

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, D, मुंबई ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "D", MUMBAI**

**श्री संजय गर्ग, न्यायिक सदस्य एवं**

**श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष**

**Before Shri Sanjay Garg, Judicial Member, and  
Shri Ashwani Taneja, Accountant Member**

**ITA NO.6246/Mum/2013  
Assessment Year: 2004-05**

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|--|----------------------|--|
| Reshma Enterprises,<br>282, Kalbadevi Rd.<br>Mumbai-400002 | <b>बनाम/<br/>Vs.</b> | ITO WD 14(2)(3),<br>Earnest House,<br>Nariman Point<br>Mumbai-400021 |
| (Appellant)  |                      | (Revenue)  |
| P.A. No. AAAFR7937B  |                      |  |

**ITA NO.6667/Mum/2013  
Assessment Year: 2004-05**

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| ITO WD 14(2)(3),<br>Earnest House,<br>Nariman Point<br>Mumbai-400021 | <b>बनाम/<br/>Vs.</b> | Reshma Enterprises,<br>282, Kalbadevi Rd.<br>Mumbai-400002 |
| (Revenue)  |                      | (Respondent)   |
| P.A. No. AAAFR7937B  |                      |  |

**ITA NO.6247/Mum/2013  
Assessment Year: 2005-06**

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| Reshma Enterprises,<br>282, Kalbadevi Rd.<br>Mumbai-400002 | <b>बनाम/<br/>Vs.</b> | ITO WD 14(2)(3),<br>Earnest House,<br>Nariman Point<br>Mumbai-400021 |
| (Appellant)  |                      | (Revenue)  |
| P.A. No. AAAFR7937B  |                      |  |

**ITA NO.6668/Mum/2013**  
**Assessment Year: 2005-06**

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| ITO WD 14(2)(3),<br>Earnest House,<br>Nariman Point<br>Mumbai-400021 | <u>बनाम/</u><br>Vs. | Reshma Enterprises,<br>282, Kalbadevi Rd.<br>Mumbai-400002 |
| (Revenue)  |                     | (Respondent)   |
| P.A. No. AAAFR7937B  |                     |  |

**ITA NO.3390/Mum/2014**  
**Assessment Year: 2007-08**

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| Reshma Enterprises,<br>282, Kalbadevi Rd.<br>Mumbai-400002 | <u>बनाम/</u><br>Vs. | ITO WD 14(2)(3),<br>Earnest House,<br>Nariman Point<br>Mumbai-400021 |
| (Appellant)  |                     | (Revenue)  |
| P.A. No. AAAFR7937B  |                     |  |

**ITA NO.4631/Mum/2014**  
**Assessment Year: 2007-08**

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| ITO WD 14(2)(3),<br>Earnest House,<br>Nariman Point<br>Mumbai-400021 | <u>बनाम/</u><br>Vs. | Reshma Enterprises,<br>282, Kalbadevi Rd.<br>Mumbai-400002 |
| (Revenue)  |                     | (Respondent)   |
| P.A. No. AAAFR7937B  |                     |  |

**ITA NO.6248/Mum/2013**  
**Assessment Year: 2008-09**

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| Reshma Enterprises,<br>282, Kalbadevi Rd.<br>Mumbai-400002 | <u>बनाम/</u><br>Vs. | ITO WD 14(2)(3),<br>Earnest House,<br>Nariman Point<br>Mumbai-400021 |
| (Appellant)  |                     | (Revenue)  |
| P.A. No. AAAFR7937B  |                     |  |

**ITA NO.6669/Mum/2013**  
**Assessment Year: 2008-09**

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| ITO WD 14(2)(3),<br>Earnest House,<br>Nariman Point<br>Mumbai-400021 | <b>बनाम/</b><br>Vs. | Reshma Enterprises,<br>282, Kalbadevi Rd.<br>Mumbai-400002 |
| (Revenue)  |                     | (Respondent)   |
| P.A. No. AAAGR7937B  |                     |  |

**ITA NO.6249/Mum/2013**  
**Assessment Year: 2009-10**

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| Reshma Enterprises,<br>282, Kalbadevi Rd.<br>Mumbai-400002 | <b>बनाम/</b><br>Vs. | ITO WD 14(2)(3),<br>Earnest House,<br>Nariman Point<br>Mumbai-400021 |
| (Appellant)  |                     | (Revenue)  |
| P.A. No. AAAGR7937B  |                     |  |

**ITA NO.6670/Mum/2013**  
**Assessment Year: 2009-10**

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| ITO WD 14(2)(3),<br>Earnest House,<br>Nariman Point<br>Mumbai-400021 | <b>बनाम/</b><br>Vs. | Reshma Enterprises,<br>282, Kalbadevi Rd.<br>Mumbai-400002 |
| (Revenue)  |                     | (Respondent)   |
| P.A. No. AAAGR7937B  |                     |  |

|              |                              |
|--------------|------------------------------|
| Appellant by | Shri Deepak Tralshawala (AR) |
| Revenue by   | Shri B.S. Bist (Sr. DR)      |

|                                   |                   |
|-----------------------------------|-------------------|
| सुनवाई की तारीख/Date of Hearing : | <b>05/10/2016</b> |
| आदेश की तारीख /Date of Order:     | <b>05/10/2016</b> |

**आदेश / O R D E R**

**Per Bench:**

These Cross Appeals are filed by the Revenue and assessee against separate orders of Ld. CIT(A) passed for each of the aforesaid assessment years involving identical issue.

2. During the course of hearing, arguments were made by Shri Deepak Tralshawala, Authorised Representative (AR) on Shri Deepak Tralshawala (AR) on behalf of the Assessee and by Shri B.S. Bist, Departmental Representative (Sr. DR) on behalf of the Revenue.

**We shall first take up appeal for Assessment Year 2004-05 in ITA No. 6667/Mum/2013 Revenue's appeal and ITA No.6246/Mum/20013 Assessee's appeal.**

3. The revenue has filed an appeal against the order of Ld. CIT(A) dated 29.08.2013 passed against the assessment order u/s 143(3) r.w.s. 147 of the Act, dated 14.12.2011 on following grounds:

*1. The Ld. CIT(A) has erred in law as well as on fact by not sustaining addition u/s.69 after having accepted the finding in principle that the purchases were made from undisclosed/unverifiable/unidentifiable parties in the grey market by investing in cash and the purchases from the group concerns of Shri Rakesh Gupta & family were only accommodation entries and not actual purchases.*

*2. On the facts and circumstances of the case, the Ld. CIT(A) after having accepted the fact that the purchases made from or through Shri Rakesh kumar Gupta and his family members are bogus, erred in law in not confirming the addition at least to the extent of peak of the purchases made from such parties on account of bogus purchases made in cash from the open market out of unaccounted cash, in view of the decision held by the Hon'ble ITAT's C-Bench, Ahmedabad, in the case of Vijay Proteins Ltd. Vs. ACIT (58 ITD 428)*

4. On the other hand, assessee had filed an appeal against the aforesaid order on the following grounds:

*“On the facts and circumstances of the case, and in law, the Learned CIT (A)-25, Mumbai, erred in directing the A O to make an ad hoc addition of Rs. 530,699/- (representing 10% of the purchases alleged to be bogus by the A O)”to cover up the difference of GP in recording the above said purchases as well as to plug any leakage of revenue and the addition retained by him be deleted in toto.”*

**5.** During the course of hearing, Ld. counsel of the assessee relied upon the judgment of the Tribunal in the case of Ashok Talreja (HUF) dated 17.03.2016 and submitted that it is a case of sister concern of the assessee wherein total amount has been deleted and therefore in view of the same Revenue’s appeal should be dismissed and assessee’s appeal should be allowed.

**5.1.** Per contra, Ld. DR relied upon the order of the AO and requested that the Revenue’s appeal should be allowed and assessee’s appeal should be dismissed.

**5.2.** We have gone through the orders passed by the lower authorities. The brief background of the case is that assessee is a partnership firm and during the year it was engaged in the business of trading of cloth items. The original assessment was completed u/s 143(3). Subsequently, the case of assessee was reopened u/s 147 based upon information gathered during the survey operations at the premises of one Shri Rakesh Kumar M. Gupta. During the course of assessment proceedings the AO asked the assessee to prove the transactions done with the parties connected with the aforesaid Mr. Gupta. The AO asked to substantiate the genuineness of the purchase made from these parties with documentary evidences and asked to explain as to why such

purchases should not be treated as non-genuine and added to the total income. In response, the assessee submitted that it had made purchases from these parties and the material purchased from these parties had been further sold by it during the year. In support of its claim, the assessee submitted following documentary evidences:

- a) Copy of confirmation of account of said parties
- b) Copy of bank statement highlighting payment to said parties by account payee cheque.
- c) Copy of bills of said parties in respect of purchases made from them.
- d) Copy of day to day movement of the materials (quantity wise and quality wise) purchased from these parties along with the sale of this material made to assessee's regular customers.
- e) Copy of sales bills issued to assessee's regular customers to whom this material was sold.

**5.3.** Thus, assessee claimed that purchase from these parties were fully explained and duly corroborated with the documentary evidences. However, AO was not convinced with the response of the assessee and relying upon the statement made by the said persons, the entire amount of purchases made from these persons were treated as bogus and added to the total income of the assessee.

**5.4.** Being aggrieved, the assessee filed an appeal before Ld. CIT(A) wherein detailed submissions were made along with documentary evidences. After considering submissions of the assessee, Ld. CIT(A) deleted the addition partly by sustaining the disallowance to the extent of 10%, with following observations:

*“5.5. The appellant, in the statement of facts, submitted during the course of appellate proceedings stated that it had submitted Xerox copies of purchase bills of said parties along with chart for day to day movement of the materials along with details of sales made in respect of purchases effected from these parties. The appellant had made payment to these parties by payees account cheques and had submitted relevant Xerox copies of bank statements reflecting these payments in support of claim of genuineness of purchases. The ledger extracts of these parties stating their current address, PAN, duly confirmed by them, were filed before the AO.*

*The appellant further stated that the Ld. AO has not pointed out any discrepancies in the detailed quantitative statements furnished along with copies of sales and purchases bills and has not pointed out any infirmities in the books of accounts or the quantity statements filed, but in fact has stated that "thus apparently nothing wrong is visible". This goes to prove that the account of the appellant is fully authenticated and merely on the statement made by a person that the purchases are bogus and not recorded in his books cannot be held to be bogus purchases.*

*The appellant further submitted that the Ld. AO has not given the appellant an opportunity to cross examine these parties in respect of their claim that these parties are not genuine. The appellant had furnished copies of his bank statements wherein the payments made to these parties by account payee cheques were reflected. The Ld. AO was also informed that since the sales are accepted; purchases are presumed to have been made effecting such sales and as bill wise quantitative details of purchases and sales are furnished along with detailed inventory of closing stock, the book result be accepted and no additions can be made on the assumption that purchases from these parties are bogus.*

*The appellant also stated that the Ld. AO should have considered the following decisions:*

- i) Of the Honble Bombay High Court in the case of Yusuf Fazlehusain Zaveri and Anr. Vs. Ajay Singh, ITO and Others 213 ITR 712 (Bom.)*
- ii) Of the Hon'ble Gujarat High Court in the case of DCIT vs.*

*Adinath Industries [2001] 252 ITR 476 (Guj.)*

iii) *Of the Hon'ble Bombay High Court in the case of R.B. Jessaram Fatehchand (sugar department) vs. CIT [1970] 75 ITR 33 (Bom.)*

iv) *Of the Hon'ble Tribunal Calcutta 'B' Bench in the case of Sagar Bose vs. ITO [1996] 56 ITD 561 (Cal.)*

v) *Of the Hon'ble Bombay High Court in the case of CIT vs. U.M. Shah, Prop. Shrenik Trading Co. [1973] 90 ITR 396 (Bom.)*

*Hence the appellant objected to the addition of Rs. 53,06,985/- being the entire purchases from said parties.*

*I have perused the assessment order, and the facts and circumstance of the case. On plain reading of the assessment order, I find that the AO has basically relied on the statements recorded of Shri Rakeshkumar M. Gupta & others during the course of survey action u/s 133A and subsequently re-affirmed on oath u/s 131 of the Act, to make additions in hands of purchaser party i.e. the appellant in this case. However, the AO did not provide the opportunity of cross examination of said parties to the appellant in spite of specific request made by the appellant. The Hon'ble Supreme Court in the case of **Kishanchand Chellaram vs. CIT [1980] 125 ITR 713 (SC)** has held that before the income-tax authorities could rely upon any evidence, they are bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross examine the persons giving such evidence. The law pronounced by Hon'ble Supreme Court is the law of the land and the Hon'ble Supreme Court has held that if cross examination is not permitted, in that case the statement of third parties cannot be relied upon and used against the assessee. Since in the present case, the cross examination of the alleged hawala parties was not permitted, the statement of those parties cannot be used against the appellant. Therefore, additions made merely on the basis of statement of those parties without any corroborative evidences cannot be the basis of additions in the assessment.*

5.7. *I further find that the appellant has submitted during assessment proceedings the day-to-day movement of the*

*material purchased from these parties along with the corresponding sales/ inventory of stock at the yearend. The books of accounts of the appellant are audited wherein the complete purchase and sale details are incorporated, and there is no case of any adverse comments made by the auditors on the same. There are no adverse comments in the assessment order about the quantitative reconciliation. Hence, if the sales of appellant are I as genuine, the corresponding purchases cannot be considered as bogus.*

*5.8. The AO has not dealt with the case laws relied upon by the appellant in reaching at conclusion against the appellant. The ratio of said judgments seems to be that there can be no sales without corresponding purchases, and when the quantitative details of purchase, sales & closing stock are available, the same cannot be completely overlooked in arriving at any adverse conclusion.*

*5.9. In above circumstances, even assuming the purchases from said parties treated as bogus for the reasons stated in assessment order, the contention of appellant that it has shown day to day movement of alleged material purchased cannot be overlooked. A logical conclusion which may be drawn in such situation may be that the appellant has recorded some sales in its books of accounts which materials might have been purchased by it in grey market without bills; and to regularize such purchases in grey market, the appellant might have taken accommodation bills from the said parties for purchase of specified material. In fact, the AO in page 13 of the assessment order has stated as under:*

*"In the circumstances, the bills introduced in the books are nothing but colourable device adopted to cover up investment in purchase made from outside the books which attracts the provision of sec. 69 of the IT Act."*

*The aforesaid conclusion reached by AO does not deny, and in fact gives an illusion that purchases have been made by the appellant from outside the books (i.e. in cash) and to cover up such investment in cash, the said bills are introduced in the books. One cannot deny the ground reality that goods may be available in grey market, without bill and*

*by cash, at comparatively lesser prices such a situation, it would not be justified to make addition of the full amount of purchase made from said parties. Rather, the cause of justice would be met by making addition of a reasonable percentage of such purchases in order to fill in the gap and pluck loophole of any revenue leakage in aforesaid circumstances. I feel that estimate of differential profit @10% of disputed purchases will be fair and reasonable to cover up the difference of GP in recording the said purchases as well to plug any leakage of revenue. Therefore, addition. @10% of disputed purchases i.e. Rs. 5,30,699/- is confirmed and the balance amount of addition is deleted hence, the appellant gets partial relief of Rs. 47,76,286/-.”*

**5.5.** Thus, from the above order of Ld. CIT(A), it is noted that after analyzing details and evidences of the case, it has been held by the Ld. CIT(A) that since sales of the assessee have been treated as genuine of the AO, the corresponding purchases cannot be considered as bogus, especially when quantitative conciliation was produced before the AO and nothing wrong has been found therein. It was thus held that since sales have been accepted therefore, goods sold must have been purchased also, thus, entire purchases could not have been disallowed. But, it was further held that since purchases could not be fully substantiated therefore, there may be some element of inflation therein. Under these circumstances, Ld. CIT(A) took a view to sustain disallowances to the 10% of the purchases. During the course of hearing before us, Ld. Counsel of the assessee requested that total disallowances should be deleted and purchases should be fully allowed.

**5.6.** Per contra, Ld. DR submitted that since purchases could not be substantiated fully, therefore element of inflation

cannot be totally ruled out. Therefore, some reasonable disallowance must be sustained.

**5.7.** It was alternatively submitted by the Ld. Counsel that disallowance @ 10% is very high and rate of 5% was proposed. This was not objected to by the Ld. DR. Thus, taking into account all the facts and circumstances of the case and to meet ends of justice and keeping in view peculiar facts of this case, we sustain the disallowance to the extent of 5%, and uphold the action of Ld. CIT(A) for deleting the balance additions. Thus, order of Ld. CIT(A) is modified accordingly, as a result of which only 5% of the disputed purchases stands disallowed and the remaining disallowance made by the AO would be deleted.

**6.** As a result, appeal of the Revenue is dismissed and that of assessee is partly allowed.

**Now we take up appeals for A.Ys. 2005-06, 2007-08, 2008-09 & 2009-10 in ITA Nos.6247 & 6668/Mum/2013, ITA Nos. 4631 & 3390/Mum/14, ITA Nos.6248 & 6669/Mum/2013 & ITA Nos. 6249/Mum/2013 & 6670/Mum/2013**

**7.** It was stated by both the parties that facts involved in all the years are identical. There are no distinguishing features except the amounts involved. Under these circumstances, we direct the AO to follow our order for A.Y. 2004-05 and disallowance to the extent of 5% is sustained in all the years and balance addition is directed to be deleted.

**8.** As a result, all the Revenue's appeals are dismissed and Assessee's appeals are partly allowed.

Order was pronounced in the open court at the conclusion of hearing.

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| <p>Sd/-<br/>(Sanjay Garg )<br/>न्यायिक सदस्य / JUDICIAL MEMBER</p> | <p>Sd/-<br/>(Ashwani Taneja)<br/>लेखा सदस्य / ACCOUNTANT MEMBER</p> |
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मुंबई Mumbai; दिनांक Dated : 31/10/2016

*Patel, P.S.* नि.स.

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,  
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**