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

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INCOME TAX APPEAL NO. 719 OF 2018

The Principal Commissioner of
Income-tax – 25
C-10, Pratyakshakar Bhavan,
Bandra-Kurla Complex,
Mumbai 400 051.

...Petitioner

Versus

Shree Ganesh Developers
301, Krishna Kunj,
V.L. Mehta Road,
Vile Parle (West),
Mumbai – 400 049.

...Respondent

Ms. Gokhale for the Petitioner.

Mr. Ajay R. Singh a/w Mr. Akshay Pawar for the Respondent.

CORAM

M.S. Sonak &
Jitendra Jain, JJ.
27 February 2025
5 March 2025

RESERVED ON:

PRONOUNCED ON :

JUDGMENT (Per Jitendra Jain, J.) :-

1. This appeal filed by the appellant-revenue for the assessment year 2010-11 was admitted on 29 January 2025 on the following substantial question 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. Proteins 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. Proteins Ltd, that 100% disallowances on bogus purchases is upheld ?"

Brief Facts :

2. The assessee is a firm engaged in the business of Real Estate. The assessee filed its return of income declaring income of Rs. 61,05,420/-. The said return was selected for scrutiny assessment.

3. On 25 March 2013, an assessment order under Section 143(3) of the Income-tax Act, 1961 ('the Act') was passed assessing income at Rs.15,41,95,860/-. In the assessment order, Rs.14,30,90,442/- was added on account of alleged bogus purchases from various parties. A sum of Rs.50,00,000/- was also added under Section 68 of the Act. The said order was challenged by filing an appeal to the Commissioner of Income Tax (Appeals) [CIT (A)].

4. On 29 May 2015, the CIT (A) with respect to the alleged bogus purchases deleted the additions with regard to all the suppliers except M/s Neptune Trading Co. and Hari Om Traders. With respect to these two parties, the additions made by the Assessing Officer (AO) was confirmed to the extent of only 12.5% of the purchases made from these parties.

5. The appellant-revenue challenged the order of the CIT (A) by filing an appeal to the Tribunal. In the grounds of appeal, the appellant-revenue challenged the deletion of the purchases made from various parties. With respect to M/s Neptune Trading Co. and Hari Om Traders, a specific ground was also taken by the appellant-revenue to the effect that the CIT (A) erred in estimating profit at 12.5% on the bogus purchases. It is important to note that the respondent-assessee has not challenged the additions sustained by the CIT (A) to the extent of 12.5% on the purchases made from M/s Neptune Trading Co. and Hari Om Traders.

6. The Tribunal vide its order dated 24 May 2017 upheld the order of the CIT (A) in *toto* insofar as the issue of bogus purchases is concerned. It is on the above backdrop that the the appellant-revenue has challenged the order of the Tribunal on substantial questions of law reproduced above.

7. Ms. Gokhale, learned counsel for the appellant-revenue relied upon the order of the AO and submitted that the CIT (A) and the Tribunal ought to have confirmed the additions made by the AO. She further submitted that with respect to M/s Neptune Trading Co. and Hari Om Traders, the respondent-assessee has not challenged the estimation of 12.5% made by the CIT(A) by filing an appeal to the Tribunal. She further submitted that the respondent-assessee, therefore, has admitted the purchases made from M/s Neptune Trading Co. and Hari Om Traders are bogus. She further submitted

that the reasoning given with respect to the deletion of the purchases made from other parties would not be applicable to the purchases made from M/s Neptune Trading Co. and Hari Om Traders, since the bank details were not submitted to show that the cash has not been withdrawn which was the case with respect to other parties. She therefore, submitted in the alternative that atleast to the extent of purchases made from M/s Neptune Trading Co. and Hari Om Traders the additions made by the AO should be restored.

8. Mr. Ajay Singh, learned counsel for the respondent-assessee defended the orders made by the CIT (A) and the Tribunal and submitted that in the remand proceedings, detailed investigation was done in which the transactions were found to be genuine and, therefore, the appeal filed by the appellant-revenue is required to be dismissed. He further submitted that both the authorities have given concurrent findings of the fact for coming to the conclusion that the purchases are not bogus and, therefore, the additions made by the AO were not justified. He further submitted that merely because M/s Neptune Trading Co. and Hari Om Traders have not given bank statements, on this ground itself purchases cannot be non-genuine.

