



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

INCOME TAX APPEAL NO.1240 OF 2018
WITH
INCOME TAX APPEAL NO.2087 OF 2018

Pr. Commissioner of Income Tax-12, Mumbai
Aaykar Bhavan, Maharshi Karve Road,
Mumbai-400020 ...Appellant

Versus

M/s Drisha Impex Pvt. Ltd.,
A/1-7, Link Palace off Link Road,
Malad(W), Mumbai 400064. ...Respondent

Ms Shilpa Goel for the Appellant-Revenue.

Mr K Gopal and Ms Neha Paranjape for the Respondent.

CORAM M.S. Sonak &
Jitendra Jain, JJ.

RESERVED ON: 2 April 2025
PRONOUNCED ON: 7 April 2025

JUDGMENT (Per Jitendra Jain, J):-

1. These appeals, filed by the Appellant-Revenue for Assessment Years (AY) 2009-10 and 2010-11, challenges the common order of the Income Tax Appellate Tribunal (ITAT), Mumbai, dated 21 June 2017.

2. These appeals were admitted on 30 January 2025 on the following substantial questions of law:

SUBSTANTIAL QUESTIONS OF LAW

“(i) Whether the Tribunal after accepting that this a case of

bogus purchases, could have proceeded to determine profit rate without confirming the disallowance of purchases, without considering the provisions of Section 69C of the Income Tax Act, 1961 and without considering the decision of the Gujarat High Court in the case of N.K. Industries Ltd. Vs. Deputy Commissioner of Income Tax, (2016) 72 taxmann.com 289 since the Special Leave Petition against the said decision was dismissed by the Hon'ble Supreme Court in case of N. K. Protiens Ltd. Vs. Deputy Commissioner of Income Tax, on 16 January 2017, (2017) 84 taxmann.com 195 (SC) ?

(ii) On the facts and circumstances of the case and in law, the ITAT has erred in restricting the disallowance to profit margin on unproven purchases without considering the position of law established by the Hon'ble Apex Court in the case of N. K. Protiens Ltd, that 100 % disallowances on bogus purchases is upheld ?

3. Since the facts of both appeals are similar, they are, by consent, disposed of by common order by treating Income Tax Appeal No.1240 of 2018 for AY 2009-10 as a lead matter.

Brief Facts:

4. The Respondent-Assessee is engaged in trading in electronic items, toys, electronics, etc. A return of income was filed declaring total income of Rs.10,60,910/-, and the same was accepted under Section 143(1) of the Income-tax Act (hereinafter referred to as 'the Act').

5. Subsequently, the case of the Respondent-Assessee was reopened on the ground that the purchases made by the Respondent-Assessee from certain parties were non-genuine. On 28 March 2014, an order under Section 143 (3) read with Section 147 of the Act was passed, wherein Rs.6,15,71,284/-, the peak of the purchases made from the parties mentioned in the assessment order, was added as bogus purchases.

6. The Assessing Officer (AO), in Paragraph 5.8 of his order, has given his reasoning for making the disallowance. It

is important to note that in the assessment order, AO recorded that Respondent-Assessee has expressed its inability to produce regular books of accounts that were duly audited under the Income-tax Act. It is also recorded that the Respondent-Assessee has confirmed that no incidental expenses relating to these purchases by way of octroi, transport, delivery expenses, etc. were incurred. It also records the submissions made by the Respondent-Assessee, during the assessment, that they are not able to locate the suppliers.

7. The Summons issued to these suppliers were returned unserved. The Respondent-Assessee also admitted during the assessment proceedings that they cannot submit the suppliers' ledger since it is in the VAT department's custody. It is also further stated that the portable hard disk containing all the accounts has been lost. The officer, in his order, has noted that no books of accounts were produced, no stock register is maintained, there is an outstanding liability on account of unpaid VAT, purchases have been inflated, suppliers and agents cannot be found at the addresses given by the Respondent-Assessee, and the Respondent-Assessee expressed its inability to provide new addresses or produce the parties.

8. Based on the above material and reasoning, the officer concluded that the Respondent-Assessee had not discharged its onus to establish the genuineness of the purchases from these parties. Therefore, although the purchases from these parties amounted to Rs.9,12,33,855/-, the peak of these purchases, amounting to Rs.6,15,71,284/-,

was disallowed.

9. The assessment order was challenged before the Commissioner (Appeal), who, vide his order dated 30 December 2015, granted substantial relief to the Respondent-Assessee by confirming only 1% of the bogus purchase.

10. The Revenue challenged the order of the Commissioner (Appeal) by filing an appeal to the Tribunal, and the Tribunal, by the impugned order, increased the disallowance from 1% estimated by the Commissioner (Appeal) to 3% of the peak of the purchases, which came to Rs.20,93,100/-. The relevant discussion of the Tribunal can be found in paragraph 7, which reads as follows;-

"7. We have heard the rival contentions and perused the relevant material on record. We are convinced with the arguments of Ld. DR that the assessee has failed to discharge the primary onus of proving the purchases and it could not produce evidences to show actual delivery of material and also could not produce confirmatory letters from the alleged bogus suppliers. Even the assessee failed to produce own books of accounts in quantitative details. However, We also find that the assessee is in possession of purchases invoices and the payments are through banking channels as evident by ledger extracts of the various suppliers and bank statements placed in the paper book. Therefore, even if all the purchases are found to be bogus, we note that sales turnover has not been disputed by the revenue and the payments are through banking channels. The trend of GP/NP rates does not show abnormal variations. Therefore, in such a situation, the addition, which could be made, was to account for profit element embedded in these purchase transactions to factorize profit earned by assessee against purchase of material in the grey market and undue benefit of VAT against bogus purchases, which Ld. CIT (A) has rightly done so. However we find some strength in the arguments of the Ld. DR that the Ld. CIT (A) provided a major relief on the facts and circumstances of the case. Therefore, after due discussion with respective representatives, we increase the said disallowance to 3% of impugned purchases of

Rs.9,12,33,855/- which comes to Rs.27,37,015/-. Accordingly, the assessee shall suffer the said disallowance of Rs. 27,37,015/- against the impugned purchases. The revenue's appeal stands partly allowed."

Submissions of the Appellant-Revenue:

11. Ms Goel, learned counsel for the Appellant-Revenue, submitted that the Tribunal has given finding of fact that the Respondent-Assessee has failed to discharge the onus of proving the purchases. However, after giving such a finding the Tribunal erred in confirming disallowance only 3% of the impugned purchases and not the whole of the peak of total purchases found to be bogus. She submitted that the Tribunal having concluded that the purchases were bogus ought to have disallowed the whole of the peak purchases and not 3%. She submitted that the Respondent-Assessee has not challenged the finding of the Tribunal, and the findings of the Tribunal being final, this court cannot examine whether the Respondent-Assessee has proved the purchases.

12. She relied upon the assessment order and findings of the Tribunal in support of her submissions. She also relied upon the following decisions:

i. Pr. Commissioner of Income Tax-5 Vs Kanak Impex (India) Ltd. ¹

ii. The Principal Commissioner of Income Tax-25 Vs Shree Ganesh Developers ²

iii. Refrigerated Distributors Pvt Ltd Vs The Dy. Commissioner of Income Tax 2(3)(1) ³

iv. Kachwala Gems, Jaipur Vs Joint Commissioner of

¹ Income Tax Appeal No.791 of 2021

² Income Tax Appeal No.719 of 2018

³ Income Tax Appeal No.2089 of 2019 alongwith connected matters.

Income Tax, Jaipur ⁴

v. *Kalyani Medical Stores Vs Commissioner of Income tax & Anr.* ⁵

vi. *Commissioner of Income-tax Vs La Medica* ⁶

vii. *Kaveri Rice Mills Vs Commissioner of Income-tax Kanpur* ⁷

Submissions of the Respondent-Assessee:

