IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "H", MUMBAI

BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, ACCOUNTANT MEMBER

ITA No.3966/M/2015
Assessment Year: 2011-12

Shri Mohammedi Z. Kanchwala, 11/11C, Thacker Industrial Estate, Old-Anjirwadi-A, Mazgaon, Mumbai – 400 010 **PAN: ABJPK1291P**	Vs.	Erstwhile Income Tax Officer, Ward 15(3)(2), Room No.101, Matru Mandir, Grant Road (West), Mumbai – 400 007 New Income Tax Officer, Ward 20(2)(2), Piramal Chambers, R.No.212, 2nd Floor, Lalbaug, Mumbai – 400 012
(Appellant)		(Respondent)

ITA No.4474/M/2015
Assessment Year: 2011-12

Income Tax Officer, Ward 20(2)(2), R.No.212, Piramal Chambers, Lalbaug, Mumbai – 400 012	Vs.	Shri Mohammedi Z. Kanchwala, 11/11C, Thacker Industrial Estate, Old-Anjirwadi, Mazgaon, Mumbai –10 **PAN: ABJPK1291P**
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Rajesh B. Gupta, A.R.
Revenue by : Shri M.C. Omi Ningshen, D.R.

Date of Hearing : 17.04.2017
Date of Pronouncement : 21.04.2017

O R D E R

Per D.T. Garasia, Judicial Member:

The above titled appeals one by the assessee and the other by the Revenue have been raised against the common order dated 26.05.2015 of the

Pr. Commissioner of Income Tax (OSD) (Appeals) [hereinafter referred to as the Pr. CIT(A)] relevant to assessment year 2011-12.

First we take up the Departmental appeal bearing ITA No.4474/M/2015.

ITA No.4474/M/2015

2. Revenue has raised the following grounds of appeal:

> "1. on the facts and in the circumstances of the case and in law, the Ld. Pr. CIT(A) has erred granting relief of Rs.32,28,755/- by adopting 5% rate of GP whereas no sales tax is paid on such purchases and all seven parties has been declared Hawala Parties by Sales Tax Department.
>
> 2. On the facts and in the circumstances of the case and in law, the Ld. Pr.CIT(A) has erred in finding that corresponding sales shown out of material involved in bogus purchases without mentioning how this and with what evidence before him such flinging was arrived at. If such evidence was given (as corresponding sale) the same should have been remanded to the AO for his examination and comments.
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> 3. On the facts and in the circumstances of the case and in law, the Ld. Pr. CIT(A) erred in stating that there was no evidence of cash returned to the assessee in return for cheque issued. The Pr.CIT(A) should have remanded matter for examination of this aspect by the AO since this aspect was not examined initially by the AO.
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> 4. The appellant prays that the order of the CIT(A) on the above grounds be reversed and that of the Assessing Officer be restored.
>
> 5. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

3. During the year, assessee has claimed purchases at Rs.2,39,35,906/-. The purchases included aluminum plates, S.S. sheets, patti, rods, handle, glass etc and various other accessories for window labour job framework. In order to verify the genuineness of the purchases, notices under section 133(6) were ec issued to several parties at the address provided by the assessee by registered post. The notices could not be served to the following parties and were returned back unserved by the postal authorities with the remarks 'Not known' except Mehul Traders who has not replied to the notice:

Sl. No.	Name of the party	TIN	Amount (Rs.)
1.	Mehul Traders	27260365107V	2812500
2.	Chamunda Enterprises	27900127105V	19085
3.	Balaji Enterprises	27470658077V	117901
4.	Bharat Enterprises		409292
5.	Right Choise	27380665838V	17310
6.	Hon'ble Supreme Court Sales	27650612194V	20396
7.	Shree Balaji Enterprises	27030551813V	2205

