IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3280 OF 2021

Agarwal Industrial Corporations Limited,
having its office at, 201/202, Eastern Court,
Sion-Trombay Road, Chembur,
Mumbai – 400 071. ... Petitioner

Versus

1. Union of India
   Through the Secretary, Ministry of Finance,
   Depart of Revenue, North Block, New Delhi-
   110 001.

2. Central Board of Direct Taxes
   Through the Secretary, Ministry of
   Finance, Department of Revenue, North
   Block, New Delhi – 110 001.

3. The Deputy Commissioner of Income Tax-
   Ward 14(1)(1),
   having his office at Panvel Circle,
   Panvel, District – Raigad.

4. The Principal Commissioner of Income Tax,
   Mumbai-6,
   having office at Room No.515, Aaykar
   Bhavan, M.K. Road, Mumbai.
   Maharashtra – 400 020. ...Respondents

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Mr.Naresh Jain with Ms.Neha Anchlia i/b Mr.Yash Jariwala, Advocate for petitioner.

Mr.Suresh Kumar, Advocate for respondents.

CORAM : DHIRAJ SINGH THAKUR &
ABHAY AHUJA, JJ.

PRONOUNCED ON : 10th FEBRUARY, 2023.

J U D G M E N T

PER DHIRAJ SINGH THAKUR :

1. Return of income was filed by the petitioner declaring a total income of Rs.93,92,140/-. Subsequently, the assessment was completed under section 143(3) of the Income Tax Act, 1961 ('the Act'). Reassessment proceedings were initiated against the petitioner and the income was reassessed at Rs.3,56,74,514/- after making an addition of 100% of alleged bogus purchases under section 68 of the Act.

2. An appeal came to be preferred before the Commissioner of Income Tax (Appeals) ['CIT(A)], who, vide order dated 21st March 2018, restricted the addition to 25% of the amount of purchases made.

This order, however, was challenged by both the petitioner as also the revenue before the Income Tax Appellate Tribunal, Pune.

3. The Tribunal, vide its order dated 26th September 2019,

partly allowed the appeal of the petitioner and remanded the matter to the to the file of the Assessing Officer. The Tribunal relied upon a judgment of this Court in the case of ***Pr. CIT Vs. Mohommad Haji Adam & Co.*** [1]**,** wherein, it was held that no *ad-hoc* addition for bogus purchases should be made and that the addition be made to the extent of difference between the gross profit rate on genuine purchases and gross profit rate on hawala purchases. The Tribunal held that since specific details were not readily available for facilitating the calculation of gross profit rates of genuine and hawala purchases, it set aside the impugned orders and remitted the matter to the file of Assessing Officers for applying the ratio laid down by this Court in the judgment of ***Mohommad Haji Adam & Co.*** (Supra).

4. An appeal came to be preferred by the revenue against the order of the Tribunal under section 260A of the Act on 3rd March 2021.

5. The petitioner filed declaration in Form-1 under Direct Tax Vivad se Vishwas Act with Rules, 2020 ('Act of 2020') framed thereunder in respect of 25% addition of alleged bogus purchase.

1 ITA No.1004 of 2016 dt. 11-02-2019

The petitioner had declared an amount of Rs.22,04,500/- as disputed tax based upon the orders passed by learned Commissioner of Income Tax (Appeals) [for short 'CIT(Appeals)'].

6. Respondent No.4 is stated to have issued certificate in Form-3 under the Act, wherein the demand on account of disputed tax was reflected on Rs.91,18,533/-, as against the amount payable indicated by the petitioner in Form-1 at Rs.22,04,500/-. Rectification Application was filed by the petitioner claiming that the demand raised in Form No.3 was erroneous and unjustified and that the orders of the ITAT had been ignored for purposes of calculating the tax liability.

7. The rectification application of the petitioner was rejected vide order dated 1st September 2021. With a view to justify the figure of disputed tax in Form-3. Reliance was placed upon the question No.7 of the FAQ of Circular No.09/2020, dated 22nd April 2020, issued by the Central Board of Direct Taxes (CBDT). For purposes of reference, question No.7, and the answer thereto are reproduced hereunder :

Question No.7	If Assessment has been set aside for giving proper opportunity to an assessee on the additions carried out by the AO. Can lie avail the Vivad Se Vishwas with respect to

	such additions?
Ans.	If an appellate authority has set aside an order (except where assessment is cancelled with a direction that assessment is to be framed *do novo*) to the file of the AO for giving proper opportunity or to carry out fresh examination of the issue with specific direction, the assessee would be eligible to avail Vivad se Vishwas. However, the appellant shall also be required to settle other issues, if any, which have not been set aside in that assessment, and in respect of which either appeal is pending or time to file appeal has not expired. In such a case, disputed tax shall be the tax (including surcharge and cess) which would have been payable had the addition in respect of which the order was set aside by the appellate authority was to be repeated by the AO. In such cases, while filing the declaration in Form No.1, the declarant can indicate in the appropriate schedule that with respect to the set-aside issues the appeal is pending with the Commissioner (Appeals).

8. In the present case, the dispute is not with regard to the eligibility of the petitioner under the Act. However, what is sought to be agitated is that the liability of the petitioner was being calculated as per the original order of the Assessing Officer and not as per the order passed by the Tribunal. Reliance in this regard is placed upon section 2(1)(j)(B) of the Act of 2020, which reads as under :

> "……
> (B) in a case where an order in an appeal or in writ petition has been passed by the appellate forum on or before the specified date, and the time for filing appeal or special leave petition against such order

> has not expired as on that date, the amount of tax payable by the appellant after giving effect to the order so passed."

9. The argument advanced is that the case of the petitioner falls under the aforementioned section, inasmuch as the appeal form, i.e., the Tribunal had passed the order in an appeal before the specified date which is 31st January 2020.

10. As per section 2(h) of the Act of 2020, the time for filing appeal has not expired as on that date, the amount of tax payable by the appellant had to be determined only after giving effect to the order passed by the appellate forum, i.e, the Tribunal.

11. Counsel for the respondents, Mr.Kumar, has reiterated the stand of the revenue, as is reflected in the affidavit filed wherein, the action of the authority in issuing Form No.3 based upon the FAQ dated 22nd April 2020 issued by the CBDT was sought to be supported.

12. In our opinion, FAQ No.7 issued by the CBDT would have no application in the present case for the reason that section 2(1)(j)(B) specifically and unambiguously provided for computation of

the disputed tax in a case, where the appellate forum (in this case the Tribunal) had passed an order before the specified date and the time for filing of the appeal had not expired as on that date. In the present case, as can be seen from the facts narrated hereinabove, the Tribunal had already passed the order and, therefore, disputed tax had to be calculated in terms of section 2(1)(j)(B) of the Act of 2020. Designated authority had only to calculate the disputed tax by giving effect to the orders of the Tribunal. FAQ No.7 would, in our opinion, be applicable if it was a case of remand by an appellate authority to the Assessing Officer, where a reasonable opportunity of being heard was not given by the Assessing Officer to the assessee or the Appellate Authority wanted the Assessing Officer to carry out a fresh examination of the issue with a specific direction.

13. In the present case, the order of the Tribunal is certainly not the one where the Assessing Officer had been directed to carry out a fresh examination on any issue rather the Tribunal had clinched the issue by holding that the addition could only be made to the extent of difference between the gross profit rate on genuine purchases and gross profit rate on hawala purchases.

The Tribunal remitted the matter to the file of Assessing Officer for applying the ratio laid down by this Court in the case of ***Mohommad Haji Adam & Co.*** (Supra). The reason why the Tribunal did not specify the amount based upon the afore-stated principle was that specific details were not readily available from various ARs/DRs for facilitating the calculation of such rates.

14. Be that as it may, in our opinion, the action of the respondent No.4 in issuing Form No.3 based upon FAQ No.7 issued by the CBDT is unsustainable and accordingly set aside. The said respondent shall proceeded to issue Form No.3, keeping in view the provisions of section 2(1)(j)(B) of the Act of 2020 and determine the disputed tax by giving effect to the orders of the Tribunal. Needful be done within a period of three months.

15. Writ petition is disposed of.

[ABHAY AHUJA, J.] **[DHIRAJ SINGH THAKUR, J.]**