

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'SMC' BENCH
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&**

SHRI AMARJIT SINGH, JUDICIAL MEMBER

**ITA No.5204/Mum/2018
(Assessment Year :2009-10)**

**ITA No.5205/Mum/2018
(Assessment Year :2010-11)**

&

**ITA No.5206/Mum/2018
(Assessment Year :2011-12)**

Shri Sapankumar U Jain C/O. G.P. Mehta & Co., CAS,807, Tulsiani Chambers 212, Nariman Point Mumbai – 400 021	Vs.	The Income Tax Officer 30 (3)(2) Mumbai Room No.610, C-13 BKC, Bandra (E) Mumbai – 400 051
PAN/GIR No.AADPJ9581G		
(Appellant)	..	(Respondent)

Assessee by	Shri G.P. Mehta
Revenue by	Shri Prasoon Kabra
Date of Hearing	23/11/2021
Date of Pronouncement	25/11/2021

आदेश / ORDER

PER M. BALAGANESH (A.M):

This appeal in ITA Nos.5204/Mum/2018, 5205/Mum/2018 & 5206/Mum/2018 for A.Y.2009-10 to 2011-12 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-41, Mumbai in appeal

No.CIT(A)-41/IT-43/2015-16, CIT(A)-41/IT-439/2015-16 & CIT(A)-41/IT-440/2015-16 dated 05/06/2018 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 10/03/2015 by the Id. Income Tax Officer – 30(3)(2), Mumbai (hereinafter referred to as Id. AO).

ITA No.5204/Mum/2018 (A.Y.2009-10)

2. Though the assessee has raised several grounds before us challenging the assumption of jurisdiction u/s.147 of the Act and also on merits, we find that the assessee has raised one crucial ground vide ground No.3 that notice u/s.143(2) of the Act was not served on him before the completion of assessment proceedings within the prescribed time. Since, this is the jurisdictional issue, we deem it fit to address the same first.

3. We have heard rival submissions and perused the materials available on record. We find that assessee is a wholesaler of building materials and had filed his original return of income on 30/09/2009 declaring total income of Rs.3,06,932/-, which was duly processed u/s.143(1) of the Act. Later, based on the information received from Sales Tax department of Government of Maharashtra by DGIT(Investigation), Mumbai which was eventually passed on to the Assessing Officer concerned, the case of the assessee was reopened u/s.147 of the Act. Notice u/s.148 of the Act was issued on 14/03/2014. In response to the said notice, the assessee filed a reply stating that the return filed on 30/09/2009 already may be treated as return in response to notice u/s.148 of the Act. Though it has been mentioned in the assessment order that notice us/143(2), 142(1) were duly served on the assessee in

para 2.1 of the assessment order, we find that the Id. AO vide his letter dated 20/11/2019 addressed to the Sr. Authorised Representative-ITAT of 'SMC' Bench had categorically stated that proof of service of notice u/s.143(2) of the Act for the A.Y.2009-10 is not available on record. This goes to conclusively prove that notice u/s.143(2) of the Act was not served on the assessee within the prescribed time after issuance of notice u/s.148 of the Act. We find that this ground was also raised by the assessee before the Id CIT(A). We find that Id. CIT(A) had merely placed reliance on the general statement recorded by the Id. AO that notice u/s.143(2) of the Act was issued and served on the assessee. But from the perusal of the assessment order, we find that the Id. AO had not mentioned the date of issuance of 143(2) notice and date of service of the same. This fact is further confirmed by the Id. AO vide his letter dated 20/11/2019 addressed to Sr. Departmental Representative of ITAT 'SMC' Bench. Since, this is a jurisdictional defect, the arguments advanced by the Id. DR that it becomes curable u/s.292BB of the Act as assessee had participated in the proceedings does not hold any water. In view of the decision of the Hon'ble Supreme Court in the case of CIT vs. Laxman Das Khandelwal reported in 256 Taxman 171 wherein it has been categorically held that non-issuance of notice u/s.143(2) of the Act is a jurisdictional defect and cannot get cured by Section 292BB of the Act, the re-assessment framed in the hands of the assessee for A.Y.2009-10 is herewith quashed. Since the entire re-assessment is quashed for the A.Y.2009-10, the other grounds challenging the validity of assumption of jurisdiction u/s.147 of the Act and disallowance on account of bogus purchases need not be gone into, as they would be academic in nature. Accordingly, the grounds raised by the assessee are allowed.

