

(2016) 06 GUJ CK 0038

In the Gujarat High Court

Case No : Tax Appeal Nos. 1245 to 1248 of 2006.

M/s. Vijay Trading Co. - Appellant @HASH Income-Tax Officer - Opponent

Date of Decision : 22-06-2016

Acts Referred:

Income Tax Act, 1961 — Section 260

Citation : (2016) 388 ITR 377

Hon'ble Judges : K.S. Jhaveri and G.R. Udhwani, JJ.

Bench : Division Bench

Advocate : Mr S.N. Divatia, Advocate, for the Appellant No. 1; Mrs. Mauna M. Bhatt, Advocate, for The Opponent No. 1

Final Decision : Allowed

Judgement

Mr. K.S. Jhaveri, J. - Being aggrieved and dissatisfied with the impugned order dated 03.03.2006 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench "B" (here in after referred to as ITAT) in ITA Nos. 407/Ahd/2001, 406/Ahd/2001, 1188/Ahd/1999 and 405/Ahd/2001 for the Assessment Years 1993-94, 1994-95, 1995-96, 1996-97 respectively, the assessee has preferred the present Tax Appeals.

2. These appeals were admitted for consideration of the following substantial question of law:

Tax Appeal No. 1245 of 2006

"Whether on the facts and in the circumstances of the case, the conclusion reached by the Income Tax Appellate Tribunal that the purchases aggregating to Rs. 3,15,952/- were bogus, is such could be arrived at?"

Tax Appeal No. 1246 of 2006

"Whether on the facts and in the circumstances of the case, the conclusion reached by the Income Tax Appellate Tribunal that the purchases aggregating to Rs. 11,49,455/- were bogus, is such could be arrived at?"

Tax Appeal No. 1247 of 2006

"Whether on the facts and in the circumstances of the case, the conclusion reached by the Income Tax Appellate Tribunal that the purchases aggregating to Rs. 33,16,366/- were bogus, is such could be arrived at?"

Tax Appeal No. 1248 of 2006

"Whether on the facts and in the circumstances of the case, the conclusion reached by the Income Tax Appellate Tribunal that the purchases aggregating to Rs. 4,48,000/- were bogus, is such could be arrived at?"

3. The assessee is a firm engaged in the business of trading in oil and grocery items on wholesale as well as semi wholesale basis. The assessee firm had filed its return of income for assessment year 1993-94 declaring total income of Rs. 4500/- along with Tax Audit Report. During the course of assessment proceedings, the Assessing Officer called upon the assessee to prove the genuineness of purchases of varied amounts for various assessment years. The assessee furnished material in respect of the said purchases but the Assessing Officer rejected the same and made additions of various amounts as bogus purchases.

4. The assessee preferred appeals before the CIT(A). The CIT(A) partly allowed the appeals. On appeal before the ITAT, by the revenue, by the impugned order, ITAT reversed the finding of the CIT(A) and confirmed the entire addition made by the Assessing Officer. Being aggrieved and dissatisfied with the impugned order passed by the ITAT, the assessee has preferred the present Tax Appeals for consideration of the aforesaid substantial question of law.

5. Mr. S.N. Divatia, learned advocate appearing for the assessee submitted that the Tribunal has erred in law and on facts in reversing the order of the CIT and erred in holding that the impugned purchases were bogus and payments for purchases had come back to the assessee. He submitted that the Tribunal has failed to appreciate the evidence produced by the appellant to prove the genuineness of the impugned purchases instead relied upon irrelevant evidence so as to come to the conclusion that the impugned purchases were bogus. He has relied upon the decisions of this court in the following cases:

(I) CIT v. Simit P. Sheth reported in (2013) 38 taxmann.com 385 (Gujarat);

(II) Commissioner of income tax v. Bholanath Poly Fab (P) Ltd reported in (2013) 40 taxmann.com 494 (Gujarat);

(III) Sanjay Oilcake Industries v. Commissioner of Income Tax reported in (2009) 316 ITR 274 (Gujarat).

6. Mrs. Mauna Bhatt, learned advocate appearing with Mr. Karan Sanghani, learned advocate for the assessee has supported the impugned order and submitted that the Tribunal is justified in holding that the CIT(A) is not justified in his action in modifying the order of Assessing Officer.

7. The issue involved in the present group of appeals is squarely covered by the

decision of the Apex Court in the case of Commissioner of Income Tax v. Simit P. Sheth reported in (2013) 38 taxmann.com 385 (Gujarat) wherein this Court has observed as under:

"7. That being the position, not the entire purchase price but only profit element embedded in such purchases can be added to the income of the assessee. So much is clear by decision of this Court. In particular, Court has also taken a similar view in case of Commissioner of Income Tax-IV v. Vijay M Mistry Construction Ltd. vide order dated 10.01.2011 passed in Tax Appeal No. 1090 of 2009 and in case of Commissioner of Income Tax v. Bholanath Poly Fab Pvt. Ltd. vide order dated 23.10.2012 passed in Tax Appeal No. 63 of 2012. The view taken by the Tribunal in case of Vijay Proteins Pvt. Ltd. v. CIT reported in 58 ITD 428 came to be approved.

8. If the entire purchases were wholly bogus and there was finding of fact on record that no purchase were made at all, counsel for the revenue would be justified in arguing that the entire amount of such bogus purchases should be added back to the income of the assessee. Such were the facts in case of Asst. CIT (OSC) v. Pawanraj B. Bokadia (supra).

9. This being the position, the only question that survives is what should be the fair profit rate out of the bogus purchases which should be added back to the income of the assessee. The Commissioner adopted ratio of 30% of such total sales. The Tribunal, however, scaled down to 12.5%. We may notice that in the immediately preceding year to the assessment year under consideration the assessee had declared gross profit at 3.56% of the total turnover. If the yardstick of 30%, as adopted by the Commissioner, is accepted GP rate will be much higher. In essence, the Tribunal only estimated the possible profit out of purchases made through non-genuine parties. No question of law in such estimation would arise. The estimation of rate of profit return must necessarily vary with the nature of business and no uniform yardstick can be adopted. "

7.1 Similarly in the case of Commissioner of income tax v. Bholanath Poly Fab (P) Ltd reported in (2013) 40 taxmann.com 494 (Gujarat), this Court observed as under:

"6. We are of the opinion that the Tribunal committed no error. Whether the purchases themselves were bogus or whether the parties from whom such purchases were allegedly made were bogus is essentially a question of fact. The Tribunal having examined the evidence on record came to the conclusion that the assessee did purchase the cloth and sell the finished goods. In that view of the matter, as natural corollary, not the entire amount covered under such purchase, but the profit element embedded therein would be subject to tax. This was the view of this court in the case of Sanjay Oilcake Industries v. CIT (2009) 316 ITR 274 (Gujarat). Such decision is also followed by this court in a judgment dated August 16, 2011, in Tax Appeal No. 679 of 2010 in the case of CIT v. Kishor Amrutlal Patel. In the result, tax appeal is dismissed."

7.2 . A similar question came up before this Court in the case of Sanjay Oilcake Industries v. Commissioner of Income Tax reported in (2009) 316 ITR 274 (Gujarat) and this Court while deciding the said issue has held as under:

12. "Thus, it is apparent that both the Commissioner (Appeals) and the Tribunal have concurrently accepted the finding of the Assessing Officer that the apparent sellers who had issued sale bills were not traceable. That goods were received from the parties other than the persons who had issued bills for such goods. Though the purchases are shown to have been made by making payment thereof by account payee cheques, the cheques have been deposited in bank accounts ostensibly in the name of the apparent sellers, thereafter the entire amounts have been withdrawn by bearer cheques and there is no trace or identity of the person withdrawing the amount from the bank accounts. In the light of the aforesaid nature of evidence it is not possible to record a different conclusion, different from the one recorded by the Commissioner (Appeals) and the Tribunal concurrently holding that the apparent sellers were not genuine, or were acting as conduit between the assessee-firm and the actual sellers of the raw materials. Both the Commissioner (Appeals) and the Tribunal have, therefore, come to the conclusion that in such circumstances, the likelihood of the purchase price being inflated cannot be ruled out and there is no material to dislodge such finding. The issue is not whether the purchase price reflected in the books of account matches the purchase price stated to have been paid to other persons. The issue is whether the purchase price paid by the assessee is reflected as receipts by the recipients. The assessee has, by set of evidence available on record, made it possible for the recipients not being traceable for the purpose of enquiry as to whether the payments made by the assessee have been actually received by the apparent sellers. Hence, the estimate made by the two appellate authorities does not warrant interference. Even otherwise, whether the estimate should be at a particular sum or at a different sum, can never be an issue of law.

13. In the aforesaid set of facts and circumstances of the case, the impugned order of the Tribunal is an order which is made in accordance with law and does not require any interference. The questions referred at the instance of the assessee as well as the Revenue are, therefore, answered in the affirmative, i.e., in favour of the Revenue and against the assessee in relation to the questions at the instance of the assessee, and in favour of the assessee and against the Revenue in relation to the questions at the instance of the Revenue.

8. In view of the above position of law, we are of the opinion that the Assessing Officer's action in treating the purchases as bogus and adding the entire cost of purchases in the assessment ought not to have been restored by the Tribunal. The view taken by the Tribunal in the case of Vijay Proteins Ltd. v. CIT reported in (1996) 58 ITD 428 (Ahd) has been approved. In that view of the matter, keeping in mind the fact that not the entire amount covered under such purchase, but the profit element embedded therein would be subject to tax, we find that it shall be appropriate to restrict the disallowance made in this regard to

25% of the cost of such purchases in each year.

9. In view of the above, the question raised in the present appeals is answered partly in favour of the assessee and partly in favour of the revenue. 25% of the payments made to the parties shall be disallowed on account of possible inflation of purchase price. Consequently, the impugned judgment and order passed by the ITAT is modified to the aforesaid extent. Hence, the present Tax Appeals are allowed accordingly.