

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 2260/MUM/2019 (A.Y. 2008-09)

ACIT – 19(3) Room No. 206, 2 nd Floor Matru Mandir, Tardev Road Mumbai – 400 007	v.	M/s. Rishab Steel House 301-Duncan Road, M.A. Road Mumbai -400 004 PAN: AACFR2807C
(Appellant)		(Respondent)

Assessee by : Mrs Rutuja Pawar
Department by Shri Bharat Andhle

Date of Hearing : 24.11.2020
Date of Pronouncement : 25.11.2020

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the revenue against the order of the Learned Commissioner of Income Tax (Appeals) – 3, Mumbai [hereinafter in short “Ld.CIT(A)”] dated 12.11.2018 for the A.Y. 2008-09 in restricting the addition to 5% of purchases as against the disallowance of 12.5% of purchases as non-genuine/bogus by the Assessing Officer.

2. Briefly stated the facts are that, assessee engaged in the business of Trading of steel, filed return of income on 27.09.2008 declaring income of ₹.25,70,213/- for the A.Y. 2008-09 and the return was processed u/s.143(1) of the Act. Subsequently, Assessing Officer received information from the DGIT (Inv.), Mumbai about the accommodation entries provided by various dealers and assessee was also one of the beneficiary from those dealers. The assessment was reopened U/s. 147 of the Act based on the information received from DGIT(Inv.), Mumbai, that the assessee has availed accommodation entries from M/s. Navratan Impex who is said to be providing accommodation entries without there being transportation of any goods. In the reassessment proceedings, the assessee was required to prove the genuineness of the purchases made from M/s. Navratan Impex. Assessee furnished Profit and Loss Account and details of purchase parties and submitted that the purchases made are genuine. Assessee further submitted that the payments are made through account payee cheques as such contended that all the purchases are genuine. However, parties were not produced before the Assessing Officer and no explanation was offered.

3. Not convinced with the submissions of the assessee the Assessing Officer treated the purchases as non-genuine and he was of the opinion

that assessee had obtained only accommodation entries without there being any transportation of materials and the assessee might have made purchases in the gray market. It is the finding of the Assessing Officer that the assessee failed to produce the alleged party and assessee recorded such purchases in the Books of Accounts and had not effected the corresponding sales. Assessing Officer observed that the notices issued u/s. 133(6) of the Act to the party returned unserved and the assessee has not produced the party before the Assessing Officer. Therefore, Assessing Officer treated 12.5% of the alleged bogus purchases of ₹.17,75,518/- as non-genuine and added to the income of the assessee. On appeal the Ld.CIT(A) considering the evidences and various submissions of the assessee restricted the disallowance to an extent of 5% of the non-genuine purchases.

4. Ld. Counsel for the assessee reiterated the submissions made before the Ld.CIT(A) and supported the order of the Ld.CIT(A).

5. Ld.DR vehemently supported the order of the Assessing Officer.

6. We have heard the rival submissions, perused the orders of the authorities below. On a perusal of the order of the Ld.CIT(A), we find that

the Ld.CIT(A) considered this aspect of the matter elaborately with reference to the submissions of the assessee and the averments in the Assessment Order and following the order of the Tribunal in assessee's own case in ITA.No. 1326/Mum/2016 dated 22.12.2017 directed the Assessing Officer to restrict the addition to 5% of the purchases made from alleged party, observing as under: -

"4.4. Decision on ground number 1:

I have considered the rival submissions. In appeal, the appellant submitted a copy of order of Hon'ble ITAT passed in its own case for AYs. 2009-10, 2010-11, 2011-12 and 2006-07 (ITA No.1326/Mum/2016 dt. 22.12.2017). In that order the Hon'ble ITAT has directed the AO to estimate the profit @ 5%. The relevant portion of the order is reproduced as under:

"8. We have heard the rival submissions and carefully considered the same along with the orders of the tax authorities below. The only issue before us relates to the estimation of profit in respect of purchases which are regarded to be bogus purchases by the Assessing Officer even though the sales made by the assessee have not been disputed by the Revenue. Rather it is a fact that Revenue has accepted the sales made by the assessee. The Assessing Officer has disallowed all the alleged bogus purchases and made the addition in the income of the assessee u/s. 69C of the I T Act. It is not disputed that the parties, which are alleged to be bogus purchases are available in the public domain in the website of the Sales tax Department being the hawala operators. It is not a case that the assessee is not maintaining the stock record, rather it is a case where the assessee is duly reconciling the quantitative details in respect of the purchase and sales. Therefore, in our opinion, the fact remains that he assessee would have made the purchases but not from the alleged parties. It is a case where the purchases would have been made from the grey market and when the purchases are being made from the grey market naturally the assessee would have saved not only the sales tax but also would have got the purchases at a lower rate. No doubt, in the case of M/s. Steel Line (India), this Tribunal in ITA 1321, 1322, 1323/Mum/2016 vide order dated 29.08.2017

has restricted the addition to the extent of 2% of such purchases. We have gone through the said order of the Tribunal and noted that it has been held as under:

"Against the above order of CIT(A), both assessee and revenue are in further appeal before us. We have considered rival contentions and carefully gone through the orders of the authorities below and also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by learned AR and DR during the course of hearing before us in the context of factual matrix of the case. From the record, we found that AO has made addition in respect of purchases found to be bogus as per the information from sales tax department. In the appellate proceedings, the CIT(A) recorded a finding to the fact that AO has not disputed the quantitative details and also day to day stock register maintained by the assessee. Assessee company being a trader of goods, AO not having doubted the genuineness of sales, could not have gone ahead and made addition in respect of peak balance on such purchases. Accordingly, CIT(A) concluded that issue boil down to find out the element of profit embedded in bogus purchases which the assessee would have made. When the corresponding sales have not been doubted and the quantitative details of purchases and sales vis-a-vis stock was available, we deem it appropriate considering the entirety of facts and circumstances of the case to restrict the addition to the extent of 2% of such bogus purchase. Accordingly, the order of both the lower authorities are modified and AO is directed to restrict the addition to the extent of 2% on such purchases."

From this order, we noted that the Tribunal while directing the addition to be restricted to 2% of such bogus purchases has not given any reason but mentioned that they deemed it appropriate, considering the entirety of facts and circumstances of the case, to restrict the addition to the extent of 2% of such bogus purchases. The Tribunal while giving such directions under para 3 of its order, reproduced various orders dealing with the identical issue passed by the Gujarat High Court as well as Ahmedabad Bench of this Tribunal and which has been referred to by the CIT(A) as well as by the assessee before us during the course of hearing. In these cases, we noted that the Tribunal/High Court has not directed the Assessing Officer to restrict the addition to the extent of 2% but the addition was sustained ranging from 12.5% to 25%. We may also mention that the gross profit earned by the assessee or shown in its income

tax return does not have any bearing so far as the addition is being made in respect of income earned by the assessee on the alleged bogus purchases. The logic for estimating the addition for alleged bogus purchases is that the assessee would have made purchases from the grey market and by making the purchases from the grey market the assessee would have saved taxes may be in the form of excise duty and sales tax, which is being shared between the seller and the buyer. Not only this, in our view, the assessee would never buy the material from the grey market until and unless there is saving in the cost of material. The learned AR before us even though submitted a comparative chart in respect of various decisions, which were referred to by the CIT(A) while estimating income on such alleged bogus purchases @17.5%, we do not agree with the contention of the assessee because in our opinion, whatever the assessee claims deduction for a expenditure, onus is on the assessee to prove the genuineness of the expenditure. Before us no cogent material or evidence was produced or referred to which may prove that the purchases made by the assessee from the alleged parties were genuine. The 'C' Bench of this Tribunal, as has been pointed out during the course of hearing, in the case of Modern Road Maker in ITA No. 4734/Mum/2016 vide order dated 24.10.2014, to which the VicePresident was one of the party, directed the Assessing Officer to estimate the profit on such purchases @5% by observing as under:

"21. We have considered the rival submissions of the parties and have gone through the order of authorities below and the various decisions relied by the Id representatives of the parties. Ground No. 1 relates to the confirming the addition of Rs.6,03,42,549/- on account of unexplained expenditure under section 69C of the Act (being 12.5% of Surat-Dahisar and Kolhapur Project i.e. Rs. 3,90,58,839/-, 100% of Mumbai- Pune Expressway i.e. Rs. 2,01,85,145/- and Nagpur -Hyderabad Project i.e. Rs.10,98,565/-). We have seen that while forming the assessment the assessing officer observed that during the financial year related to the assessment under consideration the assessee has shown the purchases of Rs.33,37,54,424/- from Karma Industries Ltd (KIL). The assessing officer issued show cause dated 10.02.2012 to the assessee as to why the purchases from KIL and its associate should not be treated as bogus. The assessee filed its reply dated 18.02.2014. In reply the assessee contended that the material purchased during the relevant period had been consumed in different project executed by assessee namely Mumbai- Pune, Nagpur- Hyderabad, Kolhapur and Surat- Dahisar Project. The assessee also

