

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

**BEFORE SHRI R.C.SHARMA, ACCOUNTANT MEMBER**

**ITA No. 667/Mum/2019  
(Assessment Year: 2009-10)**

Vijay B Shah (HUF), Prop.- of M/s Vijay Enterprises, 12A, Giriraj Building, S.T. Road, Carnac Bunder, Mumbai- 400009.	Vs.	I.T.O.-17(3)(5) Room No. 137, Aayakar Bhavan, M.K. Road, Mumbai-400020
<b>PAN/GIR No. AABHV 7438 J</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	None
Revenue by	Shri R.K. Gubgotra (JCIT-DR)
<b>Date of Hearing</b>	<b>05/02/2020</b>
<b>Date of Pronouncement</b>	<b>03/03/2020</b>

**आदेश / ORDER**

**PER: R.C. SHARMA, A.M.**

This appeal by the assessee is directed against the order dated 28/11/2018 of Id. CIT(A)-28, Mumbai for the A.Y. 2009-10 in the matter of order passed U/s 143(3) r.w.s. 147 of the Income Tax Act, 1961 (in short, the Act).

2. No body has appeared on behalf of the assessee in spite of issue and service of notice. On earlier occasions also appeal was fixed on 30/01/2020 wherein the assessee requested for adjournment and adjournment was granted with observation "Last opportunity" and appeal was adjourned for hearing on today i.e. on 05/02/2020.

However, neither any body appeared on behalf of the assessee nor any adjournment was filed, therefore, the Bench decided to dispose off the appeal after considering the material placed on record.

3. I have gone through the orders of the authorities below and found that the A.O. has reopened the assessment on getting information regarding assessee taking accommodation purchase bills. The A.O. made enquiry and found that the assessee has taken purchase bills without delivery of goods. Accordingly, he added 12.5% of such alleged purchases in assessee's income. By the impugned order, the Id. CIT(A) has confirmed the action of the A.O. after observing as under:

*“6.7 In 'the present facts and circumstances of the case, it S observed that the aforesaid purchases are supported by dubious bills with subsequent entries in the books of accounts and payment has been claimed to have been made by account payee cheques. The claim of the appellant that the payments have been made by the a/c payee cheque also does not make his claim I as' bonafide in view of the judicial pronouncement made by Hon'ble Calcutta High Court in the case of CIT vs. Precision Finance Pvt. Ltd. 208 ITR 465 Cal. (1994). It was held that transaction through bank is not sufficient to prove transaction as bonafide. Merely because the money is transferr through the bank account does not prove that the money is explained. It is essential to prove the creditworthiness of the persons or genuineness of the transactions. Merely furnishing of particulars is not enough. It was held that mere payment by account payee cheque is not sacrosanct nor can it make a non- genuine transaction*

*genuine. The ratio laid down in the case of Precision Finance is squarely applicable to the facts and circumstances in the present case of the appellant as well which is commensurate with the information received by the AO from the Investigation Wing. It is a fact that payment is made through banking channels but it is also a fact that on deposit of such money in these so called supplier's bank accounts cash is withdrawn on the same day or immediately thereafter.*

6.8 *It is further pertinent to note that the veracity Of the transactions through banking channels, is not a Sine-qua-non to prove that the transaction must indeed be beyond the shadow of doubt and also that there cannot be any infirmity with the same. Judicial decisions have also taken note of this aspect and started recognizing that modern instruments of tax evasion are ingenious enough to shape them in such a manner that on the surface, they appear genuine enough. The above is supported by the following case laws i.e.:-*

1. *CIT Vs. Jansampark Advt. Del. Court/ITA No.525/2014.*

*Ratio*

*"The fact that transactions are through banking channel, it does not necessarily follow that satisfaction as to the creditworthiness of parties or genuineness of transaction has been established.*

2. *CIT Vs. Vir Bhan & Sons, 273 ITR, 206(P&H)-High Court.*

*"Mere fact that amount was received by cheque, by itself, does not conclusively prove the genuineness of the transaction,*

6.9 *Further, it is the legal position that the onus is on the appellant to produce the identity of the so called suppliers and genuineness of transactions, when he has claimed the purchases to have been made from them. There is no concrete evidence produced by the appellant to*

*prove delivery of goods through independent agency / third pay in the case of the purchases.*

- 6.10 *Further, the facts of the present case show that appellant could not produce either confirmation or the party from whom goods have been purchased by the appellant. The supplier in question has found to be engaged in providing bogus bills without actually dealing in goods as per the information provided by the Sales Tax authorities. However, this is also a fact that the sales of the appellant have not been doubted by the AO. Therefore, if sales are not doubted or proved to be not genuine by the AC, then the logical corollary, is that the appellant has definitely made the purchases or elsewhere from what he could have affected the sales. Therefore what is under dispute is the purchases from the various Hawala parties from whom bills have been taken and cheques have been issued. Therefore, the purchases of the appellant from the above parties is not established. Hence the purchases per se by the appellant could not be doubted in their entirety as sales have not been doubted by the A.O.*
- 6.11 *Further, it is noted that the fact remains that the AO has not rejected the books of accounts of the appellant nor it is his case that cash was withdrawn from the bank account of the suppliers immediately after the cheques were deposited nor he has brought on record any other material to strengthen his case that the purchases are bogus. However, at the same time it cannot be denied that the above various parties from whom bogus bills are taken have indeed been declared as a hawala parties by the sales tax/VAT Department, since, the Hawala parties in question have been found, to be engaged in providing bogus bills without actually dealing in goods.*
- 6.12 *In the backdrop of the above discussion, the only logical conclusion that can be deduced that the appellant's case is such where the appellant only took bills from various Hawala parties to explain the*

*purchases made albeit from open market. Identical issue came up before the Hon'ble High Court of Gujarat in the ease of CIT vs. Bholanath Poly Fab Pvt. Ltd. Reported in 355 ITR 290 (Guj). The assessee was engaged in the business of trading in finished fabrics. The AO disallowed purchases as bogus/unexplained. The CIT(A) confirmed the action of the AO. The issue was carried in appeal before the Hon'ble Tribunal which concurred with the finding of the revenue authorities below that such purchase was made from bogus parties. After advertng to the facts and data placed before it, the Hon'ble Tribunal noted that the entire cloth of 1,02,514 metres was sold during the year and therefore, accepted the assessee's contention that the finished goods purchased by the appellant may not be from the parties shown in the accounts but from other parties. In view of this, the Hon'ble ITAT was of the view that only profit margin embedded in such purchases would be subjected to tax. The Hon'ble Tribunal relied on its earlier decision in the case of M/s Saket Steel Traders vs ITO (ITA No. 2801/Ahd/2008 dated 20/05/2008) and also made reference to the decision in the case of Vijaya Protein Vs CIT 58 MD 428 (Ahd). On appeal by the department filed in the case of Bholamath Poly Fab Pvt. Ltd, the Hon'ble High Court dismissed the appeal and concurred with the findings of Hon'ble Tribunal that not entire purchase price but profit element embedded in such purchases would be liable to tax. Viewed from the above angle it is amply evident that the decision of the AO stands up to the test.*

- 6.13 *It is the say of the Id.AR that the impugned addition has been made solely on the basis of suspicion on the part of the AO and also that suspicion, howsoever strong cannot be the basis of the assessment. Several case laws also are relied upon by AR for this proposition. In the appellant's case, by no stretch of the imagination can it be concluded that the AO has framed the assessment merely on the basis of suspicion. This is because there is clear cut evidence which exists*

*to the effect that the names of the so called seller parties i.e. various Hawala parties formally and clearly appears in the website of the Sales Tax/VAT Department, wherein it is established that the various Hawala parties are indulging in providing accommodation entries. This is an important evidence based on fact and not on suspicion. Moreover, the failure of the appellant to adduce key evidence as to transportation of the materials also points out to an important failure. Most importantly, the AO has not added the whole transaction but has rather only taxed the profit element embedded and this also is supported by numerous decisions as discussed above. Hence, the case laws, cited by the AR may be of little assistance to further the case of the appellant.*

- 6.14 *It is also canvassed that third-party statements are not binding on the appellant. Whereas, this may be so but the fact remains that in the case of the appellant the addition was made, inter-a/in, not merely on third party statement but rather on account of the failure of the appellant to discharge the burden of proof east on it to establish the veracity and the genuineness of i.e. transaction. In effect, the AO made the impugned addition on the basis of inability of the appellant to prove the different aspects of the transaction.*
- 6.15 *It is also the say of the AR that comparable instances have not been given by the AO. This is rather a fallacious argument because each assessment in a particular case stands on its own pedestal, given the peculiar facts of the case. Rather than comparable case what has to be seen is whether the AO arrived at a legally tenable decision based on the case before him while framing the assessment. This is indeed the case here.*
- 6.16 *It is further argued that no opportunity of cross examination is afforded to the appellant and also that the sole reliance on Sales Tax/VAT is not correct.*

*In this regard, it is observed that the opportunity of cross examination may not be sacrosanct and fatal to the assessment as held by Hon'ble Bombay High Court in GTC INDUSTRIES LTD Vs ACIT (1998) 65 ITD 380/60 TTJ 308(BOM). In the present appeal, at the cost of repetition it is observed that AO did not base his decision solely on the Sales Tax/VAT and came to an independent conclusion after due consideration of a myriad of factors and on account of the inability of the appellant to discharge the burden of proof cast on it.*

*6.17 It is a well-established position at law, that the importance of VAT investigation cannot be in any manner trivialized. Further, it is important to appreciate that it is not proper to say that sales tax records/investigation has no value is not correct. It has strong corroborative value. Further, the significance of VAT Investigation has been judicially noted in the case of ARUN SHIMPI vs. ITO (2016)48 CCH 195 (mum)....*

*6.18 In context of central Excise (a similar law) records maintained were held to be important piece of evidence as held in Motipur Sugul Factory (P) Ltd. V. CIT (1974) 95 ITR 401 (Pat.)(HC)(409)(PRO ASSESSE JUDGMENT OTHERWISE ACTUALLY) and in Shanker Rice Co. V. ITO (2000) 72 ITD 139 (Asr.) (SB)(Trib.) (158). By parity of reasoning the same applies to sales tax law as well in context of determination of taxable income in IT Law.*

*6.19 In the context of the judicial pronouncements rendered on behalf of the appellant, it is a trite law that each judicial decision is rendered in the very peculiar and factual matrix of that case and therefore it is not either judicially expedient or prudent to superimpose the facts of the case cited by the AR to the facts of the present case. In this sense, each case is undisputedly unique and stands on different pedestal.*

6.20 *Further, it would be very much germane to note that in various decisions, the Hon'ble ITAT, Mumbai has held that in such cases which are essentially of trading, estimation of 12.5% profit as having been embedded in the bogus purchase transaction was held to be a fair and just outcome. Some of these decisions are quoted below:-*

*a) Meru impex Ex in ITA No.2660/Mum./2017.*

*b) MP Recycling Co. in ITA No.6858/mum./2016.*

*c) Y.A Mamaji Furnishing & Co. in ITAs 4756,4757 & 4758/Mum/2014*

*d) Manish M Shah in ITA 2975/Mum/2015*

6.21 *In the ultimate analysis, based on the above elaborate discussion and after giving conscious thought and weightage to the attendant facts and circumstances of this appeal and also to the crux of this vastly litigated issue, I hereby hold that the action of the AO in adopting 12.5% as embedded profit in the transaction is not only legally tenable but also fair and just. Accordingly, I find no reason to interfere with the same and hence, the appeal on this ground of appeal is DISMISSED."*

4. Against the above order of the Id. CIT(A), the assessee is in further appeal before the ITAT.

5. I have heard the contentions of the Id. DR and carefully gone through the orders of the authorities below and found that the assessee is engaged in the trading of iron and steel. After making enquiry, the A.O. found the alleged purchases as non-genuine. However, the A.O. upheld addition only to the extent of 12.5% of the alleged bogus purchases and did not disturb the sales. By the impugned order, the Id. CIT(A) after considering various judicial pronouncements on the issue and the facts and circumstances of the



case upheld the order of the A.O. after giving detailed finding at para 6.7 to 6.21 of the appellate order. Nothing was placed before me so as to persuade me to deviate from the findings recorded by the Id. CIT(A). Accordingly, I do not find any reason to interfere in the order of the Id. CIT(A) and uphold the same.

6. In the result, appeal of the assessee is dismissed

Order pronounced in the open court on 03<sup>rd</sup> March, 2020.

**Sd/-**  
**(R.C.SHARMA)**  
**ACCOUNTANT MEMBER**

Mumbai; Dated 03/03/2020  
\*Ranjan

**Copy of the Order forwarded to :**

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

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)  
**ITAT, Mumbai**