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

INCOME TAX APPEAL NO.331 OF 2018

Pr.Commissioner of Income Tax-19 ..... Appellant

Vs.

Tirupati Earth Neerprima JV ..... Respondent

Mr.Devrat Singh for the Appellants
Mr.Jitendra Singh for the Respondent

CORAM: K.R. SHRIRAM, J &
FIRDOSH P. POONIWALLA, J.

DATED : 5TH JULY 2023

P.C.

1. This Appeal impugns the order passed by the ITAT on 1st May 2017 and the following substantial questions of law are proposed:

> *"6.1 "Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT is perverse in not considering the order of Hon'ble Supreme Court in the case of N K Protein Ltd. dated 16.01.2017, which is on the similar issue of bogus purchases and when the Hon'ble Apex Court order was already the law of the land when the Hon'ble ITAT has pronounced its order on 01.05.2017?"*
>
> *6.2 "Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in ignoring the decision in the case of N K Proteins/N K Industries by*

Hon'ble Ahmedabad High Court, further affirmed by Hon'ble Supreme Court, as mentioned at ground No. 1 above, wherein Hon'ble High Court, relying on the findings of the Hon'ble ITAT, Ahmadabad, that the suppliers are bogus, has given a finding that once the suppliers are held bogus, then it is not correct to tax only 25% of the bogus claims? This is further supported by the fact that in this case also, the AO has categorically and conclusively held that the parties from whom the purchases are shown to be made are bogus purchases as the concerns are providing bogus bills and this finding of the AO has been further strengthened by the findings of the higher appellate authority which is never controverted by Hon'ble ITAT?"

6.3 "Whether on the facts and in the circumstances of the case and in Law, the Hon'ble ITAT erred in overlooking the fact that addition made by AO based on details of scam unearthed by Sales Tax Department wherein it was established that the assessee had taken bills from bogus parties without actually making purchases from them?"

6.4 "Whether on the facts and in the circumstances of the case and in Law, the Hon'ble ITAT erred in ignoring that the purchases from bogus parties are debited in P & L Account for which the assessee had not submitted any evidences, and the same was not allowable?"

6.5 "Whether on the facts and in the circumstances of the case and in Law, the Hon'ble ITAT erred in upholding

> *the order of the Ld.CIT(A) who had limited the disallowance to the extent of 12.5% of the total alleged purchase without verification and confirmation of quantitative data of material sourced and its subsequent movement during the year?"*

2. It is Appellant's case that Respondent was a Civil Contractor who, for Assessment Year 2010-11 filed return of income on 22nd September 2009 declaring income of Rs.27,99,420/-.

3. According to Appellant, a scam was unearthed by the Sales Tax Department in respect of bogus parties who provided accommodation entries. DGIT (Inv.) Mumbai received information that Respondent had taken accommodation entries from bogus parties / hawala dealers to inflate purchases.

4. During the course of assessment proceedings, the Assessing Officer (AO) issued notices under section 133(6) of the Income Tax Act, 1961 (the Act) to 11 non-genuine parties from the list provided by DGIT (Inv.). The AO issued notice under section 142(1) of the Act, calling upon respondent to submit books of account, stock register, details of purchase, *vis-a-vis* sales along with documentary evidence. After considering the submissions of respondent, the Assessing Officer concluded that the purchases made and claimed as expenses in the profit and loss account were not genuine and the

purchases to that extent were not verifiable and cannot be accepted.

5. The AO treated purchases of Rs.94,90,188/- as bogus purchases and added the amount to the returned income of respondent. The Assessment Order dated 20th March 2013 under section 143(3) of the Act was passed determining the total income of respondent at Rs.1,22,89,610/-.

6. Being aggrieved by the Assessment Order, respondent preferred an Appeal before CIT (A). The Appeal was allowed. CIT (A) relied upon a judgment of the Hon'ble Gujarat High Court in the case of ***Commissioner of Income Tax vs. Simit P. Sheth***[1] and upon considering other facts directed the AO to restrict the addition to the profit element embedded on such purchases estimating it at 12.5% on the purchases of Rs.94,90,188/-.

7. The Revenue impugned the order of CIT (A) before the ITAT. The Appeal of Revenue came to be dismissed by ITAT. The ITAT confirmed the order of CIT(A) restricting the addition to 12.5% of the purchases. It is this order of the ITAT passed on 1st May 2017 which is impugned in this Appeal.

8. We have heard the counsel and also considered the order passed by the Assessing Officer as well as the CIT (A) and also the impugned order.

9. Mr.Singh submitted that the CIT (A) having come to a

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conclusion that there was overwhelming evidence to show that Respondent having engaged in bogus purchases and Respondent having not discharged the onus in proving genuineness of the transactions, the CIT (A) could not have concluded that only profit element should be taxed. We have to read an order in its entirety. The CIT(A) also has noted that the AO, in effect, has not considered the purchases *per se* but only the genuineness of the suppliers. Therefore, the issue would only boil down to finding out the profit element embedded in such purchases which respondent made from some unknown entities. In paragraph 2.4.32 the CIT(A) holds as under:

> *"2.4.32 As narrated earlier, the Ld. A.O. in this case has himself held that the purchases themselves were not bogus from whom the purchases were made by the appellant were found to be bogus and that is the reason for which these parties were not produced during the assessment proceedings."*

Mr.Singh made an attempt to distinguish this case at hand on facts with the facts in the other cases particularly in the case of ***Simit P. Sheth*** (Supra).

10. We are unable to accept the submissions of Mr.Singh. Respondent was engaged in the business of Civil Contractor carrying out repairs, construction, laying of drainage pipelines and other works awarded by Bombay Municipal Corporation (BMC). The AO

has not doubted the genuineness of the contract between BMC and respondent and that materials were used for executing the contract with BMC. The AO has also not given any finding as to how respondent would have concluded the contracts with BMC without making any purchases. In effect, the purchases by Respondent has not been doubted but the genuineness of the suppliers have been doubted.

11. The AO has also held that the purchases themselves were not bogus though the parties from whom the purchases were made by the Respondent were found to be bogus. He has treated them as bogus parties because these parties were not produced during the assessment proceedings.

12. The ITAT has come to a factual finding that though the suppliers were not produced before the AO, Respondent had maintained books of account which were audited and Audit Report were filed under section 44AB of the Act. Payments have been made by account payee cheques, tax invoices have been obtained and most importantly, Respondent has maintained inventory of stock and also consumed the materials purchased in executing the contract with BMC.

13. Therefore, in our view the CIT(A) and the ITAT were correct in coming to the conclusion that the purchase cannot be rejected and

the additions could be restricted to the extent of profit element, which they determined could be 12.5%.

> This is because when material has been actually purchased and consumed in executing the contract, the cost price is required to be deducted and taxes cannot be levied on the same.
>
> Further, there is nothing to indicate whether the profit element should be more than 12.5%.

14. In the circumstances in our view, no substantial question of law arises.

15. Appeal dismissed.

(FIRDOSH P.POONIWALLA, J.) **(K.R. SHRIRAM, J.)**