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

INCOME TAX APPEAL NO. 685 OF 2018

Principal Commissioner of Income
Tax – 1

....Appellant

V/s.

Nitin Ramdeoji Lohia

....Respondent

Mr. Suresh Kumar for Appellant.

Mr. Ruturaj H. Gurjar for Respondent.

CORAM : K.R. SHRIRAM &

FIRDOSH P. POONIWALLA, JJ.

DATED : 12th JULY 2023

PC. :

1. The order impugned passed by the Income Tax Appellate Tribunal (ITAT) and pronounced on 5th July 2017 is a common order for three Assessment Years, i.e. Assessment Year 2009-10, 2010-11 and 2011-12.

2. Revenue has filed three separate appeals being ITXA No. 673 of 2018, ITXA No. 750 of 2018 and this matter, i.e. ITXA No. 685 of 2018, ITXA No. 673 of 2018 and ITXA No. 750 of 2018 came up for hearing on or about 4th August 2022 and by a judgment pronounced on 21st October 2022 these two appeals were disposed. The judgment pronounced on 21st October 2022 reads as under :

. Both these appeals under Section 260A of the Income Tax Act, 1961 ("the Act") challenge the order dated 05th July, 2017, passed by the Income Tax Appellate Tribunal, Bench "B", Pune ("ITAT") in Income Tax Appeal No.1408/PUN/2015 relevant to the assessment year 2010-11 and Income Tax Appeal No.1409/PUN/2015 relevant to the assessment year 2011-12, respectively, whereby the appeals filed by the Revenue have been dismissed.

2. *The facts and issues arising in both these appeals are identical, however, for the sake of deciding the issue, reference is being made to the facts in ITA No. 673 of 2018.*

3. *The following questions of law have been proposed for our consideration:*

a. Whether in the facts and circumstances of the case and in law, the ITAT was justified in directing the A.O. to delete the addition made on account of bogus purchase ignoring the fact that the addition was made by the A.O. on the basis of credible information from the Sales Tax Department and on the fact that the assessee did not substantiate/confirm the veracity of the impugned purchases in the assessment proceedings?

b. Whether in the facts and circumstances of the case, the ITAT was justified in directing the A.O. to delete the addition made on account of bogus purchase ignoring the fact that the absolute burden of proof to substantiate/confirm the veracity of the impugned purchases was cast on the assessee, which was not discharged by cogent, relevant and reliable evidence, during the course of the assessment proceedings?

c. Whether in the facts and circumstances of the case and in law, the ITAT was justified in directing the A.O. to delete the addition made on account of bogus purchase ignoring the fact that the parties from whom the impugned purchases were claimed to be made were not available on their given addresses and further the assessee did not produce such parties before the A.O. to confirm the veracity of the impugned purchases?

d. Whether in the facts and circumstances of the case, and in view of the Hon'ble Supreme Court's judgment dated 16.01.2017 in the case of N.K. Proteins Ltd. Vs DCIT [2017] 84 taxmann.com 195 (SC), it was incumbent on the ITAT to restrict the addition made on account of Bogus Purchases', it having once come to a categorical finding that such total amount of addition made represented alleged purchases from bogus suppliers?

4. *Briefly stated the material facts are as under:*

The Respondent assessee is engaged in the business of trading in industrial oil and transport services. A return of income was filed by the assessee declaring a total income at Rs.4,47,970/-. The Sales Tax Department of the Government of Maharashtra provided information to the Assessing Officer (A.O.) giving names, addresses

and details of persons, who had provided entries of bogus purchases. The said information also contained details of beneficiaries of such bogus bills. Based upon the information so received, the A.O. issued notice under Section 148 of the Act, followed by the statutory notices under Section 143(2) and 142(1) of the Act and the order of assessment under Section 143(3) r/w Section 147 of the Act was passed on 30th March, 2015 and total income assessed at Rs.1,46,82,548/-. The A.O. thus made an addition of Rs.1,42,34,578/- on account of alleged bogus purchases from Hawala dealers/parties.