9. Mr. Ajay Singh, learned counsel for the respondent-assessee relied upon the following case laws in support of his submissions :-

- (i) Pr. CIT Vs. M/s. Mohommad Haji Adam & Co.*¹
- (ii) Pr. CIT Vs. Vaman International Pvt. Ltd.*²
- (iii) Pr. CIT Vs. JK Surface Coatings Pvt. Ltd.*³
- (iv) Pr. CIT Vs. Shapoorji Pallonji and Co. Ltd.*⁴
- (v) Pr. CIT Tejua Rohitkumar Kapadia.*⁵
- (vi) CIT Vs. Century Plyboards (I) Ltd.*⁶
- (vii) PCIT Vs. Ram Builders.*⁷
- (viii) PCIT-19 Vs. S V Jiwani.*⁸
- (ix) PCIT Vs. Chawla Interbild Construction Co. (P) Ltd.*⁹
- (x) PCIT Central-1 Vs. JWC Logistic Park (P) Ltd.*¹⁰
- (xi) CIT-7, New Delhi Vs. Odeon Builders (P) Ltd.*¹¹
- (xii) Babulal C. Borana Vs. Third Income-tax Officer.*¹²

10. We have heard the learned counsel for the appellant-revenue and the respondent-assessee.

Analysis and Conclusions :

11. The issue which falls for our consideration is whether the purchases made from various parties referred to in paragraph 4 of the assessment order can be said to have been proved as genuine by the respondent-assessee for the purpose of claiming deduction of these expenditures.

12. Admittedly, the respondent-assessee did not discharge

1 [2019] 103 taxmann.com 459 (Bom)
 2 ITXA/1940/2017, dated 29 January 2020 (Bombay HC)
 3 ITXA/1850/2017, dated 20 October 2021 (Bombay HC)
 4 [2020] 423 ITR 220 (Bombay)
 5 [2018] 94 taxmann.com 324 (Guj.)(HC)
 6 [2019] 103 taxmann.com 178 (Cal.)(HC)
 7 ITXA/398/2018, dated 18 July 2022 (Bombay HC)
 8 [2022] 449 ITR 583 (Bombay) dated 3 October 2022
 9 [2019] 412 ITR 152 (Bombay)
 10 [2018] 100 taxmann.com 355 (Bombay)
 11 [2019] 418 ITR 315 (SC)
 12 [2006] 282 ITR 251 (Bombay)

its onus of proving the purchases made from various parties during the course of the assessment proceedings. The respondent-assessee did file some evidence before the AO but same was not to the satisfaction of the AO and, therefore, the AO rejected the explanation of the respondent-assessee with respect to various parties referred to in paragraph 4 of the assessment order and made an addition of Rs.14,30,90,442/-.

13. The respondent-assessee filed additional evidences and sought to prove the genuineness of the purchases before the CIT (A). The CIT (A) called for the remand report from the AO on various evidences furnished by the respondent-assessee at the appellate stage. The AO vide letter dated 18 May 2015 filed his remand report. In the said remand report, the AO stated that in response to summons issued under Section 133(6), all the suppliers filed the details called for. Out of various suppliers except M/s Neptune Trading Co. and Hari Om Traders, bank statements were also filed by these suppliers. The AO independently enquired from the respective banks the veracity and authenticity of the bank statements furnished by the suppliers. The Officer examined the bank details and came to the conclusion that there were no cash withdrawals from the bank accounts of these suppliers after issue of cheques by the assessee. However, inspite of the same, the Officer, in the remand report, requested for confirming the additions. It is important to note that M/s Neptune Trading Co. and Hari Om Traders did not file their bank statements with the AO pursuant to the summons issued under Section

133(6) of the Act and, therefore, the Officer could not verify whether there were any cash withdrawals from the bank accounts of these parties for coming to the conclusion as to whether the purchases should be treated as having explained.

14. The CIT (A) and the Tribunal with respect to all the suppliers except M/s Neptune Trading Co. and Hari Om Traders gave a concurrent finding of fact that the assessee has proved the purchases made from these suppliers by furnishing all the details available. The fact of the AO examining the bank statements and coming to the conclusion that there were no cash withdrawals after deposit of cheque issued by the respondent-assessee was a crucial factor which the Appellate Authorities considered for coming to the conclusion that the purchases made from various suppliers except M/s Neptune Trading Co. and Hari Om Traders were genuine.

15. In our view, the respondent-assessee has not only provided all the details with respect to these suppliers but the AO independently in remand proceedings verified the purchases by issuing summons under Section 133(6) of the Act. The suppliers responded to the summons and filed all the details. The AO independently verified with the respective bankers on the genuineness of the bank statements produced by these suppliers. The AO gave a finding that there was no cash withdrawal from the bank accounts of these suppliers after issuance of cheque by the respondent-assessee. Therefore, the revenue has not been able to rebutt these

findings more particularly in the findings recorded by the AO in remand proceedings.

16. Although the investigation started with the names of the suppliers appearing on the portal of the Sales Tax Department as non-genuine, but in the income tax proceedings, the genuineness of the purchases has been proved, and the AO also verified the same. The revenue has not been able to show that these findings are perverse. Therefore, insofar as the purchases from various suppliers except M/s Neptune Trading Co. and Hari Om Traders are concerned, we do not find any reason for interfering with the orders passed by the CIT (A) and the Tribunal who have recorded concurrent findings of fact with respect of genuineness of the purchases and as a result, the appellant-revenue's appeal to that extent is required to be dismissed.

17. However, insofar as M/s Neptune Trading Co. and Hari Om Traders are concerned, these parties did not produce the bank statements to the AO in the remand proceedings. Therefore, the AO could not examine whether there were any cash withdrawals after the respondent-assessee issued cheques. Concerning all the other parties, this was the crucial factor that the Appellate Authorities considered for concluding that the purchases were genuine, more so because the enquiry was initiated initially on the premise that these parties were bogus as per sales tax authorities.

18. However, concerning these parties, in the absence of the

bank statements, the Officer could not verify whether there were cash withdrawals after the transactions with the respondent-assessee. It is also important to note that the CIT (A) with respect to these two parties, confirmed additions by estimating 12.5% of these purchases. The respondent-assessee did not challenge these findings of CIT (A) before the Tribunal.

19. In our view, accepting the submissions of the learned counsel for the respondent-assessee that with respect to the suppliers other than M/s Neptune Trading Co. and Hari Om Traders, the concurrent findings by both the Appellate Authorities clearly show that the purchases have been proved, the additions made by the AO with respect to these parties cannot be sustained. However, the crucial factor for arriving at these purchases as genuine has been the examination of the bank statements of the suppliers by which the Officer has given a finding that there has been no cash withdrawal after the deposit of the cheque issued by the respondent-assessee. This crucial factor is missing when purchasing from M/s Neptune Trading Co. and Hari Om Traders. Therefore to that extent by applying the submissions of the respondent-assessee with respect to other suppliers on the factual findings, the purchases from M/s Neptune Trading Co. and Hari Om Traders could not be verified and, therefore, these findings of facts have to be held against the respondent-assessee.

20. It is also important to note that the respondent-assessee

has accepted the addition of 12.5% of the purchases from these two parties. By accepting the said percentage, the respondent-assessee has impliedly accepted that the transactions with these two parties could not be proved and, therefore, the logical conclusion that both the Appellate Authorities ought to have adopted was to confirm the total additions of purchases from these two parties. The issue before both the Appellate Authorities was whether the purchases made from these two parties has passed the test of proving the genuineness. By accepting the additions of 12.5% of the purchases from these two parties, the respondent-assessee has accepted that these transactions of purchases are unproved and consequently, there was no justification, therefore, to restrict the addition to 12.5% only.

21. The Co-ordinate Bench of this Court in the case *Shoreline Hotel (P) Ltd. Vs. Commissioner of Income-tax, Central-I*¹³ had an occasion to adjudicate a very similar issue. In that case, the Officer made an addition of 15% of the purchases which were not proved. The CIT (A), while exercising his jurisdiction under Section 263 of the Act held that in such a case, the total purchases should have been added and not only 15%. The matter was carried unsuccessfully before the Tribunal and thereafter before this Court. This Court observed that once certain percentages of the purchases which are admitted has been not proved then, the Officer could not have added only that percentage but ought to have added full purchases. Although this was a case

¹³ (2018) 98 taxmann.com 234 (Bombay)

arising out of revisional proceedings under Section 263 but in the revisional order, the Commissioner had given a definite finding that the entire purchases should have been added. Therefore, the counsel for the respondent-assessee was not justified in distinguishing this judgment on the ground that it deals with the proceedings under Section 263 and not Section 143(3) of the Act.

22. The issue is not under which section the proceedings were initiated but the issue is that if an assessee accepts certain percentage of unproved purchases as his income then whether the additions should be made of certain percentage or the entire purchases. In our view, this decision supports the view which we have taken in the present case. The respondent-assessee having accepted 12.5% of the purchases made from M/s Neptune Trading Co. and Hari Om Traders, the natural corollary was that both the Appellate Authorities ought to have sustained total purchases from these parties and not 12.5%.

23. Similar situation arose before the Calcutta High Court in the case of **Principal Commissioner of Income-tax Vs. Mrs. Premlata Tekriwal**,¹⁴ where on very similar fact situation, the Calcutta High Court too echoed the same view that in such a case, the entire purchases should be added and not certain percentage. The view which have taken also finds support from the decision of Allahabad High Court in the case of

14 (2022) 143 taxmann.com 173 (Calcutta)

Assistant Commissioner of Income-tax Vs. Shanti Swarup Jain¹⁵ and judgment of the Gujarat High Court in the case of **N.K. Industries Vs. DCIT¹⁶**.

24. If the approach of the Appellate Authorities of estimating the profit on such purchases is to be accepted, then, in effect, the consequence would be that even if respondent-assessee has failed to prove its claim of deduction of purchases, still by estimating profit, impliedly deduction of purchases is given. For example, if the purchases by accommodation entries are Rs.100/- and a profit of 10% is estimated, then to the extent of Rs.90/- deduction on account of purchases is deemed to have been given by the Appellate Authorities. This approach would not be correct since it is nobody's case that the respondent-assessee has made sales out of books by purchasing the goods out of books.

25. If the approach of the Appellate Authorities is accepted, then the provision of Section 69C, which is an enabling provision, would become redundant. Section 69C provides that where an assessee has incurred any expenditure and offers no explanation about the source of expenditure or the explanation offered is not in the opinion of the AO satisfactory, then the amount of expenditure may be deemed to be the income of the assessee and such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income. In our view, if the approach of the CIT(A) and the Tribunal is

15 (2015) 55 taxmann.com 378 (Allahabad)

16 (2016) 72 taxmann.com 289 (Guj.).

accepted, then it would amount to endorsing outright conduct of illegality contrary to the express provisions of Section 69C of the Act, which the Appellate Authorities have entirely ignored. In the above example, by estimating 10% and thereby impliedly giving a deduction of Rs.90/-, in the teeth of the provisions of Section 69C of the Act which expressly bars the allowability of unexplained expenditure.

26. Now we propose to deal with decision relied upon by the respondent-assessee.

(i) The decision of this Court in the case of ***M/s. Mohommad Haji Adam & Co. (supra)*** is distinguishable on facts, since in that case, the CIT (A) co-related the purchases and sales and on that basis came to the conclusion that there is no reason to reject the purchases. Furthermore, the question on Section 69C of the Act was not raised before the Court. Furthermore, the decision in case case of ***Shoreline Hotel (P) Ltd. (supra)*** was not brought to the notice of the Court. Even the fact situation in the present case is different and, therefore, this decision is not applicable.

(ii) The decision of this Court in the case of ***Vaman International Pvt. Ltd. (supra)*** is also not applicable to the present facts. In the case of ***Vaman International Pvt. Ltd. (supra)***, there was a finding of fact by the Appellate Authority that the assessee has proved that the sales and purchases have taken place moreso by highlighting the fact on payment having made through banking channel and the source of expenditure was fully established beyond any doubt. It was on

these facts that the Co-ordinate Bench rejected the contention of the revenue that the purchases were bogus and, therefore, the provisions of Section 69C of the Act were not attracted. In the instant case before us, M/s Neptune Trading Co. and Hari Om Traders did not furnish the bank statements and, therefore, parameters on the basis of which the other suppliers were proved to be genuine could not be satisfied in these two cases and, therefore, this factual finding distinguishes the judgment in the case of ***Vaman International Pvt. Ltd. (supra)***. Even in this judgment, the decision in the case of ***Shoreline Hotel (P) Ltd. (supra)*** was not brought to the notice of the Court.

(iii) The decision of this Court in the case of ***JK Surface Coatings Pvt. Ltd. (supra)*** is also distinguishable since in that case, the additions were made by invoking Explanation to Section 37 of the Act. Secondly, the provision of Section 69C of the Act was not for consideration before the Court. Thirdly, the decision in the case ***Shoreline Hotel (P) Ltd. (supra)*** was not brought to the notice of the Court and the only issue canvassed before the High Court was what should be the rate of profit. In the present case, these facts do not exist and, therefore, this decision in case of ***JK Surface Coatings Pvt. Ltd. (supra)*** is not applicable to the facts of this case.

(iv) The decision relied upon in the case of ***Shapoorji Pallonji and Co. Ltd. (supra)*** is also distinguishable on facts, since in the instant case before us, the AO could not verify the bank statements of these two parties for coming to the conclusion whether there was any cash withdrawal which

would have shown that the purchases are genuine. In the case of *Shapoorji Pallonji and Co. Ltd. (supra)*, the Officer only relied on the Sales Tax Department report whereas in the present case, the Officers did independent enquiry and in the absence of bank statements of these two parties, the AO has come to the conclusion that the purchases are not genuine. Even in this case, the decision in the case of *Shoreline Hotel (P) Ltd. (supra)* was not brought to the notice of the Court.

(v) The decision in the case of *Tejua Rohitkumar Kapadia (supra)* also proceeds on a footing that there was no evidence to show that the amount was recycled back to the assessee. In the instant case before us, if the bank statements of these parties were furnished, then the Officers could have examined this issue, but in the absence of the same, the assessee cannot take the support of this decision.

(vi) The decision in the case of *Century Plyboards (I) Ltd. (supra)* is also not applicable since that case, the Tribunal has given a finding that the transactions were genuine and it was on this basis that the issue was decided in favour of the assessee.

(vii) The decisions of this Court in the cases of *Ram Builders (supra)*, *S. V. Jiwani (supra)* and *Chawla Interbild Construction Co. (P) Ltd. (supra)* are not applicable to the facts of this case. In all these cases, the issue of Section 69C of the Act was not raised. Furthermore, these 3 decisions have rejected the appeal on the ground that no substantial question of law arose, whereas, in the present case, we have admitted

the appeal after formulating the substantial question of law. The decision in the case of *Shoreline Hotel (P) Ltd. (supra)* was not brought to the notice of the Court in all the 3 decisions. Therefore, these decisions are not applicable to the facts of this case.

(viii) We failed to understand as to how the decision in the case of *JWC Logistic Park (P) Ltd. (supra)* is applicable to the facts of the present case, since the issue was with respect to deduction under Section 80IA of the Act. The counsel for the respondent-assessee fairly admits that the issue whether the purchases have been proved or not has to be decided on the facts of each case. Therefore, even on this ground, the said decision cannot be relied upon.

(ix) The decision of the Supreme Court in the case of *Odeon Builders (P) Ltd. (supra)* is not applicable since in that case, the assessee was denied opportunity of cross-examination and it was on that basis that the Supreme Court dismissed the revenue's appeal since the additions were made only on the basis of third party information gathered by the Investigation Wing of the Department and no independent verification was done. In the instant case, the Officer has done independent verification and has come to a conclusion that with respect to these two parties in the absence of bank statements, the purchases cannot be said to have been proved.

27. For all the above reasons, the question of law admitted by this Court is answered against the revenue and in favour of the respondent-assessee insofar as the purchases from various

suppliers except M/s Neptune Trading Co. and Hari Om Traders are concerned. With respect to the purchases from M/s Neptune Trading Co. and Hari Om Traders are concerned, the question is answered in favour of the appellant-revenue and against the respondent-assessee. The order of the CIT(A) and the Tribunal is reversed insofar as the purchases from these two parties are concerned. However, we make it clear that the total additions would not exceed Rs.1,00,10,773, which is the total purchase from M/s Neptune Trading Co. and Hari Om Traders.

28. The appeal is disposed of in the above terms. No order as to costs.

(Jitendra Jain, J)

(M.S. Sonak, J)