

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “F”, MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI O.P. MEENA, HON'BLE ACCOUNTANT MEMBER**

ITA NO.566/MUM/2018 (A.Y: 2009-10)

A.C.I.T Circle – 3 Room No.2, 6 th Floor, Ashar I.T. Park, M.I.D.C, Wagle Industrial Estate, Thane, Mumbai – 400 604	v.	M/s. Unitop Aquacare 501, 5 th Floor, Dosti Pinnacle, Plot No. E/7, Road No. 22, MIC, Wagle Estate, Thane (W) – 400 604 PAN: AABFU 6592 L
(Appellant)		(Respondent)

ITA NO.7397/MUM/2017 (A.Y: 2009-10)

M/s. Unitop Aquacare 501, 5 th Floor, Dosti Pinnacle, Plot No. E/7, Road No. 22, MIC, Wagle Estate, Thane (W) - 400604 PAN: AABFU 6592 L	v.	D.C.I.T Circle – 3 6 th Floor, Ashar I.T. Park, Road No. 16-Z Wagle Industrial Estate, Thane, Mumbai – 400 604
(Appellant)		(Respondent)

Assessee by : Shri Devendra Jain

Department by : Shri Rajiv Gubgotra

Date of Hearing : 11.02.2019

Date of Pronouncement : 05.04.2019

ORDER

PER C.N. PRASAD (JM)

1. These two appeals are filed by the Revenue and assessee against the order of the Learned Commissioner of Income Tax (Appeals)-2, Nashik [hereinafter in short "Ld.CIT(A)"] dated 06.11.2017 for the Assessment Year 2009-10 in sustaining the re-opening of assessment and also partly sustaining the disallowance on purchases treated as non-genuine.

2. Assessee has raised following grounds in its appeal: -

"1. In the facts and in the circumstances of the case and in law, the Learned CIT(A) has erred in upholding the reassessment proceedings initiated u/s 147 by issue of notice u/s 148 dated 25/03/2013 by the learned Assessing Officer without independent application of mind on the information received from the Sales Tax Department.

2. Without prejudice to the above, in the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the action of the Assessing Officer of completing the assessment u/s 143(3) on the basis of statement of third party without providing any opportunity of cross examination of the witnesses or documents relied upon by the Assessing Officer and thus violating the law laid down by Honorable Supreme Court in the case of Kishanchand Chellaram v. CIT (1980) 125 ITR 713 and Andaman Timber Industries v. Commissioner of Central Excise (Civil Appeal No. 4228 of 2006.)

3. Without prejudice to the above, in the facts and in the circumstances of the case and in law, the Learned CIT(A) has erred in sustaining addition of Rs. 35,91,086/- being 25% of the alleged bogus purchases of Rs.1,43,64,345/-, merely on surmises and conjectures relying upon non jurisdictional High Court decisions and disregarding the Honorable jurisdictional High Court decisions in the case of Babulal C. Borana v. Third ITO (2006) 282 ITR 251 (Bom.) and CIT v. Nikunj Eximp Enterprises (P) Ltd. (2013) 216 Taxman 171 (Bom.) and various other tribunal decisions."

3. At the time of hearing, Ld. Counsel for the assessee confined his arguments only to Ground No.3 i.e. Ld.CIT(A) erred in sustaining the addition to the extent of 25% of the alleged bogus purchases.

4. Ld. Counsel for the assessee submits that the Assessing Officer treated 100% of the purchases as bogus, for the reason that the issue of notice u/s. 133(6) of the Act were returned unserved and one of the parties stated that they have cancelled the order from the assessee and the firm M/s. Shree Yamuna Impex has already been closed during the Assessment Year 2009-10. Ld. Counsel for the assessee submits that, though the assessee has furnished that the purchases were genuine as the payments were made through account payee cheques, the Assessing Officer treated the entire purchases as non-genuine. Ld. Counsel for the assessee submits that Ld.CIT(A) referring to various case laws concluded that the assessee made purchases in the open market and were used in manufacturing and has obtained bills from hawala dealers estimated the penalty levied from such purchases @25% ignoring the copies of invoices, ledger accounts, delivery challans, consumption details, bank statement of the parties furnished by the assessee to prove the genuineness of the purchases. Ld. Counsel for the assessee submits that referring to Page No. 100 to 106 of the Paper Book which is the letter addressed to the Ld.CIT(A) showing the consumption details submits that assessee has proved the consumption and the quantities are tallying, therefore, no part of purchases can be treated as non-genuine.

5. Ld. DR vehemently supported the orders of the authorities below.

6. We have heard the rival submissions, perused the orders of the authorities below. Assessing Officer while completing the assessment required the assessee to prove the genuineness of the purchases made from certain entities which were shown to be only accommodation entry providers in the investigation made by the Sales Tax Department. The Assessing Officer also issued notice u/s. 133(6) of the Act calling for various details from the said parties. It is the observation of the Assessing Officer that one of the party's M/s. Shree Yamuna Impex replied stating that the firm was closed during the period of A.Y. 2009-10. It was also stated by the said party that it had not done any business with the assessee. The other parties have not responded and therefore, the Assessing Officer treated the entire purchases as non-genuine. Ld.CIT(A) considering the submissions and the evidences produced by the assessee and referring to the decision in the case of CIT v. Bholanath Poly Fab Pvt. Ltd., [355 ITR 290 (Guj.)] and Sanjay Oil Cake Industries v. CIT [316 ITR 274] estimated the penalty levied @25% since the assessee being a manufacturer.

7. The Hon'ble Gujarat High Court in the case of Bholanath Polyfab Pvt. Ltd [355 ITR 290] held that when the assessee made purchases and sold the finished goods as a natural corollary not the entire amount covered under such purchases would be subject to tax but only the profit

element embedded therein. Similar view has been taken by the Hon'ble Gujarat High Court in the case of CIT v. Simit P. Seth [38 taxman.com 385]. Simply because the parties were not produced the entire purchases cannot be added as held by the Bombay High Court in the case of CIT v. Nikunj Eximp [216 Taxman.com 171]. Thus, following the above decision of the Hon'ble Gujarat High Court in the case of Bholanath Polyfab Pvt. Ltd and CIT v. Simit P. Seth (supra), we direct the Assessing Officer to restrict the disallowance to 12.5% of the purchases instead of 25% sustained by the Ld.CIT(A).

8. As we have held that the profit element from such purchases should be taken @12.5%, the Revenue's appeal challenging the order of the Ld.CIT(A) in deleting the 75% of the said purchases is dismissed.

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

Order pronounced in the open court on the 05th April, 2019

Sd/-
(O.P. MEENA)
ACCOUNTANT MEMBER
Mumbai / Dated 05/04/2019
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file. //True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum