IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL (IT) NO. 2162 OF 2018

Pr. Commissioner of Income Tax - 8 … Appellant
Versus
Suraj Infrastructures Pvt. Ltd. … Respondent

Mr. Suresh Kumar for Appellant.
None present for Respondent.

CORAM **K. R. SHRIRAM &**
DR. N. K. GOKHALE, JJ.
DATED: **6th September 2023**

P.C. :

1. Mr. Suresh Kumar states that Respondent has been served. Respondent, however, is absent.

2. This is an Appeal under Section 260A of the Income Tax Act, 1961 ("**the Act**") filed by the Revenue impugning an order dated 25th September 2017 passed by the Income Tax Appellant Tribunal ("**ITAT**").

3. Respondent-assessee had filed return of income for the Assessment Year 2009-2010 declaring 'nil' income. Subsequently an order under Section 143(1) of the Act dated 25th March 2011 was passed accepting the income returned by assessee. A further order under Section 143(3) read with Section 147 of the Act was passed on 27th March 2015 assessing income at Rs. 20,00,050/-. Assessing Officer ("**AO**") had made an addition of Rs. 1,97,35,311/- on account of bogus purchases and added the same to the total income. Assessee impugned the order before the Commissioner of Income Tax (Appeals) ("**CIT(A)**"), who allowed the Appeal on the ground that the addition was made only because the name of party appears in the list of Sales Tax Department and the party was not produced before AO. The Revenue challenged the order of CIT(A) passed on 14th December 2016 before the ITAT. The ITAT partly allowed the Appeal of Revenue vide the impugned order holding that AO made addition towards gross profit on alleged bogus purchases.

4. The following substantial questions of law are proposed :

> *i. Whether on the facts and circumstances of the case and in law the Hon'ble ITAT is justified in estimating the profit element embedded in the amount represented by bogus purchases recorded in the books of account at 12.5% of the total bogus purchases without appreciating that any expenditure not found to be incurred at all, least of all that the same is also not laid out or expended wholly and exclusively for the purposes of business is not admissible in terms of the provisions of Section 37 of the Act ?*
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> *ii. Whether prejudice to ground no. 1 above, whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT is justified in taking only 12.5% of the total amount of bogus purchases as income and thus allowing 87.5% of such total amount of purchases as expenditure in contravention of the provisions of Section*

37 of the Act ?

iii. Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT is justified in allowing the relief to the assessee ignoring the judgment of Hon'ble Apex Court in the case of N. K. Proteins Limited and Shewtamber limited on this issue wherein, the SLP filed by the assessee have been dismissed by Hon'ble Apex Court ?

iv. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in directing the AO to restrict disallowance out of bogus/unproved purchases to 12.5% of such purchases without appreciating the fact that the assessee could not establish the genuineness of the transaction by producing 8 parties from whom purchases were stated to have been made and an independent enquiry conducted by the A.O. also revealed that these parties were non-existent and have been declared as Hawala Dealers by VAT department as they were found to be engaged in providing bogus bills without actual supply of goods and mere submission of copies of invoices, ledger account, bank statement etc. does not prove the genuineness of the transaction ?

v. Whether on the facts and in circumstances of the case and in law, Hon'ble ITAT justified in directing the Assessing Officer to disallow 12.5% of the bogus purchases rather than whole of such bogus purchases without appreciating that allowance of such expenditure implies allowance of purchases made in cash from the 'grey' market, thereby rendering the provisions of section 40A(3) of Income Tax Act, 1961 totally redundant, which could not have been the intention of the statute ?

5. All questions relate to the issue of bogus purchases.

6. AO had made addition towards gross profit on alleged bogus purchases based on the information received from the

Investigation Wing which stated that assessee was one of the beneficiaries of bogus purchase bills obtained through hawala operators. AO was of the opinion that though assessee furnished certain documents to justify purchases, it failed to produce the parties in person.

7. It is assessee's case that just because the party did not appear in person before AO, the genuineness of purchases can not be doubted when all details are furnished to justify the purchases. It is also assessee's case that it had declared the gross profit of 30.12% which was higher than the gross profit declared in similar line of business and AO was not justified in estimating the gross profit @ 60.24%, which was arbitrary.

8. The ITAT in its impugned order had relied upon the judgment of Gujarat High Court in the case of ***Commissioner of Income Tax v. Vijay Proteins Ltd.***[1] and also in the case of ***Commissioner of Income Tax v. Smith P. Sheth***[2] and held that no uniform yardstick can be applied for estimating gross profit on bogus purchases which is depending upon the facts of different cases. The ITAT held that the Co-ordinate Bench in number of cases has taken a consistent view and directed AO to estimate

1. 58 taxmann.com 44 (Guj.).

2. 2013(356) ITR 451 (Guj.).

gross profit of 12.5% on alleged bogus purchases and therefore, in the case at hand also directed AO to estimate gross profit at 12.5% on the bogus purchases.

9. Even on merits, the ITAT found that the approach of AO for re-opening the assessment was not correct.

10. We find that the view taken by the ITAT is a reasonable and possible view and hence, no substantial question of law arises for our consideration.

11. Appeal dismissed.

(DR. N. K. GOKHALE, J.) **(K. R. SHRIRAM, J.)**

GITALAXMI KRISHNA KOTAWADEKAR Digitally signed by GITALAXMI KRISHNA KOTAWADEKAR Date: 2023.09.08 19:34:35 +0545