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

INCOME TAX APPEAL NO. 1278 OF 2018

The Principal Commissioner of Income
Tax – 32, Mumbai ….Appellant

V/s.
Hitesh Mody (HUF) …Respondent

Ms. Swapna Gokhale (through V.C.) a/w Mr. Vaibhav Date for Appellant.
Mr. Atul K. Jasani for Respondent.

CORAM : K.R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED : 7th FEBRUARY 2024

P.C. :

1. Appellant is impugning an order dated 24th May 2017 passed by the Income Tax Appellate Tribunal (ITAT) allowing assessee's appeal and dismissing Revenue's appeal.

2. The following substantial questions of law are proposed :

QUESTIONS OF LAW

I. Whether in law and on the facts and circumstances of the case, was the Tribunal order not perverse, wherein it was content to dismiss the Appeal, by merely excerpting a major part of the order of the CIT(A) without giving reasons for doing so?

II. Whether the Tribunal was right in upholding the orders of the CIT(A), that had held 8% of the purchases as non-genuine u/s 69C?

III. Whether in law, when purchases are not satisfactorily explained and added back u/s 69C, could the addition be limited to a certain percentage as held by the CIT(A) and upheld by the Tribunal in their perfunctory order?

3. Assessee was a trader in chemicals. During the assessment of

his returns filed for the Assessment Year 2011-12, the Assessing Officer (A.O.) came to a conclusion that assessee had indulged in bogus purchases and disallowed the entire purchases worth Rs.1.35 Crores holding it to be unexplained expenditure under Section 69C of the Income Tax Act, 1961 (the Act). Aggrieved with the order, assessee filed an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. The CIT(A) held, relying on the ***Commissioner of Income Tax v. Simit P. Sheth***[1] that the entire purchases could not have been disallowed but only the profit element and proceeded to restrict the unexplained expenditure to only 8% of the total purchases made. Against the said order both assessee as well as the Revenue filed an appeal before the ITAT. The ITAT dismissed both the appeals by the order impugned dated 24th May 2017. After perusing records which we also go through with the assistance of the counsel, the ITAT found that the A.O. has added the entire amount of purchases in assessee’s income under Section 69C of the Act on the basis that assessee has purchased goods from bogus suppliers who only issued bills but do not effect any real transaction. On the other hand, the CIT(A) restricted the addition to the extent of 8% of the alleged purchases on arriving at a factual finding that the A.O. has not doubted the genuineness of the payments being shown by appellant through banking channels. The A.O. has also not questioned the inventory that was subsequently sold. The fact that payments were being made through cheque is also not something that was doubted. Therefore,

1. (2013) 356 ITR 451 (Guj)

the CIT(A) came to the conclusion that when the A.O. himself has not doubted the quantity of purchases which has been entered in the books of accounts of appellant but only proceeds based on the information received from Sales Tax authorities that the purchases were made through bogus parties. The CIT(A) relying on *Simit P. Sheth* (supra) came to a conclusion that when the total sale is accepted by the A.O., then the entire purchases cannot be added to the income of assessee and what should be added is only what can be termed a fair profit margin. On facts the CIT(A) came to a conclusion that 8% of the purchases of Rs.1,35,46,250/- would a be fair profit margin. This factual finding has been accepted by the ITAT. There are many orders and judgments which also have taken the same stand.

4. Ms.Gokhale relied upon a judgment of the Gujarat High Court in ***N.K. Industries Ltd. v. Deputy Commissioner of Income Tax***[2] to submit that when it was established that the purchases are bogus the entire amount should have been added to the income of the assessee. There is no question of granting any relief in the facts of the case. In the said judgment, the Court observed as under :

> *The Tribunal in the case of Vijay Proteins Ltd. Vs. CIT had observed that it would be just and proper to direct the Assessing Officer to restrict the addition in respect of the undisclosed income relating to the purchases to 25 % of the total purchases. The said decision was confirmed by this Court as well. On consideration of the matter, we find that the facts of the present case are identical to those of M/s Indian Woolen Carpet Factory (supra) or M/s Vijay Proteins Ltd. In the present case the Tribunal has categorically observed that the assessee had shown bogus purchases amounting to Rs.2,92,93,288/- and taxing only 25 % of these bogus claim goes against the principles of Sections 68 and*

2. (2016) 72 taxmann.com 289 (Gujarat)

> *69C of the Income Tax Act. The entire purchases shown on the basis of fictitious invoices have been debited in the trading account since the transaction has been found to be bogus. The Tribunal having once come to a categorical finding that the amount of Rs.2,92,93,288/- represented alleged purchases from bogus suppliers it was not incumbent on it to restrict the disallowance to only Rs.73,23,322/-.*

Ms.Gokhale submitted that one of the appeal that was disposed by the Gujarat High Court had been filed by one N.K. Proteins Ltd. whose SLP against the decision of the Gujarat High Court was dismissed by an order dated 16th January 2017.

5. This court in ***PCIT v. Mohammad Haji Adam & Co.***[3] has earlier distinguished *N. K. Industries* (supra) observing that the same cannot be applied without reference to the facts.

6. Also, the Hon'ble Gujarat High Court in ***PCIT v. Jigisha Satishkumar Mehta***[4] itself has distinguished *N. K. Industries* (supra) holding that therein the material was available during the course of search which exposed the falsity of entries made in regular books of accounts. The unexplained expenditure that is bogus purchases were on the basis of fictitious invoices debited in trading account.

Hence, the decision of the Hon'ble Gujarat High Court *N. K. Industries* (supra) has no application to the facts of the present case inasmuch as herein assessee could not have made sales (which are not doubted), without making corresponding purchases.

3. (2019) 103 taxmann.com 459 (Bom)
4. (2023) 155 taxmann.com 279 (Guj)

7. In fact paragraph 8 of *N.K. Industries* (supra) reads as under :

> *So far as the question regarding addition of Rs.3,70,78,125/- as gross profit on sales of Rs.37.08 Crores made by the Assessing Officer despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 is concerned, we are of the view that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6 % gross profit is taken into account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price. We have to reduce the selling price accordingly as a result of which profit comes to 5.66 %. Therefore, considering 5.66 % of Rs.3,70,78,125/- which comes to Rs.20,98,621.88 we think it fit to direct the revenue to add Rs.20,98,621.88 as gross profit and make necessary deductions accordingly. Accordingly, the said question is answered partially in favour of the assessee and partially in favour of the revenue.*

8. It is impossible in this appellate jurisdiction to investigate what the product was and what should have been the profit margin. Moreover, the CIT(A) and the ITAT have on facts come to a conclusion that 8% is the reasonable figure. Therefore, in our view, the judgment of *N.K. Industries* (supra) does not assist Ms.Gokhale's case.

9. Therefore, we do not find any reason to interfere.

10. Appeal dismissed.

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