3.1. In the result, appeal of the assessee is allowed for A.Y.2009-10.

**ITA No.5205/Mum/2018 (Assessment Year :2010-11) &
ITA No.5206/Mum/2018 (Assessment Year :2011-12)**

4. We find that assessee has challenged the disallowance made on account of bogus purchases wherein the profit percentage embedded in the value of such purchases has been estimated by both the lower authorities for both the years under consideration.

4.1. We find that assessee has made purchases of Rs.9,51,779/- from M/s. Dimple Enterprises (PAN No.AABPM5796N) in A.Y.2010-11 and Rs.12,25,203/- from the same party in A.Y.2011-12. Since this party was reflected as a tainted dealer in the website of Government of Maharashtra, Sales Tax department, the case of the assessee was reopened on the information by DGIT (Investigation) which eventually was passed on to the Id.AO concerned. In re-assessment proceedings, the Id. AO sought to verify the veracity of the purchases made from the assessee from M/s. Dimple Enterprises. The Id. AO issued notice u/s.133(6) of the Act to the said party calling for various details. Though the said notice was duly served on the said supplier, the concerned supplier did not respond to the notice u/s.133(6) of the Act. The Id. AO thereafter gave an opportunity to the assessee to produce the party with the books of accounts to substantiate the claim of the purchases. The assessee vide letter dated 25/01/2016 responded before the Id. AO that since the notice u/s.133(6) of the Act had been duly served on the concerned supplier and the said supplier had chosen not to respond to

the statutory notice, the Id. AO was requested by the assessee to enforce the attendance of the said supplier by issuing statutory notice in the manner known to law. The assessee furnished the detailed statement showing purchase of goods from M/s. Dimple Enterprises alongwith copy of relevant bills, delivery challans and disposal of the said goods in his business. The assessee also pointed out that the payments were made by account payee cheques. The bank statement of assessee showing payments to the said supplier was also submitted vide letter dated 19/10/2015. The assessee also pointed out that it had also taken sufficient steps with the supplier to furnish the requisite details but they had remained unresponded by the supplier. The Id. AO however, disregarded all the contentions of the assessee and merely placed reliance on the information received from the sales tax department that since the said supplier continues to remain as a tainted dealer in the website of Sales Tax department, Government of Maharashtra, the assessee had not conclusively proved the genuineness of purchases made from the said supplier. The Id. AO however, observed that since assessee has given corresponding sales details together with all the relevant documents, only profit element need to be brought to tax thereof. The Id. AO observed that assessee has shown gross profit of 12.49% for A.Y.2010-11 and 11.32% for A.Y.2011-12 and proceeded to estimate the gross profit on disputed purchases at 13.70% for A.Y.2010-11 and 11.84% for A.Y.2011-12 and completed the assessment.

4.2. This profit percentage was restricted to 12.5% for both the years by the Id. CIT(A). Aggrieved by the said order, only the assessee is in appeal before us.

4.3. It is not in dispute that the assessee has filed all the relevant documents to prove the genuineness of the purchases made from M/s. Dimple Enterprises for both the years under consideration. It is not in dispute that the corresponding sales made by the assessee out of the disputed purchases from Dimple Enterprises have not been doubted by the Revenue. It is not in dispute that section 133(6) notice issued by the Id. AO had been duly served on the said supplier at the address given by the assessee. We hold that if the said notice u/s.133(6) of the Act had not been responded by the said supplier, then the Id. AO should have issued summons u/s.131 of the Act by enforcing the attendance of the said supplier and got all the requisite details from the said supplier. The assessee from its side had discharged its onus by filing all the relevant documents together with the confirmation from the said supplier including the PAN card, Aadhar Card, IT return details of the supplier, among other relevant details. Hence, it could be conclusively proved that assessee had discharged its onus to prove the genuineness of the purchases and merely because notice u/s.133(6) of the Act, which had been duly served but not responded by the supplier, no adverse inference could be drawn on the assessee. We also find that absolutely no adverse inference has been drawn on the lower authorities on the documents furnished by the assessee. Hence, no addition could be made in the peculiar facts and circumstances

of the instant case in the light of decision of the Hon'ble Jurisdictional High Court in the case of PCIT vs. Vaman International Pvt. Ltd., in Income Tax Appeal No.1946/2017 dated 29/01/2020 wherein the relevant operative portion of the said order is reproduced hereunder:-

16. The first appellate authority while deleting the addition made by the Assessing Ofcer under Section 69C held that Assessing Ofcer did not doubt the sales and stock records maintained by the assessee. By submitting confirmation letters, copies of invoices, bank statement, payment order, payment by account payee cheques etc., assessee had proved that sale and purchases had taken place. By highlighting the fact that all the payments against the purchases were made through banking channel by way of account payee cheques, the frst appellate authority held that source of expenditure was fully established by the assessee beyond any doubt. He has further recorded that during appellate proceedings the assessee had furnished complete quantitative details of the items of goods purchased during the year under consideration and their corresponding sales.

17. We may now advert to the order passed by the Tribunal, relevant portion of which is extracted hereunder :

"4.4.1 We have heard the rival contentions and perused and carefully considered the materials on record, including the judicial pronouncements cited. On an appreciation of the materials on record, it is evident from the order of assessment that it is on the basis of information obtained from Sales Tax Department that the AO issued the show cause notice to the assessee to explain the said purchases and issued notices under section 133(6) of the Act to the said two parties from whom the said purchases were made, to which there was no response. The AO primarily relying on the information obtained from the Sales Tax Department and sworn statements given before the Sales Tax Department by Sri Pradeep Vyas of M/s. Victor Intertrade P. Ltd. and Shri Ketan Shah of M/s Impex Trading Company held the said purchases to be bogus. While it may be true that the said two purchase parties did not appear before the AO, for whatever reasons, the fact remains that the assessee itself had fled copies of purchase bills, copies of purchase/sale invoices, challan-cum tax invoices in respect of purchases, extracts of stock ledgers showing entry/exit of materials; copies of bank statements to evidence that payment from these purchases were made through normal banking channels, etc. to establish the genuineness of the said purchases. It is a fact evident on record that the AO has not doubted the sales effected by the assessee and therefore it is in order to conclude that without corresponding purchases being effected, the assessee could not have made sales.

4.4.2 In our considered view, the AO has not brought on record any material evidence to conclusively prove that the said purchases are bogus. Mere reliance by the AO on information obtained from the Sales Tax Department or the sworn statement of two parties before the Sales Tax Department, without affording the assessee any opportunity to cross examine those witnesses in this regard or the fact that these parties did not respond to notice under [section 133\(6\)](#) of the Act, would not in itself suffice to treat the purchases as bogus and make the addition. If the AO doubted the genuineness of this said purchases, it was incumbent upon him to cause further inquiries in the matter to ascertain the genuineness or otherwise of the transactions. Without causing any further enquires in respect of the said purchases, the AO cannot make the addition under [section 69C](#) of the Act by merely relying on information obtained from the Sales Tax Department, the statement/affidavit of third parties, Shri Pradeep Vyas and Ketan Shah; without the assessee being afforded any opportunity of cross examination of that persons and for non-response to notices under [section 133\(6\)](#) of the Act.

4.4.3 In the factual matrix of the case, where the AO failed to cause any enquiry to be made to establish his suspicions that the said purchases are bogus, the assessee has brought on record documentary evidences to establish the genuineness of the purchase transactions, the action of the AO in ignoring these evidences cannot be accepted. Further, the Hon'ble Bombay High Court in the case of Ashish International (supra) has held that the genuineness of the statements relied upon by Revenue is not established when the assessee disputes the correctness of those statements and has not been afforded adequate opportunity to cross examine these parties even though he has asked for the same. Moreover, as correctly observed by the learned CIT(A), when the payment for the said purchases to the concerned two parties is through proper banking channels and there is no evidence brought on record by the AO to establish that the said payments were routed back to the assessee, the addition made by the AO under [section 69C](#) of the Act is unsustainable. We are fortified in this view of ours by the decisions of, inter alia, the Hon'ble Bombay High Court in the cases of Nikunj Eximp Enterprises Pvt. Ltd. (supra), Ashish International (supra), the decision of the Coordinate Benches of this Tribunal in the case of Hiralal Chunilal Jain (supra) and Imperial Imp & Exp (supra). In this factual matrix of the case, as discussed above, we find no requirement for interference in the order of the learned CIT(A) and consequently uphold the same. Therefore, Revenue's five grounds (i) to (vii) are dismissed.

In the result, Revenue's appeal for A.Y. 2010-11 is dismissed. Order pronounced in the open court on 16th November, 2016."

17.1. Thus, from the above, it is seen that Tribunal had returned a finding of fact that the assessee had fled copies of purchase bills, copies of purchase/ sale invoices, challan cum tax invoices in respect of the purchases, extracts of stock ledger showing entry/exit of the materials purchased, copies of bank statements to show that payment for such purchases were made through regular banking

channels, etc., to establish the genuineness of the purchases. Thereafter, Tribunal held that Assessing Ofcer could not bring on record any material evidence to show that the purchases were bogus. Mere reliance by the Assessing Ofcer on information obtained from the Sales Tax Department or the statements of two persons made before the Sales Tax Department would not be suficient to treat the purchases as bogus and thereafter to make addition under Section 69C of the Act. Tribunal has also held that if the Assessing Ofcer had doubted the genuineness of the purchases, it was incumbent upon the Assessing Officer to have caused further enquiries in the matter to ascertain genuineness or otherwise of the transaction and to have given an opportunity to the assessee to examine/cross-examine those two parties vis-a-vis the statements made by them before the Sales Tax Department. Without causing such further enquiries in respect of the purchases, it was not open to the Assessing Ofcer to make the addition under Section 69C of the Act.

18. We are in agreement with the view expressed by the Tribunal. In fact, Tribunal has only affirmed the finding of the frst appellate authority. Thus, there is concurrent finding of fact by the two lower appellate authorities.

19. This Court in the case of Commissioner of Income Tax -1, Mumbai v/s. Nikunj Eximpp Enterpprises(P.) Ltd.372 ITR 619; wherein an identical fact situation arose did not interfere with the order passed by the Tribunal and held that no substantial question of law arose from such order. It was held that merely because the suppliers had not appeared before the Assessing Officer, no conclusion could be arrived at that the purchases were not made by the assessee.

20. On thorough consideration of the matter, we do not find any error or infirmity in the view taken by the Tribunal. No substantial question of law arises therefrom. Thus, there is no merit in the appeal. Appeal is accordingly dismissed. However, there shall be no order as to costs.

4.4. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we hold that no addition could be made on account of alleged ingenuine purchases in the peculiar facts and circumstances of the instant case. Accordingly, the grounds raised by the assessee on merits are allowed for both the years.

4.5. Since the relief is granted to the assessee on merits we are not inclined to address the grounds challenging the assumption of jurisdiction u/s.147 of the Act and they are left open.

5. In the result both the appeals of the assessee are allowed.

TO SUM UP:

<u>ITA NO.</u>	<u>AY</u>	<u>Appeal By</u>	<u>Result</u>
5204/Mum/2018	2009-10	Assessee	Allowed
5205/Mum/2018	2010-11	Assessee	Allowed
5206/Mum/2018	2011-12	Assessee	Allowed

Order pronounced on 25/11/2021 by way of proper mentioning in the notice board.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 25/ 11 /2021
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai