

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 240 of 2003

With

TAX APPEAL NO. 261 of 2003

With

TAX APPEAL NO. 242 of 2003

With

TAX APPEAL NO. 260 of 2003

With

TAX APPEAL NO. 241 of 2003

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

N.K. INDUSTRIES LTD.....Appellant(s)

Versus

DY.C.I.T.....Opponent(s)

Appearance:

MR JP SHAH, ADVOCATE for the Appellant(s) No. 1

MRS MAUNA M BHATT, ADVOCATE for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 20/06/2016

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. Being aggrieved and dissatisfied with the impugned judgment and order passed by the Income Tax Appellate Tribunal, Ahmedabad Bench 'C' (hereinafter referred to as 'the Tribunal'), the assessee has preferred the present Tax Appeals assailing the following orders

Tax Appeal No.	Date of Tribunal's order	ITA No.	Assessment Year
240 of 2003	24.01.2003	IT (SS) No. 16/Ahd/2002	01.04.1988 to 24.02.1999
241 of 2003	24.01.2003	IT (SS) No. 38/Ahd/2002	01.04.1988 to 24.02.1999
242 of 2003	24.01.2003	IT (SS) No. 15/Ahd/2002	01.04.1988 to 24.02.1999

1.1 Similarly, being aggrieved and dissatisfied with the impugned judgment and order passed by the Income Tax Appellate Tribunal, Ahmedabad Bench 'C' (hereinafter referred to as 'the Tribunal'), the revenue has preferred the present Tax Appeals assailing the following orders:

Tax Appeal No.	Date of Tribunal's order	ITA No.	Assessment Year
260 of 2003	24.01.2003	IT (SS) No. 15/Ahd/2002	01.04.1988 to 24.02.1999
261 of 2003	24.01.2003	IT (SS) No. 38/Ahd/2002	01.04.1988 to 24.02.1999

2. These matters were admitted by this Court for consideration of the following substantial question of law:

Tax Appeal No. 240 of 2003

Whether on the facts and in the circumstances of the case, Income tax Appellate Tribunal was justified in retaining the addition on account of alleged bogus purchases at 25% i.e. Rs. 73,23,322/- of the total purchases amounting to RS. 2,92,93,288/-?

Tax Appeal No. 241 of 2003

(1) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was justified in confirming the addition of Rs.3,70,78,125/- as gross profit on sales of Rs.37.08 crores made by the Assessing Officer despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 ?

(2) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was

justified in holding that the Assessing Officer had rightly made additions in respect of purchases worth Rs.1,14,78,000/- from M/s. Somnath Industries and Rs.51,67,228/- from M/s.Krishna Marketing in assessment which has been framed u/s.158BC of the Act, despite the fact that in proceedings under Section 132 of the Act no material was found in relation to said two parties to warrant such additions ??

Tax Appeal No. 242 of 2003

Whether on the facts and in the circumstances of the case, Income-tax Appellate Tribunal was justified in retaining the addition on account of alleged bogus purchases at 25% i.e. Rs. 3 crores of the total purchases amounting to Rs. 11.99 crores?

Tax Appeal No. 260 of 2003

Whether on the facts and in the circumstances of the case, Income-tax Appellate Tribunal was justified in retaining the addition on account of alleged bogus purchases at 25% i.e. Rs. 3 crores of the total purchases amounting to Rs. 11.99 crores?

Tax Appeal No. 261 of 2003

Whether on the facts and in the circumstances of the case, Income tax Appellate Tribunal was justified in retaining the addition on account of alleged bogus purchases at 25% i.e. Rs. 73,23,322/- of the total purchases amounting to Rs. 2,92,93,288/-?

3. The assessee company also popularly known as N.K. Group

of companies is involved in trading and speculation of castor seed and also engaged in export of castor oil and castor oil derivatives. During the course of search proceedings at the office premises of NKPL, blank signed cheque books and vouchers of number of concerns were found. Endorsed blank cheques of NKPL by these concerns were also found from the office premises of NKPL wherein the endorsement was on the back of the cheques. Blank bill books, letter heads and vouchers of these concerns were found and seized from the factory premises of NKPL. Purchases made from these concerns have been treated by the Assessing Officer as bogus purchases in view of elaborate reasons recorded in the assessment order. The entire deposits in the bank accounts of these parties were treated as assessee's income on protective basis.

3.1 On appeal before the Tribunal by the revenue, by impugned judgment and orders, Tribunal confirmed the findings of the CIT(A). The Tribunal also deted the addition shown for salt washing loss. Being aggrieved and dissatisfied with the impugned orders passed by the Tribunal, the revenue has preferred the present Tax Appeals for consideration of the aforesaid substantial question of law.

4. Mr. J.P. Shah, learned advocate appearing for the assessee submitted that the Tribunal erred in holding that 25% of Rs. 2.92 crores is undisclosed income as defined under Section 158B(b) of the Income Tax Act, 1961. He submitted that the Tribunal erred when on one hand it accepted the purchases to be genuine and then went ahead to estimate 25% thereof as the undisclosed income without a shred of

evidence to that effect found in search.

4.1 Mr. Shah further submitted that the Tribunal failed to appreciate that in accordance with the decision of this Court in the case of **N.R. Paper and Board Ltd vs. Dy. CIT reported in [1998] 234 ITR 733 (Guj)**, the addition which the Tribunal foisted on the assessee could be if at all the subject matter of the regular assessment and not the block assessment more particularly when no evidence was found during the course of search supporting such undisclosed income.

4.2 Mr. Shah further submitted that the Tribunal committed a grievous mistake in presuming that there was excise duty and sales tax and other taxes on oil purchased by the assessee and on the basis of such grievous error coming to the conclusion that the purchase price of the appellant would be 25% less than the market price. He submitted that the fact of the matter is there are no such taxes on oil.

4.3 Mr. Shah further submitted that the Tribunal failed to appreciate that the addition in respect of the evidence from M/s. J.D. Shroff can be made in the hands of the appellant only under Section 158BD after going through the process and procedure laid down therein and not under Section 158BC whereunder the addition can be made only on the basis of the evidence seized from the appellant and therefore the addition of Rs. 3,66,78,297/- and interest of RS. 1,78,20,544/- under section 158BC were bad in law as it was not made on the basis of the evidence found in search on the assessee but was made on the basis of the evidence found in search of M/s. J.D.

Shroff and the restoration of the point to the Assessing Officer was also bad.

4.4 Mr. Shah submitted that the Tribunal failed to appreciate that the assessee had already credited the amount of Rs. 37,07,81,250/- at market rate to sales account in its books of account and therefore there was no justification on the part of the Tribunal to again add gross profit of Rs. 3,70,78,125/- or any portion thereof to the (undisclosed) income of the assessee. He submitted that the Tribunal failed to appreciate that the Assessing Officer had solely without application of mind relied on appraisal report of A.D.I.T., the copy of which was never supplied to the assessee.

4.5 Mr. Shah has relied upon the decisions of this Court in the case of **CIT vs. Nangalia Fabrics reported in 220 Taxman 17 (Guj)**, **DCIT vs. Radhe Developers India Ltd reported in [2010] 329 ITR 1 (Guj)** and **N.R. Paper & Board Ltd vs. DCIT [1998] 234 ITR 733 (Guj)** in support of his submissions.

4.6 Mr. Shah submitted that the case of Vijay Proteins Ltd is not applicable on the facts of the present case. Drawing attention to para no. 16 of the order in the case of Vijay Proteins, he submitted that this Court decided the said case by placing reliance on *Sanjay Oilcake Industries vs. CIT* reported in 316 ITR 274 (Guj) in which it is held that there is no substantial question of law since there is inflation in purchase price. He submitted that there is distinction in facts of the present case and Vijay Proteins Ltd., inasmuch as in the case of Vijay Proteins there is inflation in purchase price

whereas in the present case the remand report clearly states that the purchases were at prevailing market rate. He submitted that even the GP and the yield is better.

5. Mr. M.R. Bhatt, learned Senior Counsel appearing with Mrs. Mauna Bhatt, learned advocate for the revenue submitted that the Tribunal has erred in law and on facts in restricting the addition on account of bogus purchases to 25% i.e. Rs. 3 crores out of the addition of Rs. 11.99 crores made by the Assessing Officer. The Tribunal has decided the issue regarding bogus purchases relying on the decision of the Rajasthan High court in the case of **M/s. Indian Woollen Carpet Factory vs. ITAT reported in [2002] 178 CTR (Raj)** wherein it has been held that addition under section 68 or 69 of the Act is tenable in the case of peak credit in the accounts of bogus suppliers. He submitted that the quantum of such peak credit and retention of the addition has been decided by the Tribunal at 25% of the total bogus purchases on the basis of its earlier decision in the case of Vijay Proteins Ltd.

6. The Tribunal in the case of Vijay Proteins Ltd. vs. CIT has observed that it would be just and proper to direct the Assessing Officer to restrict the addition in respect of the undisclosed income relating to the purchases to 25% of the total purchases. The said decision was confirmed by this Court as well. On consideration of the matter, we find that the facts of the present case are identical to those of M/s. Indian Woollen Carpet Factory (supra) or M/s. Vijay Proteins Ltd. In the present case the Tribunal has categorically observed that the assessee had shown bogus purchases

amounting to Rs. 2,92,93,288/- and taxing only 25% of these bogus claim goes against the principles of Sections 68 and 69C of the Income Tax Act. The entire purchases shown on the basis of fictitious invoices have been debited in the trading account since the transaction has been found to be bogus. The Tribunal having once come to a categorical finding that the amount of Rs. 2,92,93,288/- represented alleged purchases from bogus suppliers it was not incumbent on it to restrict the disallowance to only Rs. 73,23,322/-.

6.1 In the case of NR Paper and Boards Ltd (supra), this Court has discussed the issue as to whether after making of block assessment, regular assessment is barred or prohibited by law. This court has held that there would be no overlapping in the nature of assessment made under this Chapter of undisclosed income and the regular assessment made u/s 143(3). However, if the said decision is read in context of questions raised in the present appeal, it cannot be read as having held that even if the material found during the course of search expose the falsity of the entries made in the regular books of accounts, the consequent concealed income cannot be assessed as undisclosed income in the block assessment under Chapter XIV-B. The said decision shall therefore not be applicable on the facts and circumstances of the present case. The Tribunal is justified in holding the same against the assessee and in favour of revenue.

7. So far as question regarding additions in respect of purchases worth Rs.1,14,78,000/- from M/s. Somnath Industries and Rs.51,67,228/- from M/s.Krishna Marketing in assessment which has been framed u/s.158BC of the Act,

despite the fact that in proceedings under Section 132 of the Act no material was found in relation to said two parties to warrant such additions is concerned, we are of the view that the Tribunal is justified in holding the same against the assessee and in favour of the revenue.

8. So far as the question regarding addition of Rs.3,70,78,125/- as gross profit on sales of Rs.37.08 crores made by the Assessing Officer despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 is concerned, we are of the view that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6% gross profit is taken into account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price. We have to reduce the selling price accordingly as a result of which profit comes to 5.66%. Therefore, considering 5.66% of Rs. 3,70,78,125/- which comes to Rs. 20,98,621.88 we think it fit to direct the revenue to add Rs. 20,98,621.88 as gross profit and make necessary deductions accordingly. Accordingly, the said question is answered partially in favour of the assessee and partially in favour of the revenue.

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9. In view of the above, the impugned judgment and order passed by the Tribunal is modified accordingly. Hence, the present Tax Appeals are dismissed.

(K.S.JHAVERI, J.)

(G.R.UDHWANI, J.)

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