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

INCOME TAX APPEAL NO. 576 OF 2018

The Principal Commissioner of Income
Tax – 19

....Appellant

V/s.

Ashwin Purshotam Bajaj

...Respondent

Mr. Akhileshwar Sharma a/w Ms. Shilpa Goel for Appellant.

Mr. Jignesh R. Shah for Respondent.

**CORAM : K.R. SHRIRAM &
FIRDOSH P. POONIWALLA, JJ.
DATED : 12th JULY 2023**

PC. :

1. The following four substantial questions of law have been proposed in the appeal.

QUESTION OF LAW

1. *In the facts and circumstances of the case and in Law whether the Hon'ble ITAT order is correct in view of the Hon'ble Supreme Court decision in N.K. Protein Ltd. Which is upheld 100% addition in that case on account of bogus purchases?*

2. *Whether on the facts and circumstances of the case and in Law, the Hon'ble ITAT erred in confirming the decisions of Ld. CIT(A) of restricting the estimation of profit at 12.5% of total non-genuine purchase when it has accepted that these purchases are non genuine as held by the AO?*

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

4. *The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.*

2. It is appellant's case that respondent was carrying on sole proprietary business in the name and style of M/s. Shoe Box Inc. Respondent had a retail store selling footwear, bags, belts, wallets etc. Respondent filed his return of income on 29th September 2009 for Assessment Year 2009-10 declaring a total income of Rs.6,64,570/-. Regular assessment was completed under Section 143(3) of the Income Tax Act, 1961 (the Act) on 12th December 2011 accepting the returned income. On 28th March 2013 the assessment was re-opened under Section 148 of the Act and addition on account of alleged accommodation entries taken by respondent from Hawala dealers were added to his income. The Assessing Officer (A.O.) had received information from Sales Tax Authority, Government of Maharashtra. The A.O. came to a conclusion after considering the depositions and affidavits filed before the Sales Tax Authority that the entities from whom respondent is alleged to have purchased were only indulging in bogus accommodation entries without supply of any goods. Since none of the parties to whom notice under Section 133(6) of the Act was issued had responded, the A.O. treated purchase amounting to Rs.90,33,191/- as bogus and added the same to the returned income for Assessment Year 2009-10. The assessment under Section 143 read with Section 147 of the Act was completed on 30th March 2014 determining total income at Rs.97,58,670/-.

3. The Assessment Order was impugned before the Commissioner of Income Tax (Appeals) (CIT[A]). The CIT[A] partly allowed the appeal.

It was also observed that the A.O. did not doubt the sale and himself has held that purchases were made from parties other than the bogus bill provider. The CIT[A] relying upon the decision of the Hon'ble Gujarat High Court in ***Commissioner of Income Tax vs Simit Sheth***¹ estimated the profit element at 12.5% on such purchase, i.e., 12.5% of Rs.9,43,858/- after holding that only profit element embedded in such purchases could be added to the assessee's income.

4. Both Revenue as well as assessee were unhappy with the findings of CIT[A] and filed an appeal before the Income Tax Appellate Tribunal (ITAT). The ITAT dismissed both the appeals by the impugned order pronounced on 13th April 2017.

5. We need not go into the details because there have been many such matters which have come up before us where similar issues have been raised. It has been repeatedly held that Section 69 of the Act was not applicable to these bogus purchases as only profit has to be added in the income of the assessee. The only issue that requires to be considered is with respect to the extent of ad-hoc dis-allowance with respect to bogus purchases. Whether purchases were bogus or whether the parties from whom such purchases were allegedly made were bogus is essentially a question of fact. Mr. Sharma relied upon a Judgment of the Hon'ble Gujarat High Court in the case of ***N.K. Industries Limited vs. Deputy***

1 (2013) 38 Taxmann.com. 385 (Guj)

Commissioner of Income Tax² and connected appeals decided on 20th June 2016.

6. In the present case, one thing is clear is that the A.O. has not doubted the sales made by respondent against the purchases. Similar case of respondent was also considered by the Tribunal with regard to issues for Assessment Year 2010-11. In that also the Tribunal has observed that the A.O. has not doubted the sales made by assessee against the purchases and assessee has reconciled the quantitative details of stock as per sale invoices. The A.O. has observed that respondent has purchased material from someone else while bogus bills were organized by these Hawala Traders. Therefore, at least to the extent even if it has been purchased from Hawala Traders the indisputable fact is that the purchases have been made and admittedly quantitative reconciliation of the stock was done by respondent of sale and purchase. The ITAT therefore accepted the explanation of respondent that only the profit element in these accommodation entries are to be added to the income. The CIT(A) has restricted the addition by estimating the gross profit at 12.5%. Whether that is the right estimate is a question of fact. Therefore, we see no reason to interfere.

7. Appeal dismissed.

(FIRDOSH P POONIWALLA, J.)

(K.R. SHRIRAM, J.)

² Tax Appeal No. 240 of 2003