5. An appeal was preferred by the assessee before the CIT (Appeals). The appeal was allowed inter alia on the ground that the A.O. having not disputed the sales, it was not a case of bogus purchases and that it was at best a case of inflated purchases. The CIT (Appeals), however, was of the opinion that the gross profit shown by the assessee at 0.69% was very low in that particular kind of trade and, therefore, estimated the gross profit at 5% and further directed the A.O. to make an addition in the gross profit ratio and delete the balance addition made.

6. Both the Revenue as also the assessee preferred appeals against the order passed by the CIT (Appeals), whereas the Revenue in its appeal challenged the deletion of Rs.2.45 crores on account of alleged bogus purchases, the assessee questioned the order to the extent the gross profit rate was calculated at 5% as against 0.69% declared by the assessee, which had resulted in an addition of Rs.10,59,974/-. The Tribunal dismissed the appeal fled by the Revenue and allowed the appeal preferred by the assessee. It was held that the case of the Revenue was based on the investigation carried out by the Sales Tax Department only and that no cross-examination of the persons, whose names had figured in the list so prepared by the Sales Tax Department, was allowed. It was held that the A.O. had failed to complete the investigation in the case and that the affidavits and the confirmation letters fled by the assessee from three dealers from whom it had made purchases, were not inquired into at all and that the assessee had discharged the onus of proving the factum of making purchases from the respective parties and that there was no contrary evidence brought on record by the A.O. in that regard. It, therefore, while allowing the appeal of the assessee, directed the A.O. to delete the addition on account of bogus purchases.

7. From the above facts it is thus clear that the CIT (Appeals) partially allowed the appeal of the assessee on the ground that the A.O. had not disputed the sales and, therefore, this was not a case of bogus purchases, inasmuch as if the purchase was bogus, it would not be possible for assessee to complete the transaction by way of sale, unless it could be shown from the record that the corresponding sale was also a sham transaction.

We are in agreement with the view expressed by the CIT (Appeals) that, if the purchases are bogus, it would be impossible for the assessee to complete the business transaction and that if the

purchase is bogus, the corresponding sale also must be bogus or else the transaction would be impossible to complete and as a necessary corollary, unless the corresponding sale is held to be bogus, the purchase also cannot be held to be bogus, rather it would be a case of purchase from bogus entities/parties. That view has been upheld by the Tribunal in principal while dismissing the appeal of the Revenue. In view of the above, we are of the opinion that the questions of law proposed as (a), (b), and (c) in the appeal cannot be said to be substantial questions of law.

Insofar as the question of law framed as (d) is concerned, we find that the Tribunal has not addressed the issue of adopting the gross profit rate of 5% on the alleged Hawala purchase of Rs.2.45 crores as against the rate of 0.69% declared by the assessee, despite the fact that the CIT (Appeals) had specifically gone into that question in its order dated 18th August, 2015 and had directed the A.O. to make 5% addition in the gross profit ratio, while deleting the balance addition. We, therefore, deem it appropriate to remand the matter back to the Tribunal only to the limited extent of going into that issue. Parties to appear before the Tribunal on 05th December, 2022 and orders to be passed thereupon, preferably within a period of three months thereafter. The decision taken above in ITA No. 673 of 2018 shall apply mutatis and mutandis to ITA No. 750 of 2018. In the result, both the appeals are, accordingly, disposed of.

3. Therefore, in so far as question of law framed as D is concerned in this appeal, we remand the matter to the Tribunal only to the limited extent of going into the issue as mentioned in Sub Paragraph 3 of Paragraph No. 7 quoted above.

4. This appeal be also listed alongwith the other two appeals which have been remanded to ITAT.

5. Appeal disposed.

(FIRDOSH P. POONIWALLA, J.)

(K.R. SHRIRAM, J.)