The Assessing Officer (hereinafter referred to as the AO) was of a view that the parties from whom the assessee claimed to have purchased the goods were not available on that address and Maharashtra Sales Tax Department has also made an investigation and they have also declared 2000 persons on website of the Sales Tax Department that they were issuing bogus purchasing bills showing the sales of ferrous and non-ferrous metal products, chemicals etc. Therefore, AO tried to verify the books of accounts and payment details. AO was of a view that the purchase bill and ledger account and detail of payment filed by the assessee do not prove their genuineness especially in the light of alleged sellers are included in suspicious dealers' list of Sales Tax Department. Relying upon the various decisions, AO was of a view that Chamunda Enterprises and Mehul Traders are hawala dealers. Therefore, the purchases from these parties at Rs.33,98,689/- was treated as bogus and added to the total income of the assessee.

4. Matter carried to Ld. Pr. CIT(A) and Ld. Pr. CIT(A) has allowed the appeal by disallowing 5% of alleged purchases since the GP of the assessee was 12.79% in this year and deleted the penalty by observing as under:

> "5. I have perused the facts of the case and appellant's submissions carefully. The additions have been made of purchase from 7 parties on the basis that the notices u/s 133(6) sent to them were returned by postal authorities with the remark 'Not Known", or one of the parties did not respond to the notice. The AO has linked the non-existence of such parties with the finding of Sales Tax Department of Maharashtra that nearly 2000 dealers are admitted to issuing bogus purchase bills. The appellant has however pointed out that some of the parties do not belong to Maharashtra, hence no question of being included in the

> list of suspicious dealers declared by Sales Tax Department. In any case, there is nothing on record to prove that any of the parties would have specifically named the appellant to have issued bogus bills to him. In the case of **Parmit Textiles vs ITO (ITA Nos. 4012 to 4015 and 4020 to 4021/Mum/2012,** the Hon'ble ITAT, Mumbai observed that there was no material on record to say that the purchases made by the assessee was bogus except the general statement recorded by the Department in the case of Shri Rakesh Kumar Gupta, which was later on retracted. The Hon'ble ITAT held that in absence of any adverse material brought on record, the addition made in the case of assessee will be based on presumption only and it cannot be sustained in the eyes of law."

5. We have heard the rival contentions of both the parties. Looking to the facts and circumstances of the case, the Ld. D.R was of a view that assessee has made purchases from the bogus parties. He also submitted that the AO has relied upon the decision of Hon'ble Delhi High Court in the case of CIT vs. La Medica 117 Taxman 628 and hence, the payments by cheque do not make the transaction genuine, therefore, 100% addition should have been made.

6. We find that Ld. Pr. CIT(A) has relied upon the decision of M.K. Brothers 163 ITR 249 and held that the GP of this year is 12.79% and he further disallowed 5% of the purchases and partly allowed the appeal. We also find that Hon'ble jurisdictional High Court in the case of CIT vs. Nikunj Eximp Enterprises (P.) Ltd. (2013) 216 Taxman 171 (Bom.) held that where sales supported the purchases and payment was made through banks, merely because suppliers had not appeared before the AO, the purchases could not be rejected as bogus. In the instant case, the assessee has claimed that he has made purchases from two parties and they are in existence and the parties are not from Bombay but the parties are at Kolkata, therefore, all the purchases are supported by documentary evidence. But we do not find any force in this argument. The assessee has not taken this contention before the AO. The assessee should have made this submission before the AO but failed to do so. Therefore, this contention is not tenable and therefore we confirm the order of the Ld. Pr. CIT(A) and the Departmental appeal is dismissed.

ITA No.3966/M/2015 (Assessee's appeal)

7. In respect of assessee's appeal, the first ground relates to addition of Rs.51,66,122/- on account of suppression of sale. During the year, assessee had shown the receipt of sales of Rs.1,98,315/- from Suraj Estate Developers Pvt. Ltd. and shown the receipt of advance against sale of Rs.53,60,916/- as on 31.03.11. The 26AS shows a credit of Rs.51,66,122/- from the said party as the information obtained from the company and there was information that no advance outstanding on 31.03.11. The running bills issued by the assessee along with ledger account have been provided by Suraj Estate Developers Pvt. Ltd. and assessee has received the advance of Rs.53,60,916/- from the above party. Assessee has taken the contention that assessee has executed the work and sales bill have not been issued as the same was not accepted by the party. Assessee issued running account bills and advances are received against the work executed. Hence the income was not offered for taxation. However, the AO was of a view that the amount was received from the party is not just advance but assessee has incurred expenses against the receipt from the party. However, no revenue is reflected against the expenses incurred to execute work of Suraj Estate Developers Pvt. Ltd. Assessee cannot postpone the revenue on the pretext of non issue of the sales bill. The income is taxed in the hands of the assessee for the current year and accordingly the AO made the addition of Rs.51,66,122/- on account of suppression of sale.

8. Matter carried to Ld. Pr. CIT(A). The Ld. A.R. submitted that assessee had given contract for providing and fixing aluminum fins and glazing on the basis of item rate quotation with specifications. The work was to be executed as per the drawings. The work should be completed within the prescribed time but Suraj Estate Developers Pvt. Ltd. could not finish the work and he left the work. The assessee has shown the closing stock of this work as assessee has received the aluminum fins and glazing etc. Therefore, it was shown as closing stock in his books of account and when assessee had shown this

amount in the closing stock there cannot be any income on it. The said party has left the work and he has not finished the work, therefore when the Suraj Estate Developers Pvt. Ltd. finishes the work the whole payment has to be made. Therefore, this whole payment has to be worked out. Moreover, the entire amount cannot be added as income of the assessee. The Ld. A.R. fairly conceded that if it is treated as advance against the sales when the sales are affected only profit element can be added to the income of the assessee but not the entire advance of sales can be treated as income of the assessee.

9. The Ld. D.R. objected to it on the ground that the AO has gathered the information from the party that he has not shown any advance outstanding against this party, therefore whatever unbilled sales should be shown as WIP in his accounts, the Ld. Pr. CIT(A) is justified in confirming the same on account of suppression of sales.

10. We have heard the rival contentions of both the parties. Looking to the facts and circumstances of the case, we find that during the course of hearing the Ld. A.R. specifically submitted that Suraj Estate Developers Pvt. Ltd. had to carry out the work but he has not carried out the work. Therefore, whatever amount was to be paid to him was shown as advance and the same has been shown as advance in the books of account. Therefore, entire advance cannot be treated as income of the assessee. Therefore, in the interest of justice and fair play, we confirm the GP at the rate of 12.79% on the amount of Rs.51,66,122/- on account of suppression of sales and AO is directed accordingly. In the result, appeal of the assessee is partly allowed.

11. The second ground relates to the advance utilised for purchase of material and payment of labour. The AO noted that assessee has deposited an amount of Rs.4 lakhs in HDFC bank account. On being asked about the source of cash deposit, assessee explained that cash was received from sale of property belonging to his father which has been distributed among family

members. No proof regarding the sale transaction has been has been submitted. Therefore, Rs.4 lakhs was added to the total income of the assessee under section 68 of the Act.

12. During the course of hearing the Ld. A.R. has shown the document regarding the property before us. On being asked, whether this document was submitted before the AO and Pr. CIT(A), the Ld. A.R. fairly conceded that this was not submitted before the AO and Pr. CIT(A). Therefore, in the interest of justice and fair play, we restore this issue back to the file of the AO and assessee is directed to produce the evidence regarding the sale of ancestral property in 2005 and the AO is directed to decide the matter afresh as per the above conditions.

13. In the result, appeal of the assessee is partly allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on 21.04.2017.

Sd/-	**Sd/-**
(N.K. Pradhan)	**(D.T. Garasia)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 21.04.2017.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.