13. Mr. K Gopal learned counsel for the Respondent-Assessee defended the order of the Tribunal and submitted that statements recorded by the Sales Tax Department of the suppliers were not furnished during the assessment proceedings. He relied heavily on the submissions made before the CIT (A). He submitted that the Respondent-Assessee had filed the detailed paper book with the Tribunal and correlated each purchase and sale. He further submitted that there is no material to show that the Respondent-Assessee has received cash. He, therefore, submitted that the disallowance made by the officer was not justified. Mr Gopal further submitted that the provisions of Section 69C of the Act were not invoked by any of the authorities. He relied upon the following case laws in support of his submissions:

i. *Pr. CIT Vs Mohommad Haji Adam & Co.* ⁸

ii. *Pr. CIT Vs Vaman International Pvt. Ltd.* ⁹

iii. *Pr. CIT Vs JK Surface Coatings Pvt. Ltd.* ¹⁰

iv. *PCIT Vs Shampoerji pallonji & Co. Ltd.* ¹¹

4 (2007) 12 Supreme Court Cases 761

5 (2016) 386 ITR 387

6 (2001) 117 Taxman 628 (Delhi)

7 (2006) 157 taxman 376 (All)

8 (2019) 103 taxmann.com 459 (bombay)

9 ITXA/1940/2017

10 ITXA/1580/2017

11 (2022) 288 Taxmann 661 (SC)

- v. *PCIT Vs Shampoorji pallonji & Co. Ltd.* ¹²
- vi. *PCIT Vs Tejua Rohitkumar Kapadia* ¹³
- vii. *Pr. CIT Vs Tejua Rohitkumar Kapadia* ¹⁴
- viii. *CIT Vs Century Plyboard (I) Ltd.* ¹⁵
- ix. *CIT Vs Century Plyboards India Ltd.* ¹⁶
- x. *CIT Vs Odeon Builders (P) Ltd.* ¹⁷
- xi. *Babulal Borana Vs Third Income Tax Officer* ¹⁸
- xii. *CIT Vs Nikunj Eximp Enterprises Pvt. Ltd.* ¹⁹
- xiii. *Krishna Textiles Vs CIT* ²⁰

14. We have heard learned counsel for the Appellant-Revenue and Respondent-Assessee and have perused the appeal paper book.

Analysis and Conclusion :

15. At the outset, we wish to state that the order of the Tribunal dated 21 June 2017 and, more particularly, the findings of the Tribunal that the Respondent-Assessee has failed to discharge the primary onus of proving the purchases since the Assessee could not produce evidence to show actual delivery of material and also could not produce confirmatory letters of the alleged suppliers have become final in the absence of any challenge by the Respondent-Assessee.

16. Further findings of the Tribunal that the Assessee failed to produce audited books of accounts and quantitative

12 (2020) 423 ITR 220 (Bombay)

13 (2018) 256 Taxman 213 (SC)

14 (2018) 94 taxmann.com 324 (Guj.) (HC)

15 (2019) 262 Taxman 13 (SC)

16 (2019) 103 taxmann.com 178 (Cal.)(HC)

17 (2019) 418 ITR 315 (SC)

18 (2006) 282 ITR 251 (Bom)

19 (2015) 372 ITR 619 (Bom)

20 (2009) 310 ITR 227 (Guj.)

details have also become final. Based on these findings, the Tribunal concluded that these purchases are bogus. However, the Tribunal finds that the gross profit/net profit rate does not show abnormal variation. Therefore, the Tribunal concludes that the purchases are from the grey market and, therefore, the profit element embedded in such purchase transactions must be estimated at 3%. Even these findings of the Tribunal have become final in the absence of any challenge by the Respondent-Assessee.

17. In our view, today, the Respondent-Assessee is not free to challenge the findings of facts given by the final fact findings authority, the Tribunal, by placing reliance on the submissions made before the CIT (A). By not challenging the Tribunal's findings, the Respondent-Assessee has accepted these findings.

18. Therefore, the only issue which arises now is whether the Tribunal was justified in estimating only 3% of the alleged purchases and confirmed the disallowance on account of bogus purchases after having given above findings. In our view, the Tribunal has found that the profit rate does not show abnormal variations. Therefore, the conclusion of estimating any profit at 3% on the alleged purchases would not arise.

19. The justification given by the Tribunal for 3% as purchase from the grey market, which as admitted by the respondent assessee was never the case put forward by them at any stage, is perverse and erroneous. Regarding the reference to the purchases from the "grey market", at the outset, we may note that even Mr Gopal, the learned Counsel

for the Respondent Assessee, admitted that such was never the case of the Respondent Assessee before any of the authorities. Even the records show that the Assessee never urged such a case before any authorities at any stage. Therefore, the AO and the CIT(Appeals) naturally did not advert to this aspect. No one had even argued this case before the ITAT. Still, the ITAT, in its final order, speculates that this must have been the case and builds this defence for the Assessee. This approach suffers from perversity.

20. The issue before the Tribunal was whether the purchases from the concerned suppliers were bogus and, if the answer was yes, whether the whole of the purchases should have been added. The Tribunal has concluded that the purchases were bogus and, therefore, was not justified in estimating, after giving such a finding, to confirm the disallowance of only 3% of the bogus purchases.

21. It is important to note that in para 5.8 of the Assessing Officer's order which findings have been confirmed by the Tribunal, the officer and the Tribunal has concluded that the assessee has not established the genuineness of the purchases, the assessee has failed to provide correct address of the suppliers, payment by account payee cheque is not sacrosanct, no proof by way of documentary evidence is filed, an enquiry made through ward inspector revealed that such suppliers do not exist at the relevant places and further, there is no correlation between the purchase and sales.

22. Learned counsel for the Respondent-Assessee submitted that there is no material on record of any flowback

of cash and, therefore, this transaction cannot be treated as bogus. In our view, the officer has not based the disallowance on the said ground. In any case, whether there was any flowback of cash to the Respondent-Assessee could have been ascertained only if the bank statement of the suppliers could have been furnished to the Appellant-Revenue. The bank statement would have indicated whether there was cash withdrawal after the deposit of cheque issued by the Respondent-Assessee to these suppliers. In this case, there is a failure on the part of the Respondent-Assessee to prove by any documentary evidence the transaction of purchase, including the non-providing of the supplier bank statement and therefore, the plea raised on this count is required to be rejected.

23. Learned counsel for the Respondent-Assessee also brought to our notice the submissions made before the CIT(A), raising a grievance of no cross-examination being given of the persons whose statements have been relied upon. At the outset, we have not been shown any evidence of such a request being made at the time of the assessment before the Assessing Officer. The assessing officer has not merely relied upon the information received from the sales tax department but has independently investigated the issue from all angles and has given a finding on the purchases being bogus. Furthermore, the officer has recorded that some of the parties were related to the Respondent-Assessee and the same is not rebutted.

24. We also fail to understand why the documents from

these suppliers could not be produced if they were related. Furthermore, before the Tribunal, no such plea of denial of cross examination has been taken by the Respondent-Assessee as evident from paragraph 6 of the impugned order which records the submissions of the Respondent-Assessee. Therefore, for all these reasons, the plea raised now, which was not taken before the AO and the Tribunal cannot be entertained, and in any case, there are other independent findings based on which the Assessing Officer and the Tribunal has come to a conclusion that the transactions were bogus.

25. The submissions of the learned counsel for the Respondent-Assessee that provisions of Section 69C of the Act were not invoked by any of the authorities and therefore no addition could be made is to be rejected. In our view, firstly, the provisions of Section 69C of the Act are enabling provisions and therefore, even in the absence of invocation of such provision, the addition could have been made. In any case, the ingredients of the provisions of Section 69C which deals with unexplained expenditure and non-allowability of unexplained such spending was in essence the subject matter of adjudication right from the assessment stage and merely because this provision is not specifically quoted, the assessee could not contend that no addition could be made.

26. It is not the case of the Respondent-Assessee that no show cause notice was issued before making the addition. On the contrary, the Assessing officer has sought the say of the Respondent-Assessee on why the purchases under consideration should be treated as non-genuine and

disallowance be made. This, in effect, is what Section 69C provides. No prejudice is caused to the Respondent-Assessee when such show cause notices were issued time and again and the cause shown was duly considered. Merely because the notices may not have explicitly referred to Section 69 C, no prejudice was caused, and this cannot be grounds to urge that the provision or the principles underlying the provision were never invoked. The failure to quote a legal provision or even quoting an incorrect provision would not vitiate an action if the power and authority are to be otherwise found in the Statute.

27. We may also observe the following findings in the assessment order which are relevant and not rebutted before this Court :-

(i) The Respondent-Assessee was given ample opportunities to prove the genuineness of the purchases and inspite of the same, they could not prove the genuineness.

(ii) The Respondent-Assessee expressed its inability to furnish the purchase confirmations and addresses of the suppliers.

(iii) The Respondent-Assessee also failed to produce the suppliers along with books of accounts, bills, vouchers etc. by taking a stand that the transaction was through an agent and they are not able to trace the agent or the suppliers. We failed to understand when transactions of crores of rupees are executed how such a stand can be accepted.

(iv) The Respondent-Assessee also expressed its inability to produce its own regular books of accounts which were

audited for verification.

(v) The Respondent-Assessee also confirmed that no incidental expenses by way of octroi, transport, delivery expenses etc. relating to these purchases were incurred.

(vi) Summons issued under Section 133(6) to the suppliers were returned unserved.

(vii) The Respondent-Assessee only produced the ledger account of the parties to whom goods were sold without producing the ledger account of the suppliers from whom goods were purchased. We fail to understand how this is possible.

(viii) Further three more parties were found to have supplied the goods to the Respondent-Assessee during the course of the assessment proceedings whose genuineness were questioned and these were related parties but same were not proved.

(ix) The Respondent-Assessee failed to produce the ledger copy of the suppliers on the ground that data is not available and the same has been lost. The FIR was lodged on this issue was on 17 December 2012 i.e. prior to the submission filed with the Assessing Officer

(x) The officer has stated that statements of the suppliers admitting that these transactions are bogus were only supplementary evidence and not the sole evidence for making the addition.

(xi) In the assessment order, it is also recorded that no stock register or delivery challans are maintained.

28. The CIT(A) has only reproduced the submissions made by the Respondent-Assessee and the reasoning given by

the Assessing Officer and thereafter, merely in a casual way, has observed that since the Respondent-Assessee has filed copies of bills and bank statements, the purchases are to be treated as genuine. After having held so, the CIT(A) further held that entire purchases cannot be held to be bogus since the sales have been made and thereafter estimated 1% on the bogus purchases and confirmed the same. In our view, the first appellate authority was too casual in his approach in adjudicating this matter without considering or giving findings on the various grounds on which the Assessing Officer made the addition.

29. In our view, based on the findings above, which the Tribunal confirmed, the Tribunal erred by estimating only 3% of the alleged purchases as bogus to justify disallowance. There was a clear error of law, and the ITAT's approach contradicted several decisions on the subject, as discussed in *Kanak Impex (Supra)* and others. By indulging in speculative reasoning that was never urged by or on behalf of the Assessee, the Tribunal should not have estimated only 3% instead of confirming the disallowance of all the purchases.

30. Ms Goel is justified in relying upon the ratio of the decision in the case of *Kanak Impex (Supra)*, wherein this Court has examined this issue from paragraphs 13 to 39 and confirmed the disallowance of the whole of the purchases. We are conscious that in the case of *Kanak Impex (Supra)*, the assessee did not co-operate with the revenue, which was one reason for confirming the disallowance. However, we have examined the legal position on this issue based on the findings

of the Tribunal. Therefore, the ratio of the said decision squarely applies to the facts of the present case before us.

31. The non-cooperation was only one of the grounds and not the sole ground. Besides, it is not as if the present assessee was very cooperative. Practically every vital information was not produced by citing convenient inabilities. The documents and paperwork that would have invariably accompanied genuine transactions were missing or the assessee expressed inability to produce them. This can hardly be called cooperation. Therefore, no case is made out to distinguish Kanak Impex(Supra) or the principles therein.

32. This Court thoroughly examined the decisions relied upon by the learned counsel for the Respondent-Assessee in the case of *Shree Ganesh Developers (Supra)* in paragraph 26, and we distinguished these decisions. In our view, this distinction would also apply to the facts of the present case, and therefore, we do not wish to burden this judgment by distinguishing them again.

33. Ms. Goel is also justified in placing reliance on the decisions of the Delhi High Court in the case of *La Medica (Supra)* and the Allahabad High Court in the case of *Kaveri Rice Mills (Supra)*, wherein, in very similar fact situations, if not identical, the addition of all the bogus purchases has been confirmed.

34. For all the above reasons, we reverse the orders passed by the CIT(A) and the Tribunal and restore the addition made in the assessment orders by the Assessing Officer. Consequently, the questions of law are answered in

favour of the Revenue and against the Assessee.

35. These appeals are disposed of in the above terms.
36. No order as to costs.

(Jitendra Jain, J)

(M.S. Sonak, J)