filed reconciliation of material consumed along with chart with ratio of material. The assessee also filed the working of the estimated cost for bidding purpose, certificate from his Banker/ lender's Bank, i.e STUP Consultant. Certificate from independent Engineer appointed by National High Way Authority (NHAI) i.e. Intercontinental Consultant and Technocrats Pvt Ltd. All the purchases were made through account payee Cheques. The assessing officer was not accepted by the contention and the evidences of assessee, on the grounds that the assessee claimed that the transporting charges were born by dealers. The assessing officer recorded that from the enquiries from the RTO office, it was revealed that the majority of vehicles allegedly used for transportation are owned by the assessee itself. If the assessee was using its own vehicle while it was claiming that transport charges born by the dealer. The assessing officer further concluded that no delivery challans were found during a search and seizure proceeding. Further the vehicles other than the vehicle owned by the assessee were not utilized for transportation of material or that some vehicles number provided by assessee belongs to the Government authorities and some to the private parties. The private parties have denied to have rendered any services to the assessee or to the dealer. One of the vehicles was tanker and one tipper. The assessee could not provide the slip of weight at the time of delivery. The assessing officer disallowed the entire purchases of Rs.33,37,54,424/- from Karma Industries Ltd. The assessing officer rejected the documentary evidences furnished by the assessee. The assessing officer disbelieved the certificate of consumption issued by Engineer appointed by NHAI. The assessing officer has not brought any material on recorder to discard the evidences furnished by the assessee. The assessing officer examined two Engineers with regard to the certificate issued by them. The assessing officer has not given any adverse finding nor pointed out any infirmity in their report about the consumption of the material.No other verification of site or the projects were carried by the assessing officer. The estimated consumption of the material in the project being executed by assessee was not examined. Rather concluded that the estimated cost of such projects are always on higher side. We have seen the statement of MD of the assessee company, there is no such admission about the bogus transactions. Rather, in his statement categorically stated that the purchases are not verifiable in absence of record at that time. The statement was

retracted vide letter dated 16.2.2011. The assessing officer relied on the statement of Rajesh Mehta. However, Rajesh Mehta in his statement disclosed that he never meet the MD of the assessee company. The transactions were made through Nitin and Sunil Mehta. The assessing officer not examined Nitin and Sunil Mehta. The assessing officer gave his finding the consumption of steel in the project was not proved beyond doubt and disallowed the entire purchases from KIL.

22. However, the Id Commissioner (Appeals) restricted the disallowance of cost of purchases of Steel for Surat-Dahisar and Kolhapur Project at 12.5% i.e at Rs. 3,90,58,839/-), 100% of Mumbai- Pune Expressway (i.e. Rs.2,01,85,145/-) and Nagpur– Hyderabad Project (i.e. for Rs.10,98,565/-). Before Id Commissioner (Appeals) the assessee filed written submission. In the written submission the assessee explained that the name of Karma Industries Ltd (KIL) is not listed in the website of Sales Tax Department Government of Maharashtra. The assessee also explained the typographical mistake in the Registration number of vehicles used in transportation of the Steel, details of which are available in the paper book filed in appeal for AY 2008-09. The perusal of the details of Registration number of vehicles reveals that the mistake in writing is very minor which may occur due to human error. The assessee furnished the certified copies of the Registration Certificate (RC) and photographs of the vehicles and the evidence how the Tipper was used for transportation. The assessee also furnished explanation of the discrepancies recorded by assessing officer. On the written submission of assessee, the Id. Commissioner (Appeals) sought the comments of assessing officer. The assessing officer filed his comment / remand report dated 25.10.2016. In the remand report the assessing officer disputed the contention of the assessee and relied on his findings. After considering the submission of the assessee and the material on record the Id. Commissioner (Appeals) concluded that there are good and sufficient reasons to hold that so far as project of Surat- Dahisar and Kolhapur are concerned, the purchase of steel cannot be treated as bogus. (para 6.3.8 of Id CIT(A) order) However, the Id Commissioner (Appeals) concluded that such purchases are made from the parties other than those mentioned in the books of accounts and the profit element embedded therein needs to be brought to tax. The Id. Commissioner (Appeals) further concluded that such purchases are made

only to save 10% Excise duty and cess levied thereon at 2% and sustained the disallowance at 12.5% of the purchases shown for Surat- Dahisar and Kolhapur. The Id AR for the assessee while making his submission before argued that the assessee is engaged in execution of Infrastructure project and the rate of VAT for steel applicable for such purchased is 4% and that the assessee has already paid the same on all purchases. This fact was not disputed by Id.DR for the revenue. In our view, the disallowance of purchases of steel at 12.5% is on higher side, when the Id. Commissioner (Appeals) has concluded that the purchases of steel for Surat- Dahisar and Kolhapur cannot be treated bogus. Further, when the Id. Commissioner (Appeals) also noted that the consumption certificate of Engineer is marginal and within reasonable limit the disallowance at 12.5% is on higher side. In our view even in case the transactions are not verifiable due to certain reasons, the disallowance must be made on reasonable side, keeping in view the facts of each cases. Under Income-tax the revenue is not entitled only the income/ profit component and not the entire transaction. We have noted that the Id CIT(A) has observed that such purchases are made to avoid 10% of the payments of Excise duty. The Id CIT(A) has not examined if , the purchases were shown to avoid the excise duty. The Assessee throughout the proceedings claimed that they have paid VAT at the rate of 4%, which is nowhere disputed by lower authority. If we consider the observation of Id CIT(A) that the purchaser and seller have shared excise duty by showing the sale and purchase of steel, even than the addition in excess of such share to the income is unreasonable. Thus, keeping in view the assessee has paid the VAT at the applicable rate on all the purchases. Hence, keeping in view of any possibility of the revenue leakage which is very thin in the present case, the disallowance of purchases of steel for Surat- Dahisar and Kolhapur project at 5% of the impugned (disputed) purchases would meet the end of justice. Similar view was taken by Hon'ble Gujarat High Court in CIT Vs Simit P Seth [2013(356 ITR 451)] and by Hon'ble Bombay High Court in Hariram Bhambani ITA No 313 of 2013. The facts of the decision in N. K. Proteins (supra) relied by Id. DR for the revenue are at variance. In the said case the assessee was trader. During the search action in that case blank signed cheques books and numbers of vouchers were found on the basis of which the transaction was treated bogus. However, in the present case the assessee has given

sufficient evidences to substantiate its purchases. Moreover, no incriminating material was found during the search at the premises of the assessee. The addition of alleged bogus purchases are based on third party information. No yardstick formula can be applied while assessing the amount of revenue leakage. Moreover, the revenue has not disputed the consumption of steel. Thus, respectfully following the decision of Hon'ble Gujarat High Court in CIT Vs Simit P Seth supra and by Hon'ble Bombay High Court in Hariram Bhambani supra, the disallowance of cost of purchases of steel is restricted to 5% of the impugned purchases only. The assessing officer is directed accordingly. In the result the ground no.1 of the appeal is partly allowed."

We noted in the aforesaid case, where the Tribunal has directed the Assessing Officer to estimate the profit @5% on the alleged bogus purchases has duly given the reasons for estimating the profit 2%% while we noted in the case of M/s. Steel Line (India) (supra), the Tribunal has not given any reason in its order as to why the profit should be estimated @2% of alleged bogus purchases. Since the Tribunal in the case of Steel Line India has not given any reason and has not looked into the aspect why the assessee will buy the material from the grey market, this decision in our opinion, will not be binding on us. Since in the case of M/s. Modern Road Maker Pvt. Ltd. the Tribunal has given the reasons, respectfully following the same, direct the Assessing Officer to estimate the profit @5%. Since in all the appeals filed by the assessee the issue involved is common, we therefore following the decision for A.Y. 2006-07 direct the Assessing Officer to estimate the profit @5%."

In view of the decision of the Hon'ble ITAT cited above, the disallowance of the 12.5% of the purchase made by the AO is not sustainable. Accordingly, I direct the AO to restrict the addition to 5% of the value of purchases made from Navratan Impex. Therefore, Ground No. 1 is treated as partly allowed."

7. Since, Ld.CIT(A) followed the order of the Tribunal in assessee's own case for the earlier as well as subsequent assessment years on identical issue and decided partly in favour of the assessee by directing the Assessing Officer to estimate the profit element in alleged non-genuine purchases at 5%, facts being similar, we do not find any infirmity

in the order passed by the Ld.CIT(A) in restricting the addition to 5% of the value of purchases made. Grounds raised by the revenue are dismissed.

8. In the result, appeal of the Revenue is dismissed.

Order pronounced on 25.11.2020 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai / Dated 25/11/2020
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. The Assessee
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum