

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI**

BEFORE SHRI RAJESH KUMAR (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 214/MUM/2019
Assessment Year: 2009-2010**

Shri Anil K. Shah (HUF), 703, Supershav, Nahur Road, Sarvodaya Nagar, Mulund (West), Mumbai - 400080 PAN: AADHA5072M	Vs.	The ITO Ward – 23(2)(1), 111, Matru Mandir, Tardeo, Grant Road, Mumbai
(Appellant)		(Respondent)

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**ITA No. 215/MUM/2019
Assessment Year: 2009-2010**

Shri Anil K. Shah, 703, Supershav, Nahur Road, Sarvodaya Nagar, Mulund (West), Mumbai - 400080 PAN: AAPPS6042M	Vs.	The ITO Ward – 23(2)(1), 111, Matru Mandir, Tardeo, Grant Road, Mumbai
(Appellant)		(Respondent)

Assessee by : Shri Devendra Jain (AR)
Revenue by : Shri Jernold Michel (DR)

Date of Hearing: 21/08/2020
Date of Pronouncement: 10/09/2020

ORDER

PER RAM LAL NEGI, JM

These appeals have been filed against the two orders dated 31.08.2018 passed by the Commissioner of Income Tax (Appeals)-39 (for short 'the CIT(A), Mumbai, for the assessment years 2009-10, whereby the Ld. CIT(A) has partly allowed the appeals filed by the assessee against the assessment orders passed u/s 143 (3) r.w.s. 147 and u/s 144 r.w.s. 147 of the Income Tax Act, 1961 (for short the 'Act'). Since, these appeals pertain to the same person in the individual capacity and in the capacity of HUF and the issues involved are

identical, these were clubbed, heard together and are being disposed of for the sake of convenience.

ITA No. 214/MUM/2019 (Assessment Year: 2009-2010)

2. Brief facts of the case are that the assessee carrying on the business as dealer in Iron and Steel, filed its return of income for the assessment year under consideration on 15.09.2009 declaring the total income of Rs. 7,92,587/- The return was processed u/s 143 (1) of the Act. Subsequently, the case was reopened on the basis of information received from DGIT (Inv.), Mumbai that the assessee had obtained accommodation bills from bogus dealers in order to inflate purchases. Accordingly, the AO issued notice u/s 148 of the Act. In response to the notice u/s 142 (1) of the Act, the authorized representative (AR) of the assessee appeared before the AO and furnished some of the details called for by the AO. Thereafter, neither the assessee nor the representative appeared before the AO any details/documents were furnished before the AO. Accordingly, the AO passed the assessment order on the basis material available on record and determined the total income of the assessee at Rs. 5,38,54,780/- after making various additions. The assessee challenged the assessment order before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee partly allowed the appeal. Still aggrieved, the assessee is in appeal before this Tribunal.

3. The assessee has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

“1. In the facts and circumstances of the case and in law, the learned CIT (A) Mumbai has erred in sustaining the additions made by the assessing officer on following matters not related to the reasons recorded for issuing notice u/s 148 and thus traveling beyond the scope of reassessment and making additions to the total income on matters not related to reasons recorded for reassessment, though in principle the CIT (A) agreed with the contention of the appellant that assessing officer cannot make fishing enquiry in the course of reassessment.

<i>Nature f Addition/ Disallowance</i>	<i>Relevant ground no. before CIT(A)</i>	<i>Amt. of Addition/ Disallowance Sustained</i>
<i>Various expenses debited to Profit & Loss A/c</i>	<i>Ground No. 4</i>	<i>Rs. 2,85,180/-</i>
<i>Borrowed Funds</i>	<i>Ground No. 8</i>	<i>Rs. 6,50,000/-</i>

2. In the facts and circumstances of the case and in law, the learned CIT (A) Mumbai has erred in confirming the action of the assessing officer in considering genuine purchase made from following parties as non-genuine purchase and adding the whole amount u/s 69C.

<i>Sr. No.</i>	<i>Name of Party</i>	<i>Amount</i>
<i>1</i>	<i>M/s Prayan Trading Co.</i>	<i>Rs. 8,98,040/-</i>
<i>2</i>	<i>M/s Sampark Steels</i>	<i>Rs. 8,21,174/-</i>
	<i>Total</i>	<i>Rs. 17,19,214/-</i>

3. In the facts and circumstances of the case and in law, the learned CIT (A), Mumbai has erred in confirming the action of the assessing officer in considering, various expenses aggregate to Rs. 2,85,180/- debited to P & L A/c., as unexplained expenditure u/s 69C and disallowing 100% of such expenditure and in sustaining such disallowance CIT (A) ignored his own findings in ground of appeal no. 1 before him.

<i>Sr. No.</i>	<i>Expense</i>	<i>Amount</i>
<i>1</i>	<i>Staff Welfare</i>	<i>21,250/-</i>
<i>2</i>	<i>Salary</i>	<i>1,00,000/-</i>
<i>3</i>	<i>Crane</i>	<i>12,150/-</i>
<i>4</i>	<i>Conveyance</i>	<i>25,970/-</i>
<i>5</i>	<i>Traveling</i>	<i>22,875/-</i>
<i>6</i>	<i>Hamali</i>	<i>19,015</i>
<i>7</i>	<i>Loading & Unloading</i>	<i>39,500/-</i>
<i>8</i>	<i>Oil & Painting</i>	<i>26,195/-</i>
<i>9</i>	<i>Printing & Stationery</i>	<i>18,225/-</i>
	<i>Total</i>	<i>2,85,180/-</i>

4. In the facts and circumstances of the case and in law, the Learned CIT (A), Mumbai has erred in confirming the action of the assessing officer in considering the borrowed funds of Rs. 6,50,000/- from the following lenders as unexplained cash credits u/s 68:

Sr. No.	Lender	Amount
1	Gamhirdas D. Shah	Rs. 3,00,000/-
2	Kajal Jethwa	Rs. 3,50,000/-
	Total	Rs. 6,50,000/-

In sustaining such addition CIT (A) ignored his own findings in ground of appeal no. 1 before him.”

4. Before us, the Ld. counsel for the assessee submitted that the Ld. CIT (A) has erred in sustaining the addition made by the Assessing Officer on the issues not related to the reasons recorded for issuing notice u/s 148 and travelling beyond the scope of reassessment and making addition to the total income on matters not related to reasons recorded for the assessment. The Ld. counsel further pointed out that the Ld. CIT (A) even after holding that the Assessing Officer cannot make fishing enquiry in the course of reassessment, the Ld. CIT (A) has confirmed the addition made by the AO in the issues not relating to the reasons recorded for reopening. The Ld. counsel for the assessee placing reliance on the judgment of the Hon'ble Delhi High Court in the case of *Ranbaxy Laboratories Ltd. vs. CIT 336 ITR 136 (Delhi)* submitted that Explanation 3 to section 147 does not empower the AO to make roving enquiries in respect of other matters. Making roving enquiries in respect of other matters is different from something coming to his notice of AO during the course of assessment. The Ld. counsel further submitted that since the Ld. CIT (A) has allowed the legal ground raised by the assessee and held that the AO cannot make fishing enquiry during the course of assessment proceedings, the Ld. CIT (A) ought to have deleted the addition made by the AO on the issues other than

the issue mentioned in the reasons recorded for issuing notice u/s 148 of the Act.

5. So far as the addition on account of bogus purchases is concerned, the Ld. counsel for the assessee submitted that the Ld. CIT (A) has wrongly confirmed the action of AO and upheld the addition amounting to Rs. 17,19,214/- on account of alleged bogus purchases made from M/s Prayan Trading Company and M/s Sampark Steels. The Ld. counsel further submitted that since the AO had made addition of the said amount on the ground that the assessee had not submitted receipt of VAT paid, Sales Tax paid, transport receipt, octroi receipt, godown receipt, toll receipt, insurance receipt, dispatch vouchers and other related documents to establish the genuineness of transaction of purchases, the Ld. CIT (A) ought to have considered the other evidences placed on record by the assessee. Placing reliance on the judgment of the Hon'ble Bombay High Court in the case of *Babulal C Borana vs. Third ITO 282 ITR 251 (Bom)*, the Ld. counsel submitted that merely because the suppliers are listed as defaulters under the sales tax laws, it cannot be a ground for disallowance of those purchases. The Ld. counsel further contended that there is no evidence to support that payment made through bank was received back in cash. The Ld. counsel further placing reliance on the judgment of the Hon'ble Bombay High Court in the case of *CIT vs. Nikunj Exim Enterprises P. Ltd. 216 Taxman 171 (Bom)* further contended that mere non production of parties cannot lead to a presumption that transaction is not genuine. The Ld. counsel further submitted that in any case 100% addition is contrary to the settled principles of law.

6. On the other hand, the Ld. Departmental Representative (DR) relying on the order passed by the Ld. CIT (A) submitted that as per the law laid down by the Hon'ble Delhi High Court in the case of *Ranbaxy Laboratories Ltd. vs. Commissioner of Income Tax 12 taxman.com 74 (Delhi)*, if during the course of reassessment proceeding, the AO comes to conclusion that some items have escaped assessment then notwithstanding that those items were not included in reasons to believe as recorded for initiation of proceedings and notice the AO

can make assessment of those items. The Ld. DR further contended that since the AO had made additions in accordance with the law laid down by the Hon'ble Delhi High Court, the Ld. CIT (A) has rightly confirmed the addition of Rs. 2,85,180/- on account of various expenses in P & L account, Rs. 6,50,000/- on account of borrowed funds, Rs. 2,85,180/- on account of expenses related to Staff welfare, Salary, Crane, Conveyance, Travelling, Hamali, Loading and Unloading, Oil and painting, and Printing & Stationery amounting to Rs. 2,85,180/- and addition of Rs. 6,50,000/- on account of unexplained cash credit u/s 68 of the Act apart from the addition of Rs. 17,19,214/- on account of bogus purchases.

7. We have heard the rival submissions of parties and also perused the material on record including the cases relied upon by the parties. As pointed out by the Ld. counsel for the assessee, the assessee challenged the assessment order before the Ld. CIT (A) *inter alia* on the ground that in the facts and circumstances of the case and in law, the Ld. AO has erred in making fishing enquiries about matters not related to the reasons recorded for issuing notice u/s 148 and thus traveling beyond the scope of the assessment and making addition to the total income on matters not related to reasons recorded for reassessment. The assessee contended before the Ld. CIT (A) that on the basis of information received from DGIT (Inv.), the AO formed the belief that income of the assessee had escaped assessment to the tune of Rs. 17,19,214/- being purchases shown from hawala parties. However, the AO made fishing enquiry about many other matters not related to the reasons recorded for issuing notice u/s 148 and made various additions. The AR relied on the judgment of the Hon'ble Punjab & Haryana High Court in the case of *Vipon Khanna vs. CIT 255 ITR 220 (Punjab & Haryana)*, *Amrinder Singh Dhiman vs. ITO 269 ITR 378 (P & H)* and *Ranbaxy Laboratory Ltd. vs. CIT 366 ITR 136 (Delhi)* to substantiate the plea that the action of the AO is not sustainable in law. The Ld. CIT (A) allowed the said ground for statistical purpose holding as under:-

"I have considered the contentions of the appellant. The appellant has contended that the AO cannot make roving and

fishing enquiry in the course of the reassessment proceedings. the appellant relied on the decision of the Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Ltd. versus CIT (2011) 336 ITR (Delhi). The appellant also relied upon the jurisdictional, Mumbai bench of the ITAT in the case of Jai Glass Works vs. DCIT (ITA No. 2557/Mum/2013). I find that the cases cited by the appellant supports the contentions of the appellant. Therefore, I agree with the contentions of the appellant that the AO cannot make fishing enquiry the course of the reassessment proceedings. This aspect will be borne in mind while deciding the other grounds of appeal. For statistical purpose this ground of appeal is treated as allowed."

8. As pointed out by the Ld. counsel, the Ld. CIT (A) has decided the legal issue holding that the AO has no jurisdiction to make fishing enquiry in the course of reassessment proceedings. Admittedly, the department is not in appeal against the said findings of the Ld. CIT (A). Under these circumstances, we find force in the argument of the Ld. counsel that the finding of the Ld. CIT (A) has attained finality and the department cannot raised this plea before the Tribunal that the Ld. CIT (A) has wrongly decided the legal issue in favour of the assessee. In the case of *Ranbaxy Laboratory Ltd. vs. CIT* (supra), the Hon'ble High Court has explained the effect of Explanation 3 to section 147 inserted by Finance Act, 2009 which empowers the AO to assess the any income which comes to his notice subsequently even though no reasons have been recorded in respect thereof holding that Explanation 3 does not empower the AO to make roving enquiries in respect of other matters. Since, the Ld. CIT (A) has held in principle that the AO has made fishing enquiry in the course of reassessment proceedings and allowed the legal ground raised by the assessee for statistical purposes and since the department has not challenged the findings of the Ld. CIT (A), in our considered view, the addition made by the AO except the addition made on account of bogus purchases which was the subject matter of reassessment, are not sustainable. Once, it is established that the AO has made fishing and roving enquiry, the additions made as a result of such enquiry cannot be confirmed. Hence, we allow the legal ground raised by the assessee

and delete all the additions sustained by the Ld. CIT (A) except the addition made on account of bogus purchases.

9. So far as the addition on account of bogus purchases is concerned, we notice that the assessee did not produce delivery challan, transport bill, stock register, quantitative reconciliation of purchases and sales. As per the audit report, the assessee had not maintained the stock register. In our considered view, the assessee has failed to establish the genuineness of the purchases made from two bogus traders amounting to Rs. 17,19,214/-, therefore, the authorities below have rightly held the said transaction as bogus. We further notice that the authorities below have not rejected the sales of the assessee. As contended by the Ld. counsel, there can be no sales without any purchases. The facts and the circumstances of the case suggest that the assessee had purchased the material from grey market and evaded the applicable taxes. Therefore, addition to the extent of profit earned from such transaction and the applicable taxes evaded by the assessee is required to be made. The Hon'ble Gujarat High Court in *CIT vs. Simit P. Seth* 356 ITR 451(Guj) has upheld the decision of the Tribunal and sustained the addition 12.5% of the total bogus purchases shown by the assessee holding that only profit element embedded in such purchases can be added to income of the assessee.

10. Hence, in view of the facts and circumstance of the case and in the light of the ratio laid down by the Hon'ble Gujarat High Court in the case of *CIT vs. Simit P. Sheth* (supra), we partly allow ground No 2 raised by the assessee and direct the AO to make addition @ 12.5% of the total amount of bogus purchases upheld by the Ld. CIT (A) and to delete the remaining additions sustained by the Ld. CIT (A).

ITA No. 215/MUM/2019 (Assessment Year: 2009-2010)

2. The assessee has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

“1. In the facts and circumstances of the case and in law, the learned CIT (A) Mumbai has erred in sustaining the additions made by the assessing officer on following matters not related to the reasons recorded for issuing notice u/s 148 and thus traveling beyond the scope of reassessment and making additions to the total income on matters not related to reasons recorded for reassessment, though in principle the CIT (A) agreed with the contention of the appellant that assessing officer cannot make fishing enquiry in the course of reassessment.

