आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

श्री विकास अवस्थी, न्यायिक सदस्य एवं श्री प्रदीप कुमार केडिया, लेखा सदस्य के समक्ष
BEFORE SHRI VIKAS AWASTHY, JM AND SHRI PRADIP KUMAR KEDIA, AM

ITA Nos.2141 to 2143/PN/2014
Assessment Years : 2009-10 to 2011-12

The Asstt. Commissioner of Income Tax,
Latur Circle, Latur. …. Appellant

Vs.

Shri Salauddin Kasimsab Sayeed,
Esskay Electricals, 15, Ayodhya Society,
Near Lal Bahadur Shastri School,
Old Ausa Road, Latur – 413 512.

PAN : AZZPS5719C …. Respondent

CO Nos.25 to 27/PN/2016
(Arising out of ITA Nos. 2141 to 2143/PN/2014)
Assessment Years : 2009-10 to 2011-12

Shri Salauddin Kasimsab Sayeed,
Esskay Electricals, 15, Ayodhya Society,
Near Lal Bahadur Shastri School,
Old Ausa Road, Latur – 413 512.

PAN : AZZPS5719C …. Appellant

Vs.

The Asstt. Commissioner of Income Tax,
Latur Circle, Latur. …. Respondent

Department by : Shri Hitendra Ninawe
Assessee by : Shri Sharad Shah

सुनवाई की तारीख / **Date of Hearing : 11.08.2016**		घोषणा की तारीख / **Date of Pronouncement: 12.08.2016**

आदेश / ORDER

PER PRADIP KUMAR KEDIA, AM :

The present bunch of captioned appeals relate to the same assessee for the assessment years 2009-10, 2010-11 and 2011-12 preferred by the Revenue and the assessee has also filed Cross Objections thereon.

2. The aforesaid captioned appeals filed by the Revenue are against the consolidated order of CIT(A), Aurangabad dated 22.09.2014 relating to assessment years 2009-10, 2010-11 and 2011-12 passed under section 143(3) r.w.s. 147 of the Income-tax Act, 1961 (in short "the Act").

3. All the captioned appeals of the Revenue and Cross Objections of the assessee emanating from the assessment years 2009-10, 2010-11 and 2011-12 are being disposed of by this consolidated order.

4. In all the captioned appeals of the Revenue, the solitary issue raised by the Assessing Officer is improper relief granted by the CIT(A) against disallowance of certain purchases which were treated as 'bogus purchases'.

5. Since the issues are identical in all the captioned appeals of the Revenue, we shall first take up the assessment year 2009-10 for adjudication purposes.

ITA No.2141/PN/2014, A.Y. 2009-10 (By Revenue) :

6. In this appeal, the relevant facts concerning the impugned issue are that the assessee filed return of income declaring total income of Rs.97,96,630/- for the assessment year 2009-10 on 25.09.2009. The case was re-opened under section 147 of the Act on the basis of certain information received by the Income Tax Department from the Sales Tax Department towards 'Hawala Transactions' to the extent of Rs.15,77,000/-. Pursuant to the notice for re-opening of the assessment, the assessee explained the return filed. The assessee is engaged as a contractor in Maharashtra State Electricity Board (M.S.E.B.) and derives business income therefrom. The tax audit report and the audited financial statement were filed declaring Gross Profit (GP) at the rate of 9.47% and Net Profit (NP) at the rate of 8.00%. During the course of assessment proceedings, the assessee filed copies of ledger extracts of the suppliers in his books of account, copies of invoices issued by the suppliers, delivery challans issued by the suppliers, the evidence showing payment through banking channel by account payee bank cheques/demand drafts to the

said suppliers. For the assessment year 2009-10 and other years in appeal, the details of impugned purchases alleged to be non-genuine purchases are tabulated hereunder :-

Name of the supplier	Date of purchase	Amount of purchase Rs.	Date of payment	Amount of payment Rs.	Mode of payment
Paras Enterprises	04/10/2008 06/10/2008 (F.Y.2008-09)	8,08,232 7,68,768	07/10/2008	15,80,800 (including freight exp. Rs.3,800/-)	Bank cheque
Total		15,77,000		15,80,800	
Mahaveer Enterprises	26/02/2010 16/02/2010 (F.Y.2009-10)	9,79,939 11,25,882	06/05/2010	21,05,302	Bank cheque
Total		21,05,251		21,05,302	
National Trading Co.	30/11/2010 to 11/03/2011 (F.Y.2010-11 vide 9 bills)	54,18,365	30/11/2010 08/02/2011 08/03/2011	26,45,500 21,16,450 7,50,000 (including freight exp.)	Bank cheque Bank cheque Bank cheque
Total		54,18,365		55,11,950	
Raj Traders	06/10/2010 to 20/10/2010 (F.Y.2010-11 vide 3 bills)	8,66,671	02/11/2010	8,66,695	Bank cheque
Total		8,66,671		8,66,695	
Shree Salasar Balaji Enterprise	04/09/2010 to 18/10/2010 (F.Y.2010-11 vide 7 bills)	15,88,424	18/10/2010 01/11/2010	7,46,745 8,41,679	Bank cheque Bank cheque
Total		15,88,424		15,88,424	
Banjara Enterprises	07/01/2011 to 24/02/2011 (F.Y.2010-11 vide 8 bills)	7,50,000	08/03/2011	7,50,000	By cheque
Total		7,50,000		7,50,000	
Balaji Trading Co.	08/04/2010 to 15/12/2010 (F.Y.2010-11 vide 7 bills)	77,03,627	07/04/2010 17/08/2010 27/12/2010	21,05,297 26,45,761 30,14,075 (including freight exp.)	Bank cheque Bank cheque Bank cheque
Total		77,03,627		77,65,133	
Mahaveer Enterprises	01/10/2010 to 24/12/2010 (F.Y.2010-11 vide 5 bills)	70,30,548	04/10/2010 25/10/2010 27/12/2010	15,78,995 31,74,600 22,76,975	Bank cheque Bank cheque
Total		70,30,548		70,30,570	
Nisha Enterprises	09/05/2010 12/05/2010 (F.Y.2010-11)	6,07,532 5,71,015	05/06/2010 05/06/2010	1,28,547 10,50,000	Bank cheque Demand Draft
Total		11,78,547		11,78,547	
GRAND TOTAL		2,45,36,182		2,46,91,319	

7. The Assessing Officer, however, placed reliance upon the observations of the Sales Tax Department that these are Hawala dealers. The Assessing Officer refused to accept the purchases as bona-fide on the ground that the stock register and lorry receipt for the relevant assessment years have not been produced. The Assessing Officer observed that although the payment has been made by cheque towards these purchases, the assessee might have received cash back from the alleged seller leaving a small commission from the seller. He accordingly, held that the purchase transaction to the extent of Rs.15,77,000/- is bogus and invoked section 69A of the Act and added the same to the total income of the assessee. Similar additions towards bogus purchases were made in assessment years 2010-11 and 2011-12 for Rs.21,05,251/- and Rs.2,45,36,182/- respectively.

8. The assessee reiterated before the CIT(A) that they have actually purchased material from the suppliers in all the three assessment years and also paid the bill with tax. The seller did not pay the taxes collected on the sale and accordingly Sales Tax Department proceeded to collect the sales tax liability from the purchaser. It was submitted on behalf of the assessee that invoices, delivery challans were produced to support the purchases. However, lorry receipt and stock register could not be produced. The CIT(A) examined the notice served by the Sales Tax Department for collection of sales tax purposes and took note the relevant material placed on record. In conclusion, the CIT(A) accepted the impugned purchases as genuine and restricted the disallowance to 10% of these purchase as offered by the assessee to buy peace of mind.

9. The relevant findings of the CIT(A) is reproduced hereunder :-

> *"8. I have carefully considered the facts of the case and rival contentions. In respect of the issue of alleged non-genuine purchase, it has been noticed from the assessment records that Issue based Audit (IBA) of the assessee's books of account and record has been carried out by the Sales Tax Department and the said Department has noticed that the seller of the goods has not paid VAT which has been charged in the invoices issued to the appellant. The appellant has claimed set-off of the said VAT charged by the suppliers while arriving at VAT liability. The Sales Tax Department has, therefore issued the above mentioned notice in form*

No.302 to the appellant. There is provision in MVAT Act that in case the supplier fails to pay VAT collected from the purchasers, the purchasers are not eligible to claim set-off of the same and the set-off claimed is not allowable and the said MVAT not paid by the supplier is to be disallowed and the set-off claim is to be recovered from the purchaser. The above facts have been revealed from Issue Based Audit carried out by the Sales Tax Department and hence the notices for recovery of MVAT not paid by the supplier have been issued. The above facts nowhere established that the said purchases made by the appellant were bogus or non-genuine particularly in view of the following facts claimed by the AR of the appellant during the appellate proceedings –

(1) The invoices received by the appellant from the said parties are available on record of the appellant which contained address, phone number, mobile number, VAT & CST numbers, delivery challans issued by the suppliers. Further, the certificate that the supplier is registered under VAT & CST was allotted VAT & CST number which is in force on the date of sale is appearing in the invoices and delivery challans which are duly signed by the suppliers.

(2) The appellant has made payment to the said suppliers through banking channel i.e. by account payee cheques/demand drafts. The allegation in the assessment order that the payment through bank might have been received back in cash by the appellant from the suppliers is merely an assumption not supported by any corroborative evidence.

(3) The transactions of purchase and payment to suppliers have been duly accounted for by the appellant in the books of account.

(4) The said purchases have also been referred to in the VAT audit report and VAT returns filed by the appellant.

(5) Merely because the appellant has not maintained day-to-day stock record and lorry receipts the impugned purchases cannot become bogus purchases. The non-maintenance of day-to-day stock record in the cases where books of accounts are maintained and audited does not in any way establish that the purchases were not genuine. Further, non-availability of lorry receipts in respect of goods purchased do not establish that the purchases were bogus in view of appellant's claim that the goods were transported by the supplier and hence lorry receipts are not available.

(6) The appellant has shown reasonable net profit @8% to 9.57% for the years under appeal in respect of its contract business allotted by Government Department. The profit percentage of the appellant for A.Y.2011-12 after considering the addition made by the A.O., particularly that of alleged non-genuine purchases, works out to more than 24% which appears to be not likely in view of earlier year's profit percentage and other comparable cases of the Government contractors.

(7) The appellant has used the material purchased from the impugned suppliers in the Government contract and without the said material, the Government contract could not have been carried out.

8.1 It has also been noticed that on the similar facts, Hon'ble ITAT, Jodhpur Bench in the case of ITO Vs. Permanand (2007) 107 TTJ 395 (JD) has laid down that the A.O. could not make addition in the hands of the assessee merely on the basis of observation made by Sales Tax Department that the purchases made by the assessee from certain parties were bogus without conducting independent enquiries.

In the recent decision, Hon'ble Mumbai Tribunal in the case of DCIT-25(3)(308), Mumbai Vs. Rajeev G. Kalathi, Mumbai in ITA Nos.67, 27/Mum/2012 (AY.2009-10) vide order dated 20/08/2014 has laid down in para-2.4 of the appellate order that the A.O. cannot make addition only for the reason that the supplier was declared a hawala dealer by VAT department; the A.O. has to establish by making necessary enquiries that the payments made to the suppliers through banking channel have been immediately withdrawn in cash by them. In the said case as well as in the case of the appellant the A.O. has not brought on record any such evidence.

8.2 In view of the above facts and discussion, I am of the considered view that the A.O. is not justified in making additions of Rs.15,77,000/-, Rs.21,05,251/- & Rs.2,45,36,182/- for AYs.2009-10, 2010-11 & 2011-12 respectively only on the basis of the information received from Sales Tax department that VAT has not been paid by the suppliers and without bringing on record any evidence showing that the impugned purchases were bogus.

However, during the course of appellate proceedings, the Ld.AR of the appellant has submitted that though the impugned purchases from the above mentioned suppliers are genuine, the appellant is ready to accept additional income @10% of the said purchases only to buy peace of mind. The Ld.AR further submitted that in the absence of said purchases, the appellant could not have executed the contract work in which the said material has been used, this also proved the genuineness of the purchases. The Ld.AR further submitted that the above agreed addition is without prejudice to the contention that the purchases are genuine and no adverse inference should be drawn in any other proceedings in this regard.

In view of the above alternative contention of the appellant, the A.O. is directed to restrict the additions, on account of hawal purchases at Rs.1,57,700/-, Rs.2,10,525/- & Rs.24,53,618/- as against taxed by the A.O. at Rs.15,77,000/-, Rs.21,05,251/- & Rs.2,45,36,182/- for A.Ys.2009-10, 2010-11 & 2011-12 respectively. The appellant gets resultant relief. The A.O. is directed accordingly. Ground Nos.1, 2 & 3 for all the years under appeal are treated as partly allowed."

10. Aggrieved by the order of the CIT(A) granting partial relief to assessee, the Revenue is in appeal before us.

11. The Ld. Departmental Representative (DR) for the Revenue Shri Hitendra Ninawe relied upon the order of the Assessing Officer and contended that in the absence of stock register and lorry receipt, the burden placed on the assessee to prove the bona-fides of the purchases are not discharged. He submitted that the additions have been made based on the specific information received from Sales Tax Department in this regard and therefore the CIT(A) was not justified in interfering with the order of the Assessing Officer. He accordingly pleaded for the reversal of the relief granted by the CIT(A).

12. The Ld. Authorized Representative (AR) for the assessee Shri Sharad Shah, on the other hand, submitted that the primary documents, invoices, delivery challans, etc. were produced to support the supply received from these parties. The Ld. AR next submitted that the assessee is a M.S.E.B. contractor where the materials are supplied directly which includes the transportation charges and therefore in the absence of cost being incurred by the assessee, the lorry receipts could not be produced. As regards non-production of stock register, the Ld. AR pointed out that the contract work is carried out at various sites simultaneously and stock register is not maintained since the contract is executed on behalf of the Government body. He submitted that the Value Added Tax (VAT) payable by the seller has been collected from the assessee since these suppliers have failed to pay the taxes collected from the assessee and other parties. These by itself would not cast aspersion on the bona-fide of the purchases *per se.* He, thereafter, referred to a tabulated working placed in the course of hearing before the Bench (placed in file) and submitted that the GP will increase substantially if the impugned purchase are taken to be bogus, which is not plausible in any Government contract. The Ld. AR, thereafter, emphasized that the payments towards purchases have been made through banking channels which further lend credence to the bona-fides of the purchases. He, thereafter, adverted our attention to the allegations of the Assessing Officer that cash might have been received back in lieu of such bank payments and submitted that such allegations are wild and farfetched and has no factual basis. He contended that it is well settled law that suspicion, however strong, cannot take the place of proof. For this proposition, he relied upon the decision of the Hon'ble Supreme Court in the case of Umacharan Shaw Processes vs. CIT, 337 ITR 271 (SC). He finally submitted that non-maintenance of stock register *per se* will not have adverse effect on the bona-fides of the purchases. He, thereafter, submitted that similar issues of Hawala purchases have been considered by the various Benches of the Tribunal in host of cases and the Tribunal has taken a consistent view that the Revenue is not justified in holding purchases as bogus merely on the basis of some non-descript information received from the VAT Department towards non-availability of the suppliers or non-payment of VAT collected by them. He

further submitted that the assessee has already accepted the disallowance of 10% of the purchases to co-operate with the Department. The Ld. AR accordingly submitted that the CIT(A) was fully justified in granting relief to the assessee. He also placed reliance on the decision of Co-ordinate Bench of the Tribunal in the case of Shri Avinash Kantilal Jain vs. Addl.CIT in ITA No.980/PN/2010, order dated 31.10.2012 and ACIT vs. Gopal Pulse Processors Pvt. Ltd. Co. in ITA No.636/PN/2001, order dated 29.11.2006 where the relief were granted by the Tribunal in the similar facts. He, thereafter, adverted our attention to the Cross Objections filed by the assessee on the same issue where the assessee has questioned the addition made under section 69A of the Act. He submitted that the addition made by the Assessing Officer invoking section 69A is prima-facie unjustified and reflects non-application of mind on behalf of the Assessing Officer. He submitted that section 69A is a deeming provision which concerns circumstances where the assessee has made investment which is not recorded in the books of account or the explanation offered is not satisfactory. He pointed out that the facts of the case would clearly show that there had no investment made by the assessee *per se* but it is the case of the expenditure i.e. purchases which allegedly remained unexplained. Accordingly, he pleaded that the order of the Assessing Officer is required to be cancelled even on this ground. For this proposition, addition made under an incorrect section cannot be upheld, he relied upon the decision of the Ahmedabad Bench of the Tribunal in the case of Rajesh P. Soni vs. ACIT, (2006) 100 TTJ 892 (Ahd.).

13. We have carefully considered the rival submissions and perused the material on record. We find that the Assessing Officer had received information from the VAT Department, Maharashtra that the assessee was one of the beneficiaries of the accommodation entries from various Hawala dealers as noted earlier. We find that the only basis for rejection of the purchase declared by the assessee is the absence of lorry receipts and stock register. In this context, we find the explanation offered by the Ld. AR for the assessee that the material has been supplied directly at the respective sites for execution of work as plausible. The Revenue could not controvert such explanation. We

simultaneously take note of the fact that impugned purchases are supported by invoices, delivery challans and payment through banking channels. These documents constitute strong evidences to discredit any adverse inference. We also appreciate the argument on behalf of the assessee affirmatively that the addition on account of impugned purchases will lead to absurd results towards GP ratio from the chart submitted by the assessee (copy in file). We notice that the GP declared by the assessee i.e. 13.23% for assessment year 2011-12 will get converted into GP of 26.51% if the impugned purchases are seen adversely. Such abnormal increase in GP requires to be seen with circumvention particularly when the contract has been obtained from State Government Body through competitive tender process. Therefore, in the totality of the facts and circumstances, we do not find any reason to depart from the opinion expressed by the CIT(A) on the issue. Mere absence of stock register in these facts and circumstances will not give rise to adverse inference. Hence, we decline to interfere with the order of the CIT(A).

14. In the Result, the appeal of the Revenue in ITA No.2141/PN/2014 is dismissed.

CO No.25/PN/2016, A.Y. 2009-10 (By Assessee) :

15. Now, we shall proceed with the Cross Objection filed by the assessee. The Ground raised in Cross Objection reads as under :-

> *"1. The Ld. AO erred in making addition u/s 69A when he has not found any valuable article etc. which is not recorded in Books of Accounts."*

16. The Ld. AR for the assessee contended that the Revenue has not found any valuable article etc. which is not recorded in the books of account and therefore not justified in invoking section 69A of the Act. He, thus, pleaded for setting-aside the addition made to the total income on account of 'bogus purchases'.

17. On perusal of the assessment order, we find that while the Assessing Officer has recorded the relevant facts concerning the issue, he has applied section 69A of the Act treating impugned purchase transactions as bogus one. We appreciate the argument made on behalf of the assessee that provisions of section 69A cannot be applied for impugned additions by any stretch of imagination. Section 69A can be invoked only when the assessee is found to be owner of the money, bullion and jewellery or other valuable articles, etc. which are not recorded in the books of account, which is not the case here. However, in the same vein, we notice that the Assessing Officer has provided some foundation for addition towards unexplained purchases as perceived by him. He has merely applied wrong provisions of law to conclude against the assessee. We simultaneously notice that the CIT(A) has re-examined the entire issue and restricted the disallowance to the extent of 10% out of the impugned purchases without any reference to the aforesaid provisions of section 69A of the Act. Thus, the purported error committed by the Assessing Officer stood rectified by the order of the CIT(A). It is trite that appeal before the CIT(A) is a continuous of the process of assessment and an assessment is but another name for adjudication of tax liability to accord with taxable event in the particular taxpayers' case. The scope of power of the CIT(A) is co-terminus with that of Assessing Officer. The CIT(A), under the taxing enactment sits in appeal, only in a manner of speaking. What, he does, functionally, is only to adjudicate the assessment in accordance with facts on record and in accordance with law. The CIT(A) himself can enter into the arena of assessment. For this proposition, we draw support from the decision in the case of CIT vs. K.S. Dattareya, (2012) 344 ITR 127 (Kar.). Thus, having regard to responsibility and role of the CIT(A), the order of the Assessing Officer stood merged with the order of the CIT(A). Thus, the impugned error committed by the Assessing Officer ceased to exist after the order of CIT(A). In this view of the matter, we do not find any merit in the Cross Objection of the assessee. Accordingly, the Cross Objection of the assessee in C.O. No.25/PN/2016 is dismissed.

18. In the result, both the appeal of the Revenue and Cross Objection of the assessee are dismissed.

19. Since the facts and issue in ITA Nos.2142 & 2143/PN/2014 and CO Nos.26 & 27/PN/2016 are identical to the facts and issue in ITA No.2141/PN/2014 and CO No.25/PN/2016, therefore, our decision in ITA No.2141/PN/2014 and CO No.25/PN/2016 shall apply *mutatis-mutandis* to ITA Nos.2142 & 2143/PN/2014 and CO Nos.26 & 27/PN/2016. Thus, the appeal of the Revenue in ITA Nos.2142 & 2143/PN/2014 and Cross Objection of the assessee in CO Nos.26 & 27/PN/2016 relating to assessment years 2010-11 and 2011-12 respectively are also dismissed.

20. Resultantly, all the captioned appeals of the Revenue as well as Cross Objections of the assessee are dismissed.

Order pronounced on this 12th day of August, 2016.

Sd/-	**Sd/-**
(**VIKAS AWASTHY**)	(**PRADIP KUMAR KEDIA**)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

पुणे Pune; दिनांक Dated : 12th August, 2016.

सुजीत

आदेश की प्रतिलिपि अग्रेषित/Copy of the order is forwarded to :

1) The Assessee;
2) The Department;
3) The CIT(A), Aurangabad;
4) The CIT, Aurangabad;
5) The DR “B” Bench, I.T.A.T., Pune;
6) Guard File.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune