Pradnya Bhogale

# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
# ORDINARY ORIGINAL CIVIL JURISDICTION
# INCOME TAX APPEAL NO. 1543 OF 2017

The Principal Commissioner of Income Tax-25 ..Appellant

vs.

Pinaki D. Panani ..Respondent

…….

Mr. Nirmal C. Mohanty for Appellant.
Mr. Rahul K. Hakani for Respondent.

…….

CORAM : NITIN JAMDAR &
M.S.KARNIK, JJ.

DATE : 8 JANUARY 2020

P.C.:-

The Appellant challenges the order passed by the Income Tax Appellate Tribunal dated 19.12.2016 in Income Tax Appeal No.119/Mum/2015 and C.O. No.117/Mum/2015 for Assessment Year 2009-10.

2. The Appeal pertains to the Assessment Year 2009-10.

3. The Appellant-Revenue has raised following question of law as a substantial question of law for consideration in this Appeal :-

> "A. Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal is justified in allowing unsubstantiated purchases of Rs.1,69,48,368/-

and upholding the order of CIT(A) in applying net profit of 5.76% on total Contract amount ?"

4. The Respondent-Assessee carried on business as a Civil Contractor. The Respondent-Assessee filed return of income for the Assessment Year 2009-10 on 29 September, 2009 declaring total income of Rs.48,65,060/-. The assessment was completed under Section 143(3) of the Income Tax Act on 7 December, 2011. Thereafter the assessment was reopened under Section 147 of the Income Tax Act. Information was received from the Sales Tax Department that Respondent-Assessee had taken bogus purchase entries of Rs.1,69,48,368/- from the different parties. The reassessment order was accordingly passed on 17 February, 2014 determining the total income of Rs.2,18,13,430/-.

5. Appeal was filed by the Respondent-Assessee to the Commissioner of Income Tax (Appeals) who partly allowed the Appeal by order dated 21 October, 2014 and sustained addition of Rs.50,44,947/- and deleted Rs.1,19,03,421/- out of addition of Rs.1,69,48,368/-. The Commissioner of Income Tax (Appeals) also observed that the Respondent-Assessee had approached the Settlement Commission for the subsequent years and the case was settled accepting the additional income offered by the Respondent-Assessee based on the net profit @ 5.76% on total contracted amount. Aggrieved by this order the Appellant-

Revenue filed an Appeal to the Income Tax Appellate Tribunal. By the impugned order the same has been dismissed.

6. In support of the question of law Mr. Mohanty, the learned counsel for the Appellant submitted that an information was received from the Sales Tax Department that certain parties from whom the Respondent-Assessee had purchased material were Hawala dealers and when the Respondent-Assessee was confronted with the same he could not produce the confirmation from the said parties. He submitted that merely because payment was made by crossed cheque was not enough to establish that the purchases were genuine. Mr. Mohanty also submitted that out of various purchases made by the Reapondent-Assesee the Appellant-Revenue had questioned only purchases to the tune of Rs.1,69,48,368/- and that business could have been carried out by the other purchases which has not been questioned.

7. Mr. Hakani, the learned counsel for the Respondent placed reliance on the decisions of this Court in the case of *The Principal Commissioner of Income Tax-17 vs. M/s. Mohommad Haji Adam & Co.* in Income Tax Appeal No.1004/16 and *Principal Commissioner of Income Tax, Central-4 vs. M/s. Paramshakti Distributors Pvt. Ltd.* in Income Tax Appeal No.413/17. He submitted that even if the purchases made from the parties in question are to be treated as bogus, it does not

necessarily mean that entire amount should be disallowed and that no benefit should be given to the Respondent-Assessee. Mr. Hakani submitted that bifurcation of purchases of Rs.1,69,48,368/- and the contention that genuine material purchased in question is not the case urged before the authorities.

8. We have perused the orders passed by the Commissioner of Income Tax (Appeals) and the Tribunal. The Commissioner of Income Tax (Appeals) has observed that the Respondent-Assessee was doing work on contract basis with the Municipal Corporation of Greater Mumbai. He submitted the bills to the Corporation which were verified by the Engineers of the Corporation. It is upon the acceptance of quality and quantity of the work that the payment was released. It is also noted by the Commissioner that the Assessing Officer did not doubt about the completion of the contract work and that the consumption of the material by the Respondent-Assessee which was duly verified by the Engineers of the Municipal Corporation. The Commissioner of Income Tax (Appeals) and the Tribunal opined that without actually consuming the raw materials, the work done by the Appellant could not have been possible.

9. It is in this context, the observations of the Division Bench in the case of the *Principal Commissioner of Income Tax-17 vs. M/s. Mohommad Haji Adam & Co.* need to be referred :-

*"8. In the present case, as noted above, the assessee was a trader of fabrics. The A.O. found three entities who were indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied. The finding of the CIT(A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by the assessee and the sales declared. That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases. The decision of the Gujarat High Court in the case of* ***N.K. Industries Ltd.*** *(supra) cannot be applied without reference to the facts. In fact in paragraph 8 of the same Judgment the Court held and observed as under -*

*"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."*

10. Assuming that the Respondent-Assesssee the purchasers from whom the purchases were made were bogus, in view of the finding of fact that the material was consumed, the question would be of extending the percentage of net profit on total turnover. This would be a matter of calculations by the concerned authority. In this context, if the Commissioner of Income Tax (Appeals) and the Tribunal chose to follow the percentage arrived by the Settlement Commission in the Respondent-Assessee's own case for the other years, this exercise cannot be considered as irregular or illegal.

11. In the circumstances, no substantial question of law arises in this Appeal.

12. The Appeal is accordingly dismissed.

(M.S.KARNIK, J.) (NITIN JAMDAR, J.)