<i>Nature f Addition/ Disallowance</i>	<i>Relevant ground no. before CIT(A)</i>	<i>Amt. of/Addition/ Disallowance Sustained</i>
<i>Various expenses debited to Profit & Loss A/c</i>	<i>Ground No. 4</i>	<i>Rs. 6,20,512/-</i>
<i>Interest expense</i>	<i>Ground No. 5</i>	<i>Rs. 5,36,251/-</i>
<i>Borrowed Funds</i>	<i>Ground No. 8</i>	<i>Rs. 9,50,000/-</i>

2. In the facts and circumstances of the case and in law, the learned CIT (A) Mumbai has erred in confirming the action of the assessing officer in considering genuine purchase made from following parties as non-genuine purchase and adding the whole amount u/s 69C.

<i>Sr. No.</i>	<i>Name of Party</i>	<i>Amount</i>
<i>1</i>	<i>M/s Prayan Trading Co.</i>	<i>Rs. 6,52,090/-</i>
<i>2</i>	<i>M/s Sampark Steels</i>	<i>Rs. 6,25,185/-</i>
	<i>Total</i>	<i>Rs. 12,77,275/-</i>

3. In the facts and circumstances of the case and in law, the learned CIT (A), Mumbai has erred in confirming the action of the assessing officer in considering, various expenses aggregate to Rs. 6,20,512/- debited to P & L A/c., as unexplained expenditure u/s 69C and disallowing 100% of such expenditure and in sustaining such disallowance CIT (A) ignored his own findings in ground of appeal no. 1 before him.

<i>Sr.</i>	<i>Expense</i>	<i>Amount</i>
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No.		
1	Bonus	20,000/-
2	Staff Welfare	22,870/-
3	Car Expense	36,512/-
4	Crane	32,610/-
5	Hail Charges	19,675/-
6	Labor Charges	1,80,000/-
7	Loading Charges	69,850/-
8	Oil & Painting	36,975/-
9	Printing & Stationery	15,250/-
10	Straightening Charges	34,345/-
11	Weightment Charges	32,425/-
12	Salary	1,20,000/-
	Total	6,20,512/-

4. In the facts and circumstances of the case and in law, the Learned CIT (A), Mumbai has erred in confirming the action of the assessing officer in disallowing interest expense of Rs. 5,36,251/- debited to P & L A/c u/s 40(a)(ia) and in sustaining such disallowance CIT (A) ignored his own findings in ground of appeal no. 1 before him.

5. In the facts and circumstances of the case and in law, the Learned CIT (A) has erred in confirming the action of the assessing officer in considering the borrowed funds of Rs. 9,50,000/- from the following lenders as unexplained cash credits u/s 68:

Sr. No.	Lender	Amount
1	Cambhirdas D Shah	Rs. 2,00,000/-
2	Tushar Doshi	Rs. 5,00,000/-
3	R.B. Shah	Rs. 2,50,000/-
	Total	Rs. 9,50,000/-

In sustaining such addition CIT (A) ignored his own findings in ground of appeal no. 1 before him.”

3. The facts and the issues involved in the present case are identical to the facts and the issues involved in assessee's case ITA No. 214/Mum/2019

discussed above except the amounts of additions sustained by the Ld. CIT (A). Since, we have partly allowed the appeal of the assessee and sustained addition of 12.5% of the total amount of bogus purchases sustained by the Ld. CIT (A) and deleted the remaining additions in ITA No. 214/Mum/2019 aforesaid and since there is no material change in the facts of the present case, consistent with our findings in the assessee's case in ITA No. 214/Mum/2019 aforesaid, we direct the AO to make addition of 12.5% of the total amount of bogus purchases shown by the assessee in the present case and delete the remaining additions sustained by the Ld. CIT (A).

In the result, both the appeals filed by the assessee are partly allowed.

Order pronounced on 10th Sept., 2020 under rule 34 (4) of the Income Tax Appellate Tribunal Rules, 1963.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 10/09/2020

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/ Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai