on collating the data provided by the Sales Tax Authority and the Director General of Income Tax, Investigation, it was observed that the three parties were hawala bill issuers. Therefore, notices were issued under Section 133(6) to provide the details with respect to the purchase transactions entered into with the Assessee; however, none of the parties have complied with the said notices, either on account of non availability at the given addresses or they simply chose to remain silent

and therefore, the Assessee was requested to produce the parties for cross-verification. But instead of producing the parties, the Assessee has only produced parties ledger and bank statements. Learned counsel submits that therefore though the Assessee has obtained purchase bills amounting to Rs. 3,15,72,840/- from the aforesaid three parties, however, he has not been able to furnish any concrete evidence to establish the delivery of so called goods purchased from the parties and therefore the inference that the purchase amounting to Rs. 3,15,72,840/- claimed to have been made by the Assessee from the said parties is bogus. He would submit that without purchase of goods, sales cannot take place. Since the income arising from said sales has been shown and offered by the Assessee in his profit and loss account, there must be purchases made in that regard, however, those purchases are bogus as no physical delivery of goods have taken place. According to him, therefore, the expenditure claimed by the Assessee for which sources have not been satisfactorily explained, have been rightly treated as unexplained expenditure under Section 69C and accordingly added back to the total income of the Assessee.

15. Learned Standing Counsel submits that without prejudice to the above, Assessee might also be having an undisclosed stock of goods with

him for which he has arranged bogus bills for selling the same and therefore in such a situation, the undisclosed stock of goods has rightly held to be unexplained investment in the Assessee's hand under Section 69 of the Act, for which further addition of Rs. 3,15,72,840/- is called for.

16. He submits that neither the Appellate Authority nor the Tribunal have appreciated that under Section 69C of the Act it is not just that where the Assessee offers no explanation about the source of such expenditure that such expenditure may be deemed to be the income of the Assessee but the said section also refers to a situation where the explanation offered by the Assessee is in the opinion of the Assessing Officer not satisfactory that the said expenditure may be deemed to be unexplained expenditure and liable to be added to the income of the Assessee.

17. Mr. Pinto urges this Court to address this issue as according to him this issue has not been *hitherto* addressed by any recent decision of this Court.

18. On the other hand, Mr. Mandar Vaidya, learned counsel for the Respondent-Assessee relies upon the decision of the CIT(A) and the Tribunal to submit that both the CIT(A) and the Tribunal have given concurrent findings of fact that the Assessing Officer had not doubted the export sales made by the Assessee, that he had accepted the book results shown by the Assessee and that there was no doubt that the payments were made by the Assessee through banking channels. He submits that the Assessee had produced before the Assessing Officer the delivery challans, purchase bills as well as evidence that the payments were made through banking channels and as such the Assessee has discharged his initial burden. Mr. Vaidya would submit that it was the duty of the Assessing Officer to rebut the evidences but no such rebuttal was brought on record before the Tribunal. He submits that this is not the case of bogus purchases or accommodation entries and the CIT(A) and the Tribunal have rightly deleted the addition except to the extent of 10% of the purchases and against which the Assessee has no grievance.

19. We have heard Mr. Arvind Pinto, learned Counsel for the Appellant-Revenue and Mr. Mandar Vaidya, learned Counsel for the Respondent

and with their able assistance, we have perused the papers and proceedings in the matter.

20. Before proceeding further, we deem it appropriate to reproduce the said Section 69C of the Income Tax Act as under:

“Unexplained expenditure, etc.

69C.*Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year :*

Provided that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income.”

21. The said provision provides that where in any financial year the Assessee has incurred any expenditure and offers no explanation about the source of such expenditure or part thereof or the explanation, if any, offered by him is not in the opinion of the Assessing Officer satisfactory, the amount of such expenditure is deemed to be the income of the Assessee for that financial year.

22. In nuce, the Section covers a situation where no explanation has been offered about the source of the expenditure or the explanation offered is not found to be satisfactory by the Assessing Officer. In such a case, the unexplained expenditure would be deemed to be the income of the Assessee.

23. The entire bedrock of the Assessing Officer's case appears to be that the Assessee has not produced the parties from whom the Assessee had made the subject purchases although admittedly parties' ledger accounts, bank statements were produced before him and even though there were sales against purchases and payments were made by account payee cheques through banking channels. The CIT(A) also records that all the purchases were reflected in the stock reconciliation furnished before him and the Assessing Officer.

24. The Assessing Officer came to a conclusion that though the goods were certainly purchased by Assessee but not from persons, who had supplied the bills. Statedly relying upon the purported affidavits filed before the Sales Tax Authorities, the Assessing Officer was of the view that the goods were purchased in cash from the market and sale bills were

obtained from hawala dealers for that purpose. No material has been brought on record by the Assessing Officer to show that the Assessee purchased material from the market or from unexplained cash. In the alternate, he presumed that the sales were effected from unaccounted stock and held the said amounts as unexplained investment under Section 69 of the Act. No evidence or material appears to have been brought on record or finding given by the authorities to arrive at this presumption.

25. On the basis of the above, the Assessing Officer propounds a hypothesis that the money which was given by cheques to such persons has come back to the Assessee in the form of cash. The CIT(A) has found that neither the Assessing Officer has made available any documents nor is there any evidence to demonstrate the same.

26. There is no dispute that the subject purchases were infact made, that the Assessee has made payments by account payee cheques which have been cleared through the normal banking channels, the Assessee had furnished the bills, delivery challans relating to the said purchases, the transactions appear to have been duly accounted for in the books of Assessee. The CIT(A) has observed that all the purchases were reflected in

the stock reconciliation furnished before him in respect of the subject purchases made by the Assessee. There is no evidence or material brought on record by the Assessing Officer that the purchases made were for cash or that the purchasers had returned the cash corresponding to the cheque payments received from the Assessee. The CIT(A) has recorded that there is no evidence of money flowing back to the Assessee and that the Assessing Officer had made the addition merely on the basis of presumption. The Assessing Officer had not made available copies of the documents relied upon by him for the purpose of making the addition. These are all findings of fact for which the Tribunal is the last fact finding authority.

27. The Assessee in our view has discharged his onus in respect of the subject purchases. The Assessing Officer has also not doubted the sales arising out of the said export activity and its GPR. This is not a case which falls within the ambit of Section 69C as held by the Assessing Officer.

28. In the case at hand, the Assessee statedly had made purchases from the three parties totalling to amount of Rs. 3,15,72,840/- in respect of which it has been found by both the CIT(A) as well as the Tribunal that the sales in question have not been doubted, that the payments have been

made by the Assessee through banking channels and that the Assessing Officer has also accepted the book results shown by the Assessee. It is also finding of fact that the Assessee has produced before the Assessing Officer delivery challans, purchase bills as well as evidence of payments through banking channels. As such, the Assessee has discharged the initial burden or onus of providing the details of the parties; and it was incumbent on the Assessing Officer to rebut the evidence produced by the Assessee. We do not find anything on record controverting the findings of fact of the CIT(A) as well as the Tribunal. Despite uncontroverted findings of fact and keeping in mind that the Assessing Officer had issued 133(6) notices to the three suppliers of goods and the parties had not attended and even though the Assessing Officer did not take any further steps for investigation, in all fairness, the CIT(A) as well as the Tribunal had upheld the dis-allowance in respect of the purchases for the year under consideration to the extent of 10% of such purchases against which admittedly no appeal has been filed by the Assessee.

29. If the CIT(A) relying upon the various decisions including the decision in the case of *CIT Vs. Bholenath Poly Fab (P) Ltd.(supra)*, has restricted the disallowance to 10% of the purchases, which decision has

not been disturbed by the Tribunal, we find that The view taken by the Tribunal is a possible view and cannot be faulted with.

30. The decision of this Court (Per Dhiraj Singh Thakur, J) dated 18th July, 2022 in ITXA No. 398 of 2018, where similar issue came to be decided is useful. Paragraph 12 of the said decision is pertinent and is quoted as under:-

“We are of the opinion that the view expressed by the Tribunal in upholding the order passed by the learned CIT(A), cannot be said to be in any manner perverse or legally untenable, inasmuch as, if the entire amount of Rs. 4,74,54,793/- were to be held as non-genuine purchases, then it would not be possible to justify as to how the works allotted to the assessee for execution by the semi Government Agencies could be completed. Therefore, the argument that the entire amount of Rs. 4,74,54,793/- ought to have been added to the income of the assessee is untenable, especially when the learned CIT(A) in its order as upheld by the Tribunal in the order impugned held that the purchases per se were not in dispute but the parties from whom the purchases are shown to have been made are disputed.”

31. In view of the above discussion, we do not find any error or perversity in the order of the Tribunal. The Appeal, therefore, does not raise any substantial question of law and is dismissed. No costs.

(ABHAY AHUJA, J.)

(DHIRAJ SINGH THAKUR J.)

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