



**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**TAX APPEAL NO. 553 of 2012**

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COMMISSIONER OF INCOME-TAX-I....Appellant(s)

Versus

SIMIT P SHETH....Opponent(s)

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Appearance:

MR KM PARIKH, ADVOCATE for the Appellant(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**  
and  
**HONOURABLE MS JUSTICE SONIA GOKANI**

**Date : 16/01/2013**

**ORAL ORDER**

**(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. Revenue is in appeal against the judgement of Income Tax Appellate Tribunal ('the Tribunal' for short) dated 24.02.2012 raising following substantial question of law for our consideration:

*"Whether on the facts and in the circumstances of the case the Tribunal was right in law in restricting the disallowance to the extent of 12.5% of the bogus purchase, without appreciating the factual aspect and by ignoring the manifest evidence relies upon by the Assessing Officer and overlooking the ratio laid down by the Hon'ble High Court in the case of Pawanraj B. Bokadia in Tax Appeal No. 2345 of 2009 dated 29.09.2011?"*

2. Briefly stated facts are:



2.1 That the respondent assessee is engaged in the business of trading in steel on wholesale basis. For the assessment year 2006-07, the assessee filed return of income declaring total income of Rs. 1,95,500/-. The assessment was re-opened by issuing notice under Section 148 of the Income-tax Act on 28.03.2008.

2.2 During the course of the re-assessment proceedings, Assessing Officer noticed that some of the alleged suppliers of steel to the assessee had made their statements on oath to the effect that they had not supplied the steel to the assessee but had only provided sale bills. In turn, they were receiving a small commission.

2.3 The Assessing Officer pursued the issue further. In the assessment order, he recorded that the case of the three so-called suppliers viz. Bhavna Trading Co., M/s. Minaxi Enterprise and Arun Industrial Corporation, there were no documents other than the delivery challans and sale invoices. There was no movement of goods. Assessing Officer, therefore, concluded that total purchases of Rs. 41,04,903/- cumulatively made from the said three parties were bogus. He thus, treated such purchases as bogus purchases and added the entire amount of Rs. 41,04,903/- to the gross profit of the assessee. He also rejected the books of accounts and estimated the assessee's business profit at Rs. 5 lacs.

2.4. The assessee thereupon preferred appeal before the Commissioner (Appeals). The Commissioner



(Appeals) though confirmed the view of the Assessing Officer that the purchases were not made by the said three parties viz. Bhavna Trading Co., M/s. Minaxi Enterprise and Arun Industrial Corporation but believed that the appellant assessee had made the purchases from other parties in the open market. Thereupon, he retained 30% of the purchase cost as the probable profit of the assessee. The Commissioner (Appeals) reduced the additions from Rs. 41,04,903/- to Rs. 12,31,471/- and deleted the balance of Rs. 28,73,432/-. While doing so, he deleted the addition of Rs. 5 lacs as made by the Assessing Officer on the ground that since the addition on account of bogus purchases had already been made the same cannot be formed the basis for books of accounts and estimating the income.

2.5 Such order of the Commissioner (Appeals) gave rise to two appeals one by the assessee and another by the revenue. Such appeals came to be disposed by the Tribunal by common judgement dated 24.02.2012. The Tribunal was of the opinion that twelve and half percent of the disputed purchases should be retained in the hands of the assessee as business profit. In the result, Tribunal partially allowed the assessee's appeal. In the final conclusion though the revenue's appeal was also partly allowed, we fail to see in what manner.

3. It is this judgement of the Tribunal which is in challenge before us at the hands of the revenue. Learned counsel, Mr. Parikh vehemently contended that the Commissioner



(Appeals) and the Tribunal both committed a serious error in overturning the Assessing Officer's decision to make full addition of Rs. 41,04,903/- when the purchases are found to be bogus. There was thereafter no question of retaining only portion thereof for addition to the income of the assessee. Counsel heavily relied on the decision of Division Bench of this Court in case of ACIT (OSC) Ward 5(3) Nadiad Vs. Pawanraj B Bokadia in Tax Appeal No. 2345 of 2009 dated 27.09.2011 wherein this court was pleased to allow the revenue's appeal and reinstate the entire additions of the bogus purchases made by the Assessing Officer.

4. In the present case, however, we notice that before the Commissioner (Appeals), the assessee pointed out that the assessee was trading in steel. Once his sale of 'x' quantity of steel is accepted, the purchases of the same quantity had to be believed. It was canvassed that the assessee had made sales of Rs. 1,10,786/- metric tone of steel. Therefore, there had to be a matching quantity of purchase of steel also. It was argued that since the Assessing Officer accepted the sales of the steel, equivalent of purchase also must be believed. It was in this background that the Commissioner (Appeals) made the following observations:

*"4.3 I have considered the submissions of the Authorized Representative and the order of the Assessing Officer. It has been admitted that there was a regular arrangement for providing accommodation sales bills. The appellant has not been able to provide a confirmation from the supplier that the goods were indeed supplied to the appellant. It is an established fact that the onus lies on the appellant to prove that the*



*purchases are genuine. The appellant has made the payments in cheque and the sales made by the appellant have been accepted in toto by the Assessing Officer. Hence, it is to be presumed that though bills made have been given by M/s. Bhavna Tradign Co., Mis. Minakshi Enterprises and M/s. Arun Industrial Corporation the actual purchases have not been made for them. It can therefore be concluded that the appellant has made purchases from persons in the open market. Taking into account all the relevant facts of the case I hold that 30% of the purchase cost would be a reasonable amount to be confirmed, to cover the profits of the appellant. Hence addition to the extent of Rs. 12,31,471/- is confirmed and the balance of Rs. 28,73,432/- is directed to be deleted."*

5. We are broadly in agreement with the reasoning adopted by the Commissioner (Appeals) with respect to the nature of disputed purchases of steel. It may be that the three suppliers from whom the assessee claimed to have purchased the steel did not own up to such sales. However, vital question while considering whether the entire amount of purchases should be added back to the income of the assessee or only the profit element embedded therein was to ascertain whether the purchases themselves were completely bogus and non-existent or that the purchases were actually made but not from the parties from whom it was claimed to have been made and instead may have been purchased from grey market without proper billing or documentation.
  
6. In the present case, CIT believed that when as a trader in steel the assessee sold certain quantity of steel, he would have purchased the same quantity from some source. When the total sale is accepted by the Assessing Officer, he could not have questioned the very basis of the



purchases. In essence therefore, the Commissioner (Appeals) believed assessee's theory that the purchases were not bogus but were made from the parties other than those mentioned in the books of accounts.

7. That being the position, not the entire purchase price but only profit element embedded in such purchases can be added to the income of the assessee. So much is clear by decision of this Court. In particular, Court has also taken a similar view in case of **Commissioner of Income Tax-IV vs. Vijay M Mistry Construction Ltd.** vide order dated 10.01.2011 passed in Tax Appeal No. 1090 of 2009 and in case of **Commissioner of Income Tax-I vs. Bholanath Poly Fab Pvt. Ltd.** vide order dated 23.10.2012 passed in Tax Appeal No. 63 of 2012. The view taken by the Tribunal in case of **Vijay Proteins Pvt. Ltd. Vs. CIT** reported in **58 ITD 428** came to be approved.
8. If the entire purchases were wholly bogus and there was finding of fact on record that no purchase were made at all, counsel for the revenue would be justified in arguing that the entire amount of such bogus purchases should be added back to the income of the assessee. Such were the facts in case of *ACIT (OSC) Ward 5(3) Nadiad Vs. Pawanraj B Bokadia (supra)*.
9. This being the position, the only question that survives is what should be the fair profit rate out of the bogus purchases which should be added back to the income of the assessee. The Commissioner adopted ratio of 30% of



such total sales. The Tribunal, however, scaled down to 12.5%. We may notice that in the immediately preceding year to the assessment year under consideration the assessee had declared gross profit @ 3.56% of the total turnover. If the yardstick of 30%, as adopted by the Commissioner, is accepted GP rate will be much higher. In essence, the Tribunal only estimated the possible profit out of purchases made through non-genuine parties. No question of law in such estimation would arise. The estimation of rate of profit return must necessarily vary with the nature of business and no uniform yardstick can be adopted.

In the result, tax appeal is dismissed.

**(AKIL KURESHI, J.)**

**(MS SONIA GOKANI, J.)**

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