

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

**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.495/M/2020
Assessment Year: 2011-12**

M/s. United Waterproofing Corporation, 5/2-A, Apartment, Bandiwali Hill Road, Jogeshwari (W), Mumbai -400 102 PAN: AAAFU1604Q	Prakash	Vs.	Income Tax Officer- 31(3)(2), 625 Kautilya Bhavan, BKC Bandra East, Mumbai - 400051
(Appellant)			(Respondent)

Present for:

Assessee by : Shri Phalgun Desai, A.R.
Revenue by : Ms. Smita Verma, D.R.

Date of Hearing : 23.08.2021
Date of Pronouncement : 14.09.2021

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 22.11.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2011-12.

2. Ground No.1 is dismissed as not pressed.
3. The only issue raised by the assessee in ground No.2 is against the order of Ld. CIT(A) enhancing the addition of Rs.15,373/- made by the AO to Rs.1,22,985/- which is 100% of bogus purchases.

4. The facts in brief are that the assessee filed the return of income on 30.09.2011 declaring a total income of Rs.13,21,493/- which was processed under section 143(1) of the Act. The case of the assessee was thereafter reopened by the AO after receipt of information from DGIT (Inv.), Mumbai that assessee is beneficiary of hawala purchase entries to the extent of Rs.1,22,985/- and accordingly the notice under section 148 of the Act was issued on 17.06.2014. The AO called for various details and information from the assessee from time to time during the course of assessment proceedings which were duly filed before the AO. The AO finally rejected the contentions of the assessee and treated the purchases as non genuine thereby making an addition of Rs.15,373/-, being 12.5% of the purchases, to the income of the assessee by framing assessment under section 143(3) read with section 147 of the Act dated 25.03.2016.

5. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee and further directed the AO to apply rate 100% of the bogus purchases on the ground that the assessee has failed to prove the genuineness of the purchases and consumption/utilization of the materials purchased.

6. After hearing both the parties and perusing the material on record, we note that Ld. CIT(A) has enhanced the addition on account of bogus purchases to 100% of the bogus purchases as against 12.5% applied by the AO. The only reason given by the Ld. CIT(A) is that the assessee has failed to prove the genuineness of purchases and consumption of material. We note that in case of bogus purchases the entire purchases can

not be brought to tax as has been held in a series of decisions of the co-ordinate Bench wherein it has been held that only profit element can be brought to tax despite the purchases being bogus. After taking into account the facts of the assessee's case, we are of the considered opinion that Ld. CIT(A) has wrongly enhanced the addition to 100% and the same can not be sustained. Accordingly, we are setting aside the order of Ld. CIT(A) on this issue by restoring the assessment order.

7. Accordingly, ground No.2 is allowed.

8. The issue raised in ground No.3 is against the confirmation of addition of Rs.4,14,421/- by Ld. CIT(A) as made by the AO by invoking the provisions of section 40A(3) of the Act.

9. The facts in brief are that the AO on the basis of examination of books of accounts observed that assessee has made various cash payments exceeding Rs.20,000/- to various parties and accordingly a show cause notice dated 02.03.2016 was issued to the assessee as to why the payment exceeding the limit as specified under section 40A(3) of the Act should not be disallowed which was replied by the assessee by submitting that the payments in most of the cases were below Rs.20,000/- and where the payments exceeded Rs.20,000/-, the same were covered under rule 6DD(k) of IT Rules. The Ld. A.R. submitted that these are the purchases made from the sand suppliers who brought trucks filled with sand to the project site and unloaded the truck on the condition that the payments would be made in cash only. The assessee could not furnish the PAN, names and addresses, however, produced the vouchers containing names and receipts for payment given by these truck drivers.

According to the AO since the assessee has failed to give the names and addresses of the agent through whom these supplies of sand were received which remained to be verified. Finally, the AO disallowed these purchases under section 40A(3) of the Act by adding the same to the income of the assessee.

10. The Ld. CIT(A) dismissed the appeal of the assessee by upholding the order of AO by observing that the payment exceeding Rs.20,000/- in cash can only be allowed if the assessee could establish the unavoidable circumstances necessitating the payments in cash, however, nothing has been done by the assessee to prove that there were practical difficulties and unavoidable circumstances under which the payments were made in cash and covered under rule 6DD(k). Finally, the Ld. CIT(A) dismissed the appeal by distinguishing the decision of co-ordinate Bench of the Tribunal in M/S A Daga Royal Arts vs. ITO ITA No. 1065/JP/2016 dated 15.05.2018 by observing that in that case identity of the seller and the genuineness of the transactions were established whereas in the present case the assessee has failed to establish the identities of both the agent as well as suppliers.

11. After hearing both the parties and perusing the material on record, we find that assessee is engaged in the business of water proofing and labour job work. It was submitted before us that sand is purchased by the assessee from agent who arranged the loaded truck of sand at the site of the assessee on the condition that payment would be accepted in cash only. These transporters are not having any fixed place of business but bring sand filled lorries and come to the site through some reference.

These truck drivers are not having any PAN numbers and therefore we find merit in the contention of the assessee that keeping in view of the nature of business of the assessee and nature of material purchase, it is impracticable to make payment otherwise than in cash. We are therefore not in agreement with the conclusion drawn by the Ld. CIT(A) that the identity of the agent as well as suppliers were required to be established in order to claim the expenditure where the payments are made in cash. We have examined the details furnished by the assessee qua these suppliers a copy of which is filed at page No.105 of the paper book and found that only in three cases the payment has exceeded Rs.20,000/- and in all other cases the payments were below Rs.20,000/-. In the case of Bhati Construction Company who is a sub contractor, the payment was Rs.25,410/- whereas in the case of Bhanwarlal, the payment was made of Rs.26,722/- for sand for L& T Splendor site and lastly the payment was made to Mr. Ibrahim Bhai Kabodia for purchase of bricks worth Rs.25,370/-. Even in three cases the reasonable cause has been explained by the assessee before us that payment had to be made out of business emergencies and practical difficulties. In view of these facts, we are inclined to set aside the order of Ld. CIT(A) and direct the AO to delete the disallowance.

12. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 14.09.2021.

**Sd/-
(Mahavir Singh)
VICE PRESIDENT**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 14.09.2021.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.