

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)
"SMC" BENCH, MUMBAI**

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER

ITA NOs. 1591 & 1592/MUM/2020 (A.Y: 2009-10)

Kamlesh T. Basnsali Flat No. 202, 2nd Floor Earth Pillar, Sadashiv Lane Mumbai -400004 PAN: AIKPB8482H	v.	Income Tax Officer -10(2)(2) Matru Mandir, Tardev Road, Mumbai – 400 007
(Appellant)		(Respondent)

Assessee by	:	Shri Dhaval Shah
Department by	:	Shri Sanjay J. Sethi
Date of Hearing	:	20.09.2021
Date of Pronouncement	:	25.11.2021

ORDER

PER C.N. PRASAD (JM)

1. These appeals are filed by the assessee against different orders of the Learned Commissioner of Income Tax (Appeals)–30, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 27.04.2018 and 13.12.2018 for the A.Y. 2009-10 arising out of re-assessment orders passed u/s. 143(3) r.w.s. 147 of the Act dated 05.03.2015 and 18.03.2016 respectively.

ITA.No. 1591/MUM/2020 (A.Y: 2009-10)**2. Assessee has raised following grounds in this appeal: -**

"1. The Ld. CIT(A) has erred in law and in facts in confirming the action of the assessing officer in issuing notice u/s 148 of the Act and re-opening of the assessment u/s. 147 of the Act which is invalid and bad in law.

2. The Ld. CIT(A) has erred in law and in facts confirming the order of the assessing officer without complying with principles of natural justice.

3. The Ld. CIT(A) has erred in law and in facts confirming the disallowance of alleged bogus purchases of Rs. 3,88,719/- being 12.5% of Rs. 31,09,750/-in the hands of the appellant.

4. The appellant craves leave to add to, alter, amend and/or delete in all the foregoing grounds of appeal."

3. Briefly stated the facts are that, assessee an individual engaged in the business of ferrous and non-ferrous metals filed return of income on 14.09.2009 declaring income of ₹.1,36,338/- for the A.Y. 2009-10 and the return was processed u/s. 143(1) of the Act. Subsequently, Assessing Officer received information from the DGIT(Inv.), Mumbai about the accommodation entries provided by various dealers and assessee was also one of the beneficiary from those dealers. The assessment was reopened U/s. 147 of the Act based on the information received from DGIT (Inv.), Mumbai, that the assessee has availed accommodation entries from Anand Deep Metal and Navratan Impex who are said to be providing accommodation entries without there being transportation of any goods.

In the reassessment proceedings, the assessee was required to prove the genuineness of the purchases made from various dealers as referred in Assessment Order. In response assessee furnished purchase invoice of the specified party, copies of bank statements, chart showing the details final order purchases of the alleged parties and submitted that the purchases made are genuine. Assessee further submitted that the payments are made through account payee cheques as such contended that all the purchases are genuine.

4. Not convinced with the submissions of the assessee the Assessing Officer treated the purchases as non-genuine and he was of the opinion that assessee had obtained only accommodation entries without there being any transportation of materials and the assessee might have made purchases in the gray market. Assessing Officer observed that the notices issued u/s. 133(6) of the Act to the parties are returned unserved with a remark "not found" and the assessee has not produced the parties before the Assessing Officer. It is the finding of the Assessing Officer that assessee failed to produce the parties and as such the Books of Accounts remained unverifiable. Therefore, Assessing Officer treated purchases of ₹.13,12,474/- from Anand Deep Metal and ₹.17,97,276/- from Navratan Impex totaling to ₹.31,09,750/- as non-genuine. However, following the

decision of the Hon'ble Gujarat High Court in the case of CIT v. Simit P. Sheth [356 ITR 451] Assessing Officer estimated the profit element from such purchases at 12.5% and disallowed ₹.3,88,719/-. On appeal the Ld.CIT(A) sustained the action of the Assessing Officer in estimating the Gross Profit at 12.5% for the A.Y:2009-10. Against this order of the Ld.CIT(A) assessee is in appeal.

5. Ld. Counsel for the assessee reiterated the submissions made before the Ld.CIT(A). Ld. Counsel for the assessee further submitted that the assessee is in the business of trading in Ferrous and non-Ferrous Metals and the disallowance made by the Assessing Officer and sustained by the Ld.CIT(A) is on higher side, thus requested to reduce the same. Learned Counsel for the assessee also placed reliance on the decision of the Tribunal in the case of Shri Vinod C. Sanghavi v. ITO in ITA.No. 6210/Mum/2018 and ITA.No. 7916/Mum/2019 dated 03.08.2021 and submitted that the Tribunal considering various decisions and also taking note of the fact that assessee is into the business of trading in Iron and steel estimated the profit element at 4%. Therefore, he requested that the same percentage may be adopted in its case.

6. Ld. DR vehemently supported the orders of the authorities below.

7. Heard both sides, perused the orders of the authorities below. It is not in dispute that sales have been accepted as genuine from out of these purchases. When the sales have been accepted as genuine the entire purchases cannot be treated as non-genuine. The Hon'ble Gujarat High Court in the case of Bholanath Polyfab Pvt. Ltd [355 ITR 290] held that when the assessee made purchases and sold the finished goods as a natural corollary not the entire amount covered under such purchases would be subject to tax but only the profit element embedded therein. Similar view has been taken by the Hon'ble Gujarat High Court in the case of CIT *v.* Simit P. Seth [38 taxman.com 385]. Simply because the parties were not produced the entire purchases cannot be added as held by the Bombay High Court in the case of CIT *v.* Nikunj Eximp [216 Taxman.com 171]. I agree with the view of the lower authorities that there should be an estimation of profit element from these purchases and should be estimated reasonably as the assessee could not conclusively prove that the purchases made are from the parties as claimed, especially in the absence of any confirmations from them. Taking the totality of facts and circumstances, keeping in view the nature of business of the assessee i.e. trader in Ferrous and non-Ferrous Metals, it would be justified if the profit element embedded in those purchases are estimated at 4%. Accordingly, I direct the Assessing Officer to estimate the profit element from the non-

genuine purchases at 4% for the Assessment Year under consideration i.e., A.Y: 2009-10 and recompute the income accordingly. Grounds raised by the assessee are partly allowed.

ITA.No. 1592/MUM/2020 (A.Y: 2009-10)

8. In this appeal assessee has raised following grounds: -

"1. The Ld. CIT(A) has erred in law and in facts in treating the appeal of the appellant as non-est and thereby dismissing the appeal in limine.

2. The Ld. CIT(A) has erred in law and in facts confirming the order of the assessing officer without complying with principles of natural justice.

3. The Ld. CIT(A) has erred in law and in facts in confirming the action of the assessing officer in issuing notice u/s 148 of the Act and re-opening of the assessment u/s. 147 of the Act which is invalid and bad in law.

4. The Ld. CIT(A) has erred in law and in facts confirming the disallowance of alleged bogus purchases of Rs. 1,18,410/- being 12.5% of Rs. 9,47,276/- in the hands of the appellant."

9. Heard both sides, perused the orders of the authorities below. This appeal was dismissed in limine by the Ld.CIT(A) holding that appeal is not maintainable on the ground that the appeal was manually filed and as per Rule 45 of I.T. Rules appeal shall be filed in Form-35 electronically. The Ld.CIT(A) was of the view that assessee has filed appeal in contravention of Rule 45 of I.T. Rules and therefore the appeal was dismissed as

non-est. It is noticed that an identical issue had come up before the Coordinate Bench in the case of All India Federation of Tax Practitioners v. ITO in ITA.No. 7134/MUM/2017 [64 ITR (Trib.) 0704] and the Tribunal held that non-filing of appeal in the electronic form is only a procedural defect which can be cured and the Tribunal restored the appeal back to the file of the Ld.CIT(A) for disposal on merits and the assessee was directed to file appeal in electronic form within ten days on receipt of order. Similar view has been taken by the Coordinate Bench in the various decisions. Following the above decisions, this appeal is restored to the file of the Ld.CIT(A) and assessee is directed to e-file the aforesaid appeal within a period of Fifteen (15) days from the date of receipt of this order, consequent to which delay in e-filing shall stand condoned and the Ld.CIT(A) shall dispose off the appeal on merits. Needless to say that the Ld.CIT(A) shall give adequate opportunity of being heard to the assessee.

10. In the result, both appeals of the assessee are partly allowed.

Order pronounced on 25.11.2021 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/
(C.N. PRASAD)
JUDICIAL MEMBER

Mumbai / Dated 25.11.2021
Giridhar, Sr.PS

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum