

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.1850 OF 2017

The Pr. Commissioner of Income Tax-15, Mumbai] ... Appellant

Versus

JK Surface Coatings Pvt. Ltd.] ... Respondent

Mr. Akhileshwar Sharma for Appellant.
None for Respondent.

CORAM :- K. R. SHRIRAM &
AMIT B. BORKAR, JJ.
DATE :- 28 OCTOBER, 2021

P. C. :-

1. Appellant is impugning an Order pronounced on 18/11/2015 by Income Tax Appellate Tribunal (hereinafter referred to as 'ITAT') while disposing of Appeal filed by Respondent and cross-Appeal filed by Appellant and is proposing the following substantial questions of law :

- "A. *Whether on the facts and in circumstances of the case and in law, the Hon'ble ITAT erred in not relying on the information received from the Investigation Wing, Mumbai and Sales Tax Department, Govt. of Maharashtra that purchases shown by the assessee are from the bogus bill providers.*
- B. *Whether on the facts and in circumstances of the case and in law, the Hon'ble ITAT erred in directing the Assessing Officer to estimate profit at 10% of the total alleged bogus purchases and not appreciating the fact*

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that the Hon'ble Supreme Court on similar issue in the case of NK Proteins Ltd in SLP-CC No(s) 769 of 2017 dated 16.01.2017 directed to make addition of the entire bogus purchases.

C. *Whether on the facts and in circumstances of the case and in law, the Hon'ble ITAT failed to appreciate during the assessment proceedings, the assessee failed to substantiate the genuineness of purchases made, though the onus lies on the assessee to prove the same. In the absence of unexplained sources of the cash payments, the AO ascertained that the assessee had made cash purchases from undisclosed parties and arranged the bills from parties, who were hawala operators."*

2. Mr. Sharma submitted that procuring bogus bills does not itself represent any business transaction and the purpose of booking the expenditure and the account through bogus bills is an illegal activity and the same is definitely an offence under, and in any case prohibited by, the law, including the act so as to be hit by Explanation to Section 37 of the Income Tax Act, 1967. First of all, the Assessing Officer has made a reference to the Explanation to Section 37 in his order but his decision to add the entire value of bogus purchases to the income is not based on this Explanation to Section 37. Moreover, considering the order of CIT(A) as well as the ITAT, Revenue does not appear to have argued these provisions and made submissions before the CIT(A) and ITAT. Moreover, the ITAT in its order, has observed that the work contract receipt was not doubted by

the AO and therefore, in the absence of purchases, it was not possible for assessee to carry out the work of this magnitude and purchase of material in cash from open market cannot be ruled out. This is a finding of fact and therefore there cannot be an offence as provided in the Explanation to Section 37.

3. Mr. Sharma also submits that under Section 40A(3) if the assessee incurs any expenditure in respect of which a payment or aggregate of payment made to a person in a day by cash exceeds a particular amount, no deduction shall be allowed in respect of such expenditure. Mr. Sharma states that at the relevant time, i.e., AY 2009-10, the limit was Rs.20,000/-. We find that this argument has not been even raised or considered by the AO or CIT or the ITAT.

4. Having considered the memo of Appeal and the Orders passed by AO / CIT(A) and the Order of ITAT, the only issue that comes up for consideration is with respect to the extent of *ad-hoc* disallowance to be sustained with respect to bogus purchases. The AO has observed 100% of the purchase value to be added to the income of Assessee, the CIT(A) has said it should be 15% and ITAT has said it should be 10%. First of all, this would be an issue which requires evidence to be led to determine what would be the actual profit margin in the business that

Assessee was carrying on and the matter of calculations by the concerned authority. According to the Tribunal, in all such similar cases, it is ranged between 5% to 12.5% as reasonable estimation of profit element embedded in the bogus purchase when material consumption factor do not show abnormal deviation.

5. Whether the purchases were bogus or whether the parties from whom such purchases were allegedly made were bogus was essentially a question of fact. When the Tribunal has concluded that the assessee did make the purchase, as a natural corollary not the entire amount covered by such purchase but the profit element embedded therein would be subject to tax.

6. Therefore, in our view, this would not raise any substantial questions of law.

7. Appeal dismissed

(AMIT B. BORKAR, J.)

(K. R. SHRIRAM, J.)