

IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Before Shri SHAMIM YAHYA, ACCOUNTANT MEMBER

I.T.A. No.7103/Mum/2019 (Assessment Year 2012-13)

ITO-28(2)(3) Room No.310, 3 rd Floor 6 th Tower, Vashi Railway Station Complex, Vashi Navi Mumbai-400 703	Vs.	N.G.Group Plot NO.8, Sector-11, Opp.Juinagar Railway Station, Sanpada, Navi Mumbai-400 709
(Appellant)		PAN : AAFFN9159E (Respondent)

Assessee by	Shri Rtu Kamal Kishor-AR
Department by	Shri Prakash Mane-DR
Date of Hearing	21.10.2021
Date of Pronouncement	02.11.2021

ORDER

Per Shamim Yahya (AM) :-

This appeal by the revenue is directed against the order of learned Commissioner of Income Tax (Appeals)-26, dated 23.09.2019 and pertains to assessment year 2012-13.

2. Grounds of appeal read as under:-

- (1) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.12,19,969/- on account of assessing the profits of the project 'Ellora Castle' without appreciating the fact that the said project has been completed on 26.10.2010 i.e during the F.Y.2010-H relevant to A.Y.2011-12" and during the year under consideration, the assessee has not declared any profit on one unit sold for total consideration of Rs.3,01,00,000/-?.
- (2) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition u/s. 41(1) of the Act amounting to Rs.16,79,981/- by holding that no event had taken place in the year under consideration to indicate remission or cessation of liabilities, without appreciating

the fact that sundry creditors reflected in the Balance sheet of the assessee reveals certain amounts outstanding were not even paid back partly to the creditors"?

- (3) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the A.O, to restrict the addition of bogus purchases to 12.5% as against 100% addition made by the Assessing Officer on account bogus purchases without appreciating the fact that parties from whom these purchases were made proven accommodation entry providers, as concluded by Sales Tax Authorities pursuant to the investigation carried out by them"?
- (4) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering the latest Apex Court decision in the case of N.K.Proteins Ltd Vs DCIT (769 OF 2017) , wherein the Hon'ble Supreme Court has confirmed 100% addition made on account of bogus purchases ?
- (5) The appellant prays that the order of Ld. CIT (A) on the above grounds be reversed and that of the Assessing officer be restored.

3. Brief facts of the case are that the appellant firm is a builder and developer. During the year, the appellant firm was engaged in the construction of residential complex namely "Ellora Castle" in sector-15, Belapur Navi Mumbai and a project on Plot No. 786 MIDC, TTC Industrial Area, Khairane Navi Mumbai namely "Ellora Olearise" under Bhoomi Net City. Separate Profit & Loss accounts are maintained for both the projects. The Appellant e-filed its return of income for AY 2012-13 on 30/9/2011 declaring Nil income. The case was selected for scrutiny and notice u/s 143(2) was issued. The assessment was completed u/s. 143(3) of the Act wherein the AO assessed the total income of Rs.39,58,530/- by making the following additions:-

- a. Addition on account of cessation of liability u/s 41 (1) amounting to Rs.16,79,981/-.
- b. The disallowance on account of bogus / unverifiable purchases amounting to Rs.10,58,583/- in respect of the 4 parties.
- c. Estimation of profit from the project 'Ellora Castle' in N.G.Group to the tune of Rs. 12,19,969/-

4. Apropos ground No.1

Brief facts of the issue is as under:-

The AO made the impugned addition by observing as under:-

“The Appellant has completed the project "Ellora Castle" in FY 2010-11 relevant to AY 2011-12 in which an order u/s. 143(3) of the Act was passed on 14/03/2014. In the said assessment order, as per the Appellant's submission, the value of closing stock was at Rs.31,76,55,022/- during the current assessment year, the Appellant has submitted the WIP of project. The relevant part is reproduced :

Particulars	FY 201 0-11	FY 2011-12
Opening WIP	236,902,945.23	339,931,243.22
Purchases	50,417,117	13,823,132
Direct Expenses		
Indirect Expenses	30,334,959.99	15,082,313.79
Total	317,655,022.22	368,836,689.01
Interest & Remuneration of partners	(4,458,510)	(4,285,981)
Profit	26,734,731	

In the assessment order for AY 2011-12, value of closing stock of 6 units were re valued at Rs.15,88,27,511/-. Therefore, the cost of one unit comes to Rs.2,64,71,252/- (all units are being of equal size), further, during the year, the Appellant incurred expenses on account of purchase (Rs.1,38,23,132) and indirect expenses (Rs.1,50,82,314) amounting to RS.2,89,05,446/-. Hence, the expenses incurred during the year for one unit is calculated at Rs.24,08,787 (Rs.2,89,05,446/12)and the cost of one unit comes to Rs.2,88,80,039/-(2,64,71,252 + 24,08,787). The Appellant had sold one unit for total sales consideration of Rs.3,01,00,000/- but had not offered any profit for taxation. Therefore, profit from sale Q^ys44p this year comes to Rs.12,19,961/- and same is added to the total income of the Appellant. The appellant has completed its project and received the payment, he has no risk whatsoever of loss in future. All significant risk and rewards of ownership are also considered to be transferred as per guidance note on recognition of revenue by real estate developers. The builders risk is over when project is complete and payment is received.”

5. Upon assessee's appeal Ld.CIT(A) deleted

i. The actual profit has been arrived in respect of the said project in AY 2013-14 which is Rs. 2,58,52,940, The same is on record of the AO. Thus, calculation of profit on presumption is erroneous.

ii. The AO has not rejected the books of account. When the books of accounts are found to be properly maintained, the figure of profit cannot be varied on basis of bold estimates.

iii. Further, the AO has accepted the actual profit of Rs.2,58,52,940/- in assessment order for AY

(iv) The AO has failed to consider that the OC has not yet been received in respect of the said project thus, significant risk and rewards are not yet transferred to the customer. Thus, the conditions for calculation of profit as per Guidance note on revenue recognition by Real estate developers are not fulfilled.

(v) The AO has calculated profit on presumption basis, he has neither followed project completion method nor percentage completion method. He has followed his own method of accounting which is not matching with any of the prescribed method of accounting.

Since a stand has already been taken on the incorrectness of computation of estimated profit in Ellora Castle project, in the appeal order for AY 2011-12, there is no reason to deviate from the same in this year, facts and circumstances being identical. Accordingly, the addition of Rs.12.19.961/- is deleted and the ground of appeal is 'Allowed'.

6. Against the above order assessee is in appeal before us. I have heard both the parties and perused the record.

7. Upon careful consideration, I agree with the Ld.CIT(A) that without rejecting books of account the AO cannot take up an arbitrary figure of undisclosed profit. Moreover, as rightly pointed out by Ld.CIT(A), AO is not mentioning as to under what method of project accounting he is computing the profit. Moreover when Ld.CIT(A) is giving a finding that AO has accepted the actual profit in respect of the project in AY 2013-14, there is no reason to make a further addition without any cogent basis for the year. Hence I uphold the order of Ld.CIT(A)

8. Apropos ground No.2

Brief facts of the issue is as under:-

(i) During the year under consideration, sundry creditors appearing in books of M/s. Bhoomi Net City reveal that following amount is outstanding :

Name of the party	31.03.2011	31.03.2012	
Ailsinghani Transport	7,745	7,7457-	Transport charges
BBR India Pvt Ltd.	9,76,742/-	9,76,742/-	Labour charges
Chamunda Steel Trading	2,60,230/-	2,60,2307-	Steel purchased
Kinjal Earthmovers	95,665/-	95,665/-	Rent charges
Omkar Enterprises	2,667/-	2,667/-	Material purchased
Shivam Mandap Decorator	3,36,932/-	3,36,932/-	Labour charges
Total _	16,79,981/-	16,79,981/-	

Considering the payable remains outstanding, it appears that there is absolutely no liability on part of the appellant to pay back the said amount. The amount is just lying idle in the books of accounts as liability. The amount of Rs. 16,79,981/- was disallowed u/s. 41(1) of the Act treating the same as cessation of liability.

9. Upon assessee's appeal Ld.CIT(A) deleted

“No event had taken place in the year under consideration to indicate remission or cessation of the liabilities in question, the provisions of section 41(1) could not have been invoked. The Appellant has been recognising the said amount in its books of accounts till date. The same has also been observed by the AO in his assessment order as mentioned above. In view of above facts of the case and respectfully following the decisions relied upon by the Appellant the disallowance made by AO u/s 41(1) of the Act is deleted and the ground of appeal is 'Allowed'.”

10. Against the above order assessee is in appeal before us.

11. I have heard both the parties and perused the record. I find that AO has invoked the provision of section 41(1) without bringing on record any cogent material. For how long the account is outstanding and on what basis of his enquiry, AO has come

to the conclusion that these accounts are not payable. Devoid of these details, the assessment is simply based upon conjecture & surmise not sustainable in law. Hence, I do not find any infirmity with the order of Ld.CIT(A). Hence, I uphold the same.

12. Apropos ground No.3 and 4

Brief facts of the issues are as under:-

“i. During the course of assessment proceedings, the appellant was asked to submit the list of suppliers from whom during the year purchases were made. On verification of the said list of suppliers, it is seen that M/s. Akshata Enterprises appear on the list of hawala dealers on the website of Sales Tax Department, Maharashtra whose business is to provide only accommodation entries by providing only bills without any supply of goods and in the relevant year, appellant has transacted an amount aggregating to Rs.2,73,797/- with the above mentioned party. During the course of assessment proceedings, the Appellant submitted the bills and ledger copy of M/s. Akshata Enterprises.

ii. The fact that the Appellant did not actually purchase goods from these parties because these parties are not existent and are into the business of providing accommodation entries only.

iii. Further, notice u/s. 133(6) was issued to M/s. Pooja Enterprises but the same returned. This also proves that the purchases made from M/s. Pooja Enterprises amounting to Rs.3,42,499/- also remains unverifiable.

iv. Notice u/s. 133(6) was also issued to M/s. Om Sai Enterprises. However, the party did not file any confirmation of transaction amounting to Rs.3,39,940/-. Hence, the transaction is unverifiable.

M/s. N G Group

Notice u/s. 133(6) was also issued to M/s. Om Sai Enterprises. However, the party did not file any confirmation of transaction amounting to Rs,1,02,3547/-. Hence, the transaction is unverifiable.

v. Thus, an amount of Rs.10,58,583/- is treated as unexplained expenditure u/s. 69C of the Act. The AO relied on various decisions as mentioned in the assessment order.”

13. Upon assessee's appeal Ld.CIT(A) restricted the disallowances to 12.5% is as under:-

“The appellant has submitted the bills, ledger accounts, delivery challans, further , payment to these parties have been made through banking channels. The veracity of these documents has not been rebutted by the AO. The items of purchase are such that are used in appellant's regular course of business. On the other hand, the AO has not brought on record any documents / statement / information / report of the Sales Tax Department which categorically states that these parties have provided bogus bills to the Appellant. As per the investigations carried out by the Sales Tax Authorities, the aforementioned parties were found to be involved in giving accommodation entries only without actually supplying the goods. The logical inference is that the purchases made by the appellant would also be in the nature of accommodation entries only. To verify the same, the AO had made enquiries by issuing notices u/s 133(6) which were returned unserved by the postal authorities. This party was found to be non existent at the address given by the appellant. The appellant also failed to provide the latest address of the party. During the scrutiny assessment the appellant furnished details of purchases and corresponding sales. However, the appellant could not produce the party before the AO in spite of opportunity being given. The appellant also failed to produce delivery challans or transportation details. The onus of proving the genuineness of such purchases is on the appellant which the appellant had not been able to discharge fully. When the hawala party had admitted on oath that it had given accommodation entries only without actually supplying the goods, the genuineness of purchases made from one party will have to be considered taking this into consideration while examining the documentation submitted by the appellant in support of its claim. The documentary evidences such as purchase bills, payments by cheques, etc. would all have been orchestrated to present a facade of genuineness and does not necessarily mean that the purchases from these parties are genuine. The Courts have held that payment by cheque by itself is not sacrosanct so as to prove genuineness of purchases when the surrounding circumstances are suspect. However, the appellant has shown onward sales which has not been doubted by the Assessing Officer. Since there can be no sales without corresponding purchases, the only logical explanation is that the appellant would have made purchases from undisclosed parties in the grey market at lower rates and purchases were shown as being made from the impugned parties to suppress its profits.. In such a situation, the various Courts including the Hon'ble Gujarat High Court in the case of CIT vs Simit P. Sheth, 356 ITR 451 have held that not the entire purchases but only the profit element embedded in these purchases was to be disallowed. The Hon'ble Gujrat High Court in this case has held that profit margin of 12.5% of the bogus purchases will be reasonable. Respectfully following the Order in the case of Simit P. Sheth the addition is restricted to 12.5% of the bogus purchases of Rs. 3,69,394/-.”

14. Against the above order, revenue is in appeal before us. I have heard both the parties and perused the records

15. I find that in this case, the sales have not been doubted it is settled law that when sales are not doubted, 100% disallowance for bogus purchase cannot be done. The rationale being no sales is possible without actual purchases. This proposition is supported from Hon'ble jurisdictional High Court decision in the case of Nikunj Eximp Enterprises(in Writ Petition No.2860, order dated 18.06.2014). In this case, the Hon'ble High Court has upheld 100% disallowance for the purchases said to be bogus, when sales are not doubted. However, the facts of the present case indicate that assessee has made purchase from the grey market. Making purchases through the grey market gives the assessee savings on account of non-payment of tax and others at the expense of the exchequer. In such situation, in our considered opinion on the facts and circumstances of the case the 12.5% disallowance out of the bogus purchases done by the Ld.CIT(A) meets the end of justice. Accordingly, we uphold the order of Ld.CIT(A).

16. The decision of N.K.Protiens relied by the revenue was a dismissal of SLP by the Hon'ble Supreme Court and has already been explained and distinguished by Hon'ble Bombay High Court in the case of Mohammad Hazi Adam & Co in ITA No.1004 of 2006, dated 11.02.2019. Hence I uphold the order of Ld.CIT(A).

17. In the result, this appeal by the revenue is dismissed.

Pronounced in the open court on 02. 11.2021.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 02/11 /2021

Thirumalesh, Sr